

# The Dying Death Penalty: An Analysis of the Decreasing Number of Death Sentences in the United States and in Virginia

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## I. Introduction

The death penalty may very well be dying. While the Supreme Court continues to uphold capital punishment in this country, support for the death penalty appears to be decreasing each year.

The number of death sentences imposed by juries and judges across the country has declined to its lowest levels since *Furman v. Georgia*.<sup>1</sup> The nation averaged 280 death sentences per year from 1986 to 2001.<sup>2</sup> That number has dropped ever since—169 in 2002, 153 in 2003, 140 in 2004, 138 in 2005, 121 in 2006, 115 in 2007, and 111 in 2008.<sup>3</sup> This decline reflects a myriad of factors, and this paper will address the leading contributors to death penalty's slow demise.<sup>4</sup> This paper will also attempt to uncover whether Virginia is experiencing this downward trend.

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<sup>1</sup> 408 U.S. 238 (1972). The Supreme Court in *Furman* struck down all then-existing death penalty statutes. The case is therefore seen as marking the beginning of the modern era of capital punishment generally.

<sup>2</sup> Death Penalty Information Center, <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2007> (last visited April 20, 2009).

<sup>3</sup> *Id.*

<sup>4</sup> While there has also been noticeable decline in executions since 1998, I do not focus on the execution rate here because of its sensitivity to legal developments such as the recent moratorium that followed the Supreme Court's decision to review the constitutionality of lethal injection in the fall of 2007. The number of executions, however, arguably reflects the level of the country's overall approval of the practice. *See generally* Franklin E. Zimring, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 87 (2003) (noting that executions are the "best overall measure of political commitment to a fully operational capital punishment system"); John H. Culver, *State Politics and the Death Penalty: From Furman to McCleskey*, 12 *J. CRIME & JUST.* 1, 1 (1989) (arguing that executions require commitment from the state legislature, governor, and judiciary and that if any of these institutional actors resists the death penalty, the death penalty will not be carried out).

## II. Why is the Death Penalty Dying?

Understanding the explanation for the falling number of death sentences is problematic because capital sentencing involves a very complicated decision-making process.<sup>5</sup> A death sentence may not be sought by the government for a variety of reasons: the victim's survivors might be against it, the cost of pursuing the capital case might be overly burdensome, the defendant might be willing to accept a life sentence, or the defendant may cooperate with the government in return for a life sentence.<sup>6</sup> Such widespread discretion, coupled with the number of actors and factors involved in the process, complicates investigating exactly what influences the number of death sentences.<sup>7</sup>

Nevertheless, the sharp reduction in death sentences by American juries is clearly a reflection of several (and sometimes competing) factors. Legal scholars, political commentators, and politicians have asserted many reasons for the recent decline. This section reviews the most commonly cited, and most likely, explanations for why the death penalty may be a dying practice.

### *A. Decreasing Political and Public Support*

Arguing against the death penalty was once extremely dangerous for a politician. During the 1988 presidential campaign, for example, Democratic candidate Michael Dukakis was asked whether he would support the death penalty

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<sup>5</sup> See Scott E. Sundby, *The Death Penalty's Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor*, 84 TEX. L. REV. 1929, 1934-35 (June 2006) ("Discerning cause and effect with death sentence rates, therefore, is tricky both because the death penalty decision-making process is a very complex one (in that so many actors and factors are at work) and because imposing a capital sentence is a case-specific decision that is highly dependent on the facts of each case.").

<sup>6</sup> *Id.* at 1934.

<sup>7</sup> *Id.*

if his wife, Kitty, were raped and murdered.<sup>8</sup> Dukakis' weak response, in which he reiterated his opposition to the death penalty and then changed the subject, hurt his campaign, perhaps fatally.<sup>9</sup>

Today, opposing the death penalty is no longer political suicide. In fact, political opposition to the death penalty has gained momentum in a growing number of states. In May 2000, the New Hampshire legislature voted to abolish capital punishment.<sup>10</sup> Governor Jeanne Shaheen vetoed the bill, however, and the legislature could not find the votes required to override the veto.<sup>11</sup> But the state has not executed anyone since 1939.<sup>12</sup> That same year, Governor George Ryan of Illinois took action and imposed a formal moratorium on executions because of concerns that the state's system of capital punishment was plagued by arbitrary results.<sup>13</sup> Governor Ryan pointed to thirteen death row inmates that were cleared of murder charges only because journalists, students, and professors at Northwestern University "unearthed pivotal evidence" that the prosecution had either missed or

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<sup>8</sup> George H. W. Bush & Michael Dukakis, Commission on Presidential Debates: The Second Bush-Dukakis Presidential Debate (Oct. 13, 1988) (debate transcript), *available at* <http://www.debates.org/pages/trans88b.html> (last visited April 1, 2009).

