



Washington and Lee University School of Law

From the Selected Works of Todd Peppers

June, 2021

What We Should Learn from the Death of Virginia's Death Penalty

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INSIDE THIS ISSUE:

<i>What We Should Learn From the Death of Virginia's Death Penalty</i>	1
<i>President's Corner</i>	2
<i>George I. Vogel, II: 2021 Frank W. "Bo" Rogers, Jr. Lifetime Achievement Award Recipient</i>	2
<i>Catherine J. Huff: 2021 Young Lawyer of the Year Award Recipient</i>	3
<i>Tribute to the Honorable Clifford R. Weckstein</i>	3
<i>The Continuing Evolution of Grandparent Visitation in Virginia</i>	4
<i>In Memoriam</i>	12
<i>Bench Bar Conference</i>	13
<i>96th RBA Annual Meeting</i>	14
<i>RLF Scholarships and Grants</i>	15
<i>Keeping It Clean Donors</i>	15
<i>Announcements</i>	16

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WHAT WE SHOULD LEARN FROM THE DEATH OF VIRGINIA'S DEATH PENALTY

BY TODD C. PEPPERS, ESQ.

Shortly before her death in the spring of 2011, I visited one last time with Marie Deans, my friend who was a long-time death penalty abolitionist. A South Carolina native, Marie moved to Richmond, Virginia in 1983 and opened the Virginia Coalition on Jails and Prisons. For the next decade, Marie would fight for the men of Virginia's death row – from finding them attorneys and working to improve prison conditions to standing “death watch” with the men during their final hours on earth. There were some victories but many defeats during Marie's time as an activist, and during our conversation she lamented the fact that she would not live to see the end of capital punishment in Virginia. In response, I told Marie that I doubted that I – twenty-seven years her junior – would see it, either.



A decade later, I was surprised but pleased to be proven wrong. Almost ten years to the day of that final conversation, I watched the live news broadcast of Virginia Governor Ralph Northam signing legislation abolishing the death penalty in the Commonwealth. Fittingly, the signing ceremony was held outside of the Greensville Correctional Center – home of the death house and death chamber. As I listened to the Governor's comments, I wished that Marie could have seen such an important day in Virginia's history.

Now that Virginia has stopped its embrace of what former Supreme Court Justice Harry Blackmun called “the machinery of death,” it is important to take account of the many costs and few benefits of capital punishment. And why this backwards glance at a now-abandoned practice? While there are many reasons to pause and examine the price paid for state-sanctioned death, one reason stands above the rest – to make sure that Virginia is not tempted to someday return to killing its citizens.

First, the basic numbers. No other state has executed more of its citizens than Virginia. Since the execution of Capitan George Kendall at Jamestown, the Commonwealth has hanged, electrocuted and poisoned (via lethal injection) approximately 1300 adults and children. The executions have included the mentally ill, the mentally handicapped, juvenile offenders, and arguably the innocent. This list includes Morris Mason, an inmate so profoundly intellectually disabled that he could not grasp the concept of his own death. Virginia continued to sentence the mentally handicapped to death until 2002, when the Supreme Court held in *Atkins v. Virginia* that such practices violated the Eighth Amendment. And the Supreme Court's ban against executing juvenile offenders came too late for Virginia death row inmates Douglas Christopher Thomas and Steve Roach (both executed in January of 2000 for crimes committed while juveniles).

Former death row inmates have had their convictions commuted or sentences reduced because of concerns of factual innocence. The most famous is Earl Washington, Jr., an intellectually disabled former Virginia laborer who came within eight days of being executed for a crime he did not commit. Washington's eventual exoneration is not an example of the system working – it was the result of a small group of dedicated volunteers, including fellow death row inmate Joe Giarratano, who shone a

(Continued on page 8)

WHAT WE SHOULD LEARN FROM THE DEATH OF VIRGINIA'S DEATH PENALTY

(Continued from page 1)

light on Washington's case and fought to save the innocent man. Giarratano himself would have his death sentenced commuted because of concerns of actual innocence, although he would not walk out of prison until December of 2017. Other recent Virginia death row inmates whose death sentences were commuted on similar grounds include Joseph Payne and Herbert Bassette. This error rate is unacceptable.

Often death or life turns not on the facts of the case, but the color of the defendant's skin. Virginia's judges and juries have disproportionately applied the death penalty to minority defendants, many of whom were executed in the early decades of the twentieth century for the alleged rape or attempted rape of white victims. And even in the era of the "modern death penalty" (1977 to present), an unacceptable number of Virginia defendants were assigned mediocre defense counsel and denied the basic tenets of procedural due process. It is not a coincidence that Earl Washington and Morris Mason were black.

