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## The Beginning of the End: Abolishing Capital Punishment in Virginia

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# The Beginning of the End: Abolishing Capital Punishment in Virginia

Alexandra L. Klein\*

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

When thinking about the history of capital punishment in the United States, I suspect that the average person is likely to identify Texas as the state that has played the most significant role in the death penalty.<sup>2</sup> The state of Texas has killed more than *five hundred people* in executions since the Supreme Court approved of states' modified capital punishment schemes in 1976.<sup>3</sup> By contrast, Virginia has executed 113 people since 1976.<sup>4</sup>

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

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1. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

2. See MAURICE CHAMMAH, LET THE LORD SORT THEM: THE RISE AND FALL OF THE DEATH PENALTY 16–17 (2021).

3. See *id.*; see generally *Jurek v. Texas*, 482 U.S. 262 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

4. See *Virginia*, DEATH PENALTY INFO. CTR., <https://perma.cc/TLL4-B3EY>.

Captain George Kendall was shot to death by a firing squad.<sup>5</sup> Virginia has *officially* executed 1,390 people, more than any other state.<sup>6</sup> I write *officially*, because Virginia, like many other states also has a history of extrajudicial executions through lynching.<sup>7</sup> The Equal Justice Initiative has calculated that between 1877 and 1950, eighty-four people were lynched in Virginia.<sup>8</sup> Lynchings were arguably a form of “extrajudicial execution” because they frequently involved either the deliberate ignorance or enthusiastic cooperation of local officials and were tools of social control, just like legislatively enacted capital punishment.<sup>9</sup>

Over four hundred years since Captain Kendall died at Jamestown, Virginia has decided to end its brutal regime of capital punishment. This is a truly historic moment. Virginia will be the first southern state, as well as the first state of the group of eleven states that seceded and formed the Confederate States of America during the Civil War to do so.<sup>10</sup>

The repeal of capital punishment in Virginia has been a lengthy process. Attorneys, scholars, and activists have fought for years against the death penalty. A jury has not imposed a death sentence in nearly a decade.<sup>11</sup> Prosecutors have tried to

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5. M. WATT ESPY & JOHN ORTIZ SMYKLA, EXECUTIONS IN THE UNITED STATES, 1608–2002: THE ESPY FILE 1 (2002).

6. See *Executions in the U.S. 1608–2002: The Espy File*, DEATH PENALTY INFO. CTR., <https://perma.cc/GZ57-8L3H>. Texas has executed 1,322. *Id.*

7. See EQUAL JUSTICE INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR (3d ed. 2017), <https://perma.cc/3X6U-UF2Z>.

8. *Id.* at 40.

9. See EQUAL JUSTICE INITIATIVE, *supra* note 7, at 28; Alexandra L. Klein, *Volunteering to Kill* 52, 52 n.330 (unpublished manuscript) (on file with the author).

10. South Carolina, Mississippi, Florida, Alabama, Georgia, Louisiana, Texas, Arkansas, Tennessee, and North Carolina were the other states that seceded to form the Confederate States of America. All of them retain the death penalty. See *State by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> [<https://perma.cc/6U37-DRSM>].

11. See Brandon L. Garrett, *The Decline of the Virginia (and American) Death Penalty*, 105 GEO. L.J. 661, 664 (2017). Mark Lawlor received a death sentence in 2011 for the rape and murder of Genevieve Orange. The Fourth Circuit ordered a new sentencing procedure for Lawlor in 2018 because he had been unconstitutionally denied the opportunity to present mental health

secure death sentences. In 2018, a Prince William County jury convicted Ronald Hamilton of capital murder for killing his wife and a police officer.<sup>12</sup> Yet the jury deadlocked on the death penalty.<sup>13</sup> Executions have also dwindled. Since 2011, Virginia has executed five people.<sup>14</sup> Only two men remain on Virginia's death row: Anthony Juniper and Thomas Porter.<sup>15</sup> Ending the death penalty is a crucial step for Virginia to create a better justice system, although significant work remains.<sup>16</sup> Most other states only conduct infrequent executions—setting aside the COVID-19 pandemic and the federal government's brutal execution spree, fewer people are sentenced to death each year and fewer people are executed.<sup>17</sup> The punishment has lost any utility it has—if indeed it had any to begin with.<sup>18</sup>

Centuries ago, Cesare Beccaria wrote, “The death penalty is not useful because of the example of savagery it gives to

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testimony that he posed a low risk of violence in prison. 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), <https://perma.cc/YJ93-7UW4>. Lawlor accepted a plea deal and is now serving life without parole. *Id.*

12. Neil Augenstein, *I Failed: Army Staff Sergeant Convicted of Murdering Wife, Va. Officer Apologizes*, WTOP NEWS (Mar. 15, 2019, 2:31 PM), <https://perma.cc/ZX8H-KGJY>.

13. *Id.*

14. See *Execution Database*, DEATH PENALTY INFO. CTR., <https://perma.cc/W9FU-UUGT> (filtering for Virginia executions since 2011). The database includes Corey Johnson, who the federal government executed in 2021 for crimes committed in Virginia in 1992. See Michael Tarm & Denise Lavoie, *US Executes Virginia Gang Killer despite COVID-19 Infection* (Jan. 15, 2021), <https://perma.cc/V2RH-834R>.

15. *Virginia's Death Row Inmates*, VIRGINIANS FOR ALTERNATIVES TO THE DEATH PENALTY, <https://perma.cc/Y2D6-VW9G>.

16. See, e.g., BRANDON L. GARRETT, *END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE* 233–60 (2017)(discussing reform efforts in a post-capital punishment regime).

17. States only executed twenty-five people in 2018 and twenty-two executions in 2019. See *Execution Database*, *supra* note 14 (filtering for executions in 2018 and 2019 only).

18. See *Furman v. Georgia*, 408 U.S. 238, 311 (1972) (White, J., concurring) (“I begin with what I consider a near truism: that the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system.”).

men.”<sup>19</sup> Beccaria wrote this at a time when executions were public affairs, sometimes involving brutal torture.<sup>20</sup> Virginia no longer conducts public executions, to be sure, and yet the death penalty remains a violent spectacle. I came across an article about the people in Virginia who volunteer to witness executions.<sup>21</sup> Virginia, like many other states with capital punishment, requires civilian witnesses.<sup>22</sup> Arkansas, which planned to execute eight inmates over a ten-day period in 2017, struggled to find the six citizens its laws require to witness executions,<sup>23</sup> until it made its plight public.<sup>24</sup> Arkansas suddenly had many volunteers, eager to watch another human die in the name of justice.<sup>25</sup> Presumably requiring citizens to come watch executions serves the general deterrence function of capital punishment. I am uncertain that the requirement actually serves that function. Instead, it seems to encourage punitive attitudes and public vengeance. It is reminiscent of lynchings, in which community members came together to kill, observe, and pose for pictures with the victim’s dangling feet in the background, confident that some form of justice had been served.

Several of Virginia’s volunteers had watched multiple executions. One witness observed *four* executions “as a show of support for law enforcement.”<sup>26</sup> Despite the aftereffects of watching executions, the volunteer witnesses remained “undeterred” and expressed willingness to observe more

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19. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 70 (Richard Bellamy, ed., Richard Davies, Trans.) (Cambridge Univ. Press 1995) (1764).

20. See STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 70–86 (2002) (describing execution practices).

21. See Gareth Evans, *The Americans Volunteering to Watch Executions*, BBC (Apr. 10, 2017), <https://perma.cc/LHF7-NVAT>.

22. VA. CODE ANN. § 53.1–234 (2020) (“At the execution, there shall be present . . . at least six citizens who shall not be employees of the Department.”).

23. ARK. CODE ANN. § 16-90-502(e)(1)(D) (West 2021).

24. Matthew Haag, *Arkansas Struggles to Find Enough People to Watch Executions*, N.Y. TIMES (Mar. 25, 2017), <https://perma.cc/33HV-XXZP>; Evans, *supra* note 21.

