

State of Electrocution

by Meghan Shapiro



Meghan Shapiro is a former deputy capital defender for the Northern Virginia Capital Defender's Office and clerk to U.S. District Court Judge Leonie M. Brinkema. She studied death penalty law at the University of Texas School of Law's Capital Punishment Center, is currently of counsel to the Law Offices of W. Michael Chick Jr. LLC in Fairfax, and practices in Alexandria as the Law Office of Meghan Shapiro.

Virginia's electric chair is our country's most active. Why? Perhaps by default (although at one time twenty-six states used electrocution, today all but four have abolished it). Or perhaps by inattention (the Supreme Court of Virginia has not revisited the issue of the constitutionality of electrocution since 1921, and no challenger has since satisfied the maze of procedural hurdles barring review). It endures despite clear national consensus and recent attacks by other states. It's time for our legal community to start asking: do we still want this century-old electric chair around?

The answer should be based on complete information. It should take into account the history of the electric chair, the science behind electrocutions, and the measured opinions of other states' highest courts which have concluded:

[T]he evidence clearly proves that unconsciousness and death are not instantaneous for many condemned prisoners. These prisoners will, when electrocuted, consciously suffer the torture that high voltage electric current inflicts on the human body. The evidence shows that electrocution inflicts intense pain and agonizing suffering.

Therefore, electrocution as a method of execution is [under the Nebraska Constitution] cruel and unusual punishment[;]¹ (Nebraska Supreme Court, 2008), and:

[D]eath by electrocution, with its specter of excruciating pain and its certainty of cooked brains and blistered bodies, violates the [Georgia Constitution's] prohibition against cruel and unusual punishment[.]²

(Georgia Supreme Court, 2001).

The electric chair's little-known chapter of American history is striking for its apparent substitution of pop-culture for scientific validation. It began when the governor of New York declared that "executing criminals by hanging has come down to us from the dark ages, and it may well be questioned whether the science of the present day cannot provide . . . a less barbarous manner."³ Peculiarly, this well-intentioned query ended up the twisted fodder of a tug-of-war between two business giants battling for the emerging U.S. electrical market—Thomas Edison versus George Westinghouse, or "DC current" versus "AC current"—each attempting to discredit the other's form of electricity as deadly, and prevent their own from being associated with executions. This is why Thomas Edison, a seemingly unlikely player in the search for the kinder execution, ended up testifying at length in the first legal challenge to electrocution (the case of William Kemmler) that Westinghouse's AC current would cause instantaneous death (and was therefore better-suited to kill people than to light America's highways and homes). Edison won; electrocution was affirmed in New York and specifically desig-

nated to be administered via AC (*not* DC) current. Westinghouse, not pleased with his new public image, actually funded Kemmler's appeal to the U.S. Supreme Court (paying more than \$100,000 in 1890).⁴

Thus the U.S. Supreme Court found itself — before any electrocution had occurred, and notably even before the Eighth Amendment was incorporated to the states⁵ — faced with Kemmler's appeal. Applying huge deference to the state court (which had heavily relied upon Edison's testimony), the Court found the method “removes every reasonable doubt that the application of electricity to the vital parts of the human body, under such conditions and in the manner contemplated by the statute, must result in instantaneous, and consequently in painless, death.”⁶ As noted by Justice Harold Hitz Burton some years later, “In upholding that statute, this Court stressed the fact that the electric current was to cause instantaneous death. . . . It was the resulting ‘instantaneous’ and ‘painless’ death that was referred to as ‘humane.’”⁷

But the Court's factual assumptions that death would be “instantaneous” and “painless” appear to have been simply wrong. The Nebraska Supreme Court, for example, has now concluded: “The Supreme Court based its holdings [beginning with *In re Kemmler*] on state courts' factual assumptions, which, in turn, relied on untested science from 1890.”⁸ That court went on to explain, “Our review of these early cases illustrates that the U.S. Supreme Court's case law on electrocution relies on unexamined factual assumptions about an electric current's physiological effects on a human.”⁹

Sure enough, the electrocution of Kemmler himself, shortly after the *Kemmler* opinion came down, would now be considered a “botched execution.” As reported on the front page of the August 7, 1890, *New York Times*:

After the first convulsion there was not the slightest movement of Kemmler's body. . . . Then the eyes that had been momentarily turned from Kemmler's body returned to it and gazed with horror on what they saw. The men rose from their chairs impulsively and groaned at the agony they felt. “Great God! He is Alive?” some one said; “Turn on the current,” said another Again came that click as before, and again the body of the unconscious wretch in the chair became as rigid as one of bronze. It was awful, and the witnesses were so horrified by the ghastly

sight that they could not take their eyes off it. The dynamo did not seem to run smoothly. The current could be heard sharply snapping. Blood began to appear on the face of the wretch in the chair. It stood on the face like sweat. . . . An awful odor began to permeate the death chamber, and then, as though to cap the climax of this fearful sight, it was seen that the hair under and around the electrode on the head and the flesh and around the electrode at the base of the spine was singeing. The stench was unbearable.¹⁰

Nonetheless, Virginia joined the national trend and installed its electric chair at the old Virginia State Penitentiary in Richmond, where it was used for the first time in 1908.¹¹ The Supreme Court of Virginia upheld the method in the 1921 case of *Hart v. Commonwealth*,¹² without any scientific analysis or evidentiary record, in pure reliance on *Kemmler*. Virginia was not alone in this apparent oversight.¹³ As well-phrased by the Nebraska Supreme Court, “lower courts, including this court, have traveled the well-worn path of summarily rejecting [electrocution] claims . . . rel[ying] on the strength of . . . *Kemmler*.”¹⁴

Hart has never been revisited. Instead, for the last ninety years, every challenge to Virginia's electric chair has been summarily denied in reliance on *Kemmler* and *Hart*.¹⁵ This continues despite the fact that *Kemmler* was decided even prior to *Plessy v. Ferguson*, and despite the striking national shift away from electrocution (and the

Of twenty-six states that once used electrocution, 85 percent have now moved away from it — either by legislative abandonment or judicial ruling.

rulings of other state courts, *supra*). Since *Kemmler*, national reliance on electrocution has declined to the point that no state now requires execution by that method in any circumstance. Of twenty-six states that once used electrocution, 85 percent have now moved away from it — either by legislative abandonment or judicial ruling.¹⁶ As recently described by the U.S. Supreme Court, the very reason for the adoption of lethal injection was that “state legislatures began responding to public calls to reexamine electrocution as a means of assuring a humane death.”¹⁷ Virginia and the other three states that have not yet abolished the

electric chair (Alabama, South Carolina, and Florida) give condemned inmates a choice between the chair and the needle.¹⁸ Two final states (Kentucky and Tennessee) are phasing it out, only permitting prisoners convicted prior to 1998 to select it for their executions. That's all that's left.

Though Virginia's chair was rewired and moved to Jarratt's Greenville Correctional Center in 1991, the original oak chair is still used today. And it *is* indeed used, and far more frequently

Virginia carried out five of the country's ten most recent electrocutions, and both of the two most recent (in 2009 and 2010).

than any other state's. Since 1976, the year the "modern death penalty era" began with the U.S. Supreme Court's decision in *Gregg v. Georgia*,¹⁹ Virginia has conducted a disproportionately high number of the nation's electrocutions, and recently that disparity has started growing tremendously. Since 1976, Virginia has been responsible for 19 percent of all electrocutions nationwide (30 out of 157). In the last twenty years, however, that percentage has grown to 26 percent (19 out of 74). Most striking, Virginia carried out five of the country's ten most recent electrocutions, and both of the two most recent (in 2009 and 2010). In contrast, Virginia's share of total executions nationwide (by all methods combined) has recently gone *down*: while Virginia has generally consistently been responsible for approximately 8.5 percent of executions nationwide (by all methods combined) since 1976, in the last five years our proportion of total executions has dropped to 5.5 percent.²⁰ What this means is that while our share of overall executions appears to be significantly decreasing, our share of electrocutions is sharply increasing.

This upward trend in electrocutions unfortunately accompanies very little (if any) change to the risks associated with electrocutions. According to this 1985 description by Justice William J. Brennan Jr., not much had changed since William Kemmler's gruesome electrocution more than a century earlier:

Witnesses routinely report that, when the switch is thrown, the condemned prisoner "cringes," "leaps," and "fights the straps with amazing strength." "The hands turn red, then

white, and the cords of the neck stand out like steel bands." The prisoner's limbs, fingers, toes, and face are severely contorted. The force of the electrical current is so powerful that the prisoner's eyeballs sometimes pop out and "rest on [his] cheeks." The prisoner often defecates, urinates, and vomits blood and drool. "The body turns bright red as its temperature rises," and the prisoner's "flesh swells and his skin stretches to the point of breaking." Sometimes the prisoner catches on fire, particularly "if [he] perspires excessively." Witnesses hear a loud and sustained sound "like bacon frying," and "the sickly sweet smell of burning flesh" permeates the chamber. This "smell of frying human flesh in the immediate neighborhood of the chair is sometimes bad enough to nauseate even the Press representatives who are present." In the meantime, the prisoner almost literally boils: "the temperature in the brain itself approaches the boiling point of water," and when the postelectrocution autopsy is performed "the liver is so hot that doctors have said that it cannot be touched by the human hand." The body frequently is badly burned and disfigured.²¹

The Nebraska Court similarly observed, only four years ago:

[T]here is abundant evidence that prisoners sometimes will retain enough brain functioning to consciously suffer the torture high voltage electric current inflicts on a human body. The evidence supports the district court's statement that instantaneous and irreversible brain death is a myth. . . . No one knows how long a prisoner could languish in agony, attempting to breathe, while the State passively waits to see if he or she dies.²²

Since the Georgia Supreme Court's nearly identical decision in 2001,²³ Virginia has electrocuted four men using an electrocution method believed to be substantially identical to the one the Georgia court outlawed.²⁴ Virginia has also had at least four "botched" electrocutions—*i.e.*, electrocutions where pain, agony, or grotesque treatment were visible to witnesses—since 1976.²⁵

Although Justice Brennan noticed as early as 1985 that "[Kemmler] was grounded on a number of constitutional premises that have long since been rejected and on factual assumptions that

appear not to have withstood the test of experience[.]”²⁶ and several other U.S. Supreme Court justices have signaled their desire to reconsider the holding,²⁷ given the dwindling number of states employing electrocution the opportunities for *certiorari* petitions on the issue are growing rarer. Perhaps for this reason, at least in part, the constitutionality of electrocution seems lately to be a realm of state supreme court decision-making.²⁸

The Supreme Court of Virginia is in a position to conduct a constitutional review of the electric chair, but there are a number of procedural barriers (some of the Court’s own making): 1) unlike the departments of corrections in nearly every other death penalty state, Virginia’s keeps its execution protocols a secret; 2) although the Court requires that such challenges be raised at the trial level and on direct appeal, circuit courts feel reluctant to take evidence or appoint necessary experts; 3) the Court has held that when the inmate has the option of choosing a constitutional method (such as lethal injection, which has been upheld), any challenge to the alternate choice is an unnecessary adjudication of a constitutional issue; 4) if an inmate selects lethal injection, he has no standing to challenge electrocution; 5) if an inmate refuses to select a method, he is presumed to have chosen the default (lethal injection) and has no standing to challenge electrocution; 6) and if an inmate selects electrocution, he is deemed to have waived any constitutional qualms with it.²⁹ Yet, inmates hearing stories of “botched” lethal injections, and drawn to the promise of instantaneous death by electrocution, may “choose” electrocution out of fear rather than a knowing choice or waiver — and inmates have recently been making that “choice” in Virginia more frequently than in any other state.³⁰ Until the Supreme Court of Virginia reexamines the commonwealth’s electric chair on a complete evidentiary record, executions will continue.

Endnotes:

- 1 *State v. Mata*, 275 Neb. 1, 69 (Neb. 2008)
- 2 *Dawson v. State*, 274 Ga. 327, 335 (Ga. 2001).
- 3 *In re Kemmler*, 136 U.S. 436, 444 (1890).
- 4 Deborah Denno, “When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection And What It Says About Us,” 63 OHIO ST. L.J. 63, 71-72 & n.47 (2002) (hereafter Denno, *Paradox*), citing Craig Brandon, “The Electric Chair: An Unnatural American History” 67-133 (1999). See also Richard Moran, “Executioner’s Current: Thomas Edison, George Westinghouse, and the Invention of the Electric Chair,” Knopf Publishing (2002).

- 5 The *In re Kemmler* Court found that it could not reexamine the state court’s determination that electrocution was not cruel and unusual, because the holding was a state constitutional one; accordingly, the Supreme Court’s review was limited to one of the Due Process Clause’s prohibition of “arbitrary deprivation of life, liberty, or property,” and “equal protection to all under like circumstances,” and found no violation. 136 U.S. at 448-449.
- 6 *In re Kemmler*, at 443-44.
- 7 *Francis v. Resweber*, 329 U.S. 459, 475 (1946) (Burton, J., dissenting)
- 8 *Mata*, 275 Neb. at 34.
- 9 *Mata*, 275 Neb. at 38.
- 10 Denno, *Paradox*, at 73-74 n.55, quoting Far Worse Than Hanging, N.Y. Times, Aug. 7, 1890, at 1.
- 11 Virginia Department of Corrections, History of Executions in Virginia, available at <http://media2.wavy.com/html/PDFs/History%20of%20Executions%20in%20Virginia.pdf> (last viewed June 10, 2012).
- 12 131 Va. 726 (1921). Notably, the *Hart* opinion more generally upheld the death penalty for attempted rape — a decision rendered unconstitutional by the U.S. Supreme Court’s 1977 decision in *Coker v Georgia*, 433 U.S. 584 (1977).
- 13 Massachusetts and New Jersey also began upholding electrocution shortly after *Kemmler* without independent factual evaluations. See *Storti v. Commonwealth*, 178 Mass 549 (1901); *State v. Tomassi*, 75 N.J.L. 739, 747 (1908).
- 14 *Mata* at 36 (internal quotations and brackets omitted)
- 15 See, e.g., *Orbe v. Johnson*, 267 Va. 568, 570 (2004); *Bell v. Virginia*, 264 Va. 174 (2002); *Martin v. Virginia*, 221 Va. 436 (1980).
- 16 Denno, *Paradox*, at 188-206, Appendix 2.
- 17 *Baze v. Rees*, 553 U.S. 35, 42 (2008) (upholding Kentucky’s lethal injection protocol).
- 18 In 1994 the Virginia Legislature amended the code to provide for lethal injection, and designated lethal injection as the default execution method in the commonwealth. Va. Code § 53.1-234. In that session, legislators expressed concerns about the “cruelty” of electrocution, desiring to offer the least cruel and most civilized method of execution based on modern medical knowledge. See Videotape (Part VIII): Va. Gen. Assemb. Deb., H.B. 862, Feb. 15, 1994 (on file with the Library of Virginia). Former Governor Tim Kaine joined that sentiment while he was in office, stating that electrocution should not be an option for Virginia’s executions. “Kaine Says Electrocution Should Not be An Execution Option,” July 25, 2006 (Associated Press), available at <http://www.wtop.com/?nid=25&sid=860168> (last viewed May 21, 2011).
- 19 428 U.S. 153 (1976)
- 20 All calculations made based on numbers from Death Penalty Information Center, Execution

- Database, <http://www.deathpenaltyinfo.org/views-executions> (last viewed June 10, 2012), and on file with author.
- 21 *Glass*, 471 U.S. at 1086-88 (Brennan, J., dissenting from denial of certiorari) (internal citations omitted).
 - 22 *Mata* at 65-66.
 - 23 *Dawson* at 335.
 - 24 Virginia's electrocution protocol is not available. Requests to the Department of Corrections under the Freedom of Information Act have been repeatedly denied. Washington Post reporter Josh White described the electrocution procedure in some detail, however, in "In Virginia's Death Chamber, a Rare Death by Electrocution," November 18, 2009, *The Crime Scene* (Online), available at <http://voices.washingtonpost.com/crime-scene/josh-white/larry-bill-elliott-60-was.html>, last viewed June 10, 2012.
 - 25 On August 10, 1982, Frank J. Coppola's head and legs burst into flames. See Affidavit of Deborah Denno, on file with author, at ¶ 21(b). On October 17, 1990, blood poured from Wilbert Lee Evans's eyes and nose and witnesses noted audible moaning and a sizzling sound like a pressure cooker before its top has been taken off. *Id.* at ¶ 21(l). On August 22, 1991, Derick Lynn Peterson moaned audibly as electric current was applied to him, and after two minutes of current and a four minute wait, a prison doctor determined he was still alive; after another four-minute wait, the doctor again announced that he was still alive; finally a second surge of electricity was applied bringing the total length of time for the electrocution over thirteen minutes. *Id.* at ¶ 21(m). A witness to Roger Keith Coleman's May 20, 1992, electrocution reported smoke coming from Coleman's leg. Coleman required two 1,700-volt jolts to die. See *id.* at ¶ 21(n). Deborah Denno, a law professor who has studied the use of various execution methods and whose articles were extensively cited by the United States Supreme Court in *Baze v. Rees*, *supra*, has described numerous other national examples of "botched" electrocutions. See Denno, *Paradox*, at 78-79 & Appendix 1, Table 8.
 - 26 *Glass v. Louisiana*, 471 U.S. 1080, 1081 (1985) (Brennan, J., dissenting from denial of certiorari).
 - 27 See *In re Tarver*, 528 U.S. 1152 (2000) (four justices wished to reconsider issue); *Bryan v. Moore*, 528 U.S. 960 (1999) (granting certiorari), 528 U.S. 1133 (2000) (reversing its grant of certiorari as improvidently granted due to intervening change in state law).
 - 28 See *Mata*; *Dawson*; *supra*.
 - 29 *Stewart v. LaGrand*, 526 U.S. 115 (1999) (choice of method constitutes waiver of challenge to method); *Porter v. Commonwealth*, 276 Va. 203, 237-38 (2008) (when one method constitutional, and inmate has choice, no adjudication of other); *Orbe v. Johnson*, 267 Va. 568, 569 (2004) (method of execution challenge "should have been raised before the trial court in Orbe's criminal case and on direct appeal from that judgment"); *id.* at 601 (failure to choose equals choice of the default method).
 - 30 Most recently, in 2009 and 2010, Larry Bill Elliot and Paul Warner Powell, respectively, chose electrocution over lethal injection.

Join the VSB Criminal Law Section

Organized in 1967, the purpose of the Criminal Law Section is to concern itself with the problems of crime, criminology, and the administration of criminal law in the Commonwealth of Virginia, except those subjects specifically excluded by direction of the President of the Virginia State Bar.

Visit our website at <http://www.vsb.org/site/sections/criminal>.