<sup>9</sup> See Stuart Banner, *THE DEATH PENALTY: AN AMERICAN HISTORY* 244, 276 (2002) ("Michael Dukakis was widely believed to have lost any chance of winning after he emphasized his opposition to capital punishment during a debate against George Bush."); Kimberly J. Cook, *DIVIDED PASSIONS: PUBLIC OPINIONS ON ABORTION AND THE DEATH PENALTY* 33, 37 (1998) (describing Dukakis's response as "one of the most poorly handled in presidential debating history"); David Bruck, *Political and Social Misconceptions Fueling the Death Penalty*, 13 T.M. COOLEY L. REV. 863, 864 (1996) (describing the death penalty question as "the defining event of the 1988 Presidential campaign" that "may have cost [Dukakis] the election");

<sup>10</sup> Pamela Ferdinand, *A Death Penalty Bellwether? N.H. Lawmakers Set to Vote for Repeal, but Governor Vows a Veto*, WASH. POST, May 18, 2000, at A3.

<sup>11</sup> *Id.*

<sup>12</sup> Death Penalty Infor. Ctr., *supra* note 2.

<sup>13</sup> Dirk Johnson, *Illinois, Citing Verdict Errors, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1.

ignored.<sup>14</sup> Governor Ryan declared “[o]ur capital system is haunted by the demon of error”<sup>15</sup> and subsequently pardoned four inmates he believed were innocent.<sup>16</sup> He later commuted the death sentences of 167 others to life in prison.<sup>17</sup>

Similarly, in May 2002, then governor of Maryland, Paris Glendening, imposed a moratorium on executions.<sup>18</sup> The state investigated its capital punishment scheme and discovered that state prosecutors were far more likely to seek the death penalty in cases where black defendants were accused of killing white victims, and that geography appeared to play a major role in deciding whether a defendant faced capital charges.<sup>19</sup> Recently, Maryland’s current governor, Martin O’Malley, sought repeal of capital punishment by the Maryland legislature.<sup>20</sup> In March 2007, legislation to replace the death penalty with life without parole failed by a single vote in a Senate committee.<sup>21</sup> Additionally, Maryland’s highest court ordered all executions to a halt on the ground that the state’s lethal-injection procedures had not been properly adopted.<sup>22</sup> Governor O’Malley has not succeeded in repealing the death penalty, but he has since pushed for a compromise that now makes it much harder for prosecutors to pursue for a capital sentence.<sup>23</sup> Maryland

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Jodi Wilgoren, *After Sweeping Clemency Order, Ex-Governor Ryan Is a Celebrity, but a Solitary One*, N.Y. TIMES, Feb. 7, 2003, at A16.

<sup>17</sup> *Id.*

<sup>18</sup> Jo Becker, *Death Penalty Moratorium in Question*, WASH. POST, Mar. 7, 2003, at B4.

<sup>19</sup> *Id.*

<sup>20</sup> John Wagner & Eric Rich, *O’Malley’s Inaction Irks Prosecutors*, WASH. POST, July 8, 2007, at C11.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> John Wagner, *Md. Lawmakers Approve Tighter Death Penalty Rules*, WASH. POST, March 26, 2009, available at [http://www.washingtonpost.com/wp-dyn/content/article/2009/03/26/AR2009032601896\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/03/26/AR2009032601896_pf.html) (last visited April 27, 2009).

now limits capital cases to those with biological or DNA evidence, a videotaped confession, or videotape linking the defendant to a homicide, which “are among the steepest hurdles faced by prosecutors in the 35 states that have a death penalty.”<sup>24</sup> Maryland is not alone, either. At least fifteen other states are currently considering legislation that would either abolish capital punishment or impose a moratorium on it: Illinois, New York, Arizona, Colorado, Connecticut, Kansas, Kentucky, *Missouri*, Montana, Nebraska, New Hampshire, Oregon, South Dakota, Tennessee, and Washington.<sup>25</sup>

Advocates of repealing the death penalty found more success in New Jersey and New Mexico. On December 17, 2007, New Jersey Governor Jon Corzine signed a bill to abolish the state's death penalty.<sup>26</sup> New Jersey officially became the first state to repeal capital punishment after the Supreme Court reinstated the practice in *Gregg v. Georgia*.<sup>27</sup> Citing reasons such as wrongful executions, substantial costs of capital litigation, and the lack of a deterrent effect, New Jersey’s special commission had overwhelmingly recommended the elimination of the death penalty.<sup>28</sup> Governor Corzine commuted the death sentences of the eight men on death row to

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<sup>24</sup> *Id.*

<sup>25</sup> Death Penalty Info. Ctr., <http://www.deathpenaltyinfo.org> (last visited April 15, 2008).

<sup>26</sup> Craig R. McCoy, *N.J. First to Abolish the Death Penalty*, PHILADELPHIA INQUIRER, Dec. 18, 2007, at A1.

<sup>27</sup> See 428 U.S. 153, 195 (1976) (“In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.”).