25. Evans, *supra* note 21.

26. *Id.*

executions if they were needed.<sup>27</sup> The volunteer requirement reflects just how much a society is willing to tolerate capital punishment. Without the absolute willingness of random people to watch another human die at the hands of the state, possibly in agonizing pain, the penalty cannot go forward. It is a burden we all share.

Pain also presents an important reason for Virginia to end capital punishment. While the Supreme Court has concluded that *some* pain is permissible in executions,<sup>28</sup> it appears nearly impossible to execute people without a severe risk of agonizing pain and suffering. Botched hangings lead to strangulation or decapitation.<sup>29</sup> Two states have held that electrocution, “with its specter of excruciating pain and its certainty of cooked brains and blistered bodies” is unconstitutional.<sup>30</sup> Austin Sarat calculated that the average rate of botched electrocution executions from 1900 to 2010 is 1.9 percent—but from 1980 to 2010, 17.33 percent of electrocution executions were botched.<sup>31</sup> And what about lethal injection? Sarat estimates that out of the 1,054 lethal injection executions states carried out until 2010, 75, or 7.12 percent, have been botched.<sup>32</sup> That proportion is likely higher given the number of horrific botched executions carried out in the 2010s.<sup>33</sup> A recent report suggested that 84 percent of prisoners who died by lethal injection suffered pulmonary edema during executions due to the way lethal

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27. *Id.*

28. See *Glossip v. Gross*, 576 U.S. 863, 869 (2015) (“[B]ecause some risk of pain is inherent in any method of execution, we have held that the Constitution does not require the avoidance of all risk of pain.”).

29. See Alexandra L. Klein, *Nondelegating Death*, 81 OHIO ST. L.J. 931, 923 (2020).

30. *Dawson v. State*, 554 S.E.2d 137, 143–44 (Ga. 2001); *State v. Mata*, 745 N.W.2d 229, 278 (Neb. 2008).

31. AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA’S DEATH PENALTY 177 app. a (2014).

32. *Id.*

33. See Robin C. Konrad, *Lethal Injection: A Horrendous Brutality*, 73 WASH. & LEE L. REV. 1127, 1131 (2016); Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, THE ATLANTIC (June 2015), <https://perma.cc/MTK7-R7ER>.

injection drugs are administered.<sup>34</sup> The firing squad might be less painful than any of these methods, but its protocols, as it is administered in Utah, require local police officers to volunteer to kill prisoners, potentially relying on impermissible justifications for punishment like vengeance and threatening to further diminish confidence in law enforcement.<sup>35</sup> Although some may argue that the death penalty is necessary to show community condemnation and outrage, this is inconsistent with the role of the Eighth Amendment, which “limits the avenues through which vengeance can be channeled.”<sup>36</sup>

Jurisprudence surrounding capital punishment has attempted to limit who can be executed, reserving execution for the worst of the worst.<sup>37</sup> But this is a truly difficult task. The initial capital punishment regime that the Supreme Court held unconstitutional in *Furman v. Georgia*<sup>38</sup> was problematic because it offered no principled way for juries to discern who should receive death sentences.<sup>39</sup> In *Gregg v. Georgia*,<sup>40</sup> the Court approved a system of capital sentencing intended to provide jurors with better guidance in who should be executed.<sup>41</sup>

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34. See Noah Caldwell et. al., *Gaspings For Air: Autopsies Reveal Troubling Effects of Lethal Injection*, NPR (Sept. 21, 2020, 7:00 AM), <https://perma.cc/2FEH-VE84>.

35. See generally Alexandra L. Klein, *Volunteering to Kill* (unpublished manuscript) (on file with the author).

36. *Furman v. Georgia*, 408 U.S. 238, 345 (1972) (Marshall, J., concurring).

37. See, e.g., *Zant v. Stephens*, 462 U.S. 862, 870–72 (1983).

38. 408 U.S. 238 (1972) (per curiam).

39. See *id.* at 309–10 (Stewart, J., concurring)

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.