One of the most glaring defects of Virginia's modern death penalty regime was the so-called "21-day rule," which states that criminal defendants cannot introduce new evidence of factual innocence more than 21 days after sentencing. The rule meant that Virginia had one of the shortest periods of time between imposition of sentence and execution. As former Attorney General Mary Sue Terry once wrote in a legal brief, "evidence of innocence is irrelevant" when condemned men challenge their death sentences. While the 21-day rule has been modified to allow the admission of DNA evidence, the change came too late for countless men on Virginia's death row.

The men sentenced to death in Virginia often faced inhumane conditions of confinement. In the 1980's and 1990's, death row was located at the Mecklenburg Correctional Center. The row was awash in drugs, alcohol, and violence. Several death row inmates committed suicide. And despite officials bragging about their state-of-the-art facility, Mecklenburg was the site of the only mass death-row prison break in modern American history. Death row was moved to Sussex I State Prison in Waverly, Virginia, in the late 1990's, where prisoners were isolated in their cells for up to 24 hours a day (each prisoner was allowed five hours of recreation time per week). As with many things to do with Virginia's death penalty regime, the practice was ended only because of litigation.

And what did Virginians get in return? Much of the public's support for the death penalty is based on the idea of general deterrence, namely, that others are less likely to kill if they know that they themselves will be killed for their crimes. This argument is based on the faulty premise that those who commit violent crimes engage in a rational, cost-benefit analysis of the risks of being punished versus the rewards of carrying out their plans. There is no solid body of social science research, however, showing that the death penalty deters. In fact, some researchers have suggested that the death penalty has a brutalization effect that causes murder rates to increase after an execution.

Another argument is that it is cheaper to execute inmates than house them for their natural lives. While a systematic study of the costs of the death penalty versus life without parole has not been conducted in Virginia, studies in other states ar-

(Continued on page 10)

GEORGE I. VOGEL, II: 2021 FRANK W. "BO" ROGERS, JR. LIFETIME ACHIEVEMENT AWARD RECIPIENT

(Continued from page 2)

brother Kirk joined the firm and opened a third office in Richmond.

Dad has practiced in many areas of the law during his career. He began serving as a Bankruptcy Chapter 7 Panel Trustee in 1970 and continues to do so today. He has been a Commissioner in Chancery for the 23rd Judicial Circuit since 2002. And, during the early part of his practice, he assisted indigent defendants as court-appointed counsel for both the state and federal court.

In preparing for this presentation, I went through various photo albums and a scrapbook my mother had of newspaper clippings she collected over the years. On one page, the diversity of Dad's practice over the years was on full display. The titles of three articles were "*Mountaintop Land Dispute settled by Jury*," "*Woman Acquitted of Smuggling Drugs to Inmate*" and "*Two Market Buildings Sold*." The first case involved dueling land grants from 1786 and 1795 regarding the ownership of McAfee's Knob when the federal government condemned it for the Appalachian Trail. The second was a court-appointed case in 1981, and the title of the article speaks for itself. The third article involved Dad selling the Earl Hotel and the adjacent Wright building as a Chapter 7 Trustee.

Dad was also appointed to several murder cases during his early career including one involving the murder of Wiley Jackson, a prominent businessman and highway contractor. While the facts of that case would make a great book, the interesting point for today is that Wiley Jackson's great granddaughter is sitting here today as Dad's daughter-in-law.

Dad was a true general practitioner; like many of his colleagues of the day, he handled most anything that came in the door. Yet, one area of his practice has stood out over the years. That is his knowledge of all matters relating to real estate. In addition to handling many cases and countless closings in Roanoke, Dad has been a central figure in the development of Smith Mountain Lake since the late 1970s. Representing the most prolific developer at Smith Mountain Lake, there are many subdivisions that have the mark of his name on them.

Like a lot of us, Dad is also known for working long hours, including nights and weekends. The notable part, at least in my mind, is that I don't think I knew how hard he worked while I was growing up. He attended most of my athletic events, he coached many of my teams, and he served as team manager. He was always present while he somehow balanced what I now know to be a very busy law practice. Every year Mom planned incredible trips to far flung places, and every year we spent at least a week relaxing on the beach at Pawleys Island. This is no small task, and I still wonder how he did it. I only hope I have been this engaged with my children.

Dad has also served the community in various aspects throughout the years. He has served on the Board of Directors of the Roanoke Bar Association during which time he oversaw the move of the Roanoke Bar Library. He has been president of The ARC of the Greater Roanoke Valley, and served on the Board of Directors of the Roanoke Star Soccer Club.