<sup>28</sup> McCoy, *supra* note 26.

life without parole sentences and asserted that he saw it as his moral duty to end “state-endorsed killing.”<sup>29</sup> And New Mexico followed suit in March 2009.<sup>30</sup>

The newfound political opposition to the death penalty mirrors increasing public opposition to the death penalty. While the number of death sentences drop, so does public approval for its application. For instance, the highest level of support for the death penalty came in 1994 when a Gallup Poll demonstrated that eighty percent of Americans support capital punishment.<sup>31</sup> More recently, the 2007 Gallup Poll announced 69% approval, while the October 2008 Gallup Poll showed an approval rating of 64%.<sup>32</sup> Even though a majority of Americans still support the death penalty, when respondents were given a choice between life in prison without parole and the death penalty, support for capital punishment plunged to about 50%.<sup>33</sup>

#### *B. Rising Costs in Pursuing a Capital Sentence*

Across the board—at the trial level, on direct appeal, and in various collateral review proceedings—capital cases simply cost more money. Fifteen years ago, Richard Dieter of the Death Penalty Information Center estimated that the country had spent an extra \$500 million on the death penalty since its reenactment in

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<sup>29</sup> *Id.*

<sup>30</sup> *New Mexico Scraps Death Penalty*, BBC NEWS ONLINE, Mar. 19, 2009, available at <http://news.bbc.co.uk/2/hi/americas/7951972.stm> (last visited April 10, 2009).

<sup>31</sup> Death Penalty Info. Ctr., *supra* note 25.

<sup>32</sup> Death Penalty Info. Ctr., *Death Penalty in 2008: Year End Report*, available at <http://www.deathpenaltyinfo.org/2008YearEnd.pdf>.

<sup>33</sup> *See id.* (“When the death penalty is compared with practical alternatives such as a sentence of life in prison with no parole, support is much lower, with most polls indicating public support for true life sentences to be equal to or greater than support for the death penalty.”).

1976.<sup>34</sup> In Texas, the extra costs of the death penalty are estimated at \$2.3 million per case.<sup>35</sup> It costs an extra \$2.16 million in North Carolina and in Florida, an additional \$51 million is spent above what it would cost the state to punish all first-degree murderers with life in prison without parole.<sup>36</sup> Likewise, Kansas concluded that death penalty cases were 70% more expensive than non-death penalty cases.<sup>37</sup> In 2005, the Los Angeles Times estimated that it costs taxpayers \$114 million more than it would cost to house the same convicts in jail for the rest of their lives<sup>38</sup>, and New Jersey spent over \$250 million on the death penalty—without executing anyone—before abandoning it in 2007.<sup>39</sup> In short, as Robert Spangenberg and Elizabeth Walsh recently concluded, “the death penalty is not now, nor has it ever been, a more economical alternative to life imprisonment.”<sup>40</sup>

It is obvious why costs are high. “Death is different,” and no one wants to execute an innocent person.<sup>41</sup> While trial judges may not provide defense counsel every single resource, “courts appear to be increasingly receptive to an emerging

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<sup>34</sup> Richard C. Dieter, *Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty*, n.81 and accompanying text (epilogue), Death Penalty Information Center (1992, revised 1994), available at <http://www.deathpenaltyinfo.org/node/599>.

<sup>35</sup> Costs of the Death Penalty and Related Issues: Hearing on H.R. 1094 Before the House Comm. on Judiciary, 2007 Leg., (Colo. 2007) (statement of Richard C. Dieter, Executive Director, Death Penalty Infor. Ctr.), available at <http://www.deathpenaltyinfo.org/COcosttestimony.pdf> (last visited April 18, 2009).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Rone Tempest, *Death Row Often Means a Long Life*, L.A. TIMES, Mar. 6, 2005, at B1

<sup>39</sup> Robert Schwaneberg, *N.J. Panel Counts Cost of Death Penalty*, STAR-LEDGER (Newark), Sept. 13, 2006, available at 2006 WLNR 15895050.

<sup>40</sup> Robert L. Spangenberg & Elizabeth R. Walsh, *Capital Punishment or Life Imprisonment? Some Cost Considerations*, 23 LOY. L.A. L. REV. 45, 47 (1989); see also Death Penalty Info. Ctr., *Facts About the Death Penalty*, Feb. 18, 2008, available at <http://www.deathpenaltyinfo.org/FactSheet.pdf> (estimating costs associated with death penalty cases for California, Florida, Kansas, Indiana, North Carolina, and Texas).

<sup>41</sup> According to the Innocence Project, 200 people have been exonerated as a consequence of DNA testing. See <http://www.innocenceproject.org> (last visited March 30, 2009).

model of capital representation that, for both fairness and constitutional reasons, includes a defense team of investigators and experts—a model to which the Supreme Court’s recent ineffective assistance of counsel decisions give added impetus.”<sup>42</sup> Researchers have also found that a death penalty trial takes approximately four times as long as a non-death penalty trial.<sup>43</sup> Prosecutors with tightening budgets in mind may, therefore, decide to avoid a costly capital trial and opt for non-capital trial.<sup>44</sup> In fact, smaller counties may not even have the budget required to bring a capital trial.<sup>45</sup> Consequently, the staggering costs of the death penalty have convinced many that the high fiscal costs are not worth whatever marginal benefits the death penalty provides over life without parole.

