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PULLING THE PLUG ON THE ELECTRIC CHAIR: THE UNCONSTITUTIONALITY OF ELECTROCUTION

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> It certainly seems strange that a nation so advanced in science and engineering... should not be able to invent something better than the crude electric chair. Perhaps it is that every country chooses the method of execution most suitable to the temperament of its people.[1]

I. INTRODUCTION: THE AMERICAN WAY OF CAPITAL PUNISHMENT

The arguments surrounding capital punishment are generally familiar, if not well-worn platitudes. Advocates of the death penalty cite its long tradition, presumed effectiveness as a deterrent, value as a form of retribution, and alleged economic justification.[2] Conversely, opponents of capital punishment refute the claims of deterrence and economics and call for an end to what they perceive as the immorality of state-sponsored murder.[3] Yet, both advocates and opponents of the death penalty often react in an indifferent manner to the suggestion that electrocution as a method of capital punishment is cruel and unusual. Few advocates of the death penalty can be overheard protesting that electrocution may be neither instantaneous nor painless; some believe that if this is true, perhaps it promotes the electric chair's effectiveness in deterrence and retribution.[4] Those opposed to capital punishment tend to regard debate over its method as irrelevant and even harmful to their cause on the grounds that all methods of the death penalty are cruel and unusual punishment. It is a contradiction, they believe, to argue for a more humane method of the death penalty; furthermore, to do so would be to dilute their case against capital punishment itself.[5]

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[1] CHARLES DUFF, A HANDBOOK ON HANGING 122-23 (1974) (responding to an account of the protracted electrocutions of Julius and Ethel Rosenberg, who were pronounced dead after receiving three and five shocks of electricity, respectively).

[2] *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 375 (1972) (Burger, C.J., Blackmun, Powell, & Rehnquist, JJ., dissenting separately to decision holding sentencing procedures of the State of Georgia unconstitutional); Lewis F. Powell, Jr., *Capital Punishment*, 102 HARV. L. REV. 1035 (1989); ERNEST VAN DEN HAAG & JOHN P. CONRAD, THE DEATH PENALTY: A DEBATE (1984) (a comprehensive examination of both sides of the capital punishment question).

[3] *See, e.g.*, *Furman*, 408 U.S. at 238 (Douglas, Brennan, Stewart, White, & Marshall, JJ., separately concurring in per curiam decision); JONATHAN GLOVER, CAUSING DEATH AND SAVING LIVES 228-50 (1987) (a philosophical analysis of retribution and deterrence); VAN DEN HAAG & CONRAD, *supra* note 2.

[4] The celebrated 18th century philosopher and advocate of retribution Immanuel Kant once said, "For if Justice and Righteousness perish, human life would no longer have any value in the world.... [W]hoever has committed murder must *die*." GLOVER, *supra* note 3, at 228 (quoting IMMANUEL KANT, THE PHILOSOPHY OF LAW 196-98 (W. Hastie trans., Augustus M. Kelley Publishers 1974) (1887)) (emphasis in original).

[5] Telephone Interview with Marie Deans, Executive Director of the Virginia Coalition of Jails and Prisons (Mar. 26, 1993).

This indifference to the method of execution, clearly existing on both sides of the death penalty debate, may at least partially account for why there has not been a long-overdue judicial inquiry into the constitutionality of electrocution. The Supreme Court has continued to uphold the constitutionality of the death penalty while virtually ignoring the separate and distinct issue of the constitutionality of electrocution *per se*.[6] The Court has chosen to consider the issue settled, summarily dismissing all appeals on the matter, primarily on the basis of one case decided more than a century ago, *In re Kemmler*.[7]

The position of this note is that electrocution, the most common method of capital punishment in the United States for the past century,[8] is unconstitutional on the grounds that the protracted, painful, and mutilating manner in which it brings about death violates the Eighth Amendment's prohibition of cruel and unusual punishments.[9] This note argues neither for nor against capital punishment *per se*. However, as long as the Supreme Court is willing to uphold the death penalty, it should assume the responsibility of ensuring that executions are accomplished in a constitutional manner; thus far, it has circumvented that responsibility by not revisiting *Kemmler*.

This note first investigates the history of the Cruel and Unusual Punishments Clause to discover the Framers' intent and the evolution of the meaning of the Clause over the past two centuries. The prohibition of torture was uppermost in the minds of those who conceived the Eighth Amendment. Over the past century, the Supreme Court has determined that any punishment that includes any unnecessary pain is also unconstitutional.

The note then examines the substantial defects in the procedure by which the electric chair was initially accepted as a method of capital punishment. In the special hearings called to investigate the new and unknown process of electrocution, bias and incompetence in the expert testimony were disregarded. Ultimately, the objectivity of these fact-finding hearings was seriously impaired by the marketing interests of competing electric companies. Such tainted findings of fact and the baseless determination of the New York legislature that electrocution would be instantaneous and painless went unchallenged by the U.S. Supreme Court. Additionally, the Supreme Court did not decide the case on Eighth Amendment grounds, instead relying upon Fourteenth Amendment analysis. Since then, the Supreme Court has never reexamined electrocution in light of the Eighth Amendment, continually denying certiorari on the issue.

The note goes on to analyze the cruel and unusual nature of electrocution, suggesting that the procedure is unconstitutional. The predictions of instantaneous death have been shown to be incorrect from the first electrocution. Eyewitness accounts and medical evidence have long been offered to substantiate the extent of the pain and suffering dispensed by the electric chair. Further, the mutilating effects on the condemned prisoner's body, intrinsic to the process of electrocution, are shockingly similar to the tortures that led to the Eighth Amendment's original prohibition against cruel and unusual punishment. Finally, the existence of lethal injection, a less painful and more humane alternative to the

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[6] *See, e.g.*, Glass v. Louisiana, 471 U.S. 1080, 1081 (1985) (Brennan, J., dissenting from denial of cert.).

[7] 136 U.S. 436 (1890). *See Glass*, 471 U.S. at 1081 ("[S]ince [1976], an ever-increasing number of condemned prisoners have contended that electrocution is a cruel and barbaric method of extinguishing human life, both *per se* and as compared with other available means of executions. As in this case, such claims have uniformly and summarily been rejected, typically on the strength of this Court's opinion in *In re Kemmler*."). *See infra* part IV (a detailed discussion of *In re Kemmler* and the Supreme Court's response to subsequent challenges to the constitutionality of electrocution).

[8] HUGO A. BEDAU, THE DEATH PENALTY IN AMERICA 15 (3d. ed. 1992).

[9] The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

electric chair, renders electrocution an unconstitutional violation of the Eighth Amendment doctrine that no punishment shall involve any unnecessary infliction of pain.

II. THE EVOLUTION OF THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE

In order to properly understand what has been called the "vague constitutional mandate"[10] of the Eighth Amendment, it is necessary to examine its unique history. Alone among the original amendments to the Constitution, it was taken in its entirety from the English Bill of Rights of 1689.[11] Enacted by Parliament as a reaction to the abuses of the Stuart regime, the English Bill of Rights was one of the enduring monuments of the "Glorious Revolution" of 1688, which brought William III to the throne.[12] One of the conditions of the new monarch's coronation was that he accept the Bill of Rights, the tenth clause of which stated, "That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted."[13] Nearly ninety years later, in June of 1776, the phrase "nor cruel and unusual punishments inflicted" was adopted verbatim by the drafters of Virginia's Declaration of Rights.[14] In 1791 the phrase was incorporated, again verbatim, into the Bill of Rights of the United States Constitution as part of the Eighth Amendment.[15] This "peculiar durability"[16] of the Cruel and Unusual Punishments Clause arose, at least in part, because it was repeatedly adopted with relatively little discussion of its precise meaning.[17]

It has been argued that the English Parliament intended the Cruel and Unusual Punishments Clause of the English Bill of Rights to prohibit only disproportionate punishment, but that the drafters of the Bill of Rights in this country may have misinterpreted the clause, believing its sole prohibition was against torturous punishments.[18] Others have argued, however, that both categories of punishments were forbidden by the English Parliament, and that both proscriptions were preserved by the ratification of the Eighth Amendment.[19] In either case, the historical record makes clear that when the Framers adopted the Cruel and Unusual Punishments Clause, their foremost concern was with the protection of individuals against various methods of torture.[20]

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[10] VAN DEN HAAG & CONRAD, *supra* note 2, at 164.