(Continued on page 11)

WHAT WE SHOULD LEARN FROM THE DEATH OF VIRGINIA’S DEATH PENALTY

(Continued from page 8)

rive at the same undeniable conclusion – that capital murder cases are much costlier to investigate, try, and defend on appeal than cases involving life without parole. Hundreds of thousands of dollars more. The irony is inescapable – we decided that the lives of certain defendants were worthless, and, to show exactly how worthless they are, we spent an obscene amount of money putting to death that which we deemed to be human garbage.

In the early 1990’s, the old Virginia State Penitentiary was demolished. Located in downtown Richmond, for over seventy years the pen housed the death house and death chamber. When she learned of its pending destruction, my friend Marie Deans argued that the death house should remain standing as a warning about state-sanctioned death. The death house is gone, but the warning signs remain. Virginia’s death penalty was a failure. It did not make Virginians safer. It was applied in a racially discriminatory way. It failed to provide many defendants with basic due process protections. It was meted out to some of the most vulnerable members of our society, including the mentally ill and the mentally handicapped. Its error rate was unacceptably high, requiring Virginia governors to step in and exercise executive clemency to ensure that the innocent were not executed. And those that we sentenced to death for their violent acts were subjected to violence at the hands of fellow inmates and guards. We must remember these lessons lest we be tempted to go down this path again.

Todd C. Peppers is the Fowler Professor of Public Affairs at Roanoke College and a visiting professor of law at the Washington & Lee School of Law. He is the co-author of *Anatomy of an Execution: The Life and Death of Douglas Christopher Thomas and A Courageous Fool: Marie Deans and Her Struggle Against the Death Penalty*.

TRIBUTE TO THE HONORABLE CLIFFORD R. WECKSTEIN

(Continued from page 9)

I recognized that there was something special about him. Forty-one years later, I can now report what I’ve seen.

⁴¹I had selected other possible headings:

10. Why my jokes will no longer be funny
9. He has forgotten more than I ever knew
8. Who are these people and why are they calling me judge?
7. They tell me I was once a judge.
6. I love what I do. What is it that I do?
5. Twenty-eight years is enough.
4. I quit.
3. I use the word counselor because I cannot remember your name.
2. Like equity, I would follow the law but I cannot see where she went.
1. If I could wander for 12 more years I could be just like Moses.

²There is, however, some evidence in his recent writings indicating that he has mellowed somewhat on split infinitives.

³I have no doubt, for example, that on reading my above reference to his mastery of "classic" English, Cliff would immediately question my use of the word "classic" rather than "classical."

THE CONTINUING EVOLUTION OF GRANDPARENT VISITATION IN VIRGINIA

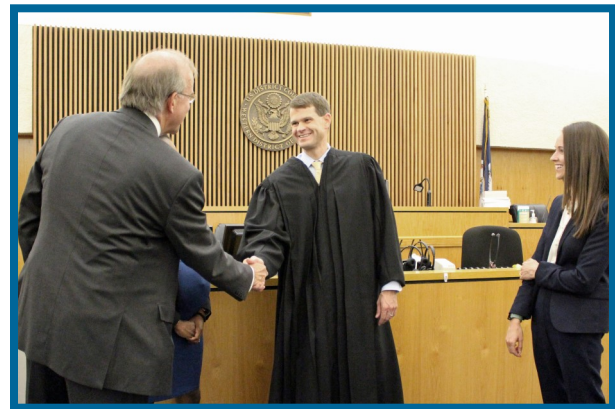
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Sours, 231 Va. 96, 100 (1986) and subsequently reaffirmed in Florio v. Clark, 277 Va. 566 (2009). The moving party must demonstrate by clear and convincing evidence: 1) parental unfitness; 2) a previous order of divestiture; 3) voluntary relinquishment; 4) abandonment; or 5) demonstrate other “special facts and circumstances” to overcome the presumption in favor of a parent.

This uncertainty presents a perfect situation for proactive lawyering. If you have a parent, or grandparent, who wants try to try to ensure the chances of a visitation award going forward, the execution of a tailored and fact-based affidavit by a parent is a sound first step.

So before you begin your summer in earnest, perform a review of both your closed files and your open files. Do you have cases where a parent is ill, or where a grandparent has been serving as a regular babysitter or daycare provider? If so, then this is a great opportunity for you to reach out and ideally try to provide these families with some peace of mind and yet continue to differentiate yourself from other family law practitioners by staying ahead of the curve.

Vicki L. Francois is an attorney at Wiese Law Firm, PLC



Judge Cullen thanking Dan Frankl for purchase of his judicial robe



Dan Frankl, RBA, Rachel Thompson, SRCBA , Judge Cullen and Sue Cook, VWAA.