### C. *The Availability of a Life Without Parole Sentence*

Another reason often cited for the declining number of death sentences is that states are offering life without parole as a punishment for death-eligible homicides. In the early 1990’s, only 22 states provided life without parole as an alternative to death.<sup>46</sup> Today, all 35 that use the death penalty also offer life without parole as an alternate sentencing option.<sup>47</sup> Even more importantly, jurors are now

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<sup>42</sup> Scott Sundby, *supra* note 5, at 1949.

<sup>43</sup> Philip J. Cook & Donna B. Slawson, *The Costs of Processing Murder Cases in North Carolina*, 78 (May 1993), available at <http://www.deathpenaltyinfo.org/northcarolina.pdf>.

<sup>44</sup> See Russell Gold, *Counties Struggle with Cost of Prosecuting Death-Penalty Cases*, WALL ST. J., Jan. 9, 2002, at B1 (asserting that the unexpected costs of a capital trial can cause as much local economic damage as a natural disaster).

<sup>45</sup> *Id.*

<sup>46</sup> Richard Deiter, *Sentencing for Life: Americans Embrace Alternatives to the Death Penalty*, available at <http://www.deathpenaltyinfo.org/sentencing-life-americans-embrace-alternatives-death-penalty> (last visited April 5, 2009).

<sup>47</sup> Death Penalty Info. Ctr., *Life Without Parole*, available at <http://www.deathpenaltyinfo.org/life-without-parole> (last visited April 2, 2009).

being expressly told that life imprisonment does not permit parole release.<sup>48</sup> Before, “jurors were greatly frustrated by not being told unambiguously what the actual alternative was to the death penalty” because jurors were skeptical that “life” really meant “life.”<sup>49</sup> Jurors, therefore, worried about the notion that a given defendant may be released on parole and recommit a violent act. The fact that juries are now being informed that life truly means life, and that the possibility of parole is simply a myth, may offer another explanation for the diminishing death sentence rate.

For instance, North Carolina has seen a sizeable drop in death sentences since it adopted life without parole in 2001. North Carolina sentenced 20 defendants to death in 1998, 24 in 1999, and 18 in 2000.<sup>50</sup> But, after juries began hearing instructions regarding life without parole, the state sentenced only 14 in 2001, 7 in 2002, 6 in 2003, and 4 in 2004.<sup>51</sup> The same is true of Texas, the state that has imposed more death sentences than any other state since 1998.<sup>52</sup> In 2005, Texas enacted legislation that now gives juries in death penalty cases the option of sentencing a defendant to life without the possibility of parole.<sup>53</sup> And in 2005, Texas

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<sup>48</sup> See *Simmons v. South Carolina*, 512 U.S. 154, 161-62 (1994) (holding that the trial court's refusal to inform the jury that the defendant would be ineligible for parole if not sentenced to death constituted a denial of due process).

<sup>49</sup> William J. Bowers and Scott E. Sundby, *Why the Downturn in Death Sentences?*, in *THE FUTURE OF AMERICA'S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH* 52 (Charles S. Lanier et al. eds., 2009).

<sup>50</sup> Death Penalty Info. Ctr., *supra* note 2.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Life Without Parole Act, 79th Leg., R.S., ch. 787, §§ 1-11, TEX. GEN. LAWS 2705 (2005).

juries sentenced just 14 defendants to death—down from 23 in 2004 and 29 death sentences in 2003.<sup>54</sup>

The availability of life without parole can alter the decision-making of both prosecutors and jurors. To some prosecutors, a life without parole sentence can be seen as a win for the criminal justice system. As one legal commentator has observed, prosecutors are “more willing to accept a guilty plea and forego death if they can assure the public and the victim’s survivors that the defendant will remain in prison for the rest of his life.”<sup>55</sup> The same is true of juries. At the penalty phase, “life without parole offers the defense a means of assuring jurors that the defendant will not pose a future danger and that the defendant will suffer a severe punishment as just deserts for his crime.”<sup>56</sup>

#### *D. Better Defense Counsel*

In the years following *Furman*, adequacy of capital defense counsel presented a major issue because arbitrary results often stem from ineffective assistance.<sup>57</sup> Death penalty cases demand the very best of lawyers, but there was no real movement to reform the capital defense bar.<sup>58</sup> Before the judiciary began to address this problem, “attorneys were appointed in capital cases who lacked a basic understanding of the necessity of crafting a case for life, let alone the knowledge of

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<sup>54</sup> Death Penalty Info. Ctr., *supra* note 2.

<sup>55</sup> Scott Sundby, *supra* note 5, at 1943-44.

<sup>56</sup> *Id.*

<sup>57</sup> See The American Bar Association, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 79-92 (1990) (concluding that “the inadequacy and inadequate compensation of counsel at trial” was one of the “principal failings of the capital punishment systems in the states today”).

<sup>58</sup> See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but the Worst Lawyer*, 103 YALE L.J. 1835 (May 1994) (recapping numerous capital cases with bad lawyering).

how to effectively construct such a case through exhaustive investigation of the defendant's past."<sup>59</sup> In explaining the decline in Georgia's death sentences, Stephen Bright, Director of the Southern Center for Human Rights, observed that "[t]he quality of defense lawyering is much better . . . Instead of just any local yokel who happens to have a bar card, it will now be somebody who has experience and is trained and knows how to investigate a case and put on mitigating evidence."<sup>60</sup> States, such as North Carolina and Georgia have now created systems that are specifically dedicated to the representation of capital defendants.<sup>61</sup> There is also a greater awareness about the need for better capital defense that did not exist previously.<sup>62</sup> The need for a lawyer to be specially trained in capital defense is now widely recognized.

While today's standards may still not be enough to avoid arbitrary results, any marginal improvement plays a role in the decreasing number of death sentences. Better capital defense lawyers can have a profound impact at trial: "[E]ven small improvements in capital lawyers' skills at jury selection, investigation, and presentation can move cases from the 'death' to the 'life' category when measured over time in a large run of cases."<sup>63</sup>

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<sup>59</sup> Scott Sundby, *supra* note 5, at 1943-44. (internal quotation omitted).

<sup>60</sup> Mike Tolson, *Fewer Killers Getting Sentenced to Death: Sharp Drop Seen Across the Nation, Including in Texas*, HOUSTON CHRON., May 22, 2005, at A1.

<sup>61</sup> See N.C. GEN. STAT. § 7A-498.2 (2005) (establishing the Office of Indigent Defense Services in North Carolina); GA. CODE ANN. § 17-12-121 (2004) (creating the Office of the Georgia Capital Defender to represent indigent persons charged with a capital felony for which the death penalty is being sought).

<sup>62</sup> See *President George W. Bush, State of the Union Address* (Feb. 2, 2005), WASH. POST, Feb. 3, 2005, at A15 (President Bush pledged in his 2005 State of the Union "to fund special training for defense counsel in capital cases, because people on trial for their lives must have competent lawyers by their side").

<sup>63</sup> Scott Sundby, *supra* note 5, at 1948.

### *E. The Role of Minority-Representative Juries*

The Supreme Court's decision in *Batson v. Kentucky* provided defense counsel the opportunity to challenge peremptory challenges during *voir dire* based on purposeful discrimination.<sup>64</sup> Because of *Batson*, defense lawyers can rely on stronger precedent to argue race-based strikes of the jury pool. And minority under-representation can have a substantial effect on the outcomes of capital trials. Research has demonstrated that in trials involving an African American defendant accused of killing a white victim, the presence of just one African American male reduces the likelihood that the jury will vote for death.<sup>65</sup> Specifically, juries vote for death in 71.9% of cases where no African American males were seated, compared to just 42.9% when one male African American was on the jury.<sup>66</sup> In short, the study found three things: African American males (1) were more likely than white males to see the defendant as remorseful, (2) tended to believe the defendant's mitigation evidence at the penalty phase, and (3) typically agreed with the defendant's assertion that he would not commit another violent act in the future.<sup>67</sup> *Batson* probably has not solved the problem of racial discrimination in juries. But, *Batson* and the awareness of under-representation has "likely kept prosecutors in at least

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<sup>64</sup> See 476 U.S. 79, 86 (1986) ("Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure.").

<sup>65</sup> William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 193-94 (2001).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 215-216.

some capital cases from engaging in wholesale exclusion of African American jurors because of concerns over reversal.”<sup>68</sup>

*F. Categorical Exclusions of Certain Defendants*

Albeit on a smaller scale, two recent Supreme Court decisions probably have decreased the number of death sentences in the country. The Court in *Roper v. Simmons* abolished the death penalty for juveniles.<sup>69</sup> But, by the time the Court made its ruling, juvenile death sentences were few and far between. In 2003 and 2004, only two juveniles were sentenced to death.<sup>70</sup> Juvenile death penalty peaked at its highest point in 1994 when it only constituted 5.4% of death sentences annually.<sup>71</sup> Therefore, abolition of juvenile death penalty may play only a minor role in the country’s death sentence decline.

The Court also struck down the death penalty for the mentally retarded in *Atkins v. Virginia*.<sup>72</sup> However, the *Atkins* Court noted that in 2002, only five states were actively seeking death sentences against defendants with an IQ of under 70.<sup>73</sup> Besides the already small number of mentally retarded executions, research has only shown the number of mentally retarded defendants who have been executed—

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<sup>68</sup> Scott Sundby, *supra* note 5, at 1941.

<sup>69</sup> See 543 U.S. 551 (2005) (holding juvenile death penalty statutes unconstitutional).

<sup>70</sup> Victor Streib, *Report on the Status of the Juvenile Death Penalty* 9 (2005), available at [http://www.law.onu.edu/faculty\\_staff/faculty\\_profiles/coursematerials/streib/juvdeath.pdf](http://www.law.onu.edu/faculty_staff/faculty_profiles/coursematerials/streib/juvdeath.pdf) (last visited April 18, 2009).

<sup>71</sup> *Id.*

<sup>72</sup> See 536 U.S. 304 (2002) (holding that that execution of mentally retarded individuals violated the Eighth Amendment’s ban on cruel and unusual punishment).

<sup>73</sup> See *id.* at 316 (“And it appears that even among those States that regularly execute offenders and that have no prohibition with regard to the mentally retarded, only five have executed offenders . . . The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.”).

not how many were sentenced to death by a jury.<sup>74</sup> Therefore, it is hard to quantify how much the drop in death sentences is attributable to *Atkins*. In any event, the two categorical prohibitions (and perhaps their effect on the public at large) demonstrate a partial explanation for the reduced number of death sentences since 2002.

### III. Examining the Death Sentencing Trend in Virginia

The above reasons for why death sentences have decreased in this country applies to Virginia, as well. In 1995, the Virginia General Assembly abolished parole for Class One felons, which includes those convicted of capital murder.<sup>75</sup> Four years later, the Virginia Supreme Court required a life without parole instruction in all capital cases when a defendant requests one.<sup>76</sup> *Batson*, *Roper*, and *Atkins* all apply to the state, and Virginia has also created a state system to administer the professional standards of capital defense counsel. As of July 1, 2004, all attorneys wishing to represent accused persons entitled to court appointed counsel must be certified by the Virginia Indigent Defense Commission, underscoring an attempt by the state to bolster capital defense services.<sup>77</sup>

Most tellingly, however, is that political opinion has shifted. The approval of capital punishment was on full display in Virginia's 2005 gubernatorial election.

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<sup>74</sup> Scott Sundby, *supra* note 5, at 1954.

<sup>75</sup> VA. CODE ANN. § 53.1-165.1.

<sup>76</sup> See *Yarbrough v. Commonwealth*, 258 Va. 347, 374 (1999) (“in the penalty-determination phase of a trial where the defendant has been convicted of capital murder . . . the trial court shall instruct the jury that the words imprisonment for life mean imprisonment for life without possibility of parole.”) (internal quotations and footnote omitted).

<sup>77</sup> See VA. CODE ANN. § 19.2-163.8(A) (2004) (mandating the Virginia Indigent Defense Commission to adopt standards for attorneys who represent capital defendants);

Republican-candidate Jeff Kilgore adamantly supported the death penalty and its expansion to include murder-accomplices.<sup>78</sup> Democratic candidate Tim Kaine, on the other hand, was a former public defender who had represented capital defendants and who expressed personal and religious opposition to the death penalty.<sup>79</sup> Kilgore's campaign ran negative advertisements featuring murder victims' family members; in one such ad, a father of a young man murdered by a death row inmate asserted that the prisoner's sentence would not be carried out if Kaine was elected Governor, and even charged that Kaine would not authorize the execution of Adolf Hitler.<sup>80</sup> Despite this, Kaine won the election<sup>81</sup>, and as Governor he has since vetoed Virginia legislation attempting to expand the death penalty to include murder accomplices.<sup>82</sup> Given the intensity of the political debate over the death penalty in Virginia, it is striking that Virginia, like the country as a whole, has seen a marked decline in the number of new death sentences over the last several years.

#### *Discerning the Death Sentence Rate According to Murders*

Virginia's murder trend should first be examined before exploring the death sentencing trend because some pundits have posited that the number of death

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<sup>78</sup> Michael D. Shear, *In Va. Bills, Death Penalty Would Cover Accomplices*, WASH. POST, Dec. 21, 2004, available at <http://www.washingtonpost.com/wp-dyn/articles/A14931-2004Dec20.html> (last visited April 10, 2009).

<sup>79</sup> *Id.*

<sup>80</sup> Michael D. Shear, *References To Hitler in Kilgore Ad Criticized*, WASH. POST, Oct. 15, 2005, available at <http://www.washingtonpost.com/wpdyn/content/article/2005/10/14/AR2005101402037.html> (last visited April 10, 2009).

<sup>81</sup> Michael D. Shear, *Democrat Kaine Wins in Virginia*, WASH. POST, Nov. 9, 2005, available at <http://www.washingtonpost.com/wpdyn/content/article/2005/11/08/AR2005110800371.html> (last visited April 10, 2009).

<sup>82</sup> Dena Potter, *Va. Senate Upholds Governor's Death Penalty Vetoes*, EXAMINER ONLINE, available at [http://www.examiner.com/a1951340~Va\\_\\_Senate\\_upholds\\_governor\\_s\\_death\\_penalty\\_vetoes.html](http://www.examiner.com/a1951340~Va__Senate_upholds_governor_s_death_penalty_vetoes.html) (last visited April 11, 2009).

sentences is decreasing because the murder rate (or the crime rate generally) is also decreasing. The argument goes like this: Fewer homicides lead to fewer death row candidates and less outrage about high criminal violence rates that would otherwise lead to more death sentences. Yet, this argument is only partially true. For every 100,000 people, the homicide rate in the United States declined from 9.8 in 1991 to 5.7 persons in 1999.<sup>83</sup> From 1999 to 2007, it stabilized between 5.5 and 5.7 victims per 100,000 people.<sup>84</sup> And from 1999 to 2007, as discussed earlier, death sentences continued to decrease. Alternatively, others have argued that the number of death sentences is decreasing because the market for “death-eligible” homicides is also decreasing. But, this is not the case, either. Using the Supplementary Homicide Reports of the Federal Bureau Investigation’s Uniform Crime Reports, researchers have estimated the number of capital murders under the umbrella of homicides generally.<sup>85</sup> The number of such death-eligible offenses has in fact declined much less than the overall decline of death sentences.<sup>86</sup> With this in mind, Virginia’s death sentence rate can be understood by looking at the number of murders occurring in the state over a ten-year period.

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<sup>83</sup> See Bureau of Justice Statistics, *U.S. Dep’t of Justice, Homicide Trends in the U.S.*, available at <http://www.ojp.usdoj.gov/bjs/homicide/tables/totalstab.htm> (last visited April 18, 2009).

<sup>84</sup> *Id.*; Death Penalty Info. Ctr., available at <http://www.deathpenaltyinfo.org/murder-rates-1996-2007> (last visited April 20, 2009).

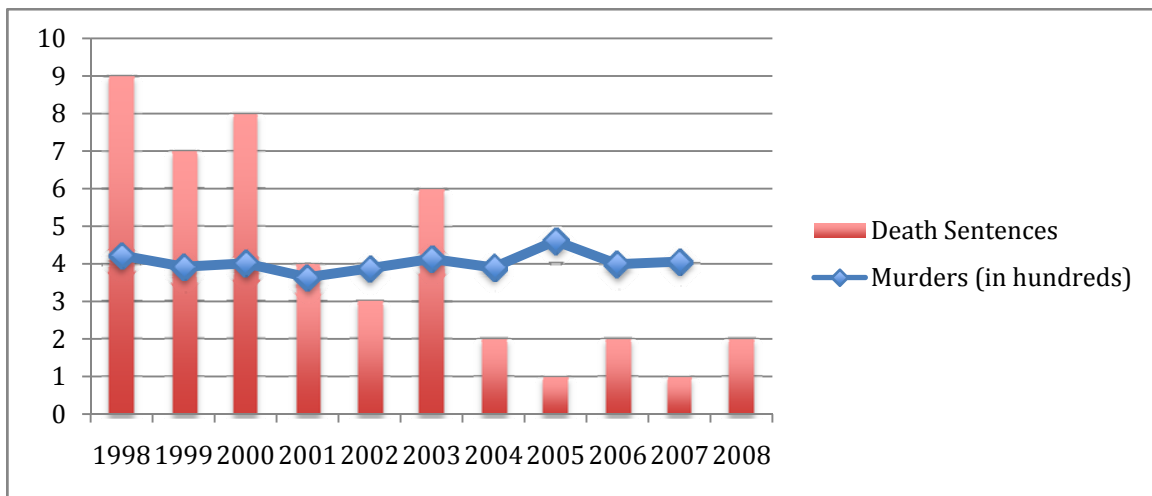
<sup>85</sup> Jeffery Fagan, Frankling E. Zimring, and Amanda Geller, *Capital Punishment and Capital Murder: A Market Share of Deterrence*, 84 TEX. L. REV. 1803, 1821 (June 2006).

<sup>86</sup> *Id.*

**Figure One: Comparison Between State Murders and Death Sentences<sup>87</sup>**

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008 <sup>88</sup>
Murders	422	392	401	364	388	413	390	461	399	406	N/A
Murder Rate per 100,000	6.2	5.7	5.7	5.1	5.3	5.6	5.2	6.1	5.2	5.3	N/A
Death Sentences	9	7	8	4	3	6	2	1	2	1	2
Death Sentence Rate	2.1%	1.8%	2.0%	1.1%	0.8%	1.4%	0.2%	0.8%	0.5%	0.2%	N/A

**Figure Two: Virginia's Death Sentencing Trend (Bar/Line Graph)**



Virginia's murder rate has remained fairly constant over the ten-year period, as shown in Figures One and Two, which also resembles the stable national trend. Yet, as demonstrated by Figure Two, the death sentencing trend in Virginia is declining. Virginia judges and juries have not sentenced more than 6 defendants to death since 2000. Looking at five-year trends, in the first five-year span represented

<sup>87</sup> See FBI: Uniform Crime Reports, available at <http://www.fbi.gov/ucr/ucr.htm>; Death Penalty Info. Ctr., *supra* note 83.

<sup>88</sup> This analysis does not include data from 2008 because the FBI has not yet issued a full report detailing the murder rate for that year. But, unless the murder rate is drastically lower for 2008, the fact that only two defendants were sentenced to death further illustrates Virginia's continuing downward trend.

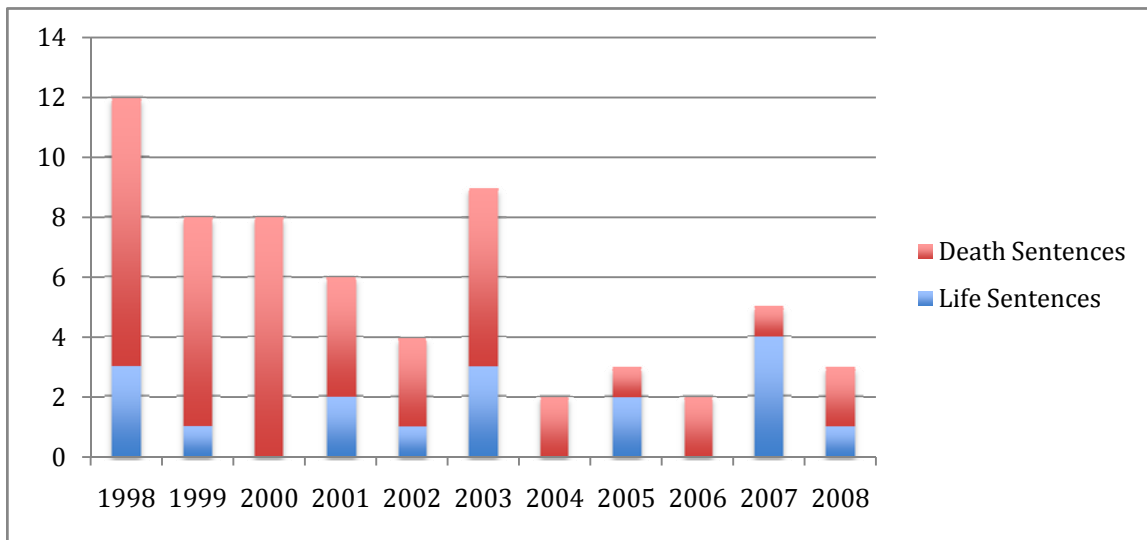
(1998-2002), Virginia sentenced 31 defendants to death. On the other hand, in the second five-year period (2003-2007), only 12 capital defendants received a death sentence—even though the market of overall murders stayed roughly the same.

Also of importance is the ratio between the number of jury and judge imposed life sentences and the number of penalty phases where death was a possible sentence.

**Figure Three: Comparing Virginia’s Life and Death Sentences<sup>89</sup>**

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Life Sentences	3	1	0	2	1	3	0	2	0	4	1
Death Sentences	9	7	8	4	3	6	2	1	2	1	2
Percentage for Death	75%	87.5%	100%	66.6%	75%	66.6%	100%	33.3%	100%	20%	66.6%

**Figure Four: Comparing the Choice Between Life and Death (Bar Graph)**



<sup>89</sup> *Virginia Capital Litigation Data*, Virginia Capital Case Clearinghouse, available at <http://www.vc3.org/resources/page.asp?pageid=561> (last visited April 27, 2009). The life sentences represented in the figure include life sentences handed down by both trial judges and juries.

The above figures do not account for the numerous cases when a prosecutor chooses not to pursue the death penalty. Instead, they show the number of death sentences handed down out of the aggregate number of capital trials brought by the Commonwealth in that year. For example, in 1998 there were 12 capital trials. Of those 12, 75% (9) resulted in a death sentence. As illustrated by the graph, however, this percentage has fallen off substantially, especially in the last few years. From 1998-2002, on average, Virginia juries sentenced 81.5% of capital defendants to death when life was also a possibility. That percentage severely dropped to an average of 58.33% from 2003-2008. Virginia juries and judges, therefore, when given the choice between life without parole and death, have been increasingly choosing life. This trend, coupled with the rapid decline of death sentences generally in the state, arguably reveals the dying death penalty.

#### **IV. Conclusion**

The considerable decline in death sentences triggers the notion that capital punishment is dying—and that may very well be true. But, there are reasons to be cautious. A majority of Americans still seem to support the practice. Neither of last year's presidential candidates supported death penalty abolition. And this is not the first time the death penalty has appeared to be in a state of decay. The Supreme Court's decision in 1972 to strike down all death penalty statutes was quickly followed by the reinstatement of capital punishment just four years later in 1976. Yet, a declining number of death sentences may set the stage for future legal battles. The Supreme Court has used jury behavior as a "significant and reliable objective index of contemporary values" in assessing whether the death penalty violates the

Eighth Amendment ban on “cruel and unusual” punishments.<sup>90</sup> If the nation continues to see such a marked decline in death sentences, the downward trend will certainly play a role in this country’s decision to continue capital punishment.

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<sup>90</sup> *Coker v. Georgia*, 433 U.S. 584, 596 (1977).