[11] *Id.*

[12] *Id.*

[13] 1 W. & M. (1689), 2d Sess., c.2. The prohibition of cruel and unusual punishments is thought to have been written primarily in response to the "Bloody Assizes," during which one Judge Jeffreys arbitrarily sentenced to death an estimated 400 peasants, on the presumption that they may have participated in the Monmouth Rebellion of 1685. LACEY B. SMITH, THIS REALM OF ENGLAND 300 (1983).

[14] Anthony F. Granucci, *'Nor Cruel and Unusual Punishments Inflicted': The Original Meaning*, 57 CAL. L. REV. 839, 840 (1969).

[15] *Id.*

[16] VAN DEN HAAG & CONRAD, *supra* note 2, at 164.

[17] Granucci, *supra* note 14.

[18] *See generally id.* at 839-45.

[19] VAN DEN HAAG & CONRAD, *supra* note 2, at 165.

[20] Granucci, *supra* note 12, at 841-42. Patrick Henry was an especially vociferous critic of the initial absence of a Federal Bill of Rights, specifically calling for a prohibition on "tortures" and "cruel and barbarous punishments." *Id.* at 841. George Mason confirmed that Virginia's Cruel and Unusual Punishments Clause prohibited torture. *Id.* at 841-42. It is not doubted that the Framers considered capital punishment an acceptable practice; not only was it routine in the colonies, but the Fifth Amendment expressly mentions "capital" crimes, and indicates that persons may be "deprived of life," as long as it is with due process of law. The Fifth Amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST.

For the first century after the Bill of Rights was adopted in this country, there were few claims under the Eighth Amendment. It was more than seventy-five years before the Supreme Court had occasion to address the Cruel and Unusual Punishments Clause.[21]

> [T]hese early cases . . . did not undertake to provide 'an exhaustive definition' of 'cruel and unusual punishments.' Most of them proceeded primarily by 'looking backwards for examples by which to fix the meaning of the clause;' concluding simply that a punishment would be 'cruel and unusual' if it were similar to punishments considered 'cruel and unusual' at the time the Bill of Rights was adopted.[22]

This practice of "looking backwards" is evident in *Wilkerson v. Utah*,[23] in which the Court upheld a sentence "to be publicly shot" against a claim that it violated the prohibition of cruel and unusual punishments.[24] The Court found that such a sentence "by no means" fell within the category of such punishments referred to by Blackstone as "punishments of torture," such as "where the prisoner was drawn or dragged to the place of execution, in treason; or where he was embowelled alive, beheaded, and quartered, in high treason."[25] Such practices of seventeenth century England were virtually nonexistent in the United States of the nineteenth century.[26] Their continued use as examples of what constituted cruel and unusual punishment could have rendered the clause meaningless. As Justice Brennan noted, "[h]ad this 'historical' interpretation of the Cruel and Unusual Punishments Clause prevailed, the Clause would have been effectively read out of the Bill of Rights."[27]

However, in the case of *Weems v. United States*,[28] the Supreme Court "decisively repudiated the 'historical' interpretation of the Clause."[29] The Court asserted that "[t]ime works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave

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[21] *See, e.g.*, Wilkerson v. Utah, 99 U.S. 130 (1878); Pervear v. Commonwealth, 72 U.S. (5 Wall.) 475 (1867).

[22] Furman v. Georgia, 408 U.S. 238, 264 (1972) (Brennan, J., concurring) (quoting Weems v. United States, 217 U.S. 349, 369, 377 (1910)) (citations omitted).

[23] 99 U.S. 130 (1878).

[24] *Id.* The petitioner was convicted of murder in the first degree, a capital crime for which the sentence in the United States traditionally consisted of hanging. However, the Territory, and later, State of Utah, has always mandated the use of the firing squad, on the grounds of the Mormon interpretation of the Biblical doctrine of "blood atonement." BEDAU, *supra* note 8, at 15.

[25] *Wilkerson*, 99 U.S. at 135 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES 377).

[26] *See generally* JOHN LAURENCE, THE HISTORY OF CAPITAL PUNISHMENT (Citadel Press 1960) (a detailed discussion of capital punishment in American history). *But cf.* ALICE M. EARLE, CURIOUS PUNISHMENTS OF BYGONE DAYS (Charles E. Tuttle ed., 1983) (1896) (for a study of the often revolting punishments administered in the American colonies through the 18th century).

[27] *Furman*, 408 U.S. at 265 (Brennan, J., concurring). In fact, by the end of the 19th century, the Supreme Court had begun to take a more expansive view of the prohibition on cruel and unusual punishment. *See* Granucci, *supra* note 14, at 842.

[28] 217 U.S. 349 (1910).

[29] *Furman*, 408 U.S. at 266 (Brennan, J., concurring). In *Weems*, the finding that the Cruel and Unusual Punishments Clause prohibited a sentence of 15 years at hard labor for making a false entry in government payroll books was grounded in the belief that the clause should be expanded beyond its original meaning. The case of O'Neil v. Vermont, 144 U.S. 323 (1892), marked the first time that a claim of cruel and unusual punishment was raised because of the disproportion between the offense and the punishment. Although the majority refused to consider the claim on procedural grounds, the three dissenting justices asserted that the whole purpose of the Eighth Amendment is to proscribe "that which is excessive." *Id.* at 340.

it birth."[30] The Court further held that the proscription of cruel and unusual punishments "is not fastened to the obsolete, but may acquire meaning as public opinion becomes more enlightened by a humane justice."[31]

Nearly half a century later, the Court reaffirmed this repudiation of the 'historical' interpretation of the clause in *Trop v. Dulles*,[32] holding that "the words of the [Eighth] Amendment are not precise, and that their scope is not static."[33] The Cruel and Unusual Punishments Clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[34] Were it otherwise, the Court stated, the clause would become "little more than good advice."[35]

This belief that "evolving standards of decency" define the boundaries of the Cruel and Unusual Punishments Clause has been fully accepted by the Supreme Court.[36] However, there exists an inherent difficulty in determining these boundaries:

> Attempts to construct a test to identify violations of the cruel and unusual clause have centered on the vague standards of whether a penalty is inhumanly cruel or grossly disproportionate. Given the overlapping analysis, the interrelationship between the concepts of cruelty, excessiveness, and necessity, and the dependence on shifting social belief, it is not surprising that a single coherent test is absent from precedent.[37]

The dependence on shifting social belief has helped to obfuscate the parameters of cruel and unusual punishment: the criterion of evolving standards of decency has been used to argue both sides of the issue.[38] In *Furman v. Georgia*,[39] Justice Marshall proposed that if a punishment was abhorred by the population, it must necessarily be held unconstitutional.[40] Four years later, in *Gregg v. Georgia*,[41] the Court inverted Marshall's test, finding that the death penalty was not cruel and unusual on the grounds that "it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction."[42] While it has been questioned whether the meaning of the Cruel and Unusual Punishments Clause should follow public opinion,

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[30] *Weems*, 217 U.S. at 373.

[31] *Id.* at 378.

[32] 356 U.S. 86 (1958) (holding that a law punishing wartime desertion with expatriation violates the Cruel and Unusual Punishments Clause).

[33] *Id.* at 100-01.

[34] *Id.* at 101.

[35] *Id.* at 104.

[36] *See* Robinson v. California, 370 U.S. 660, 666 (1962) (holding that Eighth Amendment claims must be evaluated "in the light of contemporary human knowledge").

[37] Timothy J. Foley, *The Ongoing Debate: The Constitutionality of Death*, 19 HARV. C.R.-C.L. L. REV. 245, 260 (1984) (reviewing RAOUL BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE (1982)) (citation omitted).

[38] *See supra* notes 2-3 and accompanying text.

[39] 408 U.S. 238 (1972).

[40] *Id.* at 330-32 (Marshall, J., concurring). Justices Marshall and Brennan were willing to find capital punishment *per se* unconstitutional. Three other Justices found that the "arbitrary and capricious" application of capital punishment by the State of Georgia violated the prohibition on cruel and unusual punishment. This lead to a *de facto* moratorium on capital punishment until *Gregg v. Georgia*, 428 U.S. 153 (1976), held that the sentencing procedures then in use by the State of Georgia were not arbitrary and capricious.

[41] 428 U.S. 153 (1976).

[42] *Id.* at 179.

it seems evident that any interpretation of the Clause should at least consider "evolving standards of decency."[43]

III. THE CRUEL AND UNUSUAL HISTORY OF THE ELECTRIC CHAIR

Through most of the nineteenth century, hanging was the preeminent form of execution in the United States, despite a gruesome tradition of bungled attempts and lingering deaths.[44] In 1886, after several "botched" hangings in New York aroused public sentiment, the governor of the state appointed a three-member commission to recommend a form of execution "more humane than hanging."[45] The commission considered over thirty forms of execution used throughout the world, including beating with clubs, burying alive, crucifixion, and suffocation.[46] The most popular European methods of execution—the sword, guillotine, and garrote—were particularly scrutinized, but were rejected for their mutilation of the body or apparent cruelty.[47]

One of the members of the commission, Dr. Alfred Southwick, had several years earlier witnessed the accidental death of a drunken man who had touched a live electrical wire.[48] From this incident, Dr. Southwick, a dentist, reasoned that electricity could be a reliable method of execution, and over the course of several years, he conducted many lethal electrical experiments on animals.[49] Apparently satisfied with the effects, Dr. Southwick was already predisposed for the method of electrocution at the time of his appointment to the commission.[50] His enthusiastic endorsement for the use of electrocution undoubtedly helped to convince the other two members of the commission of the electric chair's superiority to all other methods of capital punishment.[51] In 1888 the State of New York became the first jurisdiction to authorize the electric chair for the death penalty, earning Dr. Southwick the title "Father of Electrocution."[52]

The following year, in June of 1889, William Kemmler, an illiterate produce seller from Buffalo, became the first person to be sentenced to death by electrocution.[53] Counsel for Kemmler appealed on the grounds that such a sentence would violate the state

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[43] *See* MICHAEL E. ENDRES, THE MORALITY OF CAPITAL PUNISHMENT 94-102 (1985) (discussion of the influence and interpretation of public opinion regarding the Cruel and Unusual Punishments Clause).

[44] *See generally* LAURENCE, *supra* note 26, at 41-62; DUFF, *supra* note 1. For a century after the adoption of the Eighth Amendment, the sole acceptable mode of execution in the United States was hanging, except when executing spies, traitors, and deserters, who could be shot, according to federal law. BEDAU, *supra* note 8.

[45] *See* Theodore Bernstein, *'A Grand Success,'* IEEE SPECTRUM, Feb. 1973, at 54. These "botched" hangings resulted in the condemned persons dying "gruesomely" by strangulation when the drop from the scaffold proved insufficient to break the neck and sever the spinal cord. *Id.*

[46] Arnold Beichman, *The First Electrocution*, COMMENTARY, May 1963, at 411.

[47] Bernstein, *supra* note 45, at 54.

[48] Beichman, *supra* note 46, at 410.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] Bernstein, *supra* note 45, at 54-57. On June 4, 1888, New York Governor Hill signed into law a bill to substitute electrocution for hanging for any capital crime committed after January 1, 1889. *Id.* Electrocution was not initially referred to as such; it was termed "electrical execution." Some of the newspapers of the day combined the two words to get "electrocution," an amalgam which was scorned by many, including *The New York Times*, which referred to the new term as a "monstrosity," Beichman, *supra* note 46, at 411, and to the new method of execution as "euthanasia by electricity," *id.* at 415.

[53] *See In re* Kemmler, 136 U.S. 436, 449 (1890); Beichman, *supra* note 46. Mr. Kemmler was convicted of murder in the first degree for the killing of his female companion, a married woman with whom he had eloped from Philadelphia more than a year before. *Id.*

constitution's prohibition on cruel and unusual punishments.[54] To the detriment of Kemmler, however, he became "a pawn in the titanic struggle between Thomas A. Edison and George Westinghouse over what type of current should be used by the power industry."[55] In special hearings called to probe the nature and effects of electrocution, Edison testified for the State, claiming that a shock of one thousand volts of alternating current "would kill instantly, painlessly and in every case."[56] Edison was revered as a living legend and held in awe at the hearings; as an expert witness, his assertions could not be seriously challenged.[57]

Yet, Edison's claims were grounded in neither certainty nor impartiality; he admitted that he was no expert on bioelectricity, and his testimony was colored by a direct conflict with his business interests that should have precluded the inventor from testifying.[58] After Edison invented the incandescent light in 1879, he conceived and promoted through the Edison Electric Light Co. a direct current (dc) distribution system for electric power.[59] In the late 1880s, George Westinghouse's company, the U.S. Electric Light Co., made rapid and substantial gains in its quest for nationwide electrification using the technologically superior alternating current (ac).[60] These gains came at the expense of the Edison Company, which in 1888 published a pamphlet attacking alternating current for its alleged inadequacies in several areas: versatility, reliability, cost, and safety.[61] After a highly visible and acrimonious public debate, the primary issue of concern became the alleged dangerousness of alternating current.[62]

At the special hearings, Edison testified for two days on the inherent danger of alternating current and on its corollary suitable use as a method of inducing death, in an attempt to depict the current as unsuitable for ordinary use.[63] The court was evidently aware of Edison's conflict of interest but expressed no serious concern over it.[64] Edison's claim that death by electrocution would be instantaneous and painless was sufficient

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[54] Beichman, *supra* note 46, at 413. The State of New York's Cruel and Unusual Punishments Clause was identical to that of the Eighth Amendment of the U.S. Constitution. N.Y. CONST. art. 1, § 5.

[55] Bernstein, *supra* note 45, at 54.

[56] John G. Leyden, *Death in the Hot Seat: A Century of Electrocutions*, WASH. POST, Aug. 5, 1990, at D5. *See also* Beichman, *supra* note 46, at 413-14.

[57] Beichman, *supra* note 46, at 413-14.

[58] *See* BEDAU, *supra* note 8, at 15; Beichman, *supra* note 46, at 410-14; Bernstein, *supra* note 45, at 54-55.

[59] Bernstein, *supra* note 45, at 54.

[60] *See generally id.*; Beichman, *supra* note 46, at 412-14. This controversy between alternating current and direct current, commonly referred to as the "battle of the systems," is well known in the field of electrical engineering. *See generally* Terry S. Reynolds & Theodore Bernstein, Thomas Edison: The ac-dc Controversy and Legal Electrocution (Aug. 14, 1979) (paper prepared for presentation at the Thomas A. Edison Commemorative Symposium, Newark, N.J.) (on file with the author). Reynolds and Bernstein provide an excellent account of the rivalry between Westinghouse and Edison.

[61] Reynolds & Bernstein, *supra* note 60, at 2.

[62] Bernstein, *supra* note 45, at 55. The debate was promulgated with the assistance of one Harold P. Brown, a self-trained electrical engineer with a gift for attracting publicity. In June of 1888, Brown wrote a high-profile letter to *The New York Post* in which he described alternating current as "damnable" and "dangerous." It is unclear whether Brown was acting as an agent for Edison at this time, although it appears that Edison hired Brown in 1889 to actively campaign against alternating current. Beichman, *supra* note 46, at 412.

[63] Beichman, *supra* note 46, at 412-14. *See also* BEDAU, *supra* note 8, at 15. Edison testified that although alternating current was "dangerous," it could kill without burning. *Id.*

[64] Edison was not asked directly about any possible conflict of interest regarding his testimony, but he was asked, sarcastically, whether he did not have "an abiding love for Mr. Westinghouse." Edison responded that he did not "entertain any such tender passion, but had no dislike for the gentleman named." Beichman, *supra* note 46, at 414.

evidence of its truth.[65] For his part, Westinghouse was concerned that the use of his company's alternating current for electrocutions would frighten would-be customers worried about the safety of the relatively new technology.[66] For this reason, Westinghouse is reported to have provided an estimated $100,000 of financial support necessary for the appeals of the impoverished Kemmler, in an effort to prevent any association between the electrocution procedure and alternating current.[67]

It was through such prejudiced proceedings that the appeals court determined that electrocution would not be unconstitutional. Kemmler appealed the decision to New York's highest court and, finally, to the U.S. Supreme Court.[68]

IV. THE SUPREME COURT'S LEGACY: A FLAWED PRECEDENT AND A CENTURY OF NEGLECT

In *In re Kemmler*,[69] the U.S. Supreme Court held that "punishment of death by electricity" was not unconstitutional, and so authorized the first official use of electrocution.[70] Although the case has been cited dozens of times since then as evidence of the electric chair's constitutionality,[71] there are several compelling reasons for finding that *Kemmler* is not worthy of the precedential value that it has assumed in the past century.

Under the jurisprudence of the day, the New York trial court imposed upon Kemmler a higher burden of proof for establishing a constitutional violation than would be necessary today. In order to obtain relief, defendants in the nineteenth century had to prove "beyond doubt" that a method of punishment was unconstitutionally cruel and

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[65] *In re* Kemmler, 136 U.S. 436, 447 (1890).

> The courts of New York held that the mode adopted in this instance might be said to be unusual because it was new, but that it could not be assumed to be cruel in the light of that common knowledge which has stamped certain punishments as such; that it was for the legislature to say in what manner sentence of death should be executed; that this act was passed in the effort to devise a more humane method of reaching the result; that the courts were bound to presume that the legislature was possessed of the facts upon which it took action; and that by evidence taken *aliunde* the statute that presumption could not be overthrown.

Id.

[66] Beichman, *supra* note 46, at 413.

[67] Leyden, *supra* note 56. The exact amount of such expenses is uncertain; it has been estimated by various sources as between $50,000 and "well over $100,000." It is unclear whether the court knew about this financial connection, which was disputed by Westinghouse, but it was widely reported with confidence by the press. Arnold Beichman suggests that other electric companies which had also adopted alternating current helped contribute to a fund to cover Kemmler's legal expenses. Beichman, *supra* note 46, at 413.

[68] *In re* Kemmler, 136 U.S. 436 (1890); Beichman, *supra* note 46, at 413.

[69] 136 U.S. 436 (1890).

[70] *Id.*

[71] *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 299 (1987); Rummel v. Estelle, 445 U.S. 263, 288 (1980) (Powell, J., dissenting); Ingraham v. Wright, 430 U.S. 651, 667 (1977); Lowenfield v. Phelps, 817 F.2d 285, 298 (5th Cir. 1987), *aff'd*, 484 U.S. 231 (1988); Wilson v. Butler, 813 F.2d 664, 678 (5th Cir. 1987), *cert. denied*, 484 U.S. 1079 (1988); Porter v. Wainwright, 805 F.2d 930, 943 n.15 (11th Cir. 1986), *cert. denied*, 482 U.S. 918 (1987); Fuchess v. Wainwright, 788 F.2d 1443, 1446 (11th Cir.), *cert. denied*, 475 U.S. 1133 (1986); Corn v. Zant, 708 F.2d 549, 563 (11th Cir. 1983), *cert. denied*, 467 U.S. 1220 (1984); Jackson v. Bishop, 404 F.2d 571, 577 (8th Cir. 1968); Stockton v. Commonwealth, 402 S.E.2d 196 (Va.), *cert. denied*, 112 S. Ct. 280 (1991); Hoke v. Commonwealth, 377 S.E.2d 595 (Va.), *cert. denied*, 491 U.S. 910 (1988); Townes v. Commonwealth, 362 S.E.2d 650 (Va. 1987), *cert. denied*, 485 U.S. 1033 (1988); Beaver v. Commonwealth, 352 S.E.2d 342 (Va.), *cert. denied*, 483 U.S. 1033 (1987); Stockton v. Commonwealth, 314 S.E.2d 371 (Va.), *cert. denied*, 469 U.S. 873 (1984); Martin v. Commonwealth, 271 S.E.2d 123 (Va. 1980); Hart v. Commonwealth, 109 S.E. 582 (Va. 1921).

unusual.[72] Under current jurisprudence, the standard defendants must meet to prove a particular punishment is unconstitutional is preponderance of the evidence.[73] It is highly questionable whether electrocution as a means of capital punishment would survive judicial review using the preponderance of the evidence standard.

The *Kemmler* Court also held that the decision of the Court of Appeals of New York that electrocution did not violate that state's proscription on cruel and unusual punishments was not reexaminable on the grounds that the Eighth Amendment of the U.S. Constitution was not applicable to the states.[74] Instead, the Supreme Court upheld electrocution under a Fourteenth Amendment analysis, finding that the procedure did not violate either the Privileges and Immunities Clause or the Due Process Clause.[75] In using the Fourteenth Amendment, the Court imposed upon Kemmler a different standard for determining the constitutionality of electrocution than has been appropriate since 1962, when the Court in *Robinson v. California*[76] determined that the Eighth Amendment applies to the states through the Fourteenth Amendment. The Court in *Kemmler* held that only when the punishment was "manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, [would it] be the duty of the courts to adjudge such penalties to be within the constitutional prohibition"[77] of the Fourteenth Amendment. This test for cruelty has been labeled the 'historical' approach to the Cruel and Unusual Punishments Clause, which was rejected by the Supreme Court in *Weems v. United States*,[78] legitimately raising the concern that the result would be different under the 'evolving standards of decency' analysis that has been accepted by the Court.

It was fifty-seven years and thousands of electrocutions[79] after *Kemmler* before the Supreme Court, even indirectly, readdressed the issue of electrocution. In *Louisiana ex rel. Francis v. Resweber*,[80] the Court, in a 5-4 decision, denied petitioner's claim that to attempt to execute him a second time after an initial attempt at electrocution failed would

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[72] *Kemmler*, 136 U.S. at 442.

[73] *See, e.g.*, Blake v. Hill, 668 F.2d 52, 57-58 (1st Cir. 1981), *cert. denied*, 456 U.S. 983 (1982); Martin v. Foti, 561 F. Supp. 252, 257 (E.D. La. 1983).

[74] *See In re Kemmler*, 136 U.S. at 445. In *Kemmler*, the Court held that,

> It is not contended, as it could not be, that the Eighth Amendment was intended to apply to the States, but it is urged that the provision of the Fourteenth Amendment, which forbids a State to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, is a prohibition on the State from the imposition of cruel and unusual punishments, and that such punishments are also prohibited by inclusion in the term "due process of law."

Id. at 446.

[75] Section 1 of the Fourteenth Amendment provides, in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdictions the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[76] 370 U.S. 660 (1962).

[77] *Kemmler*, 136 U.S. at 446.

[78] 217 U.S. 349 (1910). *See supra* notes 28-37 and accompanying text (a discussion of the holding in *Weems* and the advancement of the 'evolving standards of decency' test).

[79] The federal government only began compiling data on executions in 1930. Information on executions prior to that date is incomplete. Yet, in the 17 years immediately prior to *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), there were 2,560 legal executions in the United States. This is presumably a sufficient number from which one could find information on the process of electrocution, which was responsible for the overwhelming majority of executions during that period. In the 1930s, there were 1,667 legal executions in the United States; in the 1940s, 1,284; in the 1950s, 717; in the 1960s, 191; in the 1970s, 3; in the 1980s, 117; from 1990-92, 67. *See* BEDAU, *supra* note 2, at 25; *United States Executions* (National Coalition to Abolish the Death Penalty, Washington D.C.), 1992, at 1.

[80] 329 U.S. 459 (1947).

violate the prohibition against cruel and unusual punishments.[81] The Court refused to reach the issue of the constitutionality of electrocution *per se*, stating that the case "does not call for an examination into any punishments except that of death."[82] Although the dissenters did find that it would be unconstitutional to attempt to execute the petitioner a second time, they agreed with the majority in upholding the *Kemmler* analysis that "the electric current was to cause instantaneous death"[83] in the usual electrocution.

The enduring result of *Francis* was to uphold *Kemmler* and deter the lower courts from examining the issue of electrocution as cruel and unusual punishment. Although recent years have seen increasing numbers of challenges to the constitutionality of electrocution, most of these appeals do not survive perfunctory review by state and federal courts. These courts have continued to rely on the findings in *Kemmler*, and have issued summary dismissals.[84] The U.S. Supreme Court has denied certiorari on all appeals which claim that electrocution violates the Eighth Amendment,[85] demonstrating a stubborn refusal to review its decision in *Kemmler*, despite the multiplicity of problems associated with the decision.

In response, Justice Brennan wrote an impassioned dissent to the denial of certiorari in *Glass v. Louisiana*,[86] in which he urged the Supreme Court to address the question of whether electrocution "causes the gratuitous infliction of unnecessary pain and

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[81] *Id.* In the words of the Court, this was a "unique situation." *Id.* at 460. After "death did not result" from the first shock of electricity from a malfunctioning electric chair, the execution was halted. Francis appealed to the Supreme Court to estop the State from attempting a second time to execute him. After losing the appeal, Francis was successfully electrocuted on the second attempt. *See* Lenny J. Hoffman, Note, *The Madness of the Method: The Use of Electrocution and the Death Penalty*, 70 TEX. L. REV. 1039, 1046-49 (1992).

[82] *Francis*, 329 U.S. at 463.

[83] *Id.* at 475. The dissenting members of the Court in *Francis* held:

> In determining whether the proposed procedure is unconstitutional, we must measure it against a lawful electrocution. The contrast is that between instantaneous death and death by installments—caused by electric shocks administered after one or more intervening periods of complete consciousness of the victim. Electrocution, when instantaneous, can be inflicted by a state in conformity with due process of law.... The all-important consideration is that the execution shall be so instantaneous and substantially painless that the punishment shall be reduced, as nearly as possible, to no more than that of death itself. Electrocution has been approved only in a form that eliminates suffering.

Id. at 474. (citation omitted). The dissent went on to claim that the Louisiana statute before the Court:

> does not provide for electrocution by interrupted or repeated applications of electric current at intervals of several days or even minutes. It does not provide for the application of electric current of an intensity less than that sufficient to cause death.... There can be no implied provision for a second, third or multiple application of the current. There is no statutory or judicial precedent upholding a delayed process of electrocution.

Id. at 475.

[84] *See, e.g.*, Sullivan v. Dugger, 721 F.2d 719 (11th Cir. 1983); Dix v. Newsome, 584 F. Supp. 1052 (N.D. Ga. 1984); Mitchell v. Hopper, 538 F. Supp. 77 (S.D. Ga. 1982), *aff'd in part and rev'd in part on other grounds*, 716 F.2d 1528 (11th Cir. 1983); Bertolotti v. State, 565 So. 2d 1343 (Fla. 1990); White v. State, 565 So. 2d 322 (Fla. 1990); Martin v. Commonwealth, 271 S.E.2d 123 (Va. 1980). *See generally* Hoffman, *supra* note 81 (providing a detailed treatment of three recent cases wherein evidence of electrocution's effects were considered by the court, albeit briefly).

[85] *See, e.g.*, Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979); McCorquodale v. Balkcom, 525 F. Supp. 408 (N.D. Ga. 1981), *aff'd in part and rev'd in part*, 705 F.2d 1553 (11th Cir. 1983), *cert. denied*, 466 U.S. 954 (1984); Ruiz v. State, 582 S.W.2d 915 (Ark. 1979), *cert. denied*, 454 U.S. 1093 (1981); Booker v. State, 397 So. 2d 910 (Fla.), *cert. denied*, 454 U.S. 957 (1981); Godfrey v. Francis, 308 S.E.2d 806 (Ga. 1983), *cert. denied*, 466 U.S. 945 (1984); State v. Glass, 455 So. 2d 659 (La. 1984), *cert. denied*, 471 U.S. 1080 (1985); State v. Shaw, 255 S.E.2d 799 (S.C.), *cert. denied*, 444 U.S. 957 (1979).

[86] 471 U.S. 1080 (1985) (Brennan, J., dissenting).

suffering and does not comport with evolving standards of human dignity."[87] Since *Gregg v. Georgia*[88] reestablished the constitutionality of capital punishment in 1976, there have been an "ever-increasing" number of death-row appeals contending that electrocution is unconstitutional.[89] Despite this phenomenon, Brennan asserted that claims of the cruel and unusual nature of the electric chair "have uniformly and summarily been rejected, typically on the strength of this Court's opinion in *In re Kemmler*."[90] Brennan concluded, "*Kemmler*, however, 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. I believe the time has come to measure electrocution against well-established contemporary Eighth Amendment principles."[91] Such an analysis has not taken place, however, and with the resignations of Justices William Brennan and Thurgood Marshall, the Court lost its two strongest opponents of the death penalty, and its foremost advocates for examination of Eighth Amendment issues relating to capital punishment.[92]

Yet, recent events in Virginia indicate that a constitutional challenge to electrocution may find a receptive audience in the lower courts. In February of 1993, Chief Loudoun County Circuit Judge James Chamblin set the first evidentiary hearing since that in *Kemmler* to consider expert testimony on whether the effects of electrocution constitute cruel and unusual punishment.[93] The day after the hearing was announced, the prosecutor dropped the capital murder charge to first-degree murder, thus aborting the hearing.[94] Nonetheless, the judge's intention to hold the hearing suggests that respect for *Kemmler*'s precedential value is waning.[95]

Soon after *Kemmler* was decided, the electric chair became the leading method of implementing the death penalty in this country; it has been used in more than 4,100 executions to date.[96] Today, there are a record number of prisoners on death row: as of January 15, 1993, there were 2,676 prisoners under sentence of death in thirty-four states.[97] This number has recently been growing at a rapid pace, as juries in the last decade have been more willing to impose the death penalty than at any time since World War II.[98] Additionally, recent rulings by the Supreme Court have severely limited the

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[87] *Id.* at 1080 (quoting Pet. for Cert. 27).

[88] 428 U.S. 153 (1976).

[89] *Glass*, 471 U.S. at 1081.

[90] *Id.*

[91] *Id.*

[92] Justices Brennan and Marshall were the only two Justices to hold that capital punishment was unconstitutional under all circumstances, in *Furman v. Georgia*, 408 U.S. 238 (1972).

[93] Commonwealth v. Curtis Eugene White, Criminal No. 8129, Va. Cir. Ct. (Loudoun Cnty, Va. 1993); *See* Frank Green, *Judge to Hear Testimony on Electric Chair 'Cruelty,'* RICHMOND TIMES-DISPATCH, Feb. 11, 1993, at B1.

[94] *See* Frank Green, *Electric Chair Hearing Won't Be Needed: 'Cruel and Unusual Punishment' Issue Will Wait Because of Reduced Charge*, RICHMOND TIMES-DISPATCH, Feb. 13, 1993, at B5. The Commonwealth's Attorney asserted that the decision to drop the capital murder charge had nothing to do with the judge's decision to hold the hearing on electrocution. *Id.*

[95] Judge Chamblin, in stating his reasons for holding the hearing, said, "that there's just, for some reason, some sort of blind adherence to this rule that came up from the decision of the U.S. Supreme Court back in 1890, that it's not cruel and unusual punishment for execution by electrocution." He also stated that *Kemmler* was decided "without any real findings of fact, without any real factual basis to support it." *Id.*

[96] Leyden, *supra* note 56. The total number of legal executions in the U.S. from January 1900 through December 1992 has been estimated at 7,452. *See* FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 105 (1986); *United States Executions*, *supra* note 79.

[97] *Death Row, USA* (NAACP Legal Defense and Educational Fund, New York, N.Y.), Winter 1992, at 1.

[98] *See generally* ZIMRING & HAWKINS, *supra* note 96, at 95-105 (describing the enormity of the death row backlog, its causes, and projections for the future).

right of state prisoners to challenge the constitutionality of their convictions and death sentences in the federal courts.[99] These restrictions on appeals, combined with the enormous backlog of prisoners on death row,[100] signify the likelihood of a greatly increased number of executions performed during the next few years.[101] This prospect gives heightened significance to the issue of whether these executions will be performed in a constitutional manner.