40. 428 U.S. 153 (1976).

41. See *id.* at 206–07

The new Georgia sentencing procedures . . . focus the jury’s attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory

Yet this has not solved the problem of limiting discretion in capital punishment. As Justice Breyer explained in his dissent in *Glossip v. Gross*,<sup>42</sup> research demonstrated “that the factors that most clearly ought to affect application of the death penalty—namely, comparative egregiousness of the crime—often do not. Other studies show that circumstances that ought *not* to affect application of the death penalty, such as race, gender, or geography, often *do*.”<sup>43</sup> Death sentences are based significantly on geography, even within individual states, and the discretion of that jurisdiction’s prosecutor.<sup>44</sup>

Legislators identify the kinds of offenses eligible for capital punishment as a way to “genuinely narrow[] the field of killers to those upon whom death could be imposed.”<sup>45</sup> These limits *should* narrow the group who is eligible for death while identifying the worst of the worst, defendants whose crimes really merit capital punishment.<sup>46</sup> Yet there is ample evidence that they do not.

In Virginia, an intentional, deliberate, and premeditated killing is not, by itself, grounds for capital punishment.<sup>47</sup>

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aggravating factor before it may impose a penalty of death. In this way the jury’s discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines.

42. 576 U.S. 863 (2015).

43. *Id.* at 918 (Breyer, J., dissenting).

44. See GARRETT, *supra* note 16, at 138–51 (discussing geographic disparities and prosecutorial decisions in capital punishment); John A. Horowitz, *Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty*, 65 *FORDHAM L. REV.* 2747, 2751 (1997); Nicholas Petersen & Mona Lynch, *Prosecutorial Discretion, Hidden Costs, and the Death Penalty: The Case of Los Angeles County*, 102 *J. CRIM. L. & CRIMINOLOGY* 1233, 1259–74 (2013).

45. Justin Marceau, Sam Kamin & Wanda Foglia, *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 *U. COLO. L. REV.* 1069, 1083 (2013).

46. *Id.*; see *Zant v. Stephens*, 462 U.S. 862, 878 (1983) (“[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.”).

47. VA. CODE ANN. § 18.2–32 (2020)

Murder, other than capital murder, by poison, lying in wait, imprisonment, starving, or by any willful, deliberate, and



Virginia has *fifteen* statutory aggravating circumstances that make a homicide offense one that can be punished by death.<sup>48</sup> Colorado had *seventeen* aggravating factors<sup>49</sup> before it abolished capital punishment in 2020.<sup>50</sup> A 2013 study of homicide offenses in Colorado revealed that “the death penalty was an option in approximately 90% of all first-degree murders,” but prosecutors sought the penalty “initially in only 3% of those killings, pursued all the way through sentencing in only 1% of those killings and obtained in only 0.6% of all cases.”<sup>51</sup> Such a statute provided little-to-no guidance on who *really* deserved capital punishment.<sup>52</sup> The real power to decide rested with prosecutors, rather than legislators.<sup>53</sup> Attempts to constrain discretion in capital punishment at various stages and decide which offenders really deserve the penalty, have demonstrated that the only way to avoid these dilemmas of discretion, which create too many opportunities for discrimination and unfairness, is to stop using capital punishment.

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

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premeditated killing, or in the commission of, or attempt to commit, arson, rape, forcible sodomy, inanimate or animate object sexual penetration, robbery, burglary or abduction, . . . is murder of the first degree, punishable as a Class 2 felony.

48. *Id.* § 18.2–31(A).

49. See Marceau, Kamin & Foglia, *supra* note 45, at 1088.

50. Neil Vigdor, *Colorado Abolishes Death Penalty and Commutes Sentences of Death Row Inmates*, N.Y. TIMES (Mar. 23, 2020), <https://perma.cc/5TNJ-8DVR>.

51. Marceau, Kamin & Foglia, *supra* note 45, at 1071–72.

52. *Id.* at 1072.

