“Going Through All These Things Twice”:
A Brief History of Botched Executions

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Introduction

At the age of eight, I became a member of the Cub Scouts. In the months after my investiture, I read and re-read *The Cub Book*, the comprehensive handbook that contained merit badge requirements and helpful instructions on how to properly carry out a diverse range of necessary actions, such as starting a fire, singing a marching ditty, and carrying paper bags of groceries. Of particular interest and frustration was the section on knots. Eventually, I was able to master the basics – the “bowline”, the “clove hitch”, the “taut line”, and even the confusing and seemingly useless “sheepshank”. But there was one knot illustrated in the book that I never could get quite right: the “hangman’s noose”.

Looking back, it seems remarkable to me that an eight-year-old boy would be given a book that provides the essential knowledge needed to perform a lynching, but I suppose the risks were minimal: it was a very difficult knot to get right. I suspect that over the centuries, more than one executioner has similarly struggled with construction of this knot. Scattered throughout historical records, there are dozens (if not hundreds) of accounts of so-called “botched executions”, in which the hangman’s noose frays, breaks, slips, unravels, or for one reason or another just does not accomplish its purpose: as Dorothy Parker succinctly lamented regarding the unreliability of death by hanging, “[n]ooses give”. But the incidence of botched executions has not been

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1 Although a variety of different books by this name have been published in a number of countries, the version I am referring to here is *The Cub Book: A Book of Things To Do for Boys 8 to 10* (National Council of the Boy Scouts of Canada, Ottawa, 1970). In Canada, this version of the book has been superseded and the 1970 edition is no longer in print.

2 When I was a bit older and a member of a more senior Scouting group, I asked my father about this. He told me the information on the hangman’s noose was probably in the book just in case we were hiking in the wilderness and “ran into some boars that needed to be dispatched”. I did not understand this comment at all, until I realised years later that he had probably said “Boers”, and had thereby made a sly reference to the founder of Scouting, Lieutenant-General Robert Baden-Powell, who heroically led British troops in the defence of Mafeking against the Boers during the Second Boer War. After the war, Baden-Powell designed Scouting – which emphasises service, patriotism, discipline, and religion – to prepare the British boy “to take his share in defence of the Empire, if it should ever be attacked”. Robert Baden-Powell *Scouting for Boys: A Handbook for Instruction in Good Citizenship* (Elleke Boehmer (ed), Oxford University Press, Oxford, 2004) at 277.

3 Dorothy Parker “Résumé” in *The Poetry and Short Stories of Dorothy Parker*
limited to hangings, and botches continue to occur even today. As recently as September 2009, a botched lethal injection execution in Ohio rekindled the death penalty debate in America.4

This article is about botched executions throughout history and the legal and policy consequences that have resulted from such incidents. Tales of botched executions, both ancient and modern, are often told – entire collections have occasionally been compiled and published, both as serious academic studies5 and as popular history gore-fests.6 To date, most academic accounts of botched executions have examined the topic within the context of determining whether US courts should hold that a particular method of capital punishment (or the death penalty itself) is consistent with the federal or a state constitution.7 Anecdotal accounts of botched executions in American anti–capital punishment literature or general historical works are also reasonably commonplace,8 and the usual reason for describing such incidents has been to illustrate the folly of “taking godlike actions without godlike wisdom or skills”.9 But what has been lacking thus far has been a study that has examined the variety of official legal and policy consequences that have resulted from the incidence of botched executions throughout history. In other words, most studies on botched executions have adopted a decidedly prospective approach, as opposed to the retrospective approach that this article adopts.

This article does not purport to be a comprehensive history of botched executions, but it aims to be a reasonably satisfying survey of a subject of

4 See below text accompanying nn 310–316.
6 See, eg, Geoffrey Abbott The Executioner Always Chops Twice: Ghastly Blunders on the Scaffold (St Martin’s Press, New York, 2002).
8 Eg, Eliza Steelwater The Hangman’s Knot: Lynching, Legal Execution, and America’s Struggle with the Death Penalty (Westview Press, Boulder (Colo), 2003) at 209; Austin Sarat When the State Kills: Capital Punishment and the American Condition (Princeton University Press, Princeton (NJ), 2001) at 70–72; Craig Brandon The Electric Chair: An Unnatural American History (McFarland, Jefferson (NC), 1999) at 205–212.
9 Borg and Radelet, above n 5, at 158.
enormous breadth. The article focuses especially on those incidents that have had the greatest effect on society in the development, modification, or abolition of capital punishment. Part I begins by discussing definitional issues and establishing what is meant by the term “botched execution”. Part II introduces the six forms of capital punishment that have most frequently been botched; for each of the six methods, the means of inflicting death and the most common ways that such executions are botched are briefly discussed. Parts III through VI constitute the heart of the paper, in which the occurrences and consequences of botched executions through time and across jurisdictions are examined, beginning with examples from ancient times and subsequently considering incidents that have occurred in Great Britain and its Empire, in France, and in the United States.

As will be seen, since the early-19th century, botched executions have led directly to significant policy and legal modifications within these jurisdictions, and such incidents have consistently occurred at a moderately frequent rate. Often, the corrective responses to botched executions – of which there generally have been four types – have been implemented by government officials in response to the public pressure generated from the publicity surrounding one or more specific incidents. The first type of consequence that is common is that the authorities will implement minor reforms that merely “tinker with the machinery of death”. Such fine-tuning may include establishment of commissions of inquiry, increased standardisation of methodologies or implements, mandating increased executioner expertise, or general pledges to do better. These types of changes generally have the least consequential effect on the death penalty in a jurisdiction. The second common response, which may be viewed as a subtype of the first, is that executions become more private: they may be moved from public venues to prisons, and the ability of the press or other members of the public to witness executions is thereby restricted or completely eliminated. The third common response is the adoption – or even the invention – of a “new and improved” form of execution, which may or may not be accompanied by abandonment of the means of execution that had caused problems in the past. The fourth and final possibility is the most extreme response, and it is also the one that has occurred least often in response to botched executions: the abolition of capital punishment in the jurisdiction.

I What Constitutes a “Botched Execution”?

There is no standard legal definition – let alone a widely accepted sociological definition – of what constitutes a “botched execution”. For purposes of this study, the term “botched execution” will be understood to define incidents within the following limitations. First, the incident

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10 Callins v Collins 510 US 1141 (1994) at 1145 (Blackmun J, dissenting from denial of certiorari).

11 Partial abolition is another possibility, that is, the abolition of capital punishment for some crimes but not for others.
must have occurred in the context of an execution: that is, in the context of an attempt by the State to inflict death as a penalty on an individual who has been found legally guilty of a criminal offence. This limitation has been adopted to exclude incidents of “lynching”, which is generally defined as an extrajudicial summary killing\(^ {12} \) of an individual who has allegedly committed a crime or a transgression of a social code.\(^ {13} \) While executions are typically performed by formally designated State executioners, lynchings are always carried out by two or more non-State actors, most often by a mob.\(^ {14} \) Lynchings may resemble executions in that they are generally motivated not by private concerns but rather by an intention to serve and protect the public.\(^ {15} \) A lynching is therefore essentially a form of “popular justice”\(^ {16} \) and is first and foremost an act of communal punishment that lacks due process of law.\(^ {17} \) In contrast, an execution is a formal procedure carried out by the apparatus of the State according to procedures mandated and governed by law.\(^ {18} \) Unlike a lynching, an execution is therefore an act of legalised killing; it is part of the “force of law” and is distinguished from “the violence that one always deems unjust”.\(^ {19} \)

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\(^ {12} \) Although non-lethal acts of corporal punishment have at times been referred to as “lynchings”, since the late-19th century the term has almost exclusively been reserved for incidents that result in the death of the victim. See Robert W Thurston *Lynching: American Mob Murder in Global Perspective* (Ashgate, Farnham (Surrey), 2011) at 25; Manfred Berg *Popular Justice: A History of Lynching in America* (Ivan R Dee, Chicago, 2011) at 3. Philip Dray *At the Hands of Persons Unknown: The Lynching of Black America* (Random House, New York, 2002) at viii.

\(^ {13} \) Edwin H Sutherland *Criminology* (JB Lippincott, Philadelphia, 1924) at 239; Dray, above n 13, at viii.


\(^ {17} \) The distinction between execution and lynching tends to break down when the subject of so-called “legal lynching” is examined. A legal lynching is said to have occurred when public officials impose the death penalty after a trial that is lacking in due process and is otherwise unduly affected by what the US Supreme Court has referred to as “an atmosphere of tense, hostile, and excited public sentiment”. *Powell v Alabama* 287 US 45 (1932) at 51. For a discussion of legal lynchings in the United States, see Dray, above n 13, at 307–315, 394–405.

Second, and more significantly, the execution must be one that was “botched”. This is an imprecise term and requires some discussion. Although the word “botch” has been a synonym for “spoil” or “bungle” since at least the early-16th century, there is apparently no record of the word being used to describe an execution until it appeared several times in an 1890 *New York Times* article that reported on the execution of William Kemmler, the first person executed by electrocution in the United States. Since the term was coined, “botched execution” has continued to be used most commonly to refer to executions that result in excessive pain or the “lingering death” that the US Supreme Court has described as a violation of the Eighth Amendment prohibition of cruel punishment. However, when examining historical executions, it is necessary to contextualise the events and to avoid overextending the epithet “botched” to any execution that inflicted a long, lingering, torturous, or otherwise barbarous death. Until very recently in human history, most societies that carried out executions intended that the punishment of death be one that inflicted pain and suffering on the prisoner. Pain in general was a fundamental component of most justice...
systems: **torture** was used to elicit evidence and, following conviction, **torment** was used to punish the condemned.\(^{24}\) In such circumstances, the infliction of pain cannot be described as a flaw in the process, for pain was anything but unanticipated and unintended:\(^{25}\)

An execution performed almost anywhere in the world as late as the eighteenth century was carried out with the understanding that someone who had committed the most horrifying of crimes should be punished in the most horrible of ways. The perpetrator should not simply be killed; he should be made to suffer – physically, psychically, or spiritually – with as much extravagance as was deemed appropriate. To people in earlier ages, to execute someone while refraining from imposing pain or degradation was absurd. A crime had been committed for which killing could not be vengeance enough nor death alone sufficient atonement.

What, then, is a botched execution? Although a number of varying definitions have been proposed for the term,\(^{26}\) all of them have been

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26 Eg, Borg and Radelet, above n 5, at 144 ("[W]e define ‘botched executions’ as those involving unanticipated problems or delays that caused, at least arguably, unnecessary agony for the prisoner or that reflect gross incompetence of the executioner."); Colin Miller “A Death by Any Other Name: The Federal Government’s Inconsistent Treatment of Drugs Used in Lethal Injections and Physician-Assisted Suicide” (2002) 17 JL & Health 217 at 231, n 104 (“[A] fair standard seems to be an execution where the patient takes longer to die than expected or suffers from severe pain."); Deborah W Denno “Getting to Death: Are Executions Constitutional?” (1997) 82 Iowa L Rev 319 at 338, n 110 (“[T]his Article considers an execution to be ‘botched’ when the execution has demonstrated technical, mechanical, or physical mishaps that substantially heighten the likelihood that an inmate experienced extreme pain and prolonged suffering."); Herb Haines “Flawed Executions, the Anti-Death Penalty Movement, and the Politics of Capital Punishment” (1992) 39 Social Problems 125 at 127 (“‘[B]otched’ executions usually refer to instances in which the executioner does his job poorly and with gruesome results”. Haines prefers to use the term “flawed executions” so as to include considerations of “the behavior of prison staff, the behavior of the prisoner, or doubts concerning a prisoner’s guilt or the appropriateness of the sentence.”).
suggested in the context of the examination of executions in the United States within a recent and circumscribed period of time. To adopt any of these definitions in a broader study of the history of botched executions such as this would, therefore, be inappropriate. However, the underlying fundamental characteristic that all the definitions have in common is that a botched execution is one in which there is an occurrence of unanticipated problems. The nature of the problem may be that the prisoner takes longer to die than anticipated, or experiences unintended physical pain or a long, lingering death. In some extreme instances, the prisoner may not die at all. On the other hand, some botched executions cause no unnecessary delay or pain in inflicting death on the prisoner, but rather result in gruesome, disturbing, or unexpected effects on the condemned person’s body, as when a hanged prisoner is accidentally decapitated. The ultimate cause of the unanticipated problem in the botched execution may be the incompetence of or a mistake made by the executioner, an unexpected degree of resistance from the prisoner, or unforeseen technological failures or difficulties.

Determining whether or not an execution was “botched” is, therefore, an imprecise exercise. Nevertheless, there are a number of clear signposts that, if present, act as reasonably reliable indicators that a botched execution has occurred. The first of these is the immediate reaction of witnesses to the execution. If the witnesses were excessively angered, horrified, or shocked by watching the execution (as opposed to a more abstract kind of upset that may be caused by the conviction, the sentence of death, or the mere existence of the death penalty), there is a good chance that the execution was botched. For example, in Florence in 1503, after an executioner required several blows with the axe to sever a head, the crowd of spectators revolted and stoned to death the unfortunate axeman:27 the reason we know the execution was botched is because of the extraordinary reaction of the witnesses. Second, if soon after an execution, there was significant or unusual public or media outrage regarding what occurred during the execution procedure, the execution was probably botched. Finally, the existence of contemporary expressions of governmental or judicial concern about a particular execution is usually an indication that the execution was botched. In a sense, then, we can best state that an execution was botched if it was perceived to have been botched by actors in the society in which it took place. Such a perception invariably arises due to the occurrence of some type of unanticipated problem. Any further elaboration on this definition would result in an inappropriate imposition of standards that are artificially contrived well after the fact.

II Methods of Execution, Methods of Botching

Given the limitless possibilities of the human experience, it is conceivable that any form of execution may potentially be botched, but throughout history, botches have most commonly been documented when one of six particular forms of capital punishment has been used. Not surprisingly, at one time or another, every one of the six forms has been a type of killing that has been thought to offer the condemned a quick and relatively painless death. Some are of ancient origin while others may be classified best as mere “institutional fads,” but each of the six remains a punishment that is legal today in one or more jurisdictions. Prior to the examination of specific instances of botched executions, I will here briefly describe the six forms and introduce some of the ways in which they may be botched.

A Hanging

Hanging by the neck until dead is a form of execution with ancient roots. Because of its relative ease and low technological burden – all that is required is a rope and a steady structure that is taller than the victim to act as a gallows, such as a tree – it is likely that throughout history it has been one of the most commonly used method of capital punishment. Hanging was developed independently in many different cultures and was used in England during Anglo-Saxon times; having been used to dispatch common criminals since time immemorial, it became the regular form of capital punishment at English common law.

For centuries, the “short drop” was the most common method of hanging, whereby after the noose was tightened around the neck, the drop was accomplished by pushing the victim off a ladder or by removing a wagon or bench that the prisoner was standing on. Using the short
drop, death was intentionally effected through slow strangulation rather than by neck breaking.\textsuperscript{34} therefore, in instances where this method was used, the mere fact that the prisoner did not die instantly is insufficient to regard the hanging as having been botched. A short-drop hanging could be botched by a breakage or slippage of the rope; the use of a too-long rope, which after the drop would leave the prisoner standing rather than hanging; a collapse or structural failure of the gallows; or by revival of the prisoner after being “cut down”.

The most significant technological advance in hanging occurred when the “new drop” scaffold was introduced.\textsuperscript{35} The new drop is a trapdoor mechanism whereby the portion of the scaffold floor where the prisoner stands is collapsed by action of a lever; the condemned person thus quickly drops through the floor of the scaffold with the rope around his neck. Although there is debate as to whether a purpose of introducing the new drop was to change the actual cause of death in hangings,\textsuperscript{36} eventually it became expected that use of the new drop should ideally result in instantaneous breakage of the prisoner’s spinal column. As a result, when slow strangulation has resulted from a hanging performed in the past two centuries, it has been common for it to be said that the hanging was botched.

The introduction of the new drop also created another possibility that became the form of botch traditionally most feared by hangmen: the accidental decapitation. The distance that a hanging victim is dropped depends on the length of the rope: decapitation will result if the rope is too long, whereas strangulation will occur if the rope is too short. The modern hangman’s struggle to avoid the botch can therefore be said to be a quest to “navigate between hanging’s Scylla and Charybdis” – slow strangulation on the one hand, and instantaneous decapitation on the other.\textsuperscript{37} Hanging remains a legal form of execution in 55 countries and in limited circumstances may be used in the US states of Delaware, New
Hampshire, and Washington.\textsuperscript{39}

B  \textit{Beheading}

As with hanging, execution by beheading is an ancient form of capital punishment.\textsuperscript{40} Traditionally, it was effected by use of an axe or sword,\textsuperscript{41} and in more recent times, by blade-bearing devices such as the Halifax gibbet, Scottish maiden, mannaia, or guillotine.\textsuperscript{42} In England and elsewhere in Europe, beheading was traditionally reserved for the nobility,\textsuperscript{43} but in France the guillotine was adopted for executing capital sentences during the French Revolution and was so used until the abolition of the death penalty in 1981.\textsuperscript{44}

In most cases of beheading, the prisoner is placed in a horizontal or a kneeling position and the fatal blow is delivered to the neck; ideally, the head is severed from the body with one chop. In order to prevent the victim from flinching, often a blindfold has been employed, and in more recent centuries, a variety of devices were developed that could be used to assist in immobilising the prisoner. With any form of beheading, the principal risk of botching arises from the possibility that difficulties will be encountered in completely severing the victim’s head from the body, whether it be from the incompetence of the executioner or from insufficient sharpness or weight of the cutting blade. When a blade-bearing device is used, botched executions may also be caused by technological malfunctions or improper use of the apparatus.

Beheading has only rarely been used or formally adopted as a legal method of execution by American jurisdictions,\textsuperscript{45} though use of the
guillotine has been proposed from time to time, most recently in 1996 by a member of the Georgia House of Representatives, who drafted a bill that would have given those sentenced to death a choice between electrocution and beheading by guillotine. 46 Today, beheading continues to be used as a legal form of capital punishment only in Saudi Arabia. 47

C Firing squad

Shortly after the invention of firearms, execution by firing squad was developed as a means of carrying out death sentences in European armies, particularly in times of war; it was an attractive option in armed forces because it was easy to carry out and required no special equipment apart from soldiers’ regular guns. 48 In non-military executions, prisoners are usually seated and strapped into a chair. Executioners are typically instructed to aim for the heart or the general chest region, and sometimes an actual target is applied to the prisoner’s body. Death is expected to be instantaneous as bullets puncture vital organs, but unless firing is done from point-blank range, there is always a risk that the bullets will...
either entirely miss the prisoner or wound him in such a manner that death is slow and painful. Cases in which an executioner is required to deliver a coup de grâce – a single bullet fired into the head – are usually regarded as instances in which the firing squad botched the execution by failing to inflict an instantaneous death. Execution by firing squad is still a legal form of execution in 54 countries and in the US state of Utah.

D Electrocution

In 1886, the state of New York enacted a bill that established a commission to investigate replacing hanging with a more humane form of execution, and after the commission unanimously recommended using electricity, the New York State Legislature adopted electrocution as the state’s official method of execution in June 1888. By so doing, New York became the first jurisdiction in the United States to abandon hanging as the official method of execution. Ultimately, electrocution came to be used by 26 US states and by the District of Columbia. No jurisdiction outside of the United States formally adopted electrocution.

In electrocution executions, the prisoner is strapped into “the chair” and a metal electrode is placed over the head and forehead, with one or more other electrodes being placed on the legs or on the spine. Moistened sponges are placed underneath the electrodes to assist in conduction of the current. Although initially a charge of around 1,000 volts was thought sufficient to cause death, experience demonstrated that a current of about double that is ideal in bringing about rapid death. Typically, two charges are administered, each lasting about a minute and separated by a 10-second interval; more than two charges may be necessary if death has not occurred.

Electrocution can be botched through the application of too much or too little electrical current. Too much current causes literal cooking of the flesh and brain, whereas too little will prolong death and may cause excruciating pain. Even a successful electrocution can have dramatic and shocking effects upon the body, so at times it is difficult to differentiate a botched electrocution from one that merely inflicted “normal” side effects. Today, the electric chair remains a possible form

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49 At 97–98.
50 Hands Off Cain, above n 39.
51 1886 NY Laws c 352.
52 For a summary of the report of the New York commission, see Mark Essig Edison and the Electric Chair: A Story of Light and Death (Walker, New York, 2003) at 95–99.
53 1888 NY Laws c 489.
54 Banner, above n 35, at 189. The US federal government has also used electrocution, because beginning in 1937 federal convicts were executed using the method that was in use in the state in which they were convicted.
55 Abbott, above n 23, at 84–85.
56 At 85.
57 At 85.
58 In arguing that the use of electrocution violates the Eighth Amendment
of execution only in the US states of Alabama, Florida, South Carolina, and Virginia. \(^{59}\)

E **Lethal Gas**

The use of asphyxiating gas was the second major American innovation in execution methods. Beginning in the 1870s, gas was often used in the United States to euthanase pets or other animals, and it had been occasionally suggested as a possible method of executing convicts, but lethal gas was generally considered to be an inferior and less scientific proposal than electrocution. \(^{60}\) In 1921, Nevada became the first jurisdiction to adopt this method of execution; its advocates reasoned that if a prisoner could be gassed while sleeping, such a procedure would be far more humane than hanging, firing squad, or electrocution. \(^{61}\) Performing an execution on a sleeping person proved to be too impractical, and so Nevada designed an airtight chamber into which poisonous gas could be blown.

Prisoners executed by lethal gas are typically strapped into a chair within the gas chamber with a stethoscope or heart monitor diaphragm attached to the chest. After the chamber is sealed, pellets of sodium cyanide are released into an aqueous solution of sulphuric acid within the chamber, which produces hydrocyanic acid, a highly toxic and pale-coloured gas. \(^{62}\) Within seconds of inhaling the fumes, the prisoner can become unconscious, and death is usually accomplished within a matter of minutes. \(^{63}\) Apart from technological glitches such as the pellets failing to drop or gas leakage from the chamber, botched gassings typically result from the prisoner thrashing from within the binding restraints and thereby dying in a more dramatic or frenzied fashion. If the prisoner holds his breath and gasps rather than breathing in the gas normally, to the US Constitution, Justice Harlan Brennan indicated some of the routinely reported results of using the electric chair: “[T]he 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. ... Witnesses hear a loud and sustained sound ‘like bacon frying,’ ... In the meantime, the prisoner almost literally boils: ‘the temperature in the brain itself approaches the boiling point of water,’ and when the postelectrocution autopsy is performed ‘the liver is so hot that doctors have said that it cannot be touched by the human hand.’ The body frequently is badly burned and disfigured.” *Glass v Louisiana* 471 US 1080 (1985) at 1087–1088 (Brennan J, dissenting from denial of certiorari) (footnotes omitted and paragraph structure modified).

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\(^{59}\) Hands Off Cain, above n 39.

\(^{60}\) Banner, above n 35, at 196.

\(^{61}\) At 196–197.

\(^{62}\) Abbott, above n 23, at 118.

\(^{63}\) At 118.
violent retching and convulsions may occur. Including Nevada, 11 US states would eventually adopt and use the gas chamber.64 Today, the gas chamber is a legal form of execution in Arizona, California, Maryland, Missouri, and Wyoming, but it is no longer used as the primary means of execution in any jurisdiction.65 As with electrocution, the use of lethal gas was never adopted by a jurisdiction outside of the United States.

F  Lethal Injection

In ancient Greece, solutions of poisonous hemlock were used to execute criminals, but throughout history poison was otherwise used only rarely as an execution method.66 In 1911, Nevada rejected a bill that would have made oral ingestion of poison a legal method of execution,67 but injection of poison into the veins of the condemned did not begin to be seriously considered until the 1940s.68 In 1953, a British Royal Commission issued a report that stated it had considered the possibility of recommending that the United Kingdom change its method of execution to chemical injection, but that the commission remained unconvinced that this method could yet be carried out “quickly, painlessly and decently in all cases”.69 In America, attention turned to the possibility of lethal injection soon after the 1976 Gregg v Georgia decision, which allowed for the resumption of capital punishment by the states.70 At the time, lethal injection was thought to have two fundamental benefits that made its adoption almost irresistible to US states. First, unlike lethal gas or electrocution, lethal injection required no expensive, specialised equipment. Second, lethal injection held out the promise of being a fully modern and humane method of killing the condemned: clean, clinical, efficient, painless, and thoroughly medicalised.

The traditional method of lethal injection is carried out by the injection of a three-drug “cocktail” into a supine prisoner. First, a rapidly acting barbiturate is administered – usually sodium thiopental – which results in loss of sensation and possible unconsciousness. Next, a muscle relaxant such as pancuronium bromide is used to paralyse the muscles used for breathing. Finally, potassium chloride is used to stop the heart.71 If administered in proper dosages with correct timing,72 unconsciousness

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64 Banner, above n 35, at 199.
65 Hands Off Cain, above n 39.
66 Abbott, above n 23, at 214.
68 Lethal injection was considered by the New York commission in 1888, but it was quickly passed over in favour of electrocution. At 296; Essig, above n 52, at 98.
72 A “Leuchter machine”, designed in the 1980s by inventor and Holocaust
typically results in 10 to 15 seconds with death following in less than five minutes; death is caused by respiratory and cardiac arrest. Such executions can be botched in a number of ways: excessive amounts of time or needle pricks can be spent searching for an appropriate vein on the prisoner; the drugs can be mistakenly administered into a muscle instead of a vein, which can cause extreme pain; incorrect dosages of drugs can be administered, causing convulsions or choking; needles can accidentally slip out of veins; and tubes can split or become kinked or otherwise blocked.

In 1977, Oklahoma became the first jurisdiction in the world to adopt lethal injection, with Texas following suit the very next day. Today, lethal injection is a legal form of execution in the People’s Republic of China, Guatemala, Taiwan, Thailand, 36 US states, and the federal government and military of the United States. It is now the primary means of executing capital sentences in all retentionist jurisdictions of the United States.

III Early Examples of Botched Executions

Early accounts of botched executions are rare. As discussed above, for most of recorded history, executions were processes rather than events, and in most societies a long and painful death was understood to be the fate of those who were condemned to die. Because of this, for much of history one of the only ways an execution could truly be botched was through the survival and escape of the prisoner. Even then, the rare incident in which this occurred was more likely to be regarded as a divine miracle than a botched execution.

Two of the earliest examples of such survival incidents are recounted in the Hebrew Bible’s Book of Daniel, which is set during in the Neo-Babylonian Empire and the early-Persian era of the sixth century BCE. In the first such account, the king has erected an enormous golden statue and has decreed that failure to worship the statue on cue is a capital offence, with the offender being condemned to be “cast into the midst of a burning fiery furnace”. Three regional governors – Hebrew men
named Shadrach, Meshach, and Abednego—refuse to worship the idol and admit forthrightly to the king, “we will not serve thy gods”. The capital sentence is executed and Shadrach, Meshach, and Abednego are bound and cast into the fiery furnace. The king is astonished when he sees four men walking in the midst of the fire, and Shadrach, Meshach, and Abednego emerge from the furnace completely unharmed. The king humbly attributes the survival of the three Hebrews to the intervention of their god, “who hath sent his angel, and delivered his servants that trusted in him, and have changed the king’s word”. In the second account, Daniel – also a Hebrew governor in a foreign empire – is “cast into a den of lions” when he violates a 30-day prohibition on petitioning any god other than the king. Daniel spends a night in the den, but in the morning is found alive, “and no manner of hurt was found upon him”; Daniel attributes his survival to an angel of his god, who “hath shut the lions’ mouths”.

A somewhat later example is found in the Martyrdom of Polycarp, a second-century CE account of the execution of the bishop of Smyrna. As related in the account, the Romans successfully execute Polycarp for his Christian beliefs, but they are unable to kill him using their preferred method of burning at the stake. After the fire is lit, it miraculously encircles Polycarp “like the sail of a ship filled by the wind”. The text reports that the scene was “not like flesh burning but like bread baking”, and that “a very fragrant odor” emerged from the pyre. To ensure that death would result, the executioner stabbed Polycarp through with a dagger, which resulted in the release of such a quantity of blood that the fire was completely extinguished. Although Polycarp was killed, it is clear from the account that he willingly offered his life to Christ as a sacrifice, and that as a result his death could not transpire as the Romans had envisaged.

The Hebrew names of the three were Hananiah, Mishael, and Azariah. Daniel 1:7.
Daniel 3:8–18.
Martyrdom of Polycarp 15:2
Martyrdom of Polycarp 16:1. A later addition to the text added that a dove flew out of the wound when Polycarp was stabbed. Holmes, above n 87, at 239, n 20.
It is possible that Polycarp died from baking or roasting rather than by burning or stabbing, as such results have not been unheard of in stake-burning executions. In 1528, Protestant theologian Patrick Hamilton was burned at the stake at St Andrews, but an observer stated that he took six hours to die and was roasted to death rather than burned. Alexandro
is intended to illustrate “that there should be so great a difference between
the unbelievers and the elect”.91

IV Botched Executions in the United Kingdom, its Antecedents,
and the British Empire

A Tales of Hanging Survival

The perception that divine intervention was responsible for any unusual occurrence that transpired during an execution was long-lived, as is illustrated by the remarkable story of the botched 13th-century execution of William Cragh. Cragh was a probably a supporter of Rhys ap Maredudd, a Welsh nobleman who instigated a revolt against King Edward I of England in 1287.92 In 1290, Cragh was captured by a supporter of Edward, William de Briouze, the Lord of Gower. Cragh was accused of multiple homicides and subsequently was hanged at a rudimentary gallows outside Swansea with another prisoner, Trahaearn ap Hywel. Cragh was hanged first: he was made to climb up a ladder, and a noose was tightened around his neck. The ladder was removed and Cragh was left to strangulate. Some minutes later, the hanging of Trahaearn commenced. Unlike Cragh, Trahaearn was not permitted to climb the ladder; but rather was hauled up by the neck via a rope that had been slung over the transverse crossbeam of the scaffold. Trahaearn was a large man, and his weight, combined with his considerable struggling, resulted in the collapse of the crossbeam of the scaffold. Although the executioner and other witnesses believed both men were already dead at the time of the structural collapse, Cragh and Trahaearn were hanged again, one from each arm of the scaffold. Both men swung from the gallows for a number of hours, until they were cut down at sunset for burial. The executioner and several witnesses reported that Cragh’s body exhibited traditional signs of death in hanging victims, including large amounts of blood in and around the mouth, throat, and nostrils; ashen-coloured and blotched skin; a voided bladder and bowels; a swollen, black, and lacerated tongue hanging from the mouth; eyeballs protruding from their sockets; teeth firmly clenched together; and no signs of movement, breathing, or heartbeat. Mysteriously, William de Briouze’s wife, Lady Mary de Briouze, begged for charge over Cragh’s

Alesio [Alexander Ales] Primus liber Psalmorum iuxta Hebræorum et divi Hieronymi Supputationem Expositus (Georg Hantzsch, Leipzig, 1554), reprinted in Peter Lorimer Precursors of Knox: or, Memoirs of Patrick Hamilton, the First Preacher and Martyr of the Scottish Reformation, Alexander Alane, or Alesius, its First Academic Theologian, and Sir David Lindsay, of the Mount, its First Poet (Thomas Constable, Edinburgh, 1857) 236 at 238.

corpse, and after her request was granted, Cragh began to revive. After eight to 10 days of convalescence, Cragh was strong enough to appear before Lord William and Lady Mary and pray that he would not be hanged a third time. Lady Mary would later claim that she had petitioned Thomas de Cantilupe, the deceased Bishop of Hereford, that he would intercede and that Cragh’s life would be spared. Cragh lived at least until 1307, long enough to testify at the canonisation hearings for Cantilupe.93

From today’s perspective, the likelihood of such an incident seems dubious, but because death in a medieval hanging was effected through slow strangulation rather than by neck breaking, it was not unheard of that a hanging victim would revive after being cut down.94 Breakage of the hanging rope was also not unusual.95 The case of Cragh was therefore reasonably anomalous, but far from unique, and papal interest in the case was limited to considering the possibility that Cragh had actually died and was resurrected, since “it was no miracle to revive a living man” who was merely the fortunate beneficiary of a botched execution.96 Nevertheless, survivors of hangings routinely attributed their escape to divine intervention or the miraculous intercession of a saint,97 and by Cragh’s day the tale of such an escape via the assistance of the Virgin Mary was already an ancient and well-known exemplum.98

Post-hanging revival occurred frequently enough in England that customs arose as to how the victim of a botched hanging was to be treated. For example, if a condemned person revived while in the churchyard or while being taken there for burial, he could not be taken into custody by the authorities as long as he remained within the confines of holy ground.99 Walter Wynkeburne, who was hanged in Leicester in 1363, revived while being transported to the churchyard for burial and was housed in the church by the clergy so as to prevent his rearrest and probable rehanging.100 A royal pardon for the survivor of a botched hanging could be expected once the king had been notified of the event,101

93 In 1320, after 13 years of investigations, Cantilupe was canonised by Pope John XXII. Cragh’s story was among those purported posthumous miracles of Cantilupe that was rejected by the papal commission. Hanska, above n 92, at 138.
94 Bellamy, above n 33, at 187.
96 Bartlett, above n 92, at 5.
97 Finucane, above n 95, at 50.
98 Hanska, above n 92, at 132–133.
99 Finucane, above n 95, at 49.
100 Henry Knighton Chronicon Henrici Knighton, vel Cnitthon, Monachi Leycestrensis (Joseph Rawson Lumby (ed), Eyre and Spottiswoode, London, 1895) vol 2 at 119.
101 See, eg, Close Rolls of the Reign of Henry III, 1234–1237 (HMSO, London, 1908) at 6 (pardon granted to Walter de Pyonne, who survived his hanging); Calendar of the Patent Rolls: Edward III, 1334–1338 (HMSO,
though the exercise of this prerogative was not given in every case and was often made conditional. Until the king had acted to pardon the condemned, the authorities were legally free to perform the hanging again. But due to the obvious notoriety of instances in which a pardon did follow a botched hanging, a popular but mistaken belief arose that at law a person could only be hanged once for an offence, and that if the accused survived a botched hanging, he was therefore entitled to be let free immediately. The persistence of such a belief is illustrated by the account of the botched hanging of David Evans in Carmarthen, Wales, in 1829:

The rope broke, and the unhappy man fell down beneath the gallows, unhurt but completely unnerved.

There were loud cries immediately from the crowd who were watching: “Shame! Let him go!”

The half-hanged man, staggering to his feet, exclaimed, “I claim my liberty. You have hanged me once, and you have no power or authority to hang me again.”

“You are greatly mistaken,” replied Calcraft [the hangman] firmly. “There is no such law as that – to let a man go if there is an accident and he is not properly hanged. My warrant and my order are to hang you by the neck until you are dead. So up you go, and hang you must until you are dead.”

Evans was forced up the scaffold ... and duly hanged, with protests still on his lips.

According to an account in the popular *Newgate Calendar*, Scottish
law could be far more favourable to survivors of botched executions. In 1728, Margaret Dickson was hanged at Edinburgh for infanticide. While being transported in her coffin for burial, she revived, and by the following morning had made a complete recovery. “By Scottish law”, concludes the account: 107

a person against whom the judgment of the court has been executed can suffer no more in future, but is thenceforth totally exculpated .... Mrs. Dickson then having been convicted and executed as abovementioned, the king’s advocate could prosecute her no farther.

Throughout Europe, however, such beneficial treatment was the exception and not the rule: one Swiss man was reportedly hanged no less than 13 times until the executioner gave up in frustration. 108

Even into modern times, however, a botched hanging could be seen as a divine signal that the condemned should go free. In the British colony of New South Wales in 1803, convicted murderer Joseph Samuel was unsuccessfully hanged three times, with the rope breaking each time. 109

After the third failed attempt, the authorities contacted Governor Philip Gidley King, who promptly commuted Samuel’s death sentence to life imprisonment, observing that “[i]t would seem that there has been Divine Intervention”. 110 Samuel thus went down in Australian lore as “the man they couldn’t hang”. 111

Incidents of obvious botching – such as when the rope broke or the scaffold collapsed – were far less common than those in which the condemned was revived post-hanging. This is not surprising, since it is likely that the vast majority of hanging survivors lived not because of the incompetence of the hangman, but because he had been bribed to facilitate a post-hanging revival. 112 The hangman’s self-sabotage was typically accomplished either by his placing the rope incorrectly around the prisoner’s neck, or by his cutting down the condemned from the gallows sooner than usual; after the hangman had done his part, revival by others would have been “a comparatively easy matter”. 113

In some locales, regardless of whether a bribe had been passed or not, it had become usual practice for the friends of the prisoner to attempt

107 Dixon.
At 156.
108 Robert Plot The Natural History of Stafford-shire (Theatre, Oxford, 1686) at 292; see also William Bates “Has Execution By Hanging Been Survived?” (1854) 9 Notes and Queries 453 at 454.
At 59.
110 At 59.
112 Radzinowicz, above n 35, at 194.
At 194.
a resuscitation once the body had been cut down and turned over for burial.  

**B Botched Beheadings and the Archetypal Bungler**

In England, a pardon or escape following a botched execution was far less likely when other forms of execution were used. In cases of beheading, a botch could only mean a horrifically painful death that was unnecessarily prolonged. When Henry VIII had 70-year-old Margaret Pole, Countess of Salisbury, executed at the Tower of London, the usual executioner was absent, and in his place “a wretched and blundering garçonnet" was given the axe. The novice reportedly missed Pole’s neck on his first few attempts – accidentally hitting her shoulder, then her head – and required several more blows to accomplish his purpose. Nearly a century and a half later, several botched beheadings by the royal executioner became so infamous that the bungling axeman’s name became the archetypal name for all executioners throughout the British Empire: Jack Ketch.

Jack Ketch was principally a hangman, and during his long tenure as London’s executioner he only carried out two beheadings, both of which were botched. According to Sir Charles Lyttelton, who witnessed the 1683 beheading of William, Lord Russell, “The hangman gave him 3 blows, besides sawing wth ye ax, before he cut his head of.”

See, eg, Henry Kensington “Revival After Execution” (1856) 2 Notes and Queries (2nd ser) 73 at 73 (claiming that at one time in the past, attempted resuscitation of a hanged prisoner was a “regular practice”); “Two Remarkable Executions” (1865) 65 Dublin University Magazine 90 at 103 (“[T]he criminal was cut down and delivered to his friends for interment. They made the usual attempt at reviving him, and in this instance succeeded.”). 


James Mackintosh The History of England (Carey and Lea, Philadelphia, 1831) vol 2 at 192. Some popular accounts have suggested that the execution was not simply botched, but that Pole refused to submit to the execution because she had received no trial, and that she was chased around the scaffold by the executioner, who was forced to repeatedly strike her with his axe until she collapsed. See, eg, Richard Jones Walking Haunted London (4th ed, New Holland Publishers, London, 2007) at 13; Abbott, above n 23, at 21. Such accounts have generally been dismissed as “fanciful”. Damian Flanagan “Notes” in Natsume Soseki The Tower of London: Tales of Victorian London (Damian Flanagan (ed and translator), Peter Owen, London, 2004) 197 at 215.


Letter from Charles Lyttelton to Christopher Hatton, 1st Viscount Hatton (21 July 1683) in Edward Maunde Thompson (ed) Correspondence of the Family of Hatton (Camden Society, London, 1878) vol 2, 32 at 32 (irregular
outrage over the “three butcherly strokes” prompted the publication and circulation of a two-page *Apologie* from Ketch. In his stated defence from the “grievous Obliquies and Invectives” that had been hurled at him, Ketch attempted to squelch the rumours surrounding the execution: he had not been drinking prior to the execution; he had not been imprisoned because of what occurred; he did not strike Russell in the shoulder with his first attempt; and after the first blow Russell did not yell out, “you Dog, did I give you 10 Guennies to use me so Inhumanely”. Ketch did admit that Russell had given him the guineas on the scaffold just prior to the execution, but maintained that Russell himself “was the real obstruct that he had not a quicker dispatch out of this World”, for Russell had refused to “pull his Cap over his eyes, which might possibly be the Occasion that discovering the Blow, he somewhat heav’d his body”. In other words, Lord Russell had flinched, which caused Ketch to miss. The *Apologie* did not explain why it had taken two more attempts to finish the job.

Two years later, as Ketch approached the beheading of the Duke of Monmouth, memories of Lord Russell’s botched execution were frequently recalled. Understandably, the Duke himself was concerned, as is attested to by a disquieting eyewitness account of the lead-up to the beheading:

M[onmouth] (To the Executioner.) *Here are six Guinneys for you; Pray do your Business well; don’t serve me as you did my Lord Russel; I have heard you struck him three or four times.*

*Here* (to his Servant) *take these remaining Guinneys and give them to him, if he does his Work well.*

*Exec.* I hope I shall.

*M.* *If you strike me twice, I cannot promise you not to stir.*

*…*

Then he lay down, and soon after he raised himself upon his Elbow, and said to the Executioner, *Prethee let me feel the Ax; he felt the Edge, and said, I fear it is not sharp enough.*

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121 At 2 (irregular spelling and capitalisation in original).
122 At 2 (irregular spelling and capitalisation in original).
123 Francis Ely and others *An Account of What Passed at the Execution of the Late Duke of Monmouth on Wednesday the 15th of July, 1685, on Tower-Hill* (Robert Horne, John Baker and Benjamin Tooke, London, 1685) at 3 (irregular spelling, italics and capitalisation in original).
Executioner. It is sharp enough, and heavy enough.

Then he lay down again.

But despite Ketch’s reassurances, Monmouth’s execution was botched far worse than Russell’s had been: after striking Monmouth with three insufficient blows, Ketch “flung away his Axe” in frustration. Being chided by the witnesses, Ketch took up the axe and added two more strokes, but “severed not his Head from his body till he cut it off with his Knife”. Ketch’s bungling “so incensed the people, that had he not been guarded and got away, they would have torn him to pieces”. Just over a year later, Ketch died, but his name lived on as the epithet the British public would hurl at all executioners, whether bungler or not.

Because beheadings were comparatively rare events and executioners therefore lacked the experience to carry them out efficiently, such executions continued to be botched in England long after Ketch’s tenure ended. When Colonel Edward Despard was convicted of high treason in 1803, he was sentenced with his co-conspirators to be hanged, drawn and quartered. As an act of royal compassion, the sentence was commuted to hanging followed by beheading of his corpse. Despard’s hanging went off without a hitch, but severing his head from his body proved difficult. A surgeon repeatedly hacked at the neck with a small dissecting knife, but amidst all his “haggling” was unable to complete the process of decapitation. In a fit of pique, the hangman “grabbed the head and twisted it around several times, at last separating it from the body”.

C The Unruly Crowd, William Calcraft, and the End of Public Hangings

As long as British executions were held in public, one of the surest signs that an execution had been botched was a negative reaction of the large crowd that would inevitably gather to observe the proceedings. In such cases, the executioner was often the target of public fury. One of the most notorious such instances occurred in December 1818 in Edinburgh,
when hangman John Simpson bungled the hanging of convicted robber Robert Johnston.\textsuperscript{130} At the time, Scotland was still using the short-drop method, and after the ladder was removed, Johnston’s toes remained on the platform. The commencement of the prisoner’s apparent slow strangulation horrified the crowd of spectators. A shower of stones and curses directed at the hangman and the police resulted in their retreat to safety; the crowd – “amid loud and repeated huzzas”\textsuperscript{131} – cut the unconscious Johnston down and attempted to demolish the scaffold. Shortly thereafter, a small riot ensued, resulting in a spectacle “which equalled in horror any thing ever witnessed in the streets of Paris during the Revolution”.\textsuperscript{132} Order was restored as the police beat back the rioters and recaptured Johnston, who was revived, and subsequently hanged until dead.\textsuperscript{133} It has been noted that “[t]here is something ironic in a crowd, gathered to witness a death, becoming violent in disgust over an unmerciful execution.”\textsuperscript{134} Nevertheless, fear of mob violence undoubtedly was one factor that led authorities in England to begin tinkering with the traditional means of execution.

When the site of London hangings was moved from Tyburn to Newgate in 1783, a significant technological advance was simultaneously introduced with the adoption of the trapdoor-drop scaffold. Although this device had been previously used in England, at this time it began to be used for all hangings at the new venue.\textsuperscript{135} For many years, it was conventional wisdom that the adoption of the new drop in England was designed to make executions “much more effective and also more humane” by replacing slow strangulation with breaking the victim’s neck.\textsuperscript{136} More recently, however, Gatrell has contended that there is no evidence for such a belief, and that the primary reasons for adoption of the

\textsuperscript{130} VAC Gatrell \textit{The Hanging Tree: Execution and the English People, 1770–1868} (Oxford University Press, Oxford, 1994) at 50.

\textsuperscript{131} “Extraordinary Execution” \textit{The Times} (London, 5 January 1819) at 3.

\textsuperscript{132} “Execution of Robert Johnston” \textit{The Scotsman} (Edinburgh, 2 January 1819) at 8.

\textsuperscript{133} “Extraordinary Execution”, above n 131, at 3; Gatrell, above n 130, at 50. Following the execution, there was some question as to whether the second hanging of Johnston was legal under Scottish law. One magazine cited the case of Margaret Dickson (discussed above in text accompanying nn 106–107) for the proposition that “a person who has been once suspended, and the time elapsed, cannot again be taken hold of for the same crime”. “Execution of Robert Johnston” (1819) 4 Edinburgh Magazine and Literary Miscellany 49 at 53. The magazine explained that in Johnston’s case, the argument was being advanced that “a warrant to hang a man until he be dead, is not a warrant to hang him till he is half-dead; to reanimate, or rather to restore him to sensation and feeling; and then to hang and torture him a second time”. At 53.

\textsuperscript{134} Michael Jasper “‘Hats Off!’: The Roots of Victorian Public Hangings” in William B Thesing (ed) \textit{Executions and the British Experience from the 17th Century to the 20th Century} (McFarland, Jefferson (NC), 1990) 139 at 142.

\textsuperscript{135} Radzinowicz, above n 35, at 202–203.

\textsuperscript{136} At 203.
drop “was to avoid the need to manoeuvre horses and carts in congested surroundings and to impart greater solemnity to the occasion”. On the other hand, when the new device was adopted, it was claimed at the time that the action of the drop, being “much more sudden and regular than that of a cart being driven away, has the effect of immediate death”. Indeed, the sheriffs who had made the decision to begin using the new drop bragged that it “is observed to put the unhappy objects out of pain in much less time than was usual at Tyburn”. But whatever was intended, hanged prisoners continued to die from slow strangulation for many years after the adoption of the drop. In a medical study from the 1990s, autopsies were performed on the bodies of 34 exhumed British prisoners who were hanged between 1882 and 1945; only six of those examined revealed evidence of cervical fractures.

Apart from Jack Ketch, no British executioner has become more associated in the public mind with botched executions than William Calcraft, who was appointed the executioner at Newgate in 1829. Calcraft had a reputation for being “particularly incompetent at his job, clumsy, [and] bungling”. Calcraft used the new trapdoor-drop scaffold, but he was incurably fond of hanging prisoners by means of exceptionally short lengths of rope: in most cases, he preferred to inflict slow strangulation rather than risk an accidental decapitation, since the latter type of botch generally resulted in the most vigorous crowd reactions against the hangman. Calcraft also enjoyed the attention given him at hangings, and would often pull on or hang from the prisoner’s legs – or even climb onto the victim’s shoulders – which accomplished the dual purpose of hastening death and entertaining the crowd. With the adoption of the new drop, it had became theoretically possible to calculate how long the rope should be for any particular prisoner in order to break his neck and cause a more or less instantaneous death, but as long as Calcraft presided over executions, there “never [was] much

137 Gatrell, above n 130, at 53–54.
138 HL “New Place of Execution” (1783) 53 Gentleman’s Magazine 990 at 990.
141 David Brandon and Alan Brooke London: The Executioner’s City (Sutton, Thrupp (Gloucestershire), 2006) at 197.
143 Anthony Stokes Pit of Shame: The Real Ballad of Reading Gaol (Waterside Press, Winchester (UK), 2007) at 53–54.
science in the system”: “Calcraft’s method of hanging was very rough, much the same as if he had been hanging a dog.”

At times, Calcraft probably wished he had taken more care. A particularly sensational execution occurred under his authority in 1856, when William Bousfield was hanged. Bousfield had attempted to commit suicide the night before and was in a weakened physical state, completely unable to stand. On the scaffold, Calcraft seated Bousfield on a chair, which was placed over the trapdoor. What happened next may have entertained the crowd, but it caught Calcraft completely off guard:

The sound of the falling drop had scarcely passed away when there was a shriek from the crowd of “He is up again!” and, to the horror of every one, it was found that the prisoner by a powerful muscular effort had drawn himself completely up to the level of the drop, that both his feet were resting upon the edge of it, and he was vainly endeavouring to raise his hands to the rope. One of the officers immediately rushed upon the scaffold, and pushed the wretched man’s feet from their hold, but in an instant, by a violent effort, he threw himself to the other side and again succeeded in getting both feet on the edge of the drop.

At this stage, Calcraft, who for unknown reasons had departed from the scaffold immediately, was called back by the police. Calcraft pulled Bousfield’s feet off the scaffold and left him to hang once more. But Bousfield was not yet finished:

Without naming names, a Times editorial issued a backhanded rebuke of Calcraft: “The smallest effort of common sense should surely enable those persons whose duty it is to preside over such matters to guard against the recurrence of such dreadful and afflicted scenes as those of yesterday.” In no small part due to Calcraft’s bungling, “the gloomy festival of punishment [began] dying out” in England, and the days of its public executions were numbered.

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145 “Execution for Murder” The Times (London, 1 April 1856) at 10.
146 At 10.
147 Bousfield’s execution took place on 31 March 1856, the day on which news reached London of the conclusion of the Treaty of Paris, which ended the Crimean War.
148 “The convict Bousfield was executed” The Times (London, 1 April 1856) at 9.
149 Foucault, above n 24, at 8.
On 29 May 1868, after months of rancorous debate, Queen Victoria gave Royal Assent to the Capital Punishment Amendment Act, which mandated that any judgment of death “shall be carried into effect within the walls of the prison in which the offender is confined”. Just three days previous, Calcraft had presided over the execution of Michael Barrett, an Irish Fenian bomber; Barrett’s execution was therefore the last British execution conducted in public. Calcraft had received death threats prior to the execution, and he was uncharacteristically nervous and circumspect at Barrett’s hanging. By all reports, Barrett died quickly, if not instantaneously, and the event concluded without incident, apart from various abusive “yells and execrations” directed at Calcraft from the crowd.

D Outrage and Reform

From thenceforth, British executions retreated behind prison walls, but because a representative of the press was usually permitted to join the small party that would witness the execution, botched hangings were inevitably publicised. When Joseph Welsh was executed in November 1869, The Times revealed that the “adjustment of the rope was slow and bungling, and such as to show that Calcraft’s age has unfitted him for his occupation”. But after the old executioner was pensioned off in 1874, it became clear that the haphazardness of Calcraft’s technique was not the sole cause of the problems with hanging. Although Calcraft’s replacements introduced longer drops, hangings in Britain continued to suffer from technological flaws and mistakes. At an 1883 hanging in Durham, the increased length of the rope caused the prisoner’s arm to become entangled in it, which considerably shortened the drop and required that the prisoner be hauled back up onto the scaffold. The

150 Capital Punishment Amendment Act 1868 (UK) 31 & 32 Vict c 24, s 2.

152 Brandon and Brooke, above n 141, at 80.
153 The Times reported that after the drop fell “Barrett did not move. He died without a struggle.” “The Execution of Barrett” The Times (London, 27 May 1868) at 9. However, a modern report has suggested, without attribution, that despite the relative cleanliness of the hanging, “still Barrett died in convulsions”. Brian P Block and John Hostettler Hanging in the Balance: A History of the Abolition of Capital Punishment in Britain (Waterside Press, Winchester (UK), 1997) at 73.

155 “Execution in Maidstone Gaol” The Times (London, 16 November 1869) at 6.
noose was untangled and placed once more around the prisoner’s neck, and the man was then suddenly and unceremoniously pushed through the trapdoor opening to complete the hanging. In 1885, the English public was introduced to its own “man they couldn’t hang” when three times the trapdoor jammed and failed to open on the scaffold at Exeter during the hanging of convicted “Babbacombe murderer” John Lee. When news of the Lee debacle was released, a furious media firestorm ensued, with considerable anger and frustration being directed at the executioner and prison officials.

The Lee incident, combined with the accidental decapitation of a hanging victim in Norwich later that year, led directly to Parliament’s 1886 establishment of the Capital Sentence Committee, headed by HA Bruce, Lord Aberdare. The Committee was charged with formulating recommendations whereby “all executions may be carried out in a becoming manner without risk of failure or miscarriage in any respect”. The recommendations of the committee’s 1888 report dealt primarily with the appointment of executioners; the practical means of conducting an execution; and the standardisation of the tools of execution, including scaffold design and rope thickness and tensility. Most significantly, the report included a “scale of drops” in table form, whereby using the weight and height of the prisoner, one could determine what length of rope would be sure to “produce instantaneous loss of consciousness and the speedy death of even the most robust”.

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157 Laurence, above n 105, at 123. Lee’s sentence was commuted to life imprisonment on compassionate grounds. For a modern comment on the flaws of Lee’s murder trial, see Barry Phillips “John Lee: An Aborted Execution” (1996) 160 JPN 466.

158 See McConville, above n 37, at 417–420.

159 John Deane Potter The Art of Hanging (AS Barnes, South Brunswick (NJ), 1965) at 173.

160 Bruce had been Home Secretary from 1868 to 1873 and was Lord President of the Council for seven months in 1873 and 1874. The other members of the committee were Henry Selwin Ibbetson (Conservative MP from Essex), Frederick Bramwell (a consulting engineer), Samuel Houghton (a medical researcher and scientific polymath), and Robert Mundy Gover (medical inspector of local prisons).

161 Report of the Committee Appointed to Inquire into the Existing Practice as to Carrying Out Sentences of Death, and the Causes which in Several Recent Cases Have Led Either to Failure or to Unseemly Occurrences; and to Consider and Report What Arrangements May be Adopted (Without Altering the Existing Law) to Ensure that All Executions May be Carried Out in a Becoming Manner without Risk of Failure or Miscarriage in Any Respect (1888) PRO Doc HO 144/212/A48697.

162 At x.
trial and error, but the committee’s table was based on medical research and experiments that had employed dynamometers and sacks of sand of varying weights tied to nooses.\textsuperscript{163} However, this official attempt to use scientific means to prevent botched executions shortly proved to be futile.

The 1891 execution of John Conway in Liverpool rekindled British outrage over botched hangings.\textsuperscript{164} Berry, the hangman, had used his personal table of drops in calculating the length of rope needed to hang Conway. However, the medical inspector who was present had made his own calculation, and he pressed Berry to employ a longer length of rope.\textsuperscript{165} Berry relented, but as a result Conway’s head was nearly ripped from his body, and the witnesses reported hearing blood gushing onto the ground. The screaming headlines in a local afternoon paper signalled the commencement of a media frenzy not unlike the one that had resulted from the failure to hang Lee: “EXECUTION OF CONWAY THIS MORNING. TERRIBLE SCENES ON THE SCAFFOLD. A BUNGLED EXECUTION. THE CONVICT’S HEAD NEARLY TORN OFF. GHASTLY DETAILS.”\textsuperscript{166}

In the late-19th century, capital punishment was still supported by a majority of the British population and a majority of parliamentarians, but following Conway’s botched execution, it became obvious to all that the revelation of any further debacles would result in the calls for abolition growing louder and more popular.\textsuperscript{167} The Home Office did what it could: it issued a memorandum to all sheriffs that contained a set of detailed instructions to executioners, a list of approved hangmen, and a revised table of drops with a re-emphasis that it be used.\textsuperscript{168} Eventually, the Home Office became the sole supplier of the rope and the other materials needed to carry out an execution.\textsuperscript{169} It would have been untenable to immediately prohibit reporters from attending executions, but press access began to be restricted; by the turn of the century, reporters were almost never permitted to attend executions in the United Kingdom.\textsuperscript{170}

In the years immediately following the 1885 Lee incident, there had

\begin{footnotes}
\item[163] Kaufman-Osborn, above n 38, at 88.
\item[164] McConville, above n 37, at 423–427.
\item[165] It is telling that neither Berry nor the medical inspector was using the official table of drops found in the 1888 report.
\item[166] “Execution of Conway This Morning” Liverpool Echo (England, 20 August 1891) at 4.
\item[167] One member of Parliament summarised popular sentiment when he wrote that “if some less disgusting method of execution is not soon devised, we shall certainly have to face before long a strong agitation against capital punishment, which I, for one, should be very sorry to see”. Henry Labouchere “Editorial” (1891) 30 Truth 242 at 242.
\item[168] McConville, above n 37, at 427.
\item[169] At 428.
\item[170] At 429. A popularly stated rationale for restricting press attendance at executions was that “a very unsavoury kind of sensational writing is [thereby] avoided”. Edmund Frederick Du Cane “Capital Punishment” (1898) 75 Chambers’s Journal 177 at 178.
\end{footnotes}
been some interest expressed in Britain that the method of execution be changed in order to avoid accidents and mishaps. Six weeks after New York had become the first US state to abandon hanging in favour of electrocution, a British MP asked the House of Commons why the United Kingdom “could not depart from the barbarous and old-fashioned means of execution” and replace it with “execution by electricity”, as had been done in America.\textsuperscript{171} The Home Secretary brushed the question off as one that was indeed “full of interest”,\textsuperscript{172} but the British government never seriously began considering alternatives to hanging until after the Second World War. By the end of the 19th century, the restrictions on press attendance at executions had effectively dried up the reports of botched executions in the United Kingdom and had the effect of removing from the public agenda any question of modernising the method of capital punishment. Capital punishment was abolished gradually in the United Kingdom between 1965 and 1998,\textsuperscript{173} but because of the lack of press access to hangings in the 20th century, botched executions played little role in the abolition debates.

E Colonial Botches

Unlike in the United Kingdom, in parts of the British Empire the controversy generated by botched hangings continued well into the 20th century. Most British colonies mirrored metropolitan Britain in that hanging was typically the chosen means of capital punishment, although firing squads were also occasionally employed. Capital sentences were common throughout the Empire, especially in the penal colonies: it has been estimated that prior to the 1856 introduction of representative government in New South Wales, hangings in the colony were “300 times as numerous in proportion to the population as in England”.\textsuperscript{174} Naturally, the traditional problems that bedevilled hangings in the homeland were also present when the colonies carried out a sentence of death. For example, when several Boer rebels were hanged for their participation in the Slaghter’s Nek Rebellion in the Cape Colony in 1815, four of the

\textsuperscript{171} (23 July 1888) 329 Parl Deb (3rd ser) 191 (Robert Farquharson, MP for West Aberdeenshire).

\textsuperscript{172} At 191 (Henry Matthews, Home Secretary and MP for Birmingham East).

\textsuperscript{173} In 1965, the sentence of death was abolished for murder in Great Britain (but not Northern Ireland) for a trial period of five years. Murder (Abolition of Death Penalty) Act 1965 (UK). In 1969, pursuant to the Act, Parliament by resolution made the effect of the Act permanent. In 1973, the sentence of death was abolished for murder in Northern Ireland. Northern Ireland (Emergency Provisions) Act 1973 (UK), s 1. Over the next 25 years, the death penalty was abolished for various other crimes, including arson in the royal dockyards, espionage, piracy with violence, and treason. With the enactment of the Human Rights Act 1998 (UK), s 21(5), the death penalty was completely abolished by the United Kingdom as a potential punishment for any crime.

\textsuperscript{174} CE Carrington The British Overseas: Exploits of a Nation of Shopkeepers (2nd ed, Cambridge University Press, London, 1968) at 211.
five condemned men had to be hanged twice due to ropes breaking.\textsuperscript{175} In British India, one magistrate characterised the haphazard nature of hanging procedures there as “shocking”,\textsuperscript{176} and botched hangings were said to occur frequently enough that by 1842 the authorities had devised a formal procedure to facilitate the reporting of irregularities or complications.\textsuperscript{177}

Problems were especially prone to occur in the early days of a colony, since execution procedures always required a period of time to be formalised and fine-tuned. In 1838, the new Province of South Australia sentenced Michael Magee to be hanged for attempted murder of a sheriff, but the authorities found it difficult to find a willing executioner, even after offering £10 compensation to entice a volunteer.\textsuperscript{178} Eventually, the cook of the South Australian Company was persuaded to act as the disguised “Jack Ketch”.\textsuperscript{179} The results of allowing an untrained cook to carry out a sentence of death were perhaps predictable:\textsuperscript{180}

But here commenced one of the most frightful and appalling sights that ever perhaps will be again witnessed in the colony. The noose had been so badly managed, that the knot, instead of the ear, came right under the chin of the dying man; and as the cart was drawn from under him, he did not fall, but merely slid gradually off; and there he was, hanging in the air, uttering the most excruciating cries, oh! God! oh! Christ! save me! and to make it worse, he had been so badly pinioned that he had got both his hands up to the rope, above his head, to prevent his choking and to ease the strain upon his neck. What was to be done? Jack Ketch was gone; where was he? He had been seen to gallop off amidst the hootings of the people ….

A police officer on horseback was dispatched to recall the Jack Ketch – as if the cook would know what to do any better than anyone else – and upon returning the hangman “made a fiendish leap upon the body of the dying man”\textsuperscript{181} by hanging onto Magee’s legs and shoulders for 13 minutes, the cook “choked him to death in mediæval style”.\textsuperscript{182}

In the Colony of New Zealand, no execution was ever botched

\textsuperscript{175} Patricia Ashman “Slaghter’s Nek” in James S Olson and Robert Shadle (eds) \textit{Historical Dictionary of the British Empire} (Greenwood Press, Westport (Conn), 1996) vol 2, 1019 at 1020.
\textsuperscript{176} FL Beaufort “Criminal Law in Bengal” (1849) 12 Calcutta Review 516 at 560.
\textsuperscript{177} Radhika Singha “‘No Needless Pains or Unintended Pleasures’: Penal ‘Reform’ in the Colony, 1825–45” (1995) 11 Studies in History 29 at 39, n 48.
\textsuperscript{178} T Horton James \textit{Six Months in South Australia} (J Cross, London, 1838) at 57.
\textsuperscript{180} James, above n 178, at 59–60.
\textsuperscript{181} At 60.
\textsuperscript{182} “The Death Penalty in South Australia” \textit{The Advertiser} (Adelaide, 25 August 1894) at 6.
quite as badly as Magee’s, but problems with hanging were common enough that one observer commented that executions conducted outside of Wellington were “often bungled” by amateur hangmen who inflicted slow strangulation on the condemned.183 A modern study has acknowledged that at least three of the 85 hangings in New Zealand history were definitively bungled because the prisoners died of asphyxiation,184 though the actual number may be higher.185

One botched hanging in particular generated calls for reform in New Zealand. In 1882, Taurangaka Winiata, the “Epsom murderer”, was hanged at Mount Eden Gaol in Auckland. After Winiata fell through the drop, “the deep, painful gasping of the half-strangled convict [was] distinctly audible”,186 the executioner was forced to pull on Winiata’s legs until death ensued.187 With apparent frustration, a physician who witnessed the execution commented to a fellow witness, “Well, I don’t think this any improvement on the last hangman.”188 The New Zealand Herald gasped that “[t]he whole proceedings were of the most barbarous and scandalous character, and were a disgrace to our humanity and civilisation.”189 Just weeks later, New Zealand newspapers began calling for the colony to eliminate the “barbarous paraphernalia of the gallows” in favour of the “marvellous agent” of electricity.190

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183 “Wellington Gossip” The Wanganui Herald (New Zealand, 7 June 1884) at 2. Sherwood Young Guilty on the Gallows: Famous Capital Crimes of New Zealand (Grantham House, Wellington, 1998) at 12–13. In 1987, a newspaper claimed that the last execution in New Zealand – the 1957 hanging of Walter Bolton – was badly bungled, and that in watching the spectacle of the slow strangulation, “three newspaper reporters present were sick, the priest had a heart attack and some prison wardens walked out”. “Last execution in 1957” The Evening Post (Wellington, 3 July 1987) at 1. These claims were made without attribution and indeed, a researcher has stated that they are unsupported by the evidence: “It is difficult to understand where the reporter got this information. A prison officer who was present maintains there was nothing unusual about this hanging, and nothing went wrong,” Young, above n 184, at 277. “Execution of Winiaia” The New Zealand Herald (Auckland, 5 August 1882) at 5. At 5. The Sheriff of Auckland denied that the hanging was botched and unconvincingly argued that the hangman did not tug on Winiata’s legs but that “he was simply adjusting the condemned man’s garments, which became disarranged”. “Execution of Winiata” Otago Witness (Dunedin, 12 August 1882) at 23. “Execution of Winiata” The Otago Daily Times (Dunedin, 5 August 1882) at 3; “Alleged Shocking Bungling: A Horrible Scene” The Evening Post (Wellington, 5 August 1882) at 2. The physician may have been referring to the botched hanging of convicted murderer Joseph Eppwright in Auckland nine years earlier. Eppwright had to be hanged twice due to problems with the drop on the gallows. See “Execution at Mount Eden Gaol” The New Zealand Herald (Auckland, 30 July 1873) at 5. “Execution of Winiata”, above n 186, at 5. “The Science of Hanging” The Observer (Auckland, 12 August 1882) at
nowhere, and like the United Kingdom, New Zealand retained hanging as the only means of execution. The 1934 strangulation hanging of William Bayly resulted in the hangman and his assistant being “strongly admonished” by prison officials, since it was feared that “such bungling gave powder and shot to the opponents of capital punishment”. Just seven years later, capital punishment for murder was formally abolished only to be reinstated in 1950 after a change of government. It was abolished for murder again in 1961 after a conscience vote in the House of Representatives, and in 1989 it was abolished for all crimes.

Unlike metropolitan Britain, public executions were common in many regions of the Empire until the 1930s, which meant that reports of botched executions had not been extinguished in the colonies as early as they had been at home. In Nyasaland, the 1924 hangings of two native men were botched: the first had to be hanged twice, and when the second’s rope broke, he was shot in the head by the presiding authorities. This incident caused such a stir that the administration of executions in the colony was centralised and the chief justice of the colony stated that in the future he would charge with murder any officer who dared to kill any prisoner by means not specified in the death warrant. Accounts of botched executions in the colonies were rarely publicised outside of the colony in question, but in 1940, the Colonial Office in London went so far as to establish a commission of inquiry in Sierra Leone colony to examine significant irregularities in execution practices and equipment that had been revealed.

A 1930 eyewitness

Although the proposal was occasionally revived in the press, see, eg, “Abolition of the Hangman” The Ashburton Guardian (New Zealand, 14 August 1888) at 3; “Away with the Gallows” The Observer (Auckland, 19 January 1889) at 3; “Modes of Execution” Ellesmere Guardian (Southbridge (NZ), 5 July 1893) at 4, there was never any serious political movement to replace hanging in New Zealand.

Donald F MacKenzie While We Have Prisons (Methuen, Auckland, 1980) at 75.

Crimes Amendment Act 1941, s 2.


Crimes Act 1961. The vote was 41:30 in favour of abolition. See (12 October 1961) 328 NZPD 2990.


Present-day Malawi.


At 410 (citing R v Jim and Makoshonga, National Archives of Malawi Doc S1/264/23).

At 417.
account of an execution in Rhodesia raises the distinct possibility that even 20th-century hangings in some British colonies were botched more often than they were not:

Within the cell the jailer and the “hangman” stood trussing up the victim. (The “hangman” by the way, was a man about town who had been asked to do the job for a fee.)

It took three minutes to bind the man, and at two minutes to six he shuffled into the room and was led to the trap doors …. And at this stage, as the wretched principal was on the trap doors, the following discussion took place between the jailer and the “hangman.”

Jailer: “Which way do we stand him?”

Hangman: “This way I think” – placing the man in position … “No, the other way.”

…

Jailer: “Where do we put the knot?”

Hangman: “Back of the neck, just under the ear.”

Jailer: “Sure? I always thought under the chin, just below the ear.”

As the Magistrate uttered a protest, because of the delay, the noose was placed over the man’s head and drawn tight until it wrinkled the skin of his neck. The Magistrate waved a signal and the lever was pulled. The trap doors opened with a clatter and the native disappeared into the darkness, the sudden tightening of the rope causing a sickening thud … the body dangled.

Next day, I met the Doctor and asked a few questions. “Nasty job yesterday, Doctor?” “It was,” He replied. “By the way, what was that queer rattle I heard some time after the man had dropped?” “To tell you the truth,” the Doctor replied, “The fall didn’t break his neck. The poor wretch was strangled to death; what you heard was his struggle for breath.” “How long did it take him to die?” “Exactly fourteen minutes.”

A botched execution of a woman played a major role in the abolition of capital punishment in Britain’s former colony of Canada. In 1935, two men and one woman were hanged in a Montreal prison for the murder of the woman’s husband. The hangings of the men were uneventful, but when Tommasina Teolis was hanged, the drop was too long and she was completely decapitated. The public disgust led one member of Parliament to propose that Canada change its method of execution to lethal gas. This proposal ultimately resulted in a 1937 parliamentary

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committee, which examined alternative means of inflicting the death penalty.205

Any action on the issue was essentially deferred because of the Second World War, but after the hanging of Teolis, proposals for the reform or abolition of capital punishment were never completely removed from the debate agenda in Canada. Another parliamentary commission studied capital punishment in the 1950s, which revealed that hangmen in Canada were neither trained nor evaluated and that consequently, botched executions were more common than had previously been understood.206 The final report of the commission in 1956 recommended that Canada retain the death penalty (partly because appearing lax in comparison to the United States would harm Canada’s interests)207 but that a more humane method of execution be adopted, preferably electrocution.208 Parliament failed to take any action on these recommendations, but the seeds of reform had been planted: 20 years later, capital punishment for murder was abolished in Canada after a conscience vote in Parliament.209

V Botched Executions in France

The ancien régime of France employed a variety of methods of execution, including hanging, beheading by sword, breaking on the wheel, burning at the stake, and being torn apart by horses.210 Because torture was relied on extensively by the French kings and was expected to accompany most executions,211 there are few pre-Revolution accounts of executions in which unexpected pain and suffering occurred. However, there are isolated reports of beheadings of aristocrats being botched. In 1766, after a disastrous military defeat in India, the Parliament of France condemned the commander of the ill-fated expedition, Thomas Arthur de Lally-Tollendal, to decapitation by sword for betraying the interests of the king. The royal executioner was Jean-Baptiste Sanson, but because of his advanced age and a stroke that had left him weak and partially paralysed, Sanson had appointed his son, Charles-Henri, to wield the sword in this instance.212 Charles-Henri raised the sword high, and

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205 At 352.
206 At 357.
207 At 364.
208 At 377.
210 Abbott, above n 23, at 125; Opie, above n 44, at 15–16.
211 So-called torture préalable (“preliminary torture”) was commonly applied to a prisoner who had been convicted of a capital offence. “Ordinary” judicial torture that was applied prior to conviction was known as torture préparatoire (“preparatory torture”). Langbein, above n 24, at 16–17.
212 Henry Sanson (ed) Memoirs of the Sansons, from Private Notes and Documents,
although his aim was true, the blow failed to decapitate the prisoner.\textsuperscript{213}

The blow was so violent that Lally was struck down to the earth. But he sprang to his feet in a moment, and he glared at Jean-Baptiste Sanson with a lamentable expression of indignation and reproach.

At this sight, the old executioner rushed towards his son, and, suddenly recovering his former strength, he took the bloody sword from his hands, and before the cry of horror which rose from the crowd subsided, Lally’s head was rolling on the scaffold.

In 1791, the French National Assembly famously enacted Article 3 of the Penal Code, which simply stated that “\textit{Tout condamné aura la tête tranchée}.”\textsuperscript{214} The justification for the change was egalitarian: torture would be prohibited, and all men who received the death sentence would now be executed in the same way.\textsuperscript{215} On humanitarian grounds, Joseph-Ignace Guillotin and others had pressed for decapitation to be effected “by a simple mechanism”,\textsuperscript{216} and Charles-Henri Sanson – who by then had inherited his father’s position – agreed. Perhaps recalling his embarrassing youthful attempt to decapitate Lally-Tollendal a quarter-century earlier, Sanson warned that beheadings by sword were too difficult and prone to error to be consistently used as a reliable means of inflicting the death penalty: some other means of beheading was needed to “avoid delays” and thereby protect executioners from “any accidental effervescence of the public”.\textsuperscript{217}

The “simple mechanism” that emerged was, of course, the guillotine, that “ultimate expression of Law”.\textsuperscript{218} Although botched executions using the guillotine were quite rare compared to the number of executions that were carried out,\textsuperscript{219} the guillotine did not completely eliminate the

\textsuperscript{213} 1688–1847 (Chatto and Windus, London, 1876) vol 1 at 128.
\textsuperscript{214} At 130.
\textsuperscript{215} “Every person condemned [to death] shall have his head cut off.” Code pénal (1791), art 3.
\textsuperscript{216} Daniel Arasse \textit{The Guillotine and the Terror} (Christopher Miller (translator), Allen Lane, London, 1989) at 11.
\textsuperscript{217} At 11.
\textsuperscript{219} Precise numbers of French guillotine victims are impossible to reconstruct, but there is general agreement that during the 1793–1794 Reign of Terror, between 35,000 and 40,000 were killed. However, this total includes those executed by drowning and those who died in overcrowded prisons, and the proportion killed by guillotine may constitute a small percentage of the total. Arno J Mayer \textit{The Furies: Violence and Terror in the French and Russian Revolutions} (Princeton University Press, Princeton (NJ), 2000) at 310. It is known that between April 1793 and July 1795, Charles-Henri Sanson carried out 2,831 beheadings by guillotine. Abbott, above n 23, at 133.
unexpected. The first person sentenced to death by guillotine in Lyon was Joseph Chalier, a radical Jacobin politician. At his 1793 execution, the guillotine was mounted on a scaffold that was inadvertently slanted, which led to an unusual malfunction in the guillotine’s operation. After Chalier was secured underneath the blade by the iron collar, the executioner released the blade, but instead of its usual quick-drop action, the blade fell quite slowly, as if something was impeding its progress. The blade was eventually stopped by Chalier’s neck, which received a “superficial wound”. The executioner inspected the device, and finding no mechanical obstruction to the blade, raised it again, and performed the procedure again, with the same result. This time Chalier’s wound was made slightly deeper. As the crowd’s discontent grew louder, the beheading was attempted a third and fourth time by the panicked executioner, but each time the blade descended gradually and only worsened Chalier’s neck wound. After the fourth attempt, and the authorities being in imminent danger of violence from the crowd, the executioner produced a large knife, which he used to brutally decapitate Chalier. Similarly, in 1806 in Bruges, three drops of the guillotine blade were required to sever the head of Isabeau Herman. Upon witnessing the spectacle, a mob rushed the scaffold and demanded that the old German executioner be stoned to death; he was saved only by the intervention of police.

Although such bunglings were rare, ultimately it was a botched execution that led to the elimination of public beheadings in France. In 1939, German conman Eugen Wiedmann was convicted of five murders by a French court and was sentenced to death. In an attempt to allow the public execution to proceed as quietly as possible, the State scheduled it to be carried out at Versailles at four o’clock in the morning, with the order that no scaffold be erected in the days leading up to the event. Unexpectedly, hundreds turned out for the execution; the size and excitement of the crowd, which was separated from the guillotine only by a police cordon, rattled the executioner Henri Desfournoux, who had only recently been appointed. After Wiedmann’s body was strapped down, it was discovered that the iron collar to secure his neck was out of alignment with the blade and would need to be adjusted. Not wanting to

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221 Abbott, above n 6, at 92.
222 Arasse, above n 215, at 123. Arasse notes that executioner’s bungling in this case led to his own execution.
223 At 124; Abbott, above n 6, at 96–97.
225 Abbott, above n 6, at 100.
226 Grivet, above n 224, at 160.
waste any more time tinkering with the machine (it was 4.30 already and there was now enough light for photographs, which the authorities had wanted to avoid), Desfournneaux instructed his assistant to firmly grip and pull on Wiedmann’s ears and hair to move his neck into position and to prevent his head from moving.\footnote{Abbott, above n 6, at 101.}

\[
\text{Even as the man obeyed, the executioner released the blade; it descended rapidly, severing the head and sending the assistant reeling backwards, his clothes soaked with the blood which pumped from the torso to flood across the ground and into the gutters surrounding the guillotine.}
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In the media, the reports and photographs of the event and the eagerness of the crowd were a sensation. In response, Prime Minister Édouard Daladier signed a decree-law that mandated that future executions take place within prisons with no journalists in attendance.\footnote{Grivet, above n 224, at 160.}

In France, the spectacle of a botched execution had led directly to the abolition of public executions.

After 1939, reports of botched executions in France became virtually non-existent due to strict laws that comprehensively prohibited all reports on executions apart from the repetition of brief government statements that an execution had occurred; even relatives of the victim were prohibited from attending most executions.\footnote{At 151–152.}

\begin{itemize}
\item As a consequence, “[n]o one could oppose capital punishment in France as a consequence of learning concrete details about the guillotine in action because this information was largely kept secret.”\footnote{At 151.}
\item But France nevertheless went on to abolish the death penalty in 1981, despite overwhelming majority support among the populace for retention.\footnote{At 152.}
\end{itemize}

The fact that this was accomplished with the spectre of botched executions playing virtually no role in the process was a testament to the deep abolitionist leanings of the French ruling élite.

VI Botched Executions in the United States

A Early American Botches

Most of the early American settlements in what became the United States were English colonies; because of this, early American colonists utilised hanging as the default method of execution,\footnote{For instance, despite the popular stereotype, the convicted witches at Salem in Massachusetts Bay Colony were not burned at the stake in 1692, but were hanged. One of the accused, Giles Corey, was pressed to death with stones, but this was a case of death during judicial torture, not an execution of a death sentence. Much has been written on the Salem witch trials; for a succinct introduction to the subject, see K David Goss The Salem Witch Trials: A Reference Guide (Greenwood Press, Westport (Conn), 2007).} and by the late-
18th century, hanging was overwhelmingly the preferred method. As in England, hangings could be untidy events, and a typical American botch prior to the widespread use of the new drop consisted of the victim having to be hanged more than once because of a rope breakage or other problem. The earliest such report is from the 1646 hanging of Mary Martin for infanticide: Cotton Mather states that the Martin had to be hanged twice “through the Unskilfulness of the Executioner”. But America also mirrored England in that even after the new drop was widely adopted, botches continued to occur. When Thomas Lee was hanged for burglary in New York using a trapdoor scaffold in 1786, the rope slipped, and after awkwardly hanging for two minutes, Lee informed the executioner, “it does not choak me”.

Executions in the United States began to be moved to the privacy of prisons several decades before the same was done in the United Kingdom. Rhode Island led the way when in 1833 it began conducting all executions within prison walls, and by the middle of the century 14 other states had followed suit. But unlike the situation in France and the United Kingdom, the occurrence of botched executions was not a major factor in motivating US jurisdictions to make this change. Rather, the 19th-century adoption of private executions in the United States was prompted primarily because of government fears of the unruly, festival-like crowds of spectators that inevitably gathered to watch a hanging; it was thought by the authorities that converting executions into private events would better promote the popular American values of the time: “restraint, discipline, control, and order”.

Ending public executions also had the added benefit of preventing cases of post-hanging revival, since such incidents typically occurred after public executions where family or friends would be charged with disposal of the body. Accounts of such revivals in America were relatively common in the late-19th century in the states that retained

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235 Francis Shallus *Chronological Tables, for Every Day in the Year* (Merritt, Philadelphia, 1817) vol 2 at 503 (irregular spelling in original).

236 Christopher S Kudlac *Public Executions: The Death Penalty and the Media* (Praeger, Westport (Conn), 2007) at 17.

public executions. In one particularly colourful case, Jack Lambert of Charleston, North Carolina, was hanged and was believed to have been revived afterwards by his family with the assistance of a doctor, “two pots full of boiling water, two pairs of heavy woollen blankets, an electric battery, aromatic spirits of ammonia, and other materials”. Because Lambert had made the unusual last request that the drop be made as small as possible so that he could be killed by strangulation rather than by neck breaking, it became obvious that Lambert’s survival was more deft escape than botched execution. As in England, those who survived executions could legally be hanged a second time, and that was the usual fate for a temporarily lucky escapee.

B Post-Civil War Tinkering and Abolition

It may be tempting to assume that the US Civil War desensitised Americans to concerns about unnecessarily painful deaths, but the opposite appears to have occurred. A veritable explosion of post–Civil War botched executions occurred in 19th-century America, but not because executioners had become less competent: “Hangings were as variable as they had ever been, but now spectators were upset at the sight of suffering.” At a non-public hanging in New Jersey in 1868, the fact that the prisoner writhed on the rope for five minutes after being hanged was enough for the witness from The New York Times to describe the event as a “fearful … horrible scene”. In an attempt to speed death, many jurisdictions experimented with longer drops in the early 1870s, with predictable results: death did come more speedily, but the incidence of accidental decapitations or mutilating tears to the neck also rose sharply.

In three exceptional cases, botched hangings led directly to the abolition of capital punishment in a state. When Wisconsin joined the Union in 1848, the only state that had abolished capital punishment for murder was Michigan, which had done so the previous year. In 1851, Wisconsin carried out its first execution as a state when John McCaffary was hanged for murder, and a crowd of a few thousand turned out in Kenosha to watch the event. No trapdoor scaffold was available, so officials threw the rope over a branch of a tree and hoisted McCaffary off
the ground. McCaffary struggled on the rope and was reported by the local newspaper to have taken at least 20 minutes to die. Abolitionists in the state used the gruesome nature of the execution in their push for abolition, which was achieved in 1853 with the passage of a law that made life imprisonment the mandatory punishment for murder. McCaffary’s execution was the first and last to be carried out in Wisconsin’s history.

Over 30 years later, a nearly identical path to abolition emerged in Maine, although the botched execution that prompted reform in this case did not occur in public. Throughout the 19th century, there had been a strong abolitionist movement in Maine, but legislators were always closely divided between retentionists and abolitionists: in 1876, the Legislature eliminated capital punishment in a razor-thin vote, only to restore death by hanging seven years later by an equally tenuous margin. After Daniel Wilkinson was hanged in November 1885, it was widely reported throughout the state that doctors had monitored the prisoner’s heartbeat in the minutes after the execution, and that it was clear that Wilkinson had been alive on the rope for 15 minutes; the lingering death was attributed to the bungling of the hangman. This incident, which proved to be the last execution carried out by Maine, was instrumental in breaking the political deadlock in the state: just over a year after Wilkinson’s botched hanging, over three-quarters of the members of the Legislature voted to abolish capital punishment.

Abolition in Minnesota followed a similar, though less impulsive, tack. William Williams was hanged in 1906, but the sheriff had overestimated the length of rope needed, so after dropping through the trapdoor, Williams immediately hit the floor. Three quick-thinking deputies took hold of the rope and cinched Williams up so that his feet were off the floor. Newspapers violated a state law that prohibited detailed reports of executions by relating how Williams had slowly strangulated to death as the deputies suspended him over a period of 14-and-a-half minutes. The day after the execution, the governor of Minnesota

246 Martin Hintz Forgotten Tales of Wisconsin (History Press, Charleston (SC), 2010) at 61; Michael Bie It Happened in Wisconsin (Morris Book, Guilford (Conn), 2007) at 23.
247 “Execution of John McCaffry [sic]” The Telegraph (Kenosha (Wis), 22 August 1851) at 1.
248 1853 Wis Sess Laws c 103.
250 John F Galliher and others America Without the Death Penalty: States Leading the Way (Northeastern University Press, Boston, 2002) at 56.
251 1887 Maine Laws c 133; Galliher, above n 250 at 59; Schriver, above n 249, at 285.
252 “Displayed His Nerve to the Very Last” The Saint Paul Dispatch (Minnesota, 13 February 1906) at 3.
253 Joseph E Hennessey “This Is Murder: I Am Innocent” The St Paul Daily News (Minnesota, 13 February 1906) at 1.
254 “Displayed His Nerve to the Very Last”, above n 252, at 3.
opened an investigation into the incident and later recommended to the Legislature that the death penalty be abolished, stating that he would rather resign than preside over another hanging in Minnesota. An abolition bill was defeated in 1909, but in 1911 Minnesota enacted a law that abolished capital punishment. As in Maine, over three-quarters of legislators voted in favour of abolition, and the outcome was at least to some extent a direct result of the fallout of Williams’s botched hanging.

C New Methods, New Botches

From an early date, the spectre of botched hangings had promoted technological change in the conduct of American executions. At the 1831 execution of pirate Charles Gibbs, the US federal government experimented with a new method of hanging called the “upright jerker”, in which the noose was attached to other ropes, which were in turn connected to a series of weights and pulleys. When the device was activated, the prisoner would be suddenly pulled upwards by the weights with enough force to snap the spinal cord. Although the upright jerker became popular in a small minority of jurisdictions, mistakes still occurred due to human error in operating the device, which was far more complicated than the traditional trapdoor scaffold. After a series of mishaps in the 1870s, nostalgia for the drop method began to grow, with some observers even claiming that the upright jerker was less humane than traditional means of hanging.

1 Electrocution botches

New York adopted the electric chair in 1888 and thereby became the first US jurisdiction to abandon hanging. Famously, the first use of the electric chair in 1890 was a spectacularly bungled job. William Kemmler had been convicted of murder and sentenced to death in the new electric chair. The US Supreme Court had ruled that executing a prisoner by electrocution was constitutionally sound, and public interest in the new procedure remained high as the day of the execution arrived. After Kemmler was strapped into the chair, the current was applied for 17 seconds. The attending doctor declared that Kemmler was dead and pointed out to the witnesses the “unmistakable evidence of death” shown

256 1911 Minn Laws c 387.
257 Galliher, above n 250, at 82.
259 Banner, above n 35, at 171–172.
260 1888 NY Laws c 489.
261 Re Kemmler 136 US 436 (1890).
by the hue of Kemmler’s skin. \(^{262}\) Just as the witnesses were preparing to leave the execution chamber, several noticed at once that Kemmler’s chest had started to heave and the sound of raspy breathing could be heard emerging from his lips. Chaos erupted in the execution chamber as the witnesses began shouting: “Great God, he is alive!” “Turn on the current!” “See, he breathes!” \(^{263}\) One reporter shouted, “For God’s sake kill him and have it over!” \(^{264}\)

The current was hastily turned back on and this time was left on for over a minute, and the electrical dynamo began unevenly snapping under the strain. \(^{265}\) The electrodes on Kemmler’s head and spine burned through the sponges and began to cook his flesh and hair, and beaded blood appeared on his face as if it were sweat. \(^{266}\) A sickening odour permeated the room, and one witness vomited. \(^{267}\) “The execution cannot merely be characterized as unsuccessful”, The New York Times witness wrote: “It was so terrible that the words fail to convey the idea.” \(^{268}\) The headline in Kemmler’s hometown paper was blunt: “KEMMLER’S DEATH WAS DISGUSTING”. \(^{269}\) It was later discovered that due to technical errors and a broken voltmeter, the voltage that passed through Kemmler was only about 700 volts (the executioners had intended the current to be more than twice as strong). \(^{270}\) Also amidst the recriminations, medical authorities came to a consensus that Kemmler had probably died after the first charge and that the “breathing” that was observed was in fact a result of involuntary muscle contractions of the autonomic nervous system. \(^{271}\) But these explanations were not publicised with the same enthusiasm and drama that attended the initial reporting of the incident, and it took years to rehabilitate the reputation of electrocution.

That rehabilitation was accomplished as use of the electric chair in New York became more and more efficient and physicians continued to promote their opinion that death resulting from electrocution “is undoubtedly painless and instantaneous”. \(^{272}\) Other states followed New York in adopting electrocution, and although there were ongoing scientific and popular debates about whether the electric chair was the most effective means of inflicting death, botched electrocutions were
rare. In part, this was because it had become conventional wisdom that although death by electrocution was instantaneous, electrocution nevertheless appeared to observers to be particularly dramatic and painful. Those who invented the electric chair had intended to take some of the spectacle out of executions, but its adoption may have in fact resulted in the opposite effect.

As compared to hanging, the electric chair was a very reliable means of effecting death, but the method proved to be fallible from time to time. In the late 1940s, a botched electrocution that failed to kill the prisoner prompted the US Supreme Court to consider whether it was constitutionally permissible to “execute” a prisoner twice. In May 1946, 17-year-old Willie Francis remarkably survived his execution in Louisiana’s electric chair, in which he received two separate jolts of electricity. After Louisiana scheduled a second execution date for Francis, the case made its way to the Supreme Court, where in 1947 a 5:4 majority of the Court held that the US Constitution would not be offended by a second execution, in part because Francis’s situation was “just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block”. “Accidents happen for which no man is to blame”, the majority sniffed, and “[l]aws cannot prevent accidents”. Later the same year, Francis was successfully electrocuted.

Since the development of lethal injection in the 1970s, use of electrocution in the United States has significantly decreased. The dramatic effects that electrocution can have on the body – as compared to the relatively benign physical reaction to lethal injection – has undoubtedly played a significant role in the decision made by many jurisdictions to discontinue use of the electric chair. For example, in holding that Georgia’s use of the electric chair violated the state constitutional ban on cruel and unusual punishment, a 5:4 majority of the state supreme court cited evidence that whether or not an electrocution is botched, electrocution undoubtedly causes mutilation to the prisoner’s body in the form of burns, blisters, and “cooked brains”. The majority contrasted these “necessary by-product[s] of death by electrocution” with the “minimally intrusive procedure” of lethal injection and concluded that the state must use the “less barbarous means”.

A study of all executions in the United States between 1977 and 2001

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273 See Banner, above n 35, at 190–192 for a summary of these debates.
274 For modern accounts of the case, see Arthur S Miller and Jeffrey H Bowman Death by Installments: The Ordeal of Willie Francis (Greenwood Press, New York, 1988); Gilbert King The Execution of Willie Francis: Race, Murder, and the Search for Justice in the American South (Basic Civitas, New York, