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Abstract

Virginia's abolition of the death penalty in 2021 was a historic development. As both a southern state and one of the country's most active death penalty jurisdictions, Virginia's transition away from capital punishment represented an important shift in the national landscape. This article considers whether that shift has any constitutional significance, focusing on the effect of Virginia's abolition on the geographical arbitrariness of the country's death penalty.

As a starting point, the death penalty in America is primarily regulated by the Eighth Amendment, which bars "cruel and unusual punishments." The United States Supreme Court has held that the death penalty is not per se unconstitutional, but that the Eighth Amendment constrains its application. In particular, modern death penalty law is concerned with the arbitrary or unusual infliction of the death penalty. Since 2015, the concept of "geographical arbitrariness"—that the death penalty's localization could render it so random or rare as to be unconstitutional—has gained increased attention.

This Article examines whether and how Virginia's abolition contributes to the geographical arbitrariness of capital punishment in America. The Article finds that Virginia's experience demonstrates the geographical arbitrariness of the contemporary death penalty in two important ways. First, this Article examines the localization of capital sentencing within Virginia. Capital

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sentencing and execution data show that as Virginia's death penalty declined, the practice was kept alive by a small minority of prosecutors who had an unusual passion for death sentencing. In its latter years, Virginia's death penalty thus increasingly reflected the unfettered discretion of local decisionmakers. Second, this Article considers how Virginia's abolition affected the national landscape of the death penalty. The Article concludes that both quantitively and qualitatively, the end of Virginia's death penalty supports a conclusion that capital punishment has become too arbitrary to be constitutional.

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I. Introduction

Virginia's death penalty ended with a slow but sustained whimper. Although many people had worked for years to end death sentences and executions in Virginia, few expected the movement to gain the momentum necessary for legislative abolition in 2021. But by the end of February, both of Virginia's legislative bodies had voted to abolish the death penalty in favor of life without parole. And on March 24, 2021, Governor Ralph Northam signed

abolition into law, calling it "the moral thing to do to end the death penalty in the Commonwealth of Virginia[.]"[1]

Much of the media coverage emphasized Virginia's status as the first southern state to abolish the death penalty.[2] The fact that Virginia is a southern state is significant for several reasons. For one, the legacy of the death penalty is intimately intertwined with a history of racial terror and lynching.[3] Virginia was one of the dozen states in which lynching was most prevalent, with 84 lynchings between 1877 and 1950.[4] Additionally, Virginia did not approach its death penalty with dilettantism. On the contrary, Virginia was the first colony to carry out an execution and was one of the modern death penalty's most active states.[5] In short, Virginia was a true death state.

For many years before Virginia's abolition, however, the state's death penalty had been in decline. By the time Virginia's abolition bill was signed into law, it had been almost a decade since the state's last new death sentence. That death sentence—imposed on Mark Lawlor in Fairfax County in 2011—had been vacated by

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1. *See* Whittney Evans, *Virginia Governor Signs Law Abolishing the Death Penalty, a 1st in the South*, NPR (Mar. 24, 2021, 2:50 PM) (reporting on the signing ceremony and its historical significance) [https://perma.cc/9QJR-5HXS]. As governor, Northam had not overseen any executions in Virginia. *See generally* Ann Marimow, *He's a Killer Set to Die. But His Mental Illness Has Set Off a New Death Penalty Battle.*, WASH. POST (June 24, 2017) [https://perma.cc/R3RX-38ZM]. The last execution had been the 2017 lethal injection of William Morva, a seriously mentally ill person who was denied clemency by Northam's predecessor, Governor Terry McAuliffe. *Id.* (describing Morva's case, trial, and appeal).

2. *See, e.g.*, Dakin Andone, *Why Virginia's Abolition of the Death Penalty is a Big Deal for the State and the US,* CNN (last updated Mar. 29, 2021, 7:56 AM) (reporting that Virginia was "the first Southern state to" abolish, which "has great import, not only for Virginia, but for the South and the rest of the country . . . .") [https://perma.cc/HYV7-3P6U]; Evans, *supra* note 1 (noting this status in headline); Hailey Fuchs, *Virginia Becomes First Southern State to Abolish the Death Penalty*, N.Y. TIMES (last updated Jul. 22, 2021) (same) [https://perma.cc/XWZ3-SRTU].

3. Critical research and thought on this issue are summarized and developed in an Equal Justice Initiative report. *See Lynching in America: Confronting the Legacy of Racial Terror*, EQUAL JUST. INITIATIVE (3d ed. 2017) [https://perma.cc/K46B-DZGA].

4. *See id.* at Table 1 (comparing African American lynching victims).

5. *See Virginia*, DEATH PENALTY INFO. CTR. [hereinafter "DPIC"] (chronicling the history of the death penalty in Virginia) [https://perma.cc/WFE5-BUDJ].

the Fourth Circuit Court of Appeals in 2018.[6] As Virginia's use of the death penalty had decreased, its localized nature also had become increasingly clear. Rather than reflecting the conscience of the people of Virginia, the death penalty largely reflected the appetites of a few local prosecutors in a handful of death-hungry jurisdictions. And rather than reflecting the seriousness of the crime or a defendant's individual characteristics, Virginia's death sentences largely reflected geographic coincidence. In other words, it was not the crime or the defendant that determined the use of the death penalty; it was the jurisdiction in which the crime happened to occur.

This article examines geographic arbitrariness through the lens of Virginia's experience with the modern death penalty. The article proceeds in four parts. *First*, I discuss the constitutional framework of arbitrariness and unusualness, and why these concepts matter in the context of the modern death penalty.[7] *Second*, I discuss the concept of "geographical arbitrariness."[8] *Third*, I describe the geography of Virginia's death penalty and its increasingly localized use prior to abolition.[9] *Fourth*, I discuss how the abolition of Virginia's death penalty has changed the geography of the modern death penalty, making our national death penalty even more unusual.[10] Along the way, this article exposes some of the arbitrary factors that kept Virginia's death penalty alive even when it had become an anachronism.

II. The Constitutional Significance of Arbitrariness and Unusualness in Capital Sentencing

America's death penalty is primarily regulated by the Eighth Amendment, which bars the infliction of "cruel and unusual

6. *See* Lawlor v. Zook, 909 F.3d 614 (4th Cir. 2018) (reversing district court's decision and remanding with instructions to grant relief).

7. *See infra* Part II (discussing the constitutional importance of arbitrariness and unusualness in capital sentencing).

8. *See infra* Part III (explaining geographic arbitrariness and unusualness).

9. *See infra* Part IV (describing the geography of the declining Virginia death penalty).

10. *See infra* Part V (providing an explanation of the geography of the post-Virginia death penalty).

punishments."[11] Given our country's long history of capital punishment, the death penalty has never been held *per se* unconstitutional.[12] Rather, the salient constitutional question has been whether the application of the death penalty renders it cruel and unusual.[13] In other words, the United States Supreme Court has accepted the constitutionality of the death penalty as a type of punishment but has regulated through the Eighth Amendment how that punishment is applied.[14] Consequently, modern American death penalty jurisprudence is fundamentally concerned with the application of the death penalty, including capital sentencing procedures, capital appeals, and post-conviction review of death sentences.

The modern era of America's death penalty was signaled in 1972, when the United States Supreme Court invalidated existing capital sentencing schemes because they were wholly discretionary and thus risked the arbitrary imposition of the death penalty.[15] Justice Stewart famously described the death sentences at issue as "cruel and unusual in the same way that being struck by lightning is cruel and unusual."[16] In particular, Stewart noted that the death penalty was imposed upon "a capriciously selected random handful" of people who had committed the same grave crimes.[17] Similarly, Justice White decried the fact that "the death penalty is exacted with great infrequency even for the most atrocious crimes

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11. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

12. *See* Trop v. Dulles, 356 U.S. 86, 100 (1958) ("Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.").

13. *See id.* at 101 ("The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

14. *See id.* at 100 ("While the State has the power to punish, the Amendment stands to assure this power be exercised within the limits of civilized standards.").

15. Each of the *Furman* justices wrote separately, meaning that the narrowest concurrences state the Court's holding. *See* Marks v. United States, 430 U.S. 188, 193 (1977) (providing that in a plurality opinion, the holding is the position taken by the members of the court who concurred in the judgement on the narrowest grounds). And those concurrences, by Justices Stewart and White, emphasized the arbitrary nature of the death penalty at the time. *See* Furman v. Georgia, 408 U.S. 238, 239 (1972) (per curiam).

16. *Id.* at 309–10 (Stewart, J., concurring).

17. *See id.*

and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."[18] In other words, the broadly discretionary death sentencing schemes were unconstitutional because they permitted unprincipled application that led to apparently random results.

The arbitrariness of the death penalty was suggested not only by the randomness of the persons sentenced to death, but also by the relative infrequency with which the death penalty was applied. Justice Brennan noted that in the forty years between 1930 and 1970, execution rates had plummeted.[19] This low rate of death sentences allowed for a strong inference "that the punishment is not being regularly and fairly applied."[20] Although the states could argue that low rates of death sentencing reflected "informed selectivity" rather than arbitrariness, very low rates made it "highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment."[21] In other words, the unusualness of the death penalty was indicative that it was being applied in an arbitrary manner.

Of course, arbitrariness and randomness are not the same thing. Although Justice Brennan wrote that the death penalty "smacks of little more than a lottery system," some of the Justices had a strong sense that the twentieth century death penalty did follow a predictable pattern.[22] In particular, some members of the *Furman* Court were concerned that discretionary sentencing schemes opened the door not to true randomness, but to a death penalty meted out on the basis of race.[23] But ultimately, *Furman*

18. *See id.* at 313 (White, J., concurring).

19. *See Furman*, 408 U.S. at 291 (Brennan, J., concurring) (noting the decline in executions by decade despite the increase in population and capital crimes committed).

20. *See id.* at 291–93 (Brennan, J., concurring) (suggesting that when such a populous country with so many capital crimes executes at most one person per week, there is reason to question application of the punishment).

21. *See id.* at 293–94 (Brennan, J., concurring).

22. *See id.* ("No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison.").

23. Justice Douglas emphasized that the wholly discretionary nature of existing capital sentencing statutes made them "pregnant with discrimination," particularly against the poor and against Black defendants. Furman v. Georgia, 408 U.S. 238, 254–57 (1972) (Douglas, J., concurring). Similarly, Justice Marshall wrote that the Court's prior approval of unguided discretion in capital sentencing

did not require that arbitrariness be the product of impermissible discrimination to have constitutional significance. Rather, the Court held that a death sentencing scheme that allows for the arbitrary application of the death penalty is unconstitutional, without reaching any conclusion as to the sources or causes of that arbitrariness.[24]

After *Furman*, hoping to save the death penalty from judicial abolition, "at least 35 States . . . enacted new statutes that provide[d] for the death penalty for at least some crimes that result in the death of another person."[25] In a set of 1976 companion cases—*Gregg v. Georgia*[26], *Proffitt v. Florida*,[27] *Jurek v. Texas*,[28] *Woodson v. North Carolina*,[29] and *Roberts v. Louisiana*[30]—the Supreme Court considered a selection of capital sentencing schemes that exemplified the various statutes enacted by the states in response to *Furman*.[31] Stated broadly, these 1976 cases established two fundamental requirements for modern capital sentencing schemes. *First*, capital sentencers cannot exercise unbridled discretion; rather, sentencing schemes must appropriately guide and limit the discretion of capital sentencers.[32]

"was an open invitation to discrimination." *Id.* at 365 (Marshall, J., concurring). In addition to racial discrimination, Marshall noted the disproportionate application of the death penalty to men and not women, and to the poor and not the privileged. *Id.* at 365–66.

24. Justice Stewart acknowledged that these concurrences "demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race." *Id.* at 310 (Stewart, J., concurring). He believed, however, that "racial discrimination has not been proved" and thus he "put it to one side." *Id.* Instead of reaching the underlying causes, Stewart wrote, "I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Id.*

25. *See* Gregg v. Georgia, 428 U.S. 153, 179–80 (1976) (plurality opinion) (exploring whether society at large endorses the death penalty).

26. 428 U.S. 153 (1976).

27. 428 U.S. 242 (1976).

28. 428 U.S. 262 (1976).

29. 428 U.S. 280 (1976).

30. 428 U.S. 325 (1976).

31. *See generally* Furman v. Georgia, 408 U.S. 238 (1972).

32. *See* Gregg v. Georgia, 428 U.S. 153, 189–95 (limiting discretion to minimize capricious and wholly arbitrary action); *see also* Proffitt v. Florida, 428 U.S. 242, 258 (1976) ("[T]he requirements of *Furman* are satisfied when the

Second, capital sentencing schemes must permit individualized consideration of the person convicted of a capital crime, rendering mandatory death sentences (death sentences automatically imposed upon conviction of a capital crime, without any consideration of the individual defendant) unconstitutional.[33]

In addition to addressing concerns about the death penalty's arbitrariness, *Gregg* and its companion cases responded to *Furman*'s concern that the death penalty had become too unusual (i.e., rare) to be anything but arbitrary. In fact, one of the key factors motivating *Gregg* was a national movement towards reinstating the death penalty. While the Court in *Furman* had relied in part on diminishing support for the death penalty, the *Gregg* Court noted that the majority of states quickly had enacted new death penalty statutes in response to *Furman*'s concerns.[34] Moreover, continuing high rates of death sentences (254 between *Furman* and 1974, and 460 between *Furman* and early 1976) appeared to counter some of *Furman*'s concerns that the death

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sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition."); Jurek v. Texas, 428 U.S. 262, 273–74 (1976) ("[A]s in Georgia and Florida, the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death."). Although these cases do not specify prerequisites for constitutional death penalty schemes, they do provide guidance. *See generally Gregg*, 428 U.S. at 153; *Proffitt*, 428 U.S. at 242; *Jurek*, 428 U.S. at 262. Modern statutory schemes typically include bifurcated guilt/innocence and sentencing proceedings, jury findings (often in the form of aggravating factors) that narrow the class of persons eligible for the death penalty, consideration of the capital defendant's mitigating evidence, and mandatory appellate review. *See Gregg*, 428 U.S. at 197.

33. *See* Woodson v. North Carolina, 428 U.S. 280, 304 (1976) ("A process that accords no significance to relevant facets of the character and records of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind."); *see also* Roberts v. Louisiana, 428 U.S. 325, 335–36 (1976) (similarly rejecting mandatory death sentences).

34. *See Gregg*, 428 U.S. at 179–80 ("The most marked indication of society's endorsement of the death penalty for murder is the legislative response to Furman. The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person.").

penalty was too unusual to be fair.[35] In other words, the states seemed to respond to *Furman*'s concerns about rareness and arbitrariness with a determination to make death sentences and executions more commonplace.

These 1976 cases thus set the stage for the modern American death penalty, a thicket of statutes and case law that purports to achieve sound, replicable judgments of the individual worth of complex human beings. After *Gregg*, capital sentencing statutes generally incorporate a system of aggravating factors (facts supporting a greater penalty) and mitigating factors (facts or reasons supporting a lesser penalty). Aggravating factors are elements of death-eligible capital murder and must be found by a jury beyond a reasonable doubt.[36] In contrast, jurors need not be unanimous in their assessments of an individual defendant's mitigation.[37] Theoretically, aggravating factors should guide capital jurors to limit death penalty eligibility to the "worst" offenses and persons, and mitigation should allow jurors to assess the individuals convicted of those death-eligible crimes. This system is intended to reflect the Supreme Court's determination "that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[38]

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35. *See id.* at 181–82 (providing capital punishment sentences from 1974 to 1976).

36. *See* Ring v. Arizona, 536 U.S. 584, 585–86 (2002) (holding that any fact that increases the maximum punishment—including an aggravating factor that makes a capital defendant eligible for the death penalty—must be found by a jury beyond a reasonable doubt); *see also* Hurst v. Florida, 577 U.S. 92, 94 (2016) (finding unconstitutional Florida system in which the jury made a sentencing recommendation but the judge made findings of aggravation). *But see* McKinney v. Arizona, 140 S. Ct. 702, 709 (2020) (allowing state appellate courts to reweigh aggravating and mitigating circumstances in collateral proceedings).

37. *See* Mills v. Maryland, 486 U.S. 367, 384 (1988) (acknowledging that a juror unanimity requirement for mitigation would violate the principle that "the sentencer must be permitted to consider all mitigating evidence."); McKoy v. North Carolina, 494 U.S. 433 (1990) (finding North Carolina's jury unanimity requirement for mitigating evidence unconstitutional).

38. Woodson, 428 U.S. at 305 (citation omitted).

Whether these new sentencing schemes would eliminate arbitrary outcomes, however, remained to be seen. In the forty-five years since *Gregg*, the United States Supreme Court frequently has revisited issues of arbitrariness in capital sentencing as a variety of arbitrariness challenges have reached the Court. For example, vagueness challenges to aggravating factors have arisen when the factors that are supposed to identify the "worst" offenses "fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur."[39] Categorical exclusion cases have found whole classes of persons or crimes ineligible for the death penalty, occasionally referring to the arbitrariness of a death sentence for certain crimes or people.[40] For a time, the Court held that victim impact testimony was usually inadmissible in capital cases due to the "impermissible risk that the capital sentencing decision will be made in an arbitrary manner."[41] Perhaps most famously, in 1987, the Court declined to find Georgia's capital sentencing scheme unconstitutional despite strong evidence that the death penalty was being administered on the basis of the most pernicious arbitrary factor: race.[42]

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39. *Gregg*, 428 U.S. at 195 n.46 (1976). Examples of this type of challenge include *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (finding Georgia's vileness aggravating factor unconstitutional when it was too vague to "impl[y] any inherent restraint on the arbitrary and capricious infliction of the death penalty.") and *Tuilaepa v. California*, 512 U.S. 967 (1994) (holding that three aggravating factors challenged in the California system were not unconstitutionally vague).

40. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 439 (2008) ("We find it difficult to identify standards that would guide the decisionmaker so the penalty is reserved for the most severe cases of child rape and yet not imposed in an arbitrary way.").

41. *See* Booth v. Maryland, 482 U.S. 496, 504 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808, 825 (1991) ("[T]he *Booth* Court was wrong in stating that this kind of evidence leads to the arbitrary imposition of the death penalty. In the majority of cases . . . victim impact evidence serves entirely legitimate purposes.").

42. *See generally* McCleskey v. Kemp, 481 U.S. 279 (1987). *But see id.* at 320 (Brennan, Marshall, Blackmun, & Stevens, JJ., dissenting) (pointing to a terrible history of the Supreme Court upholding racist laws, including in Dred Scott v. Sandford, 15 L. Ed. 691 (1857) and Plessy v. Ferguson, 163 U.S. 537, 552 (1896)). Philosopher Hugo Bedau opined that "historians will look back on McCleskey and judge it to be yet another of the court's great failures—along with Dred Scott, Plessy, Korematsu and Hirabyashi." Hugo Adam Bedau, *Someday McCleskey Will*

In sum, the concepts of arbitrariness and unusualness—as well as the *risk* of arbitrariness—have great constitutional significance in death penalty law. One of the foundational constitutional principles of the modern death penalty is that capital sentencing schemes must eliminate the risk of arbitrariness in death penalty decision making.[43] Consistent with that principle, one of the basic premises of the modern death penalty is that capital sentencing schemes—including statutory definitions of capital murder, special sentencing procedures for capital cases, evidentiary rules, and appellate review—*can* eliminate the risk of arbitrariness.[44] In other words, it is a fundamental assumption of our contemporary death penalty jurisprudence that arbitrary death sentences can be eliminated at the statutory level. For the most part, this risk management must occur at the state level,[45] where each individual jurisdiction crafts its own statutes, procedures, and evidentiary rules.

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be Death Penalty's Dred Scott, L.A. TIMES (May 1, 1987) [https://perma.cc/9DGS-9K9R]. For an insightful contemporary examination of *McCleskey* and the underlying data that supported a challenge to Georgia's racist death penalty, *see* Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L. L. REV 585 (2020).

43. *See Constitutionality of the Death Penalty in America*, DPIC (discussing arbitrariness and eliminating sentencing disparities within Supreme Court cases regarding the suspension and reinstatement of capital punishment) [https://perma.cc/4EA4-BRGX].

44. *See* Roberts v. Louisiana, 428 U.S. 325, 325–26, 334, 337 (1976) (discussing safeguards against arbitrariness).

45. Of course, the federal government also has a death penalty, but the vast majority of contemporary death sentences and executions occur at the state level. In the modern era, only sixteen people have been executed by the federal government. Thirteen were executed in an unusual surge between July 14, 2020, and January 16, 2021, by the Trump administration. *See Executions Under the Federal Death Penalty*, DPIC [https://perma.cc/R8UP-KEB2]. This aberrant federal execution activity exemplified political use of the death penalty. *See, e.g.*, Michael Tarm & Michael Balsamo, *Trump Ratchets up Pace of Executions Before Biden Inaugural*, ASSOCIATED PRESS (Dec. 7, 2020) ("Critics have said the restart of executions in an election year was politically motivated, helping Trump burnish his claim that he is a law-and-order president.") [https://perma.cc/9KCP-9EF8]; *see also* Jean Marbella, *Amid Pandemic and Trump's Final Chaotic Days, A Maryland Man with COVID-19 Fights His Upcoming Federal Execution*, BALT. SUN (Jan. 9, 2021) ("The number of people executed in the U.S. has been on about a two-decade decline. A total of 17 people were executed in 2020, including the 10 federally . . . but Trump has long and vocally supported the death penalty.") [https://perma.cc/NR4L-994A].

III. Geographic Arbitrariness & Unusualness

As the above discussion conveys, the constitutionality of the modern American death penalty hinges on whether it actually eliminates the arbitrary, unusual imposition of death sentences. Additionally, the death penalty is "unusual" for constitutional purposes when it is imposed on a "capriciously selected random handful" rather than the "worst of the worst."[46] In the last twenty years, however, the death penalty has become increasingly unusual in this country. The contemporary death penalty is a local one: limited to certain states, and heavily practiced only within specific jurisdictions within those states.[47] As result, one of the single greatest factors in whether a person will face the death penalty is not *who* they are, or *what* they did, but *where* they did it. This localization begs an obvious question: can a system in which geography plays such a critical role truly be ensuring that the death penalty is conferred upon the select few who both have the worst characters and records, and have committed the worst crimes?

Concern for geographic disparities in death sentencing figured prominently in Justices Breyer's and Ginsburg's high-profile dissent in *Glossip v. Gross*.[48] The *Glossip* dissent, which concluded that the death penalty is likely unconstitutional, ignited concern about the continuing arbitrariness of the death penalty and the failure of modern death sentencing schemes to cure the constitutional infirmities noted in *Furman*.[49] The dissent

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46. *See* Kansas v. Marsh, 548 U.S. 163, 206 (2006) (Souter, Stevens, Ginsburg, & Breyer, JJ., dissenting) (citing Roper v. Simmons, 543 U.S. 551, 568 (2005)) (noting that "within the category of capital crimes, the death penalty must be reserved for 'the worst of the worst'").

47. *See State by State*, DPIC (reporting which states do and do not maintain capital punishment) [https://perma.cc/8KLC-VBN5].

48. *See generally* Glossip v. Gross, 576 U.S. 863 (2015) (Breyer & Sotomayor, JJ., dissenting).

49. *See, e.g.*, Lincoln Caplan, *Richard Glossip and the End of the Death* Penalty, THE NEW YORKER (Sept. 30, 2015) (noting that Justice Scalia opined after the *Glossip* dissent that he "wouldn't be surprised" if the United States Supreme Court rules the death penalty unconstitutional) [https://perma.cc/ABU7-MTCT]; Scott Lemiuex, *Why the American Death Penalty System is Broken*, THE WEEK (Oct. 5, 2015) ("'Glossip is likely to be executed because capital punishment enhances prosecutorial power to secure unreliable and arbitrary death sentences.' This is simply not a system that can be defended. It is becoming increasingly

emphasized that since *Gregg* "circumstances and the evidence of the death penalty's application have changed radically."[50] Specifically, there was by then forty years of evidence that the *Gregg* solution had failed, including evidence of continued arbitrariness and the death penalty's national decline:

> In 1976, the Court thought that the constitutional infirmities in the death penalty could be healed; the Court in effect delegated significant responsibility to the States to develop procedures that would protect against those constitutional problems. Almost 40 years of studies, surveys, and experience strongly indicate, however, that this effort has failed. Today's administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purposes. Perhaps as a result, (4) most places within the United States have abandoned its use.[51]

Since *Gregg*, the United States Supreme Court tried "to make the application of the death penalty less arbitrary by restricting its use to . . . 'the worst of the worst.'"[52] Instead, the *Glossip* dissenters noted, the death penalty has continued to be "imposed arbitrarily, i.e., without the 'reasonable consistency' legally necessary to reconcile its use with the Constitution's commands."[53] Rather than being imposed on the basis of proper factors such as "comparative egregiousness of the crime," death sentences are imposed on the basis of factors "that ought *not* . . . affect application of the death penalty, such as race, gender, *or geography* . . . ."[54]

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difficult to disagree with Justice Breyer's conclusion in June that the death penalty is categorically unconstitutional.") [https://perma.cc/CL5L-EYRA]; Tom Randall, *A Halted Execution and the Future of the Death Penalty*, BLOOMBERG (Sept. 30, 2015) (focusing on Breyer's argument that the death penalty has become unconstitutionally unusual) [https://perma.cc/7FWC-49BF].

50. *Glossip*, 576 U.S. at 909.

51. *Id.*

52. *Id.* at 916 (quoting Kansas v. Marsh, 548 U.S. 163, 206 (Souter, J., dissenting)) (citing 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."); Kennedy v. Louisiana, 554 U.S. 407, 420 (2008) (citing Roper, 543 U.S. at 568)).

53. *Id.* at 917 (citing Eddings v. Oklahoma, 455 U.S. 104, 112 (1982)).

54. *Id.* at 918 (second emphasis added).

The focus of the *Glossip* dissenters on the geography of the death penalty was novel to the Court's jurisprudence. The dissenters observed that "[g]eography . . . plays an important role in determining who is sentenced to death."[55] This is not, however, "simply because some States permit the death penalty while others do not. Rather within a death penalty State, the imposition of the death penalty heavily depends on the *county* in which a defendant is tried."[56] Justices Breyer and Ginsburg set forth some of the data on the increasing geographic disparity of the death penalty, emphasizing the role of individual counties within a state:

> Between 2004 and 2009, for example, just 29 counties (fewer than 1% of counties in the country) accounted for approximately half of all death sentences imposed nationwide. What accounts for this county-by-county disparity? Some studies indicate that the disparity reflects the decisionmaking authority, the legal discretion, and ultimately the power of the local prosecutor. Other suggest that the availability of resources for defense counsel (or the lack thereof) helps explain geographical differences. Still others indicate that the racial composition of and distribution within a county plays an important role. Finally, some studies suggest that political pressures, including pressures on judges who must stand for election, can make a difference . . . . The research strongly suggests that the death penalty is imposed arbitrarily.[57]

The *Glossip* dissenters noted that this geographical arbitrariness is also reflected in their judicial experience, which included inexplicable disparities in the types of cases that are prosecuted as death cases, as well as the types of defendants whom certain prosecutors seek to execute.[58]

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55. *Id.* (citing Steven Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single County Case Study*, 34 CARDOZO L. REV. 1227, 1253–56 (2013)).

56. *Id.* (citing Robert Smith, *The Geography of the Death Penalty and its Ramifications*, 92 B.U. L. REV. 227, 231–32 (2012); John Donohue, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973, Are There Unlawful Racial, Gender, and Geographic Disparities?*, 11 J. EMPIRICAL LEGAL STUD. 637, 673 (2014)) (emphasis added).

57. Glossip v. Gross, 576 U.S. 863, 919–20 (2015).

58. *See id.* at 923 ("[W]hy does one defendant who participated in a single-victim murder-for-hire scheme . . . receive the death penalty, while another defendant does not, despite having stabbed his wife 60 times and killed his . . . daughter and . . . son while they slept? *In each instance, the sentences*

Thus, one of the ways in which the death penalty has become arbitrary is that geography now plays a central role in determining who receives death sentences. But, as Breyer explains, this geographic disparity is not a function of legislative decisionmaking, as evidenced by the fact that disparate sentences are imposed within single states under the same statutory regime.[59] Rather, it is a function of decisionmaking at the county level, where it is nearly impossible to eliminate arbitrariness. In other words, even within a death penalty state that has a single capital sentencing scheme, disparities in death sentences and executions persist at the county level. Not all counties seek death sentences, and not all counties pursue capital prosecutions to execution. As the *Glossip* dissenters suggested, there may be many reasons at play, including race and indigent defense resources.[60] But one of the factors is certainly prosecutorial discretion, as individual prosecutors vary widely in their appetites for death, and there is little restraint on their broad charging power.[61]

As this discussion in *Glossip* exemplifies, geographic disparities could result in unconstitutional arbitrariness. But the *Glossip* dissent explains that geographic disparities are also important for another reason—they are proof the death penalty has become unconstitutionally "unusual."[62] As discussed in Part

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compared were imposed in the same State at about the same time") (emphasis added).

59. *See id*. at 918 (explaining that geography plays an important role in determining who is sentenced to death, not because some States permit the death penalty while others do not, but because within death penalty States, the imposition of the death penalty heavily depends on the county in which a defendant is tried).

60. *See id*. at 919 ("[T]he racial composition of and distribution within a county plays an important role.").

61. *See id*. at 921 (noting that the *Gregg* "Court believed it possible to interpret the Eighth Amendment in ways that would significantly limit the arbitrary application of the death sentence," but stating that "no longer seems likely" as "[t]he Constitution does not prohibit the use of prosecutorial discretion."); *see also id*. at 922 (citing Timothy Kaufman-Osborn, *Capital Punishment, Proportionality Review, and Claims of Fairness (with Lessons from Washington State)*, 79 WASH. L. REV. 775, 791–92 (2004)) (explaining how systemic issues and biases continue to permeate the administration of the death penalty, and "it seems unlikely that appeals can prevent the arbitrariness" observed by the Justices).

62. *Id*. at 944.

II,[63] the Constitution "forbids punishments that are cruel and *unusual*."[64] One of the concerns enunciated in *Furman* was that although the death penalty was not historically unusual, it had become unusual in modern times.[65] But state legislatures responded strongly to *Furman* by enacting new death penalty statutes, a shift that was important to the decision in *Gregg*.[66] By the time of *Glossip*, the dissenters argued, the tides had again shifted, this time in opposition to the death penalty.[67]

Between 1976 and 2015, the death penalty had declined significantly and become increasingly unusual in this country.[68] The *Glossip* dissenters pointed out that there were 137 death sentences in 1977 and only seventy-three in 2014.[69] At the same time, the total annual number of executions had fallen.[70] Furthermore, there was a consistent *direction* of change towards death penalty abolition, with an increasing number of states abolishing the death penalty and no state reinstating it within the forty years between *Gregg* and *Glossip*.[71] In 2014, for example, only seven states carried out a total of thirty-five executions, while only

63. *See* discussion *supra* Part II (citing U.S. CONST. amend. VIII) ("America's death penalty is primarily regulated by the Eighth Amendment, which bars the infliction of 'cruel and unusual punishments.'").

64. *Id.* at 938.

65. *See* Furman v. Georgia, 408 U.S. 238, 291 (1972) (Brennan, J., concurring) (noting "a steady decline in the infliction of this punishment").

66. *See* Gregg v. Georgia, 428 U.S. 153, 179–81 (1976) ("The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman* . . . . the post-*Furman* statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people.").

67. *See* Glossip v. Gross, 576 U.S. 863, 943 (2015) (reasoning that recent trends "reflect the fact that a majority of Americans, when asked to choose between the death penalty and life in prison without parole, now choose the latter").

68. *See id.* at 938–39 ("[I]n the last two decades, the imposition and implementation of the death penalty have increasingly become unusual.").

69. *See id.* at 939 (noting the general decline of new death sentences imposed).

70. *See id*.

71. *See id.* at 939–40 ("Accordingly, 30 States have either formally abolished the death penalty or have not conducted an execution in more than eight years.").

seventy-three persons were sentenced to death.[72] In comparison, 279 people were sentenced to death and ninety-eight executed only fifteen years earlier in 1999.[73]

In addition to numbers of death sentences and executions, the *Glossip* dissenters looked to the localization of the death penalty to quantify its unusualness.[74] The dissenters noted that "the number of active death penalty States ha[d] fallen dramatically" since *Furman*, when forty-one states permitted the death penalty and there were only nine abolition states.[75] At the time of *Glossip*, nineteen states had abolished the death penalty, and another eleven had death penalty statutes but had not executed a single person in nearly a decade.[76] The dissenters further noted that nine states had executed fewer than five people in the eight years before *Glossip*, "making an execution in those States a fairly rare event."[77] Thus, the dissenters concluded, there were only "11 States in which it is fair to say that capital punishment is not 'unusual.'"[78] "And just three of those States accounted for 80% of the executions nationwide (28 of the 35) in 2014", and only four other states executed people.[79] The dissent noted that thus "in 43 States, no one was executed."[80] This included Virginia, described as one of the "States most associated with the death penalty," where the dissenters noted a "dramatic decline[]" in executions.[81]

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72. *See id*. at 939 (reporting the numbers of persons executed and sentenced to death in 2014).

73. *See id.* (reporting the numbers of persons executed and sentenced to death in 1999).

74. *See id*. (Breyer & Ginsburg, JJ., dissenting) ("Often when deciding whether a punishment practice is, constitutionally speaking, "unusual," this Court has looked to the number of States engaging in that practice.").

75. *See id*. at 939–40 (reporting the decline in States that permit the death penalty, indicating that the practice is becoming more unusual).

76. *See id.* at 940 (citing *State by State*, DPIC ("As of today, 19 States have abolished the death penalty (along with the District of Columbia) . . . In 11 other States that maintain the death penalty on the books, no execution has taken place for more than eight years[.]") [https://perma.cc/8KLC-VBN5]).

77. *Id.*

78. *Id.*

79. *See id*. ("Indeed, last year, only seven States conducted an execution.").

80. *Id*. at 941.

81. *See id.* at 943 ("[D]ramatic declines are present in Virginia[.]").

Given the decline in death penalty activity, county-by-county disparities had become important not only to the arbitrariness of the death penalty, but also its unusualness:

> [T]he death penalty has become increasingly concentrated geographically. County-by-county figures are relevant, for decisions to impose the death penalty typically take place at a county level. County-level sentencing figures show that, between 1973 and 1997, 66 of America's 3,143 counties accounted for approximately 50% of all death sentences imposed. By the early 2000's, the death penalty was only actively practiced in a very small number of counties: between 2004 and 2009, only 35 counties imposed 5 or more death sentences, i.e., approximately one per year. And more recent data show that the practice has diminished yet further: between 2010 and 2015 (as of June 22), only 15 counties imposed five or more death sentences. *In short, the number of active death penalty counties is small and getting smaller. And the overall statistics on county-level executions bear this out. Between 1976 and 2007, there were no executions in 86% of America's counties*.[82]

In sum, the *Glossip* dissenters set forth a powerful argument that the contemporary geography of the American[83] death penalty rendered it unconstitutional in two ways. *One*, the localization of the death penalty within states means that persons are being sentenced to death and executed based on an arbitrary factor: the county in which they are prosecuted. Although many forces could be involved in county-by-county disparities—including defense resources, racial discrimination, and the identity and politics of specific prosecutors or judges—the arbitrary result is the same. *Two*, when the number of states and counties using the death penalty decline, the penalty becomes increasingly unusual in violation of the Eighth Amendment. As discussed in more detail

82. *Id.* at 941 (citations omitted) (emphasis added).

83. *See id.* at 944 (noting foreign nations that have abolished the death penalty by law or through practice, but relying "primarily upon domestic, not foreign events, in pointing to changes and circumstances that tend of justify the claim that the death penalty, constitutionally speaking, is unusual.").

below,[84] the decline and abolition of Virginia's death penalty powerfully illustrates both points.

IV. The Geography of the Declining Virginia Death Penalty

In 2015, inspired by the *Glossip* dissent, I wrote a motion to bar the death penalty in a Virginia case due to its geographically arbitrary and unusual prosecution, selection, and imposition.[85] The motion was filed in a capital case in Prince William County, one of Virginia's most active death penalty jurisdictions.[86] The case was prosecuted by special prosecutors from Fairfax County, another active death penalty county. The motion argued that being prosecuted capitally or sentenced to death in Virginia depended largely on a single arbitrary factor—the county of prosecution.[87] Unsurprisingly, the trial court did not find Virginia's death penalty unconstitutional.[88] But the abolition of Virginia's death penalty provides us with an opportunity to examine retrospectively the geography of Virginia's death penalty and county-by-county disparities in its use.

Many analyses of the geography of the death penalty focus on differences between America and the rest of the world, as well as differences between the states.[89] But in their important 2011

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84. *See* discussion *infra* Parts IV–V (outlining the disparities that arise in the imposition of the death penalty based on geography and how the decline in States imposing the death penalty contributes to those disparities).

85. *See generally* Glossip v. Gross, 576 U.S. 863 (2015) (Breyer & Sotomayor, JJ., dissenting).

86. *See* Rachel Weiner, *Study: Prince William, Fairfax Among Counties That Account for Majority of U.S. Executions*, WASH. POST (Oct. 2, 2013) (discussing that the rate of executions in Prince William County places it among one of the deadliest counties in the U.S.) [https://perma.cc/Q5AD-3J8B].

87. *See generally* Defendant's Motion to Bar Imposition of the Death Penalty (2015) (filed on behalf of a capital defendant in Prince William County).

88. *See id.*

89. *See* James Liebman & Peter Clarke, *Minority Practice, Majority's Burden: The Death Penalty Today*, 9 OHIO STATE J. CRIM. L. 255, 259–60 (2011) (citing DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 11 (2010)) (noting that "[t]he historical, political, demographic, and other explanations . . . offered for differences in the use of the death penalty" have tended to be focused on differences between states, "for example, on States that did and did not practice slavery, join the Confederacy, or tolerate lynching."); *see also* FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 72–78 (2003) (treating States and regional groupings of States as

article—relied upon by the dissenters in *Glossip*[90]— Professor James S. Liebman and Peter Clarke conducted a county-by-county analysis of America's death penalty, demonstrating "that the modern American death penalty is a distinctly minority practice across the United States and in most or all of the thirty-four so-called death penalty States."[91] In a revealing example, the authors pointed out that as of 2011, almost two-thirds of Texas counties had not carried out an execution in the previous thirty-five years, notwithstanding Texas's reputation as the "Death Penalty Capital of the Western World."[92] Because of these county-by-county disparities, the authors concluded, "state-focused commentary misses important facets of the death penalty's localism."[93] Although Virginia was not the focus of Liebman's and Clarke's work, the Commonwealth was no exception to this rule. The authors noted that between 1996 and 2011, new death sentences had declined every year except one.[94] And because of this decline, between 2004 and 2011, Virginia had executed nearly twice as many people as received new death sentences.[95]

Although "Virginia has long been thought of as a death penalty heavyweight," as of 2011, "Virginia ha[d] moved from being a moderate death-sentencing state to being a marginal death-sentencing state."[96] In other words, ten years before

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the key unit of analysis); Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in "Executing" Versus "Symbolic" States in the United States*, 84 TEX. L. REV. 1869, 1879 (2006) (noting that the United States is not monolithic in its death penalty practices and dividing the nation into "abolitionist" states, "symbolic" states, and "executing" states).

90. *See Glossip*, 576 U.S. at 919, 941 (relying on the findings of Liebman and Clarke to conclude that local geography plays an important role in determining who is sentenced to death) (citing Liebman & Clarke, *supra* note 89 at 265–66, 274, and n.47).

91. Liebman & Clarke, *supra* note 89, at 263.

92. *Id.* at 261 (citing David Michael Smith, *The Death Penalty Capital of the Western World*, 13 PEACE REV. 495 (2011)).

93. *Id.*

94. *See id.* at 329 (explaining the general decline of new death sentences since 1996).

95. *See id.* at 329 n.376 (noting that Virginia is among the small number of states where the annual number of executions has exceeded annual new death sentences) (citations omitted).

96. *See id.* at 334 & n.397 (providing evidence that many counties did not use the death penalty, while many others employed it only sparingly).

abolition, Virginia already had become a declining death penalty state.

In the decade between 2011 and abolition, this trend became only stronger. Between 1980 and 1990, for example, Virginia had executed eleven people.[97] Between 1991 and 2000—the dark ages of Virginia's death penalty—the Commonwealth executed seventy people.[98] And in its penultimate decade, between 2001 and 2010, Virginia executed another twenty-seven people.[99] But, as mentioned above, 2011 was the year of Virginia's last new death sentence, and that sentence was vacated by the Fourth Circuit Court of Appeals in 2018.[100] In its last decade, Virginia executed a total of five people, a number in stark contrast to the other decades of Virginia's modern death penalty era.[101] Due to both Virginia's relatively fast execution pace and the decline in new death sentences, there were only two men (Anthony Juniper and Thomas Porter) on death row at the time of abolition.[102]

As Virginia's death penalty declined, it became increasingly localized. In 2013, the Death Penalty Information Center released a report demonstrating that just two percent of counties had been responsible for more than half of executions in the modern death penalty era (i.e., since *Gregg*).[103] That report, cited by the *Glossip*

97. *See Death Sentences in the United States Since 1977*, DPIC (providing the total number of people that Virginia has executed since 1977) [https://perma.cc/EW7N-TBVW].

98. *See id.* (compiling the number of people executed per year in Virginia between 1991 and 2000).

99. *See id.* (noting that Virginia did not carry out the first execution of its modern era until 1982).

100. *See* Lawlor v. Zook 909 F.3d 614, 635 (4th Cir. 2018) (plurality opinion) (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978) ("'When the choice is between life and death, th[e] risk [that the death penalty will be imposed in spite of factors which may call for a less severe penalty] is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.'").

101. *See* DPIC, *supra* note 97 (compiling the number of people who were executed in Virginia between 2010 and 2020).

102. *See Museum Receives Virginia's Implements of Execution*, CBS 19 NEWS (Jan. 15, 2022) (acknowledging that then-Governor Ralph Northam commuted the death sentences of Thomas Porter and Anthony Juniper) [https://perma.cc/78S5-52WB].

103. *See, e.g.*, Richard C. Dieter, *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All*, DPIC, at 1 (Oct. 2013) (stressing that "since the reinstatement of the death penalty in 1976, Texas

dissenters,[104] noted that "[j]ust four states (Texas, Virginia, Oklahoma, and Florida) ha[d] been responsible for almost 60% of the executions."[105] But the disparities were most striking at the county level. In fact, at the time, the vast majority of counties nationwide were not responsible for anyone currently on death row, and eighty-five percent "ha[d]not had a single person executed in over 45 years."[106]

In other words, capital punishment had not been evenly spread across these death penalty states; it had been concentrated in certain local jurisdictions. For example, four Texas counties were responsible for nearly half of the state's executions, and three California counties were responsible for over half of that state's death sentences.[107] Two percent of counties nationwide accounted for not only the majority of executions (693 of 1,320), but also the majority of persons then living on death row (1,755 of 3,125).[108] These were not, however, necessarily the same two percent of counties.

Although Virginia's use of the death penalty had been declining overall, Virginia was still well-represented in the two percent of counties that accounted for the majority of executions since 1976. In fact, seven Virginia counties—Prince William (9), Chesterfield (8), Virginia Beach City (8), Fairfax (5), Hampton City (5), Pittsylvania (5), and Portsmouth City (5)—made the list.[109] Given that sixty-two counties made the list, Virginia accounted for

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alone has accounted for 38% of the nation's executions") [https://perma.cc/CF5S-K8HY].

104. Glossip v. Gross, 576 U.S. 863, 919 (2015) (Breyer & Ginsburg, JJ., dissenting).

105. Dieter, *supra* note 103, at 4.

106. *Id.* at 1.

107. *See id.* at 5 (providing examples of local jurisdictions within particular states that are responsible for the majority of the executions and death sentences in the United States).

108. *See id.* at 6 & n.17–18 (demonstrating that high population counts did not explain the disparity because "these counties represent[ed] only 15.9% of the U.S. population (execution counties) or 24.7% of U.S. population (death row counties)").

109. *See id.* app. at 27–28 (organizing data in a table of the two percent of counties responsible for 52% of the death penalty executions since 1976).

slightly over eleven percent of these avid death penalty jurisdictions.[110]

But no Virginia county made the list of sixty-two counties accounting for fifty-six percent of the death row population.[111] By the 2013 publication of the DPIC's report, Virginia had not imposed a new death sentence in several years. At the same time, Virginia had executed almost one hundred people between 1991 and 2010.[112] As a result, Virginia's death row population had dwindled by 2013, and no Virginia county was responsible for many persons on death row.[113] After the DPIC report, Virginia's executions continued to decline.[114] Between the close of the DPIC's data set in 2012 and abolition, there were four executions in Virginia: Robert Gleason in 2013, Alfredo Prieto in 2015, and Ricky Gray and William Morva in 2017.[115] Only one of these four men, Mr. Prieto, had been sentenced to death in one of the seven most active execution counties (Fairfax).[116]

Of course, it should be noted that executions are not the only measure of death penalty activity. Execution and death sentence totals may vary greatly, and the reasons for this are likely complex.[117] (To offer one example that deserves attention, there is "a strong correlation between the prolific application of the death penalty and the high percentage of cases being reversed on

110. *See id.*

111. *See id.* app. at 29–30 (creating a table of the two percent of counties responsible for 56% of the individuals sentenced on death row).

112. *See* Liliana Segura, *The Long Shadow of Virginia's Death Penalty*, THE INTERCEPT (last updated Apr. 11, 2021) (describing Virginia's complicated history with the death penalty) [https://perma.cc/TXK7-K7SL].

113. *See id.* (illustrating how executions in Virginia declined around 2013).

114. *See id.* (compiling the executions that have taken place in Virginia since the DPIC's report from 2013).

115. *See id.* (highlighting the most recent executions that have taken place in Virginia).

116. *See id*. (stating that Alfredo R. Prieto was executed in Fairfax County in 2015); *see also* Weiner, *supra* note 86 (establishing that Fairfax County, Virginia is one locality that accounted for a significant number of executions based on a study from 2013) [https://perma.cc/ZCA4-39TB].

117. *See Death Penalty in 2021: Year End Report*, DPIC (Dec. 16, 2021) (showing the number of death sentences and executions each year in the United States) [https://perma.cc/8G43-SB5E].

appeal."[118]) Thus, looking at the rate of executions does not tell us everything about county-by-county activity.[119] For example, between 1977–2004, Arlington County and Danville each were responsible for eight death sentences and Richmond was responsible for thirteen.[120] But none of these jurisdictions were included in the two percent of counties that accounted for the majority of executions between 1976 and 2012.[121] The story of these jurisdictions' involvement in Virginia's death penalty is an important one—since a just system is concerned not only with executions, but also with death sentencing—but that issue is outside the scope of this article.[122]

The seven Virginia counties included in the nation's two percent of death penalty jurisdictions declined at different times.[123] But most of the counties were active in the 1990s—the heyday of Virginia's death penalty—and fell off afterwards.[124] For example, although Virginia Beach was responsible for six executions in the 1990s, it was responsible for only two after 1997,

118. Dieter, *supra* note 103, at 19.

119. *See Execution Database*, DPIC (outlining the number of executions performed based on factors like year, state, age, etc.) [https://perma.cc/G5D6-V2TU].

120. *See* Brandon L. Garrett, *The Decline of the Virginia (and American) Death Penalty*, 105 GEO. L.J. 661, 717–18 (2017) (establishing the number of death sentences in different counties in Virginia between 1977 and 2004).

121. Between 1976 and the abolition of the death penalty in Virginia, Arlington County was responsible for three executions (Michael Satcher in 1997, Angel Breard in 1998, and Christopher Beck in 2001). Richmond City was also responsible for three executions (Linwood Briley and James Briley, also known as "the Briley Brothers," in 1984 and 1985, respectively, and Ricky Gray in 2017). In addition, Danville City was responsible for three executions (Johnny Watkins in 1994, Dana Edmonds in 1995, and Christopher Scott Emmett in 2008). Richmond County was responsible for four executions (Timothy Spencer in 1994, Ronald Bennett in 1996, Eric Payne in 1999, and Christopher Goins in 2000). *See Execution Database*, *supra* note 119 (compiling the executions that have occurred in Arlington County, Danville, and Richmond from 1973 to present day).

122. *See id.* (establishing the executions that have taken place not only by state, but also by county, highlighting jurisdictional differences).

123. *See* Dieter, *supra* note 103, at 27–28 (listing the two percent of counties that were responsible for fifty-two percent of executions since 1976, including seven Virginia counties).

124. *See Execution Database*, *supra* note 119 (highlighting the number of executions that took place in Virginia in the 1990s in various counties).

and both of those occurred in 2000.[125] The last execution attributable to Pittsylvania County was that of Teresa Lewis, who was executed in 2010.[126] But before then, Pittsylvania had not been responsible for an execution since the 1999 death of Ronald Yeatts, and Pittsylvania's other three executions had been carried in 1997 and 1998.[127] Similarly, only one of Portsmouth City's five executions occurred after 1999, the 2006 death of Dexter Vinson.[128] The same is true of Chesterfield County.[129] Although Chesterfield was responsible for eight executions, only one occurred after 1999, the 2006 execution of John Schmitt.[130] And Hampton City followed a similar pattern, with four executions in the 1990s and a final one in 2004.[131]

The two other counties that made the DPIC's two percent of execution counties—Prince William County and Fairfax County—

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125. This data was derived from the DPIC's Execution Database, which is searchable by state. *See id.* The persons executed under Virginia Beach City death sentences were Albert Clozza in 1991, Andrew Chabrol in 1993, David Pruett in 1993, Richard Townes in 1996, Joseph O'Dell in 1997, Mario Murphy in 1997, Michael Clagett in 2000, and Russel Burkett in 2000. *Id.*

126. *See id.* (showing the last execution that took place pursuant to a Pittsylvania County death sentence when searching the database by state).

127. *See id.* (acknowledging the individuals who were executed under Pittsylvania County death sentences when using the state filter and searching executions in Virginia). The five persons executed pursuant to Pittsylvania County death sentences were Roy Smith in 1997, Ronald Watkins in 1998, Ronald Fitzgerald in 1998, Ronald Yeatts in 1999, and Teresa Lewis in 2010. *Id.*

128. *See id.* (listing the individuals who were executed under Portsmouth City death sentences). The five men whose executions were attributable to Portsmouth City were Richard Boggs in 1990, Coleman Gray in 1997, Carlton Pope in 1997, Jason Joseph in 1999, and Dexter Vinson in 2006. *Id.*

129. *See id.* (establishing the number of executions attributable to various counties in Virginia when searching the database by state).

130. *See id.* (identifying the individuals who were executed pursuant to Chesterfield County death sentences). The eight men executed under Chesterfield County death sentences were Edward Fitzgerald in 1992, Charles Stamper in 1993, Mark Sheppard in 1999, Tony Fry in 1999, George Quesinberry in 1999, Everett Mueller in 1999, Andre Graham in 1999, and John Schmitt in 2006. A striking five of fourteen Virginia executions in 1999 were attributable to Chesterfield County alone. *Id.*

131. *See id.* (identifying the executions that took place pursuant to Hampton City death sentences when using the state filter to find executions in Virginia). Hampton City was responsible for the executions of Derick Peterson in 1991, Herman Barnes in 1995, Thomas Beavers in 1997, Thomas Royal in 1999, and Mark Bailey in 2004. *Id.*

held onto their death sentencing regimes for slightly longer periods of time.[132] Prince William was responsible for four executions after 1999: Lonnie Weeks (2000), John Muhammad (2009), Larry Elliot (2009), and Paul Powell (2010).[133] And Fairfax County was responsible for three after 1999: Bobby Ramdas (2000), Mir Kasi (2002), and Alfredo Prieto (2015).[134]

In 2017, Professor Brandon Garrett examined the decreasing use of Virginia's death penalty, comparing declines in Virginia and North Carolina, and contrasting those experiences with Florida's continued use of the death penalty.[135] Notably, both Virginia and North Carolina had instituted Capital Defender Offices ("CDOs").[136] In Virginia, the CDOs had been created in 2002 to specialize in death penalty defense representation.[137] The CDOs greatly increased the quality of representation provided to persons facing the death penalty, leading Professor Garrett to "suggest that capital representation may be a significant factor in the death

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132. *See id.* (conveying the executions that have taken place under Prince William County and Fairfax County death sentences when searching the database with the state filter set for Virginia).

133. *See id.* (identifying the four executions that Prince William County was responsible for after 1999). Prince William County was responsible for the following executions in the 1990s: Timothy Bunch in 1992, Michael George in 1997, Dawud Mu'Min in 1997, Tony Mackall in 1998, and Carl Chichester in 1999. *Id.*

134. *See id.* (naming the three individuals executed under Fairfax County death sentences). Fairfax County's executions in the 1990s were Wilbert Evans in 1990, Dennis Eaton in 1998, and Johnile DuBois in 1998. Although Fairfax City's executions were not included in the DPIC's calculation, the City was responsible for two additional executions before the 2000s: Richard Whitley in 1987 and Dwayne Wright in 1998. *Id.*

135. *See* Garrett, *supra* note 120, at 720, 722 (comparing the Virginia, North Carolina, and Florida death penalty experiences). The Virginia and North Carolina systems were different, with the former providing direct representation and the latter handling appointments, but both dramatically improved the quality of capital defense representation. *Id.* (examining the differences and similarities between the systems in North Carolina and Virginia, and how they both led to a decline in death sentences).

136. *See id.* at 720 ("In 2001, similar to what happened in Virginia in the following year, a statewide North Carolina Office of the Capital Defender was created.").

137. *See id.* at 678 (describing how regional capital defenders were created in Virginia in the early 2000s).

penalty decline . . . ."[138] As defense representation improved and death sentences declined, however, some jurisdictions chose to continue seeking the death penalty.[139]

Professor Garrett observed that death sentencing became increasingly concentrated in "large, densely populated counties, like Fairfax County, the largest county in Virginia . . . ."[140] One possible factor was "that large counties are more likely to absorb the costs of seeking the death penalty . . . ."[141] This theory makes sense, since funding to pay for the death penalty appears important to a jurisdiction's willingness to bring death penalty cases.[142] Other research suggests, however, that population density is not what distinguishes active capital counties from counties that cease seeking the death penalty.[143] In fact, 2016 research by Professor Lee Kovarsky shows that the death penalty "concentration levels *do not correspond to population density* or to the distribution of homicides, and are not substantially attributable to locally differentiated punishment norms."[144]

Professor Kovarsky examined the concentration of executions in death penalty states over four periods: 1996–2000, 2001–2005,

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138. *Id.* Professor Garrett expands on the death penalty's decline in his book. *See generally* Brandon Garrett, END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE (2017).

139. *See id.* at 717–18 (discussing the counties in Virginia where the death sentences were more often imposed).

140. Brandon Garrett, et al., *The American Death Penalty Decline*, 107 J. CRIM. L. & CRIMINOLOGY 561, 605 (2017).

141. *Id.*; *see also* Garrett, *supra* note 120, at 717 ("Larger counties may be better able to shoulder the expense of capital trials, both on the prosecution side and the defense side . . . . Perhaps reflecting these changing political and cost considerations, more of the capital trials occurred in the largest Virginia counties.").

142. *See* Greg Goelzhauser, *Prosecutorial Discretion Under Resource Constraints: Budget Allocations and Local Death-Charging Decisions*, 96 JUDICATURE 161, 164 (2013) ("With budgets playing a central role in campaigns, prosecutors facing budget constraints may be less inclined to seek the death penalty relative to their better-funded counterparts.").

143. *See* Lee Kovarsky, *Muscle Memory and the Local Concentration of Capital Punishment*, 66 DUKE L.J. 259, 285 (2016) (arguing that the number of death sentences in different locations is not directly attributable to the concentration of the population).

144. *Id.* at 264 (emphasis added).

2006–2010, and 2011–2015.[145] He observed that in the first period in Virginia, there were fifty-two executions from twenty-seven counties.[146] By the fourth period, there were three executions from three counties.[147] Professor Kovarsky observed that executions became more concentrated in Virginia "not so much because the capitally active counties are responsible for more executions, but because a number of infrequent producers became abstainers."[148] In other words, many less active jurisdictions ceased seeking the death penalty, while a few others continued.[149]

To understand the concentration of executions in the counties continuing to produce them, Professor Kovarsky noted that "[t]he response to local crime is meted out largely through the discretionary practice of local police, prosecutors, defense attorneys, juries, and judges."[150] These actors in the death penalty system—referred to by Kovarsky as "local stakeholders"—"have discretion that substantially affects capital outcomes, and certain discretionary decisions tend to correlate with others."[151] Kovarsky's work provides a fascinating look at how the discretion of these decisionmakers correlate.[152] But most significantly, Kovarsky notes that "perhaps the greatest (if not most visible) source of local variation is the discretion of the local prosecutor," and that "[m]ultiple studies confirm that prosecutorial discretion

145. *See id.* at 266–267 ("For death sentences and executions, I compute separate concentration indices spanning the last twenty years of the modern era, from 1996 to 2015.").

146. *See id.* at 277 (laying out the values for executions at the state level, including fifty-two executions in twenty-seven counties in Virginia between 1996–2000).

147. *See id.* (illustrating the decline in executions in Virginia between the period of 1996–2000 to 2011–2015).

148. *Id.* at 284.

149. *See id.* (observing statistics regarding different states' implementations of the death penalty and noting how certain jurisdictions stopped seeking the death penalty).

150. *Id.* at 289.

151. *Id.* at 289–90.

152. *See id.* at 289 ("The accumulated decisionmaking of each stakeholder set both reflect and produces what I call local muscle memory: the correlated exercise of local discretion.").

has an extremely substantial effect on the pattern of capital charging within a state."[153]

Virginia's experience is consistent with Kovarsky's work.[154] As Virginia's death penalty declined and became increasingly concentrated, the importance of local decisionmakers became more evident. But even before the decline in Virginia's death penalty, county-by-county disparities had been observed and attributed to Virginia's scheme of broad, standardless prosecutorial discretion.[155] In fact, as early as 2002, a legislative review concluded that disparities in prosecution by county were a significant factor in Virginia's death penalty.[156] The legislative review concluded that although prosecutorial discretion was a necessary component of the Virginia system, "it must be recognized that this discretion . . . will generate outcomes that cannot be easily reconciled on the grounds of fairness."[157]

Notably, Virginia's local disparities could not be attributed to the high density of active counties. Rather, the 2002 review showed that "prosecutors in high-density population (typically urban) localities [were] *much less likely* to seek the death penalty when

153. *Id.* at 290–91 (citing BARRY NAKELL & KENNETH A. HARDY, THE ARBITRARINESS OF THE DEATH PENALTY 125–39 (1987) (North Carolina); RAYMOND PATERNOSTER & ROBERT BRAME, AN EMPIRICAL ANALYSIS OF MARYLAND'S DEATH SENTENCING SYSTEM WITH RESPECT TO THE INFLUENCE OF RACE AND LEGAL JURISDICTION 26–31, 37–39 (2003) (Maryland) [https://perma.cc/QM8A-EVP2]; Leigh B. Bienan, et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27, 178–84 (1988) (New Jersey); William J. Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067, 1067–1100 (1983) (Florida); Donohue, *supra* note 56, at 650 (Connecticut), Raymond Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754, 779–80 (1979) (South Carolina)); *see also* Katherine Barnes, et al., *Place Matters (Most): An Empirical Study of Prosecutorial Decisionmaking in Death-Eligible Cases*, 51 ARIZ. L. REV. 305 (2009) (Missouri).

154. *See* J. LEGIS. AUDIT & REV. COMM'N OF THE VA. GEN. ASSEMB., REVIEW OF VIRGINIA'S SYSTEM OF CAPITAL PUNISHMENT 18 (2002) (describing a legislative study done regarding capital punishment in Virginia, including the use of prosecutorial discretion) [https://perma.cc/9QH2-STFW].

155. *See id.* at III–VI (discussing the findings of a study dealing with how prosecutorial discretion affects the death penalty's application in Virginia).

156. *See id.* (highlighting the findings of a study regarding differences in implementation of the death penalty in various places in Virginia).

157. *Id.* at 49.

confronted with a capital-eligible case than their counterparts in other localities."[158] Prosecutors in medium-density jurisdictions sought the death penalty in forty-five percent of eligible cases, while prosecutors in high-density jurisdictions sought the death penalty in sixteen percent of cases.[159] A decade later, the same geographic disparities in Virginia were noted in the American Bar Association's comprehensive assessment of Virginia's death penalty scheme ("VIRGINIA REPORT").[160]

Both the JLARC REPORT and the VIRGINIA REPORT attributed these geographic disparities to prosecutorial discretion.[161] The VIRGINIA REPORT noted that Virginia "prosecutors have enormous discretion in deciding whether or not to seek the death penalty."[162]

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158. *Id.* at IV (emphasis in original).

159. *See id.* at V, 29 (comparing the tendency for prosecutors to seek the death penalty in medium-density jurisdictions and in high-density jurisdictions); *see also id.* at 22 (including Fairfax County in the study as a high-density jurisdiction, and Prince William County as a medium-density jurisdiction).

160. *See* ABA, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE VIRGINIA DEATH PENALTY ASSESSMENT REPORT 118 (Aug. 2013) (noting the local geographic disparity in capital cases within Virginia) [https://perma.cc/J6PZ-Q7JT]. This report is the result of a nonpartisan analysis of the Commonwealth's death penalty scheme conducted by a "state-based assessment team" designed to include "current or former judges, state legislators, current or former prosecutors, current or former defense attorneys, active state bar association leaders, law school professors, and anyone else whom the Project felt was necessary." *Id.* at ii. To ensure an unbiased viewpoint, "[t]eam members [we]re not required to support or oppose the death penalty or a suspension of executions." *Id.* To eliminate partisanship concerns, "the assessment teams focused on capital punishment laws and processes and did not consider whether states, as a matter of morality, philosophy, or penological theory, should have the death penalty." *Id.* When judging a state's performance, the ABA's assessment team evaluated its law and procedures in relation to "the protocols set out in the ABA Section of Individual Rights and Responsibilities' 2001 publication, *Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States*." *Id.*

161. *See* J. LEGIS. AUDIT & REV. COMM'N OF THE VA. GEN. ASSEMB, *supra* note 154, at 29 (describing how location correlated with the rate prosecutors chose to seek the death penalty for nearly identical crimes); *see also* ABA, *supra* note 160, at 109 (noting the significant charging discretion that prosecutors possess).

162. ABA, *supra* note 160, at 109; *see also* VA. CODE § 19.2-71(B) (2011) (acknowledging that the decision to charge a capital felony is within the complete discretion of the local Commonwealth's Attorney); *In re* Horan, 271 Va. 258, 264 (2006) ("The discretion of the Commonwealth's Attorney to choose the offense for which a defendant will be charged includes the discretion to decide whether to seek the death penalty when capital murder is the charged offense.").

This unbridled discretion results in "considerable geographic disparity in Virginia with respect to death penalty-eligible cases."[163] According to the JLARC REPORT, "'[l]ocation, more than any other factor, impacted the probability that prosecutors would actually seek the death penalty for capital murder cases,' even though the report observed 'no major differences in the types of capital cases that occur' in different parts of Virginia."[164] "In fact, '[c]ases that are virtually identical in terms of the premeditated murder and predicate offense, the associated brutality, the nature of the evidence and the presence of the legally required aggravators are treated differently' depending on the jurisdiction in which the crime occurred."[165]

To understand Virginia's death penalty during its decline, then, it is necessary to understand *who* was seeking it. In other words, which counties had prosecutors who were exercising their broad discretion to seek the death penalty, and how was that discretion exercised? The VIRGINIA REPORT gave prosecutors an opportunity to help answer these questions by attempting to survey ten Commonwealth's Attorney's Offices,[166] including six jurisdictions that had been particularly active in the modern era.[167] Of the jurisdictions surveyed, however, only one returned a response, and the Commonwealth's Attorney for that locality was a member of the "Virginia Death Penalty Assessment Team" responsible for the report.[168] On behalf of the others, the Virginia Association of Commonwealth's Attorneys provided a letter stating

163. ABA, *supra* note 160, at 118.

164. *Id.* at 118–19 (quoting J. LEGIS. AUDIT & REV. COMM'N OF THE VA. GEN. ASSEMB., *supra* note 154, at 29).

165. *Id.* (quoting J. LEGIS. AUDIT & REV. COMM'N OF THE VA. GEN. ASSEMB., *supra* note 154, at 28).

166. In Virginia, the "Commonwealth's Attorney" is the elected prosecutor for each county or city, holding a four-year term. *See* VA. CODE § 15.2-1626 (describing the electoral process and four-year term of a Commonwealth's Attorney in Virginia).

167. *See* ABA, *supra* note 160, at 115 & n.33. (noting that the American Bar Association attempted to survey Commonwealth's Attorney's Offices in Danville City, Richmond City, Roanoke City, Virginia Beach City, Arlington County, Chesterfield County, Henrico County, Norfolk City, Pittsylvania County, and Prince William County).

168. *Id.* at 115 & n.36.

that the study was "not warranted" and "not in the best interest of VACA or those [it] serve[s]."[169]

Although Virginia's Commonwealth's Attorneys were unresponsive to the ABA, much is known about the elected prosecutors who carried on Virginia's death penalty as it declined. As noted above, two of the Virginia counties included in the DPIC's two percent of executions counties—Prince William County and Fairfax County—continued to be responsible for executions after the other localities had declined.[170] One of these, Prince William, long had been a death county and was responsible for more executions in the modern era than any other Virginia locality.[171] But the other, Fairfax, appeared to become more active as other counties declined. "[F]rom 1977 until 2004, Fairfax imposed just five death sentences, compared with smaller jurisdictions which imposed many more," including Prince William County.[172] But although Fairfax did not appear to be a traditional death county, Garrett notes, Fairfax County had three capital trials between 2005 and 2011.[173] To understand the continued pursuit of the death penalty in these counties during Virginia's decline, it is necessary to consider the elected officials who made those decisions and the localities they represented.

It is impossible to understand Prince William County's role in the modern Virginia death penalty without discussing Paul Ebert. Ebert was first elected Commonwealth's Attorney in 1968, four years before the Supreme Court held the death penalty

169. *Id.* at 115 (quoting Letter from David N. Grimes, President, Va. Ass'n of Commonwealth's Att'ys, to John Douglass, Chair, Va. Death Penalty Assessment Team (Apr. 23, 2012) (alterations in original)).

170. *See* Dieter, *supra* note 103, at 27–28 (listing Prince William County and Fairfax County among the "two percent" counties). Of course, other jurisdictions (including some not on the DPIC list) continued to bring capital charges and seek the death penalty in the 2000s. However, I have chosen to focus on Prince William County and Fairfax County as the two prolific members of the two percent that continued to bear responsibility for executions after other active jurisdictions desisted or reduced their involvement in Virginia's death penalty system.

171. *See id.* at 27 (noting Prince William County's nine executions since 1976, the highest of any Virginia county).

172. Garrett, *supra* note 120, at 718 n.317.

173. *See id.* at 717 (stating that three capital trials occurred in Fairfax County from 2005 to 2011).

unconstitutional in *Furman v. Georgia*.[174] Ebert held office for fifty-two years, almost the entirety of Virginia's modern death penalty era. During those fifty-two years, Ebert was responsible for fifteen death sentences,[175] nine of which resulted in executions.[176] No prosecutor was responsible for more death sentences, and no jurisdiction was responsible for more executions.

During his half century as a Commonwealth's Attorney, Ebert was not circumspect about his love for the death penalty. Although some prosecutors require careful deliberation before seeking capital charges, Ebert "was quoted as stating that he . . . 'usually charge[s] capital murder if it qualifies,' and that in many instances, 'he charge[s] capital murder even if it's questionable as whether or not it fits in that category."[177] In other words, Ebert erred on the side of the death penalty.

Because of Ebert's reputation as a death penalty prosecutor, he was handpicked to secure a death sentence for John Muhammad, the "Beltway Sniper."[178] Muhammad and his codefendant, teenager Lee Boyd Malvo, had committed crimes in multiple jurisdictions, so Ebert "knew there would be jockeying to see who would prosecute the duo first."[179] Muhammad and Malvo were charged and taken into federal custody, leaving United States Attorney General John Ashcroft to decide which jurisdiction would

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174. *See* Matthew Barakat, *Ebert Retires After 52 Years of High-Profile Prosecutions*, ASSOCIATED PRESS (Dec. 24, 2019) (commenting that Ebert was first elected as Commonwealth's Attorney for Prince William County in 1968) [https://perma.cc/6F8Y-PA3P].

175. *See id.* ("Over 13 terms as the chief prosecutor in Prince William County, Ebert sent 15 people to death row, the most of any Virginia prosecutor.").

176. *See* Dieter, *supra* note 103, at 27 (reporting Prince William County's nine executions since 1976).

177. *See* ABA, *supra* note 160, at 118 (quoting Frank Green, *'Like They're God': Prosecutorial Discretion Called Awesome Power*, RICHMOND TIMES-DISPATCH (Feb. 5, 1998) (discussing Prince William County and Commonwealth's Attorney Paul Ebert) (alterations in original).

178. *See* Neal Augenstein, *A Prosecutor's Tale: Paul Ebert on Pursuing the Death Penalty*, WTOP NEWS (Sept. 28, 2012) (describing how U.S. Attorney General John Ashcroft picked Paul Ebert to prosecute John Muhammad) [https://perma.cc/U8L9-RZJB]; *see also* Rachel Philofsky, *Beltway Sniper Attacks*, BRITANNICA (last updated Apr. 9, 2019) (noting that John Muhammad was known as one of the "Beltway Snipers") [https://perma.cc/H4DL-9BHR].

179. Augenstein, *supra* note 178.

prosecute the men.[180] Ashcroft, who wanted the men sentenced to death, chose Ebert to prosecute Muhmmad.[181] Robert Horan, then the Fairfax County Commonwealth's Attorney, was chosen to prosecute Malvo.[182] Muhammad's attorney asked, "What is more unseemly than the attorney general of the United States saying we're going to go Virginia where Mr. Muhmmad is going to be killed?"[183] Muhammad was sentenced to death.[184]

Before the Muhammad prosecution, a profile about Ebert in *The Baltimore Sun* portrayed him as an aggressive prosecutor who would "be satisfied with nothing less than death" in Muhammad's case.[185] Ebert described himself as "really just a country boy" who frequently went fishing with Robert Horan, Malvo's prosecutor.[186] Although Ebert was raised in the Washington, D.C. suburbs, he liked Prince William County because "it was close to a rural area and there were a lot of dairy farms."[187] A defense attorney who described Ebert as "a good old boy from way back" suggested that Muhammad's defense attorneys—both of whom practiced law in neighboring jurisdictions—were "going to have their hands full because they're two Northern boys coming down into our part of the country . . . ."[188]

At the time, Ebert downplayed his attachment to the death penalty. The profile noted that "Ebert says he has little interest in

180. *See id.* (noting that United States Attorney General John Ashcroft had to decide in which jurisdiction John Muhammad and Lee Boyd Malvo would be prosecuted).

181. *See id.* (asserting that United States Attorney General John Aschroft wanted to know where the defendants were likely to receive death sentences, and consequently chose Paul Ebert to prosecute John Muhammad).

182. *See id.* (conveying how Robert Horan was chosen to prosecute Lee Boyd Malvo); *see also Jury Says Lead Sniper Should Die*, TAMPA BAY TIMES (last updated Sept. 2, 2005) (pointing out that John Ashcroft "sent the two to Virginia, citing the state's ability to impose 'the ultimate sanction'") [https://perma.cc/8JTZ-J8TR].

183. *Jury Says Lead Sniper Should Die*, TAMPA BAY TIMES (last updated Sept. 2, 2005) [https://perma.cc/8JTZ-J8TR]

184. *See id.* (noting that John Muhammad was sentenced to death).

185. Stephen Kiehl, *Muhammad Faces Aggressive Longtime Prosecutor in Va.*, THE BALTIMORE SUN (Oct. 12, 2003) [https://perma.cc/G3XW-JF9N].

186. *Id.*

187. *Id.*

188. *Id.*

the machinations of the death penalty and how it is carried out, and doesn't go to the executions of the men he has sent to death row."[189] Ebert did not know how many men he had sent to their deaths: "'I don't count 'em,' he said. 'It doesn't basically do anything for me to seek the death penalty. I don't want to witness an execution. Having the death penalty is just a mechanism of the law that I'm sworn to uphold.'"[190] When John Muhammad was executed in 2009, however, Paul Ebert was there to watch him die.[191]

Ebert's death penalty prosecutions, including that of John Muhammad, were not without criticism, particularly for Ebert's refusal to disclose exculpatory evidence.[192] In fact, the Fourth Circuit Court of Appeals scolded Ebert for the amount of evidence that was not disclosed to the defense in Muhammad's case.[193] Although the Court did not grant Muhammad relief, the Court stated that it "by no means condone[d] the actions of the Commonwealth in this case. As a matter of practice, the prosecution should err on the side of disclosure, especially when a defendant is facing the specter of execution."[194]

Several years later, the Court also found that Ebert had been "rightly lambasted" by the federal district court for his failure to disclose exculpatory evidence in another death penalty case, that of Justin Wolfe.[195] The Fourth Circuit noted that Ebert's nondisclosure was "entirely intentional," citing Ebert's own "flabbergasting explanation that he has 'found in the past when you have information that is given to certain counsel and certain defendants, they are able to fabricate a defense around what is

189. *Id.*

190. *Id.*

191. Jeanne Meserve & Mike Ahlers, *Sniper John Allen Muhammad Executed,* CNN (Nov. 11, 2009) (providing commentary from Ebert following Muhammad's execution) [https://perma.cc/RQC5-KMYF].

192. *See, e.g.*, Muhammad v. Kelly, 575 F.3d 359, 370 (4th Cir. 2009) (analyzing Ebert's withholding of exculpatory information during Muhammad's trial).

193. *Id.* ("While not admirable, the Commonwealth's actions did not violate the Constitution.").

194. *Id.*

195. Wolfe v. Clarke, 691 F.3d 410, 423–24 (4th Cir. 2012).

provided.'"[196] When Wolfe received a new trial, Ebert's continued misconduct led the federal district court to bar any reprosecution, a move that was later reversed by a divided panel of the Fourth Circuit.[197] When Wolfe ultimately entered a plea agreement, however, the Virginia State Bar failed to discipline Ebert for his actions in the prosecution. Despite the Fourth Circuit's blistering criticism of Ebert's discovery practices in capital cases, his office continued to seek the death penalty. Most of these cases, however, ended in plea agreements.[198]

In the fifty-two years that Ebert held office, the demographics of Prince William County also changed dramatically. When Ebert was a young lawyer, the county was "a rural outpost with 50,000 people at the time."[199] Now, Prince William is home to almost 500,000.[200] Although Prince William was historically white, 22.2% of the population is now Black or African American, 24.5% is Hispanic or Latino, and 9.4% Asian.[201] As Prince William became a "majority minority" county, white power structures rebelled at this shift.

For example, many are familiar with SB 1070, Arizona's controversial 2010 law that required state and local officials to enforce federal immigration laws by, among other things, demanding proof of legal status "where reasonable suspicion exists that the person is an alien who is unlawfully present in the United States."[202] But a precursor to this bill existed in Prince William

196. *Id.* at 423.

197. Wolfe v. Clarke, 718 F.3d 277 (4th Cir. 2013). Full disclosure: the author of this Article was a member of Wolfe's retrial defense team, and had previously been a student in the Innocence Project Clinic at the University of Virginia School of Law, which was involved in the investigation supporting Wolfe's habeas petition and relief.

198. *See* Garrett, *supra* note 120, at 667 (noting that "improvements at trial [in Virginia capital cases since 2005] are representative of the deeper changes in the work that lawyers now do early on in capital defense, producing plea bargains that result in sentences less than death in the vast majority of cases.").

199. Kiehl, *supra* note 185.

200. U.S. CENSUS BUREAU, *Quick Facts: Prince William County, Virginia* (July 1, 2021) (providing the population data of Prince William County) [https://perma.cc/L4QA-J4MA].

201. *Id.*

202. Senate Bill 1070, Ariz. State Senate (2010) [https://perma.cc/G2B6-9BJ9].

County, where its proponent—county Supervisor John T. Stirrup—characterized it as "the first step towards taking back our community[.]"[203] This bill, which exemplified the prejudice and racial tensions that existed in the county, resulted in an exodus of Latinos from Prince William.[204] Despite the efforts of some residents to keep Prince William white, the county is now "the second most populous and the most diverse" in Virginia.[205]

By the time of Ebert's final death penalty case—the 2018 trial of Ronald Hamilton—Prince William County had become a different locality from the one in which he used to easily secure death sentences. At the time, Ebert observed that "the Hamilton case is the first time his office has failed to persuade a jury to recommend a death sentence."[206] Ebert also faulted the changing demographics of Prince William for the refusal of the jury, which "included five people of color," to sentence Hamilton to death.[207] ""The demographics of Prince William were relatively conservative all those years and much more pro-death,' Ebert said. 'And I

203. Nick Miroff, *Prince William Passes Resolution Targeting Illegal Immigration,* WASH. POST (July 11, 2007) [https://perma.cc/H6JH-MJ28].

204. *See* Jeremy Borden, *Latinos Returning to Prince William After Immigration Crackdown, but Scars Remain,* WASH. POST (June 26, 2012) [https://perma.cc/K4X4-JVMJ]; *see also* Sasha Ingber, *Undocumented Children Fuel New Tension on Immigration in Virginia,* NAT. GEO. (Aug. 16, 2014) (noting that a group named "Help Save Manassas" lobbied for anti-immigrant law during the time and argued that "border crashers have contributed to rising crime rates, increasing burdens on our schools, hospitals, and public services, and the very destruction of our American culture . . . .") [https://perma.cc/M7EM-NHSY].

205. Daniel Berti, *Census: Prince William Among Fastest Growing, Most Diverse Counties in Virginia,* PRINCE WILLIAM TIMES (Aug. 17, 2021) (last updated Oct. 12, 2021) [https://perma.cc/UX9R-VTRG].

206. Ian Shapira, *He's Sent More Killers to Death Row Than Any Virginia Prosecutor. But Not This Time,* WASH. POST (Nov. 5, 2018) [https://perma.cc/VTX4-W3SL].

207. *Id.* (noting that "[o]nce rural and overwhelming white, the county is now approaching a half-million residents, and the majority are minorities."). (indicating that the demographics of a once rural and majority white community is now a majority minority population).

always knew someone on the jury. Now, I seldom know someone on the jury.'"[208] Ebert retired the following year.[209]

As Virginia's death penalty declined in the 2000s, Fairfax also remained an active jurisdiction. During the modern era of Virginia's death penalty, Fairfax's first Commonwealth's Attorney was Robert Horan, Jr., who led the locality's prosecutions from 1967–2007.[210] In addition to prosecuting in neighboring counties for decades, Horan and Ebert were friends who frequently fished together, and Horan considered Ebert "a master" of fishing.[211] When Ebert was chosen to prosecute Muhammad and Horan chosen to prosecute Malvo, a *New York Times* profile described the men as "death penalty veterans."[212] Referring to the purposeful assignment of the cases to death penalty prosecutors, the profile noted that "to many people in the Washington area, the number that really counts is the 17 people they have sent to death row."[213]

Fairfax is an interesting example of how focusing only on the county of prosecution can sometimes obscure the role of the individual prosecutor. For example, the 2013 DPIC report that listed Fairfax as one of the two percent of counties responsible for the majority of executions in the modern era attributed five to Fairfax County.[214] But at that time, Horan had been responsible for *seven* executions. Two of the men executed—Richard Whitley

208. *Id.* Of course, in addition to the shifting demographics of the county and lack of acquaintances on the jury, Ebert also ran into one of the greatest factors in Virginia's declining death penalty: the CDO. As discussed by Professor Garrett, the establishment of regional capital defenders greatly improved Virginia's death penalty representation, contributing to the decline in Virginia's death penalty. Garrett, *supra* note 120, at 666. It is no coincidence that Hamilton was represented by an experienced, high-quality defense team led by the Northern Virginia Office of the Capital Defender.

209. *See* Justin Jouvenal, *Virginia's Longest-Running Prosecutor Plans to Retire at the End of the Year*, WASH. POST (Feb. 5, 2019) (noting that Ebert announced he would retire at the end of [2019]) [https://perma.cc/HTR6-UVT2].

210. Harry Jaffe, *What I've Learned: Robert Horan,* WASHINGTONIAN (May 1, 2008) (detailing the career of Robert Horan Jr.) [https://perma.cc/T9HT-9ZET].

211. Kiehl, *supra* note 185 (describing the relationship between Ebert and Horan).

212. Adam Liptak, *Prosecutors in Sniper Cases Are Death Penalty Veterans,* N.Y. TIMES (Nov. 10, 2002) [https://perma.cc/9N87-JFKZ].

213. *Id.*

214. *See* Dieter, *supra* note 103, at 29 (listing Fairfax County as responsible for five executions).

(1987) and Dwayne Wright (1998)—had been sentenced to death for crimes committed in the City of Fairfax, a locality also prosecuted by Horan and his office.[215] Additionally, an eighth man who was executed in 2015, Alfredo Prieto, was originally prosecuted by Horan.[216]

In a retrospective on his career, Horan was asked whether he ever witnessed an execution. Horan replied that he had, but that he "kind of forg[o]t who—I went down to watch one of the guys in the electric chair on Spring Street in Richmond."[217] Asked to describe the experience, Horan stated that "[i]t was interesting" and that "the guys who get capital punishment tend to be such a horrible breed of human being."[218] Like Ebert, Horan prosecuted for decades of demographic change, seeing Fairfax change from "a rural county" to a majority minority suburb with Virginia's largest population.[219] At the same time, Fairfax has become one of the wealthiest counties in America.[220]

Horan was succeeded by his Chief Deputy, Raymond Morrogh, in 2007.[221] As Commonwealth's Attorney, Morrogh was responsible for the resentencing of Alfredo Prieto, who became one of the last men executed in Virginia.[222] Morrogh also prosecuted Mark Lawlor, the last person sentenced to death in Virginia, whose death sentence was vacated in 2018.[223] In 2019, however, Morrogh

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215. *See* DPIC, *supra* note 97; *see also* Harry Jaffe, *What I've Learned: Robert Horan*, WASHINGTONIAN (May 1, 2008) [https://perma.cc/T9HT-9ZET].

216. Jaffe, *supra* note 210 (referring to the Prieto prosecution).

217. *Id.*

218. *Id.*

219. *Id.*

220. *See* Emmie Martin, *This is the No. 1 Highest-Earning Region in the US, and it Isn't in New York or California*, CNBC (Mar. 20, 2019) (noting that Fairfax County has become one of the counties with the highest median household incomes) [https://perma.cc/MX3P-RNAU].

221. *See Raymond F. Morrogh*, VA. DEP'T OF ELECTIONS (noting that Morrogh was elected as the Commonwealth's Attorney in 2007, winning the election with 56% of the vote) [https://perma.cc/A485-M6G5].

222. *See* Tom Jackman, *Prieto Sentenced to Death for Fairfax Murders*, WASH. POST (Nov. 5, 2010, 10:56 P.M.) (noting that Morrogh prosecuted Prieto) [https://perma.cc/4RV7-LLVU].

223. *See* Tom Jackman, *Va. Man Sentenced to Death in 2011 Gets New Hearing, And New Prosecutor Agrees to Life Sentence*, WASH. POST (Mar. 12, 2020) (noting that Morrogh had originally prosecuted Lawlor) [https://perma.cc/NE87-5ME3].

was upset in the Democratic primary by Steve Descano, whose criminal justice platform included opposition to the death penalty.[224] During the primary, Morrogh's campaign inexplicably claimed that he was "personally and religiously opposed" to capital punishment.[225] After losing to Descano, however, Morrogh unsuccessfully backed his Republican opponent in the general election.[226] Once in office, Descano reached a plea agreement with Lawlor that guaranteed he would spend life in prison without parole, a decision that Morrogh decried.[227] With both Ebert and Morrogh out of office by January 2020, neither Prince William County nor Fairfax County sought a death sentence in the final full year of Virginia's death penalty.[228]

The Virginia experience exemplifies the research indicating that it is individual local decisionmakers—especially prosecutors—who are responsible for the increasing concentration of the death penalty. As capital punishment declined in Virginia, individual prosecutors with longstanding commitments to the death penalty continued the practice. As elected Commonwealth's Attorney for more than fifty years, Paul Ebert was responsible for the most death sentences and executions in Virginia.[229] In neighboring Fairfax County, Ebert's longtime friend Robert Horan oversaw forty years of death penalty prosecutions, a tradition that

224. *See* Justin Jouvenal, *Fairfax County's Democratic Prosecutor Will Endorse an Independent—Not a Democrat—To Replace Him*, WASH. POST (Sept. 26, 2019) (describing that Descano promised to bring liberal reforms, including ending the use of the death penalty) [https://perma.cc/GX67-NRE6].

225. *See* Brad Swanson, *Should Values Lead Justice? Fairfax Prosecutor Candidates Clash*, THE BLUE VIEW (May 25, 2019) (noting that despite Morrogh's wholly discretionary decisions to seek the death penalty, he claimed to be opposed to it) [https://perma.cc/SL3C-T6WC].

226. *See Defeated Democratic Commonwealth's Attorney Endorses Republican in General Election,* STEVE DESCANO DEMOCRAT FOR COMMONWEALTH'S ATTORNEY (Sept. 26, 2019) (noting that Ray Morrogh endorsed the Republican candidate in the general election for Commonwealth's Attorney in Fairfax County) [https://perma.cc/2MWM-UAM7].

227. *See* Jackman, *supra* note 223 (describing the Lawlor plea agreement).

228. *See Virginia Abolishes the Death Penalty,* EQUAL JUST. INITIATIVE (last updated Mar. 24, 2021) (noting that Virginia has had no executions since 2017 and no new death sentences since 2011) [https://perma.cc/SV2U-87GE].

229. *See* Matthew Barakat, *Ebert Retires After 52 Years of High-Profile Prosecutions*, ABC NEWS (Dec. 24, 2019, 2:33 P.M.) (describing Ebert's history of death penalty prosecutions) [https://perma.cc/CQ4Y-Y6VM].

was carried on by his immediate successor, who had been his chief deputy.[230] While looking at the county of prosecution largely captures the effect of individual prosecutors, it does so imperfectly, as exemplified by the exclusion of two of Horan's executions from the Fairfax County total.

In sum, Virginia's experience with the death penalty powerfully illustrates the increasing localization of the death penalty. This localization has rendered capital punishment increasingly arbitrary, as discussed by the *Glossip* dissenters.[231] Multiple reasons for localization have been suggested, and the reasons are likely complex.[232] For example, the *Glossip* dissenters point to differences such as local prosecutors, defense resources, and race.[233] Ultimately, the local prosecutor cannot be artificially divorced from the jurisdiction that elected him or her, and factors such as wealth, racial composition, and politics undeniably play into election. But at the same time, it was the broad discretion of certain local decisionmakers—particularly those who had been involved in perpetuating the death penalty for decades—that maintained the death penalty during its decline in Virginia's.

In and of itself, geography (particularly county of prosecution) is an arbitrary factor in the administration of the death penalty. In America, a county line easily can make the difference between whether a defendant lives or dies. But it is not the earth within a geographical boundary that makes the decision whether to seek an execution. In some jurisdictions, including Virginia, elected prosecutors with unfettered discretion decide. Of course, some might argue that prosecutors *should* be granted broad discretion to make decisions about charging defendants and seeking sentences, and that this is not constitutionally problematic. But as

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230. *See* Martha Neil, *40-Year Prosecutor Still Swinging as Era Ends*, ABA JOURNAL (Apr. 12, 2007, 12:58 A.M.) [https://perma.cc/3M8B-NGHD].

231. *See* Glossip v. Gross, 576 U.S. 863, 920 (2015) (Breyer & Sotomayor, JJ., dissenting) (noting that "local geography" is one of the "irrelevant or improper factors" that "significantly determine who receives the death penalty," and that such factors "strongly suggest[] that the death penalty is imposed arbitrarily.").

232. *See id.* at 919 (citing research that attributes local disparities to multiple complex factors such as prosecutorial discretion, defense resources, demographics, and politics).

233. *Id.* (same).

illustrated by Part II,[234] the Eighth Amendment proscribes arbitrary death sentences and executions regardless of their cause. Indeed, the *Glossip* dissent suggests that localization has resulted in constitutionally suspect arbitrariness, whatever the underlying causes of that geographic concentration.

Additionally, Virginia's experience with death penalty localization suggests some reasons the role of prosecutorial discretion in geographic disparities *should* matter. For example, Paul Ebert's admission that he brought capital charges even when it was "questionable" is contrary to *Gregg*'s vision that the death penalty could be administered in an evenhanded manner that would narrow and guide discretion.[235] The admission that changing demographics, including race of the decisionmaker, influenced the administration of Virginia's death penalty as it declined challenges any basic concept of fairness. And the failure of Robert Horan to recall the name of a human being he charged, prosecuted, placed on death row, and personally watched be electrocuted runs contrary to the gravity of the death penalty that our system is meant to reflect.[236] These glimpses at Virginia's modern death penalty suggest a significant flaw with *Gregg*'s fundamental premise that state capital sentencing systems can eliminate arbitrariness, or even reduce its risk to some constitutionally tolerable point: there is always a human (and thus imperfect) decisionmaker.

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234. *See supra* Part II.

235. *See* ABA, *supra* note 160, at 118 (quoting Frank Green, *'Like They're God': Prosecutorial Discretion Called Awesome Power*, RICHMOND TIMES-DISPATCH (Feb. 5, 1998) (noting that Ebert "was quoted as stating that he . . . 'usually charge[s] capital murder if it qualifies,' and that in many instances, 'he charge[s] capital murder even if it's questionable as whether or not it fits in that category.") (alterations in original). This is obviously antithetical to the United States Supreme Court's vision of death penalty schemes that can ensure the punishment is limited to a narrowly defined set of offenses.

236. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 290 (1972) (Brennan, J., concurring) ("Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity."); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (reporting that "the penalty of death is qualitative different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.").

V. The Geography of the Post-Virginia Death Penalty

Just as the decline of Virginia's death penalty speaks to the increasing localization of capital punishment in America, the abolition of its death penalty speaks to the growing unusualness and arbitrariness of capital punishment in our country. With Virginia's abolition, the national picture of the death penalty has changed both quantitatively and qualitatively. Of course, there is one fewer death penalty state, and capital punishment is no longer available in some of America's longtime death counties. But abolition in Virginia—the first southern state to end its death penalty—also alters the cultural landscape of capital punishment in America.

A fundamental concept in Eighth Amendment jurisprudence is "that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[237] In other words, the concept of what constitutes "cruel and unusual punishment" can and does change as we develop as a society.

In the modern era, the Supreme Court has frequently applied the "evolving standards of decency" concept in the context of categorical exclusions from the death penalty.[238] This jurisprudence excludes certain categories of crimes or defendants from either a death sentence or execution, focusing on whether the death penalty is proportionate under the circumstances.[239] For example, the Court has referred to evolving standards of decency in holding the death penalty unconstitutional for intellectually

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237. *See* Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (citing Weems v. United States, 217 U.S. 349, 378 (1910)) (explaining that the Eighth Amendment "may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.").

238. *See id.* at 100–01 (noting that "[t]he Court recognized in [*Weems*] that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.") (citing *Weems*, 217 U.S. 349).

239. *See, e.g.*, Coker v. Georgia, 433 U.S. 584 (1977) (referring to the requirement that the death penalty be proportionate to the crime committed).

disabled persons[240] and juveniles,[241] as well as in barring the execution of the insane.[242] Similarly, the Court has relied on related principles in finding the death penalty unconstitutional for the rape of an adult woman,[243] for felony murder without proof that the defendant killed or intended a death,[244] and for rape of a child that does not result in death.[245]

The Court's categorical exclusion jurisprudence follows a two-step analysis that encompasses both quantitative and qualitative questions. Quantitatively, the Court asks whether a "national consensus" has developed regarding a category of death penalty practice.[246] Primarily, the Court looks to how many jurisdictions allow death sentences for a certain crime or category of defendant.[247] The Court also looks to other objective indicia, such

240. *See* Atkins v. Virginia, 536 U.S. 304, 311–12 (2002) (barring the death penalty for intellectually disabled persons).

241. *See* Roper v. Simmons, 543 U.S. 551, 561–63 (2005) (holding that persons may not be executed for crimes committed under the age of eighteen).

242. *See* Ford v. Wainwright, 477 U.S. 399, 406 (1986) (barring execution of the insane).

243. *See Coker*, 433 U.S. at 592 (holding that the death penalty is a disproportionate and excessive punishment for the rape of an adult woman).

244. *See* Enmund v. Florida, 458 U.S. 782, 788 (1982) (holding that the death penalty may not be applied to persons guilty of felony murder who did not commit the actual killing or intend the death).

245. *See* Kennedy v. Louisiana, 554 U.S. 407, 438 (2008) (finding the death penalty unconstitutional for the crime of child rape that does not result in the death of the child).

246. *See, e.g.*, *Atkins*, 536 U.S. at 316 (concluding that "it is fair to say that a national consensus has developed against" execution of the intellectually disabled); *Roper*, 543 U.S. at 564 ("The evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for the [intellectually disabled]."); *Kennedy*, 554 U.S. at 426 ("The evidence of a national consensus with respect to the death penalty for child rapists, as with respect to juveniles, [intellectually disabled] offenders, and vicarious felony murderers, shows divided opinion but, on balance, an opinion against it.").

247. *See, e.g.*, *Coker*, 433 U.S. 593–96 (analyzing data and concluding that "[t]he current judgment with respect to the death penalty for rape is not wholly unanimous among state legislatures, but it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman."); Enmund v. Florida, 458 U.S. 782, 789–93 (1982) (quantifying state positions on the death penalty for felony murder and observing that "only a small minority of jurisdictions—eight—allow the death penalty to be imposed solely because the defendant somehow participated in a robbery in the course of which

as jury verdicts, to assess contemporary acceptance of the death penalty under certain circumstances.[248] Finally, the Court looks to whether there is a significant trend indicating that the death penalty is now viewed as disproportionate for certain persons or crimes.[249] The Court has observed that "[i]t is not so much the number of these States that is significant, but the *consistency of the direction of change*."[250] Trends against the death penalty are particularly notable because of a political reality: "the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime . . . ."[251]

The second step of the Supreme Court's "evolving standards of decency" analysis is a qualitative assessment in which the justices consider their own judgments of a punishment's continued constitutionality.[252] As part of this analysis, the Court considers

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a murder was committed."); *Atkins*, 536 U.S. at 313–17 (considering the number of states that have barred execution of the intellectually disabled); *Roper*, 543 U.S. at 564–67 (discussing which states allow the execution of juveniles); *Kennedy*, 554 U.S. at 422–26 ("[I]n 45 jurisdictions, petitioner could not be executed for child rape of any kind. That number surpasses the 30 States in *Atkins* and *Roper* and the 42 States in *Enmund* that prohibited the death penalty under the circumstances those cases considered.").

248. *See, e.g.*, *Gregg*, 428 U.S. at 181 ("The jury also is a significant and reliable objective index of contemporary values because it is so directly involved."); *Coker*, 433 U.S. at 596 (stating "that it is thus important to look to the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried.") (citing *Gregg*, 428 U.S. at 181); Enmund v. Florida, 458 U.S. 782, 794 (1982) ("Society's rejection of the death penalty for accomplice liability in felony murders is also indicated by the sentencing decisions that juries have made . . . . The evidence is overwhelming that American juries have repudiated imposition of the death penalty for crimes such as petitioner's."); *Atkins*, 536 U.S. at 316 (noting that "even in those States that allow the execution of mentally retarded offenders, the practice is uncommon.").

249. *See, e.g.*, *Atkins*, 536 U.S. at 315 ("It is not so much the number of these States that is significant, but the consistency of the direction of change."); *Roper*, 543 U.S. at 567 (noting that "the objective indicia of consensus" to be considered when deciding a death penalty case must include "the consistency in the trend toward abolition of the practice").

250. *Atkins*, 536 U.S. at 315; *see also Roper*, 543 U.S. at 566 (concluding that "the same consistency of direction of change has been demonstrated").

251. *Atkins*, 536 U.S. at 315.

252. *See, e.g.*, *Coker*, 433 U.S. at 597 ("These recent events evidencing the attitude of state legislatures and sentencing juries do not wholly determine this controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty

whether the death penalty serves any penological purposes, such as deterrence or retribution.[253] The Court also looks to specific fairness problems raised by the Eighth Amendment issue at hand.[254] For example, in finding the execution of intellectually disabled unconstitutional, the Court pointed to concerns that the intellectually disabled are at risk of making false confessions, being less capable of assisting in their own defenses, and appearing less remorseful.[255] And in holding the death penalty unconstitutional for minors, the Court looked to their immaturity, vulnerability, and capacity for change.[256]

There is no reason, however, that the concept of "evolving standards of decency" should be limited to categorical exclusion

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under the Eighth Amendment."); *Enmund*, 458 U.S. at 797 ("Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it us for us ultimately to judge whether the Eighth Amendment" permits the death penalty for a given crime); *Atkins*, 536 U.S. at 321 ("Our independent evaluation of the issue reveals no reason to disagree with the judgment of the 'legislatures that have recently addressed the matter' and concluded that death is not a suitable punishment for a[n intellectually disabled] criminal."); *Roper*, 543 U.S. at 574 (reaffirming the need for the Court "to bring its independent judgment to bear on the proportionality of the death penalty for a particular class of crimes or offenders . . . ."); Kennedy v. Louisiana, 554 U.S. 407, 434 (2008) ("As we have said in other Eighth Amendment cases, objective evidence of contemporary values . . . is entitled to great weight, but it does not end our inquiry . . . . We turn, then, to the resolution of the question before us, which is informed by our precedents and our own understanding of the Constitution and the rights it secures").

253. *See Enmund*, 458 U.S. at 798–801 (stating that putting Enmund to death "does not measurably contribute to the retributive end of ensuring that the criminal gets his just desserts"); *Atkins*, 536 U.S. at 317–20 ("The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct."); *Roper*, 543 U.S. at 571–72 (discussing that the penological justifications for the death penalty do not apply with the same force to juveniles as it does adults).

254. *See Atkins*, 536 U.S. at 318 (explaining that individuals with intellectual disabilities are not exempted from criminal punishment but that they do have diminished personal culpability); *Roper*, 543 U.S. at 570 ("From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."); *Coker*, 433 U.S. 598 (arguing that the crime of rape does not compare to the crime of murder and death should be reserved for the most serious offenses).

255. *See, e.g.*, *Atkins*, 536 U.S. at 320–21.

256. *See Roper*, 543 U.S. at 569–70.

challenges. Rather, the concept can be applied to the question of the American death penalty as a whole. Indeed, the essential meaning of this concept is that the Eighth Amendment does *not* bind us to accept historical punishments that have become constitutionally intolerable. As the Court observed in *Trop v. Dulles*,[257] "[t]he provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation."[258] Furthermore, the Eighth Amendment is meant to be a constraint upon the legislatures, securing an individual right to be free of cruel and unusual punishments from the power of the government. "The basic concept underlying the Eighth Amendment is the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards."[259] As civilized standards evolve, the Eighth Amendment is meant to reflect that growth.

In fact, long before the Court's categorical exclusion jurisprudence solidified, several of the concurring justices in *Furman* referred to "evolving standards of decency" in holding that the death penalty was unconstitutional as then applied.[260] By doing so, these justices acknowledged that the evolving standards analysis could encompass the death penalty as applied in our nation as a whole.[261] And although the 1976 cases permitted the American death penalty to resume, they also found that mandatory death sentences were inconsistent with evolving standards of decency.[262] At the time, the Court concluded that "one

257. 356 U.S. 86 (1958).

258. *Id.* at 103.

259. *Id.* at 100.

260. *Furman*, 408 U.S. at 242 (Douglas, J., concurring) ("[T]he Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'"); *id.* at 269–70 (Brennan, J., concurring) ("We know . . . that the Clause 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'"); *id.* at 327 (Marshall, J., concurring) ("Emphasizing the Flexibility inherent in the words 'cruel and unusual' . . . '[t]he amendment must draw its meaning from the evolving standards of decency that mark the process of a maturing society.'").

261. *See Furman*, 408 U.S. at 242 (Douglas, J., concurring); *id.* at 269–70 (Brennan, J., concurring); *id.* at 327 (Marshall, J., concurring).

262. *See* Woodson v. North Carolina, 428 U.S. 280, 293–301 (1976) (holding that mandatory death sentences are unconstitutional).

of the most significant developments in our society's treatment of capital punishment has been the rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense."[263]

The evolving standards concept is thus not limited to piecemeal challenges to the death penalty. It also can be applied to the American death penalty to assess—as the *Furman* justices did—whether the practice of capital punishment reflects contemporary standards of humanity. The *Glossip* dissenters did just this, using the evolving standards analysis to consider whether the death penalty had become unconstitutionally unusual as of 2015, particularly in light of its national decline.[264]

The *Glossip* dissent focused on the first step—objective indicia of a punishment's rejection—to look at the increasingly unusual use of the death penalty.[265] The dissenters noted that "in 2014, only seven States carried out an execution" and "just 73 persons were sentenced to death."[266] The dissenters also considered how "the number of active death penalty States has fallen dramatically," with ten states abolishing the death penalty between 1972 and 2015.[267] In addition to the nineteen abolition states, eleven states had not executed a person for eight years.[268] Nine of the twenty states that had carried out executions in the preceding eight years had "conducted fewer than five in that time, making an execution in those States a fairly rare event."[269] And of course, the dissenters also pointed to the increasing geographic localization of the death penalty, with emerging county-by-county disparities.[270] Finally,

263. *Id.* at 301.

264. *See* Glossip v. Gross, 576 U.S. 863, 938–44 (Breyer & Sotomayor, JJ., dissenting) (discussing the decline in the "imposition and implementation" of death sentences).

265. *See id.*

266. *Id.* at 939.

267. *See id.* at 939–40 (noting that the death penalty had been abolished in nine states by 1972, but functionally or formally abolished in thirty states by 2015).

268. *See id.* at 940.

269. *Id.*

270. *See id.* at 941–42 (noting that "use of the death penalty has become increasingly concentrated geographically" and that as a result of localization, "it is now unusually to find capital punishment in the United States, at least when we consider the Nation as a whole").

the dissenters pointed to the consistent direction of change towards abolition.[271]

These numbers have changed since 2015, but the direction of change has remained consistent. Since 2015, five more states—Delaware (2016), Washington (2018), New Hampshire (2019), Colorado (2020), and Virginia (2021)—have abolished the death penalty.[272] New moratoria on executions have been declared in California[273] and by the federal government.[274] Twenty-three states, plus the District of Columbia, no longer have a death penalty.[275] Even more startling, thirteen states and the U.S. Military have the death penalty, but have not carried out an execution in a decade.[276] Another two states—Arizona and Idaho—have not executed a person in at least five years.[277] In 2021, only five states (Texas, Missouri, Alabama, Oklahoma, and Mississippi) and the federal government were responsible for executions.[278] The same was true in 2020, when only the federal government and Texas, Georgia, Tennessee, Alabama, and Missouri executed people.[279] Although these were pandemic years, the numbers were not dramatically different in 2019 (seven states responsible for executions), 2018 (eight states), 2017 (eight states, including Virginia), and 2016 (five states).[280] The end of Virginia's death

271. *See id.* at 943 (explaining that an increasing number of states have abolished the death penalty or ceased executions, and that "the direction of change is consistent.").

272. *See State by State*, DPIC (reporting which states maintain capital punishment) [https://perma.cc/8KLC-VBN5].

273. GAVIN NEWSOM, EXEC. DEPT., EXEC. ORDER N-09-19 (Mar. 13, 2019) (ordering an executive moratorium on the death penalty) [https://perma.cc/UUE5-JYCX].

274. Memorandum from Att'y Gen. Merrick Garland to Deputy Att'y Gen., the Assoc. Att'y Gen., Heads of Dept. Components, *"Moratorium on Federal Executions Pending Review of Policies and Procedures"* (July 1, 2021) (ordering a moratorium on federal executions) [https://perma.cc/3M5U-SM2C].

275. *States with No Recent Executions*, DPIC, (last updated Nov. 17, 2021) (listing states that have had no recent executions) [https://perma.cc/BQ9F-3RD7].

276. *See id.*

277. *Id.* (reporting that Arizona and Idaho have the death penalty but have not executed anyone in at least five years).

278. *See* Execution Database, *supra* note 119.

279. *See id.*

280. *See id.*

penalty thus has contributed to a growing, consistent trend against the use of the death penalty in America. In other words, abolition in Virginia is another data point supporting the increasingly evident conclusion that the death penalty no longer comports with our country's civilized standards.

Virginia adds to this picture not only quantitatively, but also qualitatively. Virginia was a true death penalty state. In 1608, Virginia became the first colony to carry out an execution, the shooting death of Captain George Kendall.[281] Historically, Virginia has carried out the most executions.[282] And in the modern era, Virginia executed 113 people, a total second only to Texas at the time of abolition.[283] Although Virginia's death penalty had declined significantly, the Commonwealth also had two executions in the five years preceding abolition, both under a Democratic governor.[284]

Significantly, Virginia also is the first southern state to abolish the death penalty.[285] Although the death penalty is not an exclusively southern practice, it is a heavily southern one. In the modern era, the South has been responsible for 1258 executions, while the Midwest has been responsible for 192, the West for 86, and the Northeast for 4.[286] The death penalty in America, particularly in the South, is also tied to a history of racial violence and lynching. Virginia was a prominent lynching state, with

281. *See* Andone, *supra* note 2 (stating that Virginia carried out the colonies' first recorded execution); *see also* Natasha Frost, *Was the Colonies' First Death Penalty Handed to a Mutineer or Spy?*, HIST. (Aug. 24, 2018) (telling the story of the execution of Captain George Kendall) [https://perma.cc/4KY8-DTAY].

282. *See Virginia*, DPIC ("Virginia has executed more people in its history than any other state.") [https://perma.cc/WFE5-BUDJ].

283. After Virginia's abolition, Oklahoma executed two men in late 2021, bringing Oklahoma up to 114 executions. *See* Execution Database, *supra* note 119.

284. *See Virginia*, DPIC (noting there were two executions in 2017) [https://perma.cc/XSJ6-7VPT].

285. *See* Hailey Fuchs, *Virginia Becomes First Southern State to Abolish the Death Penalty*, N.Y. TIMES (last updated Jul. 22, 2021) [https://perma.cc/ZY7P-EJQY].

286. *See Executions by State and Region Since 1976*, DPIC (providing a breakdown of executions by region) [https://perma.cc/7MXF-SACX].

eighty-four lynchings between 1877 and 1950.[287] By abolishing the death penalty, Virginia explicitly expressed its desire to address the legacy of racial injustice that helped fuel its capital punishment system.[288]

In sum, Virginia's abolition tilts the national geography of the death penalty both quantitatively and qualitatively. By the numbers, Virginia contributes an additional state to the growing trend towards abolition in our country.[289] But because Virginia was an active death penalty state in the modern era, its abolition also likely represents a meaningful subtraction of deaths from execution totals over time.[290] In addition to these quantitative changes, the end of Virginia's death penalty suggests a qualitative shift: the movement of the abolition trend into the South, where the death penalty has its strongest legacy. Virginia's abolition thus represents something different from the legislative acknowledgement of *de facto* abolition that might occur in other states: it represents a change in the people's acceptance of the death penalty as a civilized punishment. This development signals

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287. *See* EQUAL JUST. INITIATIVE, *supra* note 3, at 3, 40 (stating the number of lynchings that occurred in Virginia).

288. *See, e.g.*, Gregory S. Schneider, *Virginia Abolishes the Death Penalty, Becoming the First Southern State to Ban Its Use*, WASH. POST (Mar. 24, 2021) ("Citing the long history of racial disparity in the way the death penalty has been applied, with Black defendants far more likely to be executed than White ones, [Governor Ralph] Northam said the system can no longer be justified.") [https://perma.cc/45DT-K9Z3]; *id.* ("Sen. Scott A. Surovell (D-Fairfax), who sponsored the Senate version of the bill and has worked against the death penalty for more than a decade, cited Virginia's history as both the birthplace of the Bill of Rights during the Revolution era and a land of racism and violence against Black people during the time of Jim Crow."); Colleen Grablick & Christian Zapata, *Northam Signs Bill Ending Death Penalty in Virginia*, NPR (Mar. 25, 2021) ("[I]n the lead-up to signing the bill, Northam cited racial discrimination tied to capital punishment.") [https://perma.cc/V9LN-Z22E].

289. *See, e.g.*, Gretchen Frazee, *How States are Slowly Getting Rid of the Death Penalty*, PBS (Mar. 13, 2019) (highlighting that states are trending away from using the death penalty) [https://perma.cc/7TAV-XSPQ]; *Several States Consider Repealing or Reforming Death Penalty Laws*, ABA (Mar. 10, 2020) (explaining that efforts to repeal the death penalty have been gaining momentum) [https://perma.cc/CU62-QFN2].

290. *See generally* Madeleine Carlisle, *Why It's So Significant Virginia Just Abolished the Death Penalty*, TIME (last updated Mar. 24, 2021) ("[S]ince 1976, [Virginia] has executed 113 people, a higher percentage of death row inmates than any other U.S. state.") [https://perma.cc/M2XE-ADPR].

that evolving standards of decency no longer support the death penalty in America.

VI. Conclusion

For forty-five years, our country has accepted the premise that the death penalty can be administered in a way that is neither arbitrary nor unusual. Since *Gregg*, the Supreme Court has allowed the states and federal government to legislate capital sentencing schemes, occasionally stepping in to point out that the chosen process risks too much injustice. This system relies on the fundamental assumption that a jurisdiction's capital sentencing scheme can eliminate arbitrariness through providing for guided discretion and an individualized assessment of each defendant. No individual sentencing scheme can eliminate, however, the arbitrary effects of geography.

The Virginia experience powerfully illustrates the arbitrary influence of geography on the death penalty. In Virginia, a minority of jurisdictions used the death penalty, most notably during the crime panic of the 1990s.[291] But as Virginia's death penalty declined, it became increasingly evident that capital punishment was a local practice. Research suggests that geographic concentration is a phenomenon attributable to local decisionmakers, and Virginia's experience reflects that reality.[292] In the modern era, Virginia's death penalty was produced and maintained primarily by certain decisionmakers who avidly practiced the pursuit of death, sometimes for decades.[293] When only the county of prosecution is considered, there is a risk that the role of individual decisionmakers might be obfuscated. But when considering the vagaries of individual discretion within Virginia's active death penalty jurisdictions, the administration of the modern death penalty appears even more freakish.

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291. *See Virginia*, DPIC (providing search tools to view the local use of the death penalty) [https://perma.cc/XSJ6-7VPT].

292. *See* Dieter, *supra* note 103 (stating that fewer than two percent of counties in the U.S. account for over half of the nation's death-row population).

293. *See, e.g.*, Kiehl, *supra* note 185 (discussing the career of Paul Ebert, Prince William County's chief prosecutor for over three decades, whose prosecutions resulted in more death sentences than any other prosecutor in Virginia).

The abolition of Virginia's death penalty also renders the national death penalty considerably more arbitrary. Six years after the *Glossip* dissent, the trend towards abolition has grown.[294] Virginia adds not only a single state to this picture, but also a historic legacy of capital punishment in the south. While abolition in some states might seems inevitable in light of the historic disinclination of those states toward capital punishment, abolition in Virginia represents a more significant shift. This is an abolition that represents evolution, as opposed to a simple legislative acknowledgement of the status quo.

Of course, much remains to dissect in the retrospective assessment of Virginia's death penalty. But both the decline and abolition of Virginia's death penalty do suggest a return to one of the first principles of Eighth Amendment law: the death penalty is unconstitutional when it is arbitrarily applied. In retrospect, it is hard to escape the conclusion that Virginia's death penalty was anything but arbitrary in its decline. It is equally hard to escape the conclusion that our national death penalty has become even more "unusual" without the participation of Virginia, its first and most prolific executioner.

294. *See* Frazee, *supra* note 289 (explaining that there is "a nationwide trend of states moving away from the death penalty" and that "public support for the death penalty has waned significantly" since 1996).