V. DEATH BY ELECTROCUTION: PROTRACTED, PAINFUL, AND MUTILATING

In authorizing William Kemmler's execution in 1890, the United States Supreme Court affirmed the judgment of the Court of Appeals of New York and held conclusive the determination of the legislature that "the use of electricity as an agency for producing death constituted a more humane method of executing the judgment of the court in capital cases."[102] The Court further held that "we agree with the court below that [the testimony] 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."[103]

Yet, any testimony indicating that electrocution would be instantaneous and painless was discredited with the first use of the electric chair.[104] Kemmler's electrocution was described as a "ghastly spectacle." Some witnesses indicated that electrocution appeared to be "far worse" than hanging, and surmised that "the electrical experiment" would never again be used as a form of capital punishment.[105] Significantly, among the witnesses who spoke of the cruelty of the process were three who might have been thought to state otherwise: specifically, one of the engineers operating the electric chair, the prosecuting sheriff, and a spokesman for the District Attorney's office.[106] The spokesman indicated that, "there is no question that unnecessary and revolting cruelty was inflicted upon the unfortunate Kemmler.... This man, it appears, was made to suffer most horribly, and the first great experiment in this matter could hardly be termed a success."[107]

Thus began a debate, now over a century old, on the true nature of death by electrocution. Justice Brennan observed that "[b]ecause contemporary courts have summarily rejected constitutional challenges to electrocution, the evidence respecting this method of killing people has not been tested through the adversarial truthfinding process."[108] The details concerning the process and effects of electrocution are not widely known because "executions are carried out in private; there are few witnesses; pictures are not allowed; and newspaper accounts are, because of 'family newspaper'

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[99] *See, e.g.*, McCleskey v. Zant, 111 S. Ct. 1454 (1991).

[100] The average execution in recent years has taken place approximately eight years after the date of the crime. Powell, *supra* note 2, at 1038 n.26.

[101] *United States Executions*, *supra* note 79, at 1. There were 29 executions in 1992. This was more than double the 14 executions in 1991 and was more than the number of executions in any year since 1962. *Id.*

[102] *Kemmler*, 136 U.S. at 443.

[103] *Id.* at 443-44.

[104] *Far Worse Than Hanging: Kemmler's Death Proves An Awful Spectacle*, N.Y. TIMES, Aug. 7, 1890, at 1.

[105] *Id.* at 1-2.

[106] *Id.*

[107] *Id.* at 2. Sheriff O.A. Jenkins, of Buffalo, "was so badly affected that he had to take to his room." He concluded that hanging was "infinitely more humane." *Id. See also Was He Tortured? Kemmler's Execution a Horrible Electrical Experiment*, THE PRESS, Aug. 7, 1890, at 1.

[108] Glass v. Louisiana, 471 U.S. 1080, 1086 (1985).

requirements of taste, sparing in detail.''[109] Some opponents of capital punishment claim that many of the procedures and restrictions governing electrocutions are employed to keep from public knowledge the details of the electrocution process.[110]

Defenders of electrocution maintain that even if death is not instantaneous, the first shock of electricity immediately renders the victim unconscious and therefore impervious to any pain that would be present before death ensues.[111] This belief has never been medically proven. On the contrary, many medical experts throughout this century have noted the unpredictability of electricity's effect on the human body and the inability to ascertain exactly when consciousness is lost and when death takes place.[112] ''[T]he space of time before death supervenes varies according to the subject. Some have a greater physiological resistance than others.''[113] Over sixty years ago, a prominent physician, contradicting assertions that the initial shock of electricity leaves the victim ''brain dead,'' observed that ''[t]he brain has four parts. The current may touch only one of those four parts; so that the individual retains consciousness and a keen sense of agony. For the sufferer, time stands still; and this excruciating torture seems to last for an eternity.''[114] Equally compelling testimony came from a French scientist familiar with the physiological effects of electricity; he expressed the belief that the electric chair was ''the most inhuman form of execution conceived by the mind of man.''[115] The scientist was quoted in London's *Daily Mail* as stating:

> In every case of electrocution... death inevitably supervenes but it may be very long, and above all, excruciatingly painful.... I do not believe that anyone killed by electrocution dies instantly, no matter how weak the subject may be. In certain cases death will not have come about even though the point of contact of the electrode with the body shows distinct burns. Thus, in particular cases, the condemned person may be alive and even conscious for several minutes without it being possible for a doctor to say whether the victim is dead or not.... This method of execution is a form of torture.[116]

More recently, in December of 1992, two noted physicians gave similar testimony in affidavits before the U.S. Supreme Court.[117] Dr. Orrin Devinsky, learned in the field of

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[109] *Id.* at 1086 n.12 (quoting *Hearings on H.R. 8414 et al. before Subcomm. No. 3 of the House Comm. on the Judiciary*, 92d Cong., 2d Sess. 308 (1972)).

[110] Telephone Interview with Marie Deans, Executive Director of the Virginia Coalition on Jails and Prisons (Mar. 31, 1993). In Virginia the list of such procedures and restrictions during the electrocution includes the minimal number of witnesses; the prohibition of photographs and videotaping; the use of separate rooms for the electric chair and the witnesses, who must view the electrocution through a thick glass window, thus reducing the ability of the witnesses to hear or smell the effects of the electrocution; and, the use of a hood that covers the head and upper part of the face, in order to shield from view the effects of electrocution upon the prisoner's face. Only the fingers of the prisoner and the bottom of the prisoner's face are exposed to view. *Id.*

[111] *See, e.g.*, LAURENCE, *supra* note 26, at 67-68.

[112] ''The violence of killing prisoners through electrical current is frequently explained away by the assumption that death in these circumstances is instantaneous and painless. This assumption, however, in fact 'is open to serious question' and is 'a matter of sharp conflict of expert opinion.' '' *Glass*, 471 U.S. at 1088 (quoting *Hearings on H.R. 8414 et al. before Subcomm. No. 3 of the House Comm. on the Judiciary*, 92d Cong., 2d Sess., 305 (1972)).

[113] DUFF, *supra* note 1, at 118.

[114] NEGLEY K. TEETERS, HANG BY THE NECK 447 (1967) (quoting N.Y. WORLD, Nov. 17, 1929).

[115] DUFF, *supra* note 1, at 118.

[116] *Id.* at 118-19 (quoting the DAILY MAIL, Jan. 14, 1928).

[117] Poyner v. Murray, 113 S. Ct. 419 (1992).

neurology and the in effects of electrocution on the human body,[118] testified that "there is no evidence that intentional electrocution is either painless or humane. To the contrary, all credible scientific evidence indicates the opposite."[119] Among Dr. Devinsky's conclusions were his assertions that electrocution was "intensely painful"[120] and that "[t]here is no medical or scientific support for the proposition that intentional electrocution for execution causes immediate brain death and the subject experiences no pain."[121]

Dr. Harold Hillman, Director of the Unity Laboratory in Applied Neurobiology at the University of Surrey in Great Britain,[122] stated that "[c]ontrary to representations by proponents of death by electrocution, large electrical shocks have *never* been shown to induce anesthesia, *before* unconsciousness."[123] Dr. Hillman further asserted that "[i]n order for consciousness to be lost, or nerve activity destroyed, the electrical current would have to penetrate the brain."[124] However, during an electrocution, the condemned's brain is "incapacitated through [the] relatively slow process of heating up by the passage of electricity through the body. In short, the brain literally cooks until death occurs."[125] Based upon his "education, training, experience, and particular expertise in death and dying,"[126] Dr. Hillman reached the following conclusions, *inter alia*, about electrocution:

> i. Execution by electrocution is intensely painful.
> ii. The condemned subject retains consciousness long enough to feel conscious pain.
> iii. Death is never instantaneous.[127]

Such concerns were held by Justice Brennan, who indicated that a method of capital punishment must minimize the risk of unnecessary pain, violence, and mutilation in order

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[118] Orrin Devinsky, M.D., is the Chief of Neurology in the Hospital for Joint Diseases, New York, New York, and the Director of New York University Hospital for Joint Diseases Comprehensive Epilepsy Center. He holds a bachelor's degree in science and a master's degree in biology from Yale University, and a medical degree from Harvard University. He is an associate professor of neurology at the New York University School of Medicine; he was the recipient of two separate fellowships, including one at the National Institute of Health, in the laboratory Electroencephalography and Clinical Neurophysiology; he has written four books, including one book on the examination of cranial and peripheral nerves, and one book on behavioral neurology; he has written more than 50 scientific papers and chapters, and more than 40 abstracts and letters. Aff. of Orrin Devinsky, M.D. at 1-4, Poyner v. Murray, 113 S. Ct. 419 (1992) (No. 92-5461).

[119] *Id.* at 10.

[120] *Id.* at 4.

[121] *Id.* at 4-5. Devinsky also concluded that "[i]t is likely that some individuals who are intentionally electrocuted experience great discomfort and pain," *id.* at 4, and that "[t]here have never been studies to determine the brain's own electrical activity during intentional electrocution, and any such study would be confounded by the external electrical stimulus which would mask any brain generated electrical activity," *id.* at 5.

[122] Dr. Harold Hillman holds degrees in physiology and medicine and surgery, and a Ph.D. in biochemistry, and he wrote his thesis on neurochemistry. He is senior physiologist at the University of Surrey, and, since 1970, has been Director of its Unity Laboratory in Applied Neurobiology, which was established for the purpose of conducting research on human and animal brains. He has authored some of the few modern publications in medical and scientific journals on the process of dying. He has published more than 150 full-length scientific papers, including four books. He has taught internationally and has held leadership positions in national and international medical organizations. Aff. of Dr. Harold Hillman at 1-3, Poyner v. Murray, 113 S. Ct. 419 (1992) (No. 92-5461).

[123] *Id.* at 5 (emphasis in original).

[124] *Id.* at 4-5.

[125] *Id.*

[126] *Id.* at 3.

[127] *Id.* at 3-4.

to be found constitutional.[128] Dissenting in *Glass v. Louisiana*,[129] Brennan noted that there exists "considerable empirical evidence and eyewitness testimony ... which if correct would appear to demonstrate that electrocution violates every one of [these] principles."[130] Brennan continued:

> This evidence suggests that death by electrical current is extremely violent and inflicts pain and indignities far beyond the "mere extinguishment of life." 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.[131]

Such testimony raises a second concern with electrocution: in addition to the well-founded belief that electrocution kills neither instantly nor painlessly, the process is objectionable on the basis of the horrible mutilation, disfigurement, and indignity it renders on the condemned. According to those who have observed electrocutions, the prisoner's "flesh swells and his skin stretches to the point of breaking."[132] "Witnesses hear a loud sound 'like bacon frying,' and 'the sickly sweet smell of burning flesh' permeates the chamber."[133] In addition, the occupant of the electric chair almost literally boils: "the temperature in the brain itself approaches the boiling point of water."[134] When the post-electrocution autopsy is performed, "the liver is so hot that doctors have said it cannot be touched by the human hand."[135]

The gruesome details provided by Brennan have been recorded by many sources; it has been noted that the "various indignities attend[ing] electrocutions" include that "[t]he body may catch on fire ... The body turns bright red as its temperature rises. Witnesses to electrocutions often become emotionally upset by the gruesome aspects of this method of death."[136] After the execution, the body is placed in what is termed the "cool-off" room for the autopsy; before the autopsy can take place, the temperature of the body has to cool, and the contorted limbs of the deceased have to be straightened out with sandbags.[137]

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[128] Glass v. Louisiana, 471 U.S. 1080, 1086 (1985) (Brennan, J., dissenting).

[129] *Id.* at 1080.

[130] *Id.* at 1086.

[131] *Id.* at 1086-87.

[132] *Id.* at 1087.

[133] *Id.*

[134] *Id.* at 1088.

[135] *Id.*

[136] Martin R. Gardner, *Executions and Indignities—An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 OHIO ST. L.J. 96, 126 (1978).

[137] Telephone Interview with Marie Deans, Executive Director of the Virginia Coalition on Jails and Prisons (Mar. 29, 1993).

Professor Michael Radelet, a prominent opponent of capital punishment,[138] has documented the details of numerous "botched" electrocutions, *i.e.*, those which are protracted or which appear to be even more painful than normal. The flaw in these botched executions is generally either the result of human error or is inexplicable. In the ten years from 1983 through 1992, out of the total of ninety-three electrocutions, seven have been botched.[139] This means that, on average, nearly one out of every thirteen electrocutions involved unanticipated side effects or protracted duration,[140] adding significantly to the pain of the procedure.

One of the more notorious examples of a botched electrocution resulting from the mistakes of the executioner involved a 1989 Alabama case in which a physician described the prisoner as having been subjected to "unimaginable pain and suffering" in the process of "literally burn[ing] to death."[141] In that case, the executioner officials admitted connecting the electrical cables to the wrong wall receptacles, resulting in an electric shock that was painful, but insufficient to cause death. The chair was rewired, and death was pronounced nineteen minutes after the prisoner first received an electric shock.[142] In a 1990 Florida case, six-inch flames erupted from the prisoner's head because the execution officials negligently replaced a natural sponge with a synthetic sponge in the headpiece.[143] One witness indicated that the prisoner was "charred alive rather than swiftly dispatched to oblivion."[144] In a Virginia case, the large size of the prisoner induced the execution officials to deliver an increased voltage of electricity, which caused copious bleeding from the prisoner's eyes and nose, drenching his shirt in blood.[145]

In all cases, physicians must wait for the prisoner's body to cool down before they can check for signs of life, and this often leads to lengthy delays before subsequent jolts of electricity may be applied. Several especially protracted procedures have been classified as botched electrocutions by Radelet because of the amount of time the condemned prisoner was forced to suffer.[146] In a 1983 Alabama case, the electrode attached to the prisoner's leg erupted in flames and broke away from its strap following the first jolt of

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[138] Michael L. Radelet is Associate Professor of Sociology at the University of Florida. He received a Ph.D. in sociology from Purdue University and received two years of postdoctoral training at the University of Wisconsin Medical School. He has published four books and over two dozen scholarly papers relating to capital punishment, and he has testified before committees of the U.S. Senate and U.S. House of Representatives. He has been retained by the Florida Supreme Court's Racial and Ethnic Bias Study Commission to research patterns of death sentencing in Florida. Aff. of Michael L. Radelet at 1, Hill v. Lockhart, 791 F. Supp. 1388 (E.D. Ark. 1992) (No. PB-C-92-240); Telephone Interview with Professor Michael L. Radelet (Apr. 6, 1993).

[139] Michael L. Radelet, *Post-Furman Botched Executions* (June 1992) (on file with the author). *See also* Dawn M. Weyrich, *Gruesome Blunders: Botched Execution Spurs New Challenge*, WASH. TIMES, June 7, 1990, at A1, A10-11.

[140] *United States Executions*, *supra* note 79. This is a 7.5% rate for the number of botched electrocutions out of the total number of electrocutions performed during 1983-1992.

[141] Thomas v. Jones, 742 F. Supp. 598, 605 (S.D. Ala. 1990); Michael L. Radelet, *Post-Furman Botched Executions*, 50 LIFELINES 1 (Nat'l Coalition to Abolish the Death Penalty 1990).

[142] Horace F. Dunkins, executed on July 14, 1989. After officials rewired the chair, a second jolt, nine minutes after the first, was sufficient to kill Dunkins. Radelet, *supra* note 139.

[143] Jesse Joseph Tafero, executed on May 4, 1990. Due to this human error, he required three shocks of electricity to stop his breathing. The replacement sponge did not conduct electricity, as was intended, but caught fire, erupting in six-inch flames from Tafero's head. *Id.*

[144] Colin Hughes, *This Electric Chair Works Fine, If You Are a Colander*, THE INDEPENDENT, July 26, 1990, at 11.

[145] Wilbert L. Evans, executed on October 17, 1990. Radelet, *supra* note 139; DeNeen L. Brown, *Execution Probe Set*, WASH. POST, Oct. 21, 1990, at B1.