53. See Brandon Hasbrouck, *The Just Prosecutor*, 98 WASH. U. L. REV. (forthcoming 2021) (manuscript at 34) (on file with author).

54. See *We Need to Talk about an Injustice*, TED (Mar. 2012), <https://perma.cc/WW4N-23CA>.

people convicted of killing the white people who owned them were sentenced to be burned to death,<sup>55</sup> hanged,<sup>56</sup> and sometimes decapitated or dismembered so their bodies could be displayed in public places.<sup>57</sup>

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

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

Although states undertook substantial reform efforts following *Furman v. Georgia*, they did not eliminate the bias with which the death penalty is administered.<sup>60</sup> “The death

55. BANNER, *supra* note 20, at 71 (identifying enslaved people who were burned to death).

56. *Id.* at 72 (“Slaves were often hung in chains for crimes like rape and arson, in a show of force to other slaves in their community.”).

57. *Id.* at 74

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

*Id.* at 74–75 (discussing a similar dismemberment and display in Amelia County, Virginia).

58. *Id.* at 139.

59. *Id.* at 141.

60. See *McCleskey v. Kemp*, 481 U.S. 279, 327 (1987) (Brennan, J., dissenting) (“[P]rosecutors seek the death penalty for 70% of black defendants with white victims, but for only 15% of black defendants with black victims, and only 19% of white defendants with black victims.”); see also Alexis Hoag, *Valuing Black Lives: A Case for Ending the Death Penalty*, 51 COLUMBIA HUM. RTS. L. REV. 985, 990 & n.15 (2020) (collecting studies reflecting racial disparities in capital punishment).

penalty is still disproportionately sought and imposed against defendants accused of murdering white victims.”<sup>61</sup> Of the 113 people executed in Virginia since 1976, fifty-two were Black.<sup>62</sup> Census estimates from 2019 estimate that Black people make up 19.9 percent of Virginia’s population.<sup>63</sup> Virginia has executed twenty-one people for killing Black victims; only seven of the executed were white.<sup>64</sup> It executed ninety-three people for killing white victims; thirty-seven of the executed were Black.<sup>65</sup> Professor Alexis Hoag argues that the death penalty reflects the way in which the United States consistently undervalues Black lives.<sup>66</sup> Virginia’s post-1976 capital punishment scheme shows that some victims matter far more, and that some lives matter far less. Hoag argues that the only just remedy for undervaluing Black lives is to end capital punishment.<sup>67</sup>

During his oral argument in *Furman v. Georgia*, Professor Anthony Amsterdam explained that rare executions raise important questions about discrimination: “The very fact that capital punishment comes to be as rarely and as infrequently and as discriminatorily imposed as it is, takes the pressure off the legislature, quite simply, to do anything about it.”<sup>68</sup> That is not the path the General Assembly chose. Instead, it chose the only just remedy for Virginia’s bloody legacy of capital punishment. The General Assembly wisely chose to commute Mr. Porter’s and Mr. Juniper’s sentences to life without parole, rather than set off new legal battles about whether the state should still execute them.<sup>69</sup> Ending the constant battle over

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61. Hoag, *supra* note 60, at 990.

62. See *Execution Database*, *supra* note 14 (filtering executions based on race of the person).

63. *QuickFacts Virginia*, U.S. CENSUS BUREAU, <https://perma.cc/7EAD-DNE6>.

64. See *Execution Database*, *supra* note 14 (filtering executions based on the race of the victim).

65. See *id.* (filtering executions based on the race of the victim and the executed person).

66. See Hoag, *supra* note 60, at 991.

67. See *id.*

68. Transcript of Oral Argument at 15, *Furman v. Georgia*, 408 U.S. 238 (1972) (No. 69-5003), <https://perma.cc/8QUW-KAK8> (PDF).

69. When states abolish capital punishment, courts tend to hold that the imposition of death sentences afterward is not permissible. See *generally* State

whether a death sentence should be imposed offers victims and their families respite from ongoing judicial proceedings that force them to relive the impossibly horrific trauma of losing a loved one.<sup>70</sup>

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

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

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