[146] Radelet, *supra* note 139.

electricity.[147] Execution officials reattached the electrode, but it required two additional jolts of electricity and a total of fourteen minutes before the prisoner was declared dead, his body charred and smoldering.[148] In 1984, an initial two-minute jolt of electricity failed to kill a prisoner in Georgia. He was forced to endure a six-minute wait for his body to cool down sufficiently before the physicians could examine him, during which time he took twenty-three breaths. After the doctors declared him alive, the prisoner was killed by the second jolt of electricity.[149] An Indiana prisoner in 1985 was expected to be killed by one jolt of 2,300 volts. In fact, it became necessary to administer four jolts of electricity before he died, leading the Department of Corrections to admit that the execution "did not go according to plan."[150]

Such depictions of the frequently prolonged and inconsistent effects of electrocution, along with examples of its typical mutilating effects, constitute substantial evidence of the unconstitutionality of the electric chair. It would seem beyond doubt that the effects of electrocution are so "inhuman and barbarous"[151] and offensive to the "evolving standards of decency that mark the progress of a maturing society,"[152] that even if one were to believe that electrocution instantly and in every case rendered its victims unconscious and, thus, unable to feel more than a moment's pain, the mutilation and disfigurement *per se* should be determinative that electrocution is unconstitutionally cruel and unusual. The mutilating effects of the electric chair differ only in degree from the barbaric "punishments of torture" catalogued by Blackstone,[153] which were determined by the Supreme Court over a century ago to be unquestionably unconstitutional.[154]

A final argument against electrocution is that evidence suggests that lethal injection, the intravenous introduction of a deadly combination of drugs into the condemned prisoner's body, may be a less painful alternative to the electric chair. In 1976, the chief of the anesthesiology department at the University of Oklahoma Health Sciences Center, Dr. Stanley Deutsch, responding to an inquiry from an Oklahoma state legislator, wrote that "[w]ithout question," the process of lethal injection is "extremely humane in comparison to either electrocution" or the gas chamber.[155] Dr. Deutsch asserted that lethal injection would "produce death in a predictable way and with certainty," and that "this is a rapid pleasant way of producing unconsciousness."[156] After dozens of executions by lethal injection from which to draw his conclusions, the University of Surrey's Dr. Harold Hillman attested that "[e]xecution by lethal injection, if performed properly, is substantially less painful [than execution by electrocution]."[157]

If this is so, lethal injection would render the continued use of the electric chair unconstitutional by a well-established standard of the Eighth Amendment: the Cruel and Unusual Punishments Clause forbids all forms of "unnecessary cruelty."[158] Originating

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[147] John Evans, executed on April 22, 1983 in Alabama. *Id.*

[148] *Id.* Smoke and sparks emitted from Evans's hood after the first jolt. Two physicians entered the chamber and found that Evans still had a heartbeat. The second jolt resulted in more smoke and burning flesh. The physicians again found a heartbeat, and a third shock was applied. *Id.*

[149] Alpha Otis Stephens, executed on December 12, 1984. *Id.*

[150] *Id.* William E. Vandiver, executed on October 16, 1985. *Id.*

[151] *In re* Kemmler, 136 U.S. 436, 447 (1890).

[152] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[153] *See supra* note 25 and accompanying text (a partial listing of the punishments Blackstone and the founders of the Eighth Amendment considered cruel and unusual).

[154] Wilkerson v. Utah, 99 U.S. 130 (1878).

[155] Don Colburn, *Lethal Injection: Why Doctors Are Uneasy About The Newest Method Of Capital Punishment*, THE WASH. POST, December 11, 1990, at Z12, Z14.

[156] *Id.*

[157] Aff. of Dr. Harold Hillman at 4, Poyner v Murray, 113 S. Ct. 419 (Va. 1993) (No. 92-5461).

[158] *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878).

in one of the first cases to interpret the Amendment, *Wilkerson v. Utah*,[159] the belief in the minimization of unnecessary pain and suffering has been one of the most consistent principles of Eighth Amendment jurisprudence. The position was reaffirmed by the Court in *Louisiana ex rel. Francis v. Resweber*,[160] which held that "[t]he traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence."[161] More recently, the landmark case of *Gregg v. Georgia*[162] held that the Eighth Amendment prohibits "the unnecessary and wanton infliction of pain."[163] In view of this standard against the infliction of unnecessary pain in carrying out the death penalty, lethal injection's evidently less painful method of execution should render the electric chair unconstitutional.

Since 1977 such concerns have helped to persuade twenty state legislatures of the thirty-six states that currently sanction capital punishment to authorize lethal injection.[164] Lethal injection has generally appealed to legislatures for several reasons: it is less expensive than other methods, it is considered less painful and more humane than other methods of capital punishment, and, for this reason, death penalty advocates believe that lethal injection might persuade more juries to recommend the death penalty in murder cases.[165] There is considerable evidence that lethal injection is a means of performing executions quickly and painlessly with no mutilation or disfigurement of the body.[166] Accordingly, it would appear that the painful, lingering deaths, mutilation, and botched executions intrinsic to the electric chair are an unconstitutional infliction of unnecessary pain in light of lethal injection's significantly more humane method of capital punishment.

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[159] *Id.*

[160] 329 U.S. 459 (1947).

[161] *Id.* at 463.

[162] 428 U.S. 153 (1976).

[163] *Id.* at 173.

[164] Colburn, *supra* note 155, at Z15. Sixteen states presently mandate lethal injection as their sole method of execution, and four other states grant the prisoner a choice between lethal injection and another method. *Id.* at Z14. Lethal injection is the sole method of capital punishment in Arkansas, Colorado, Delaware, Illinois, Missouri, Mississippi, Nevada, New Jersey, New Mexico, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Utah, and Wyoming. The four additional states that grant the condemned inmate the choice of lethal injection or another method are Idaho (firing squad), Montana (hanging), North Carolina (gas chamber), and Washington (hanging). The 12 states that currently authorize the electric chair are Alabama, Connecticut, Florida, Georgia, Indiana, Kentucky, Louisiana, Nebraska, Ohio, South Carolina, Tennessee, and Virginia. *Id.*

[165] *Id.* at Z14. It is this last reason that has made lethal injection controversial. Opponents of the death penalty are concerned that lethal injection merely provides a more "acceptable face" for capital punishment, ZIMRING & HAWKINS, *supra* note 96, at 112, or that it is an attempt to "euphemize the deed." VAN DEN HAAG & CONRAD, *supra* note 2, at 192. The possibility that lethal injection poses the threat of ever-greater numbers of executions is reason enough for opponents of the death penalty to strongly resist its implementation. *See generally*, ZIMRING & HAWKINS, *supra* note 96, at 107-23. (describing the advent, issues, and politics of lethal injection). There is no proof, however, that juries do in fact consider the method of execution in deciding whether to recommend the death penalty.

[166] Executions by lethal injection have generally been without complications, although there have been five cases that have been problematic. Three of these cases were executions of drug addicts whose veins had been so riddled by needles that the execution technicians took up to 45 minutes to locate a usable vein for the catheter. In a fourth case, the catheter came out of the vein of the condemned. In a fifth case, the condemned individual had a violent, physical reaction to the drugs, which were administered in an improper dosage. Radelet, *supra* note 139.

VI. CONCLUSION

In re Kemmler[167] held that the U.S. Constitution forbade "inhuman and barbarous" methods of execution that go beyond the "mere extinguishment of life" and cause "torture or a lingering death."[168] Although this is a correct interpretation of the law, the Court's holding was faulty in its findings that electrocution would be instantaneous and painless. These findings were based upon biased testimony offered before the process was ever used on a human being. After more than one hundred years and thousands of electrocutions, there is overwhelming evidence to question these findings and to challenge the electric chair's presumption of constitutionality.

As our society's definition of what constitutes cruel and unusual punishment has changed dramatically over the past century, it is by today's constitutional standards that the electric chair should be examined. Were the Supreme Court to analyze the documented nature and effects of electrocution, it is doubtful that the Court could find the extreme violence and repulsive mutilation rendered by the electric chair acceptable in light of our "evolving standards of decency." It was Justice Marshall's belief that a public "fully informed" about the death penalty would readily reject it as a punishment;[169] this is certainly true for electrocution.

The existence of lethal injection as a significantly quicker and less painful method of execution than the electric chair raises the possibility that the electric chair is rendered unconstitutional on the grounds that it consists of "unnecessary pain." The Eighth Amendment's prohibition of such unnecessary pain in carrying out a death sentence is well-established, and there has been sufficient use of lethal injection to believe that its performance invalidates electrocution as a means of capital punishment.

The Supreme Court should overrule *Kemmler* and approve a new, objective examination of all the factual evidence of the torture and mutilation inherent in electrocution. In light of the "evolving standards of decency" that determine what our society is willing to consider cruel and unusual punishment under the Eighth Amendment, it is improbable that electrocution could survive such an inquiry. The supposition that the electric chair results in "instantaneous, and consequently in painless, death"[170] continues to be the presumption of our courts, but the accumulated information from thousands of electrocutions constitutes *prima facie* evidence that the supposition is groundless. To its discredit, for over a century the Supreme Court has refused to review this issue; it is time the Court confronted our sordid tradition of electrocution as a method of capital punishment.

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[167] 136 U.S. 436 (1890).

[168] *Id.* at 447.

[169] *Furman v. Georgia*, 408 U.S. 238, 361 (1972) (Marshall, J., concurring).

[170] *Kemmler*, 136 U.S. at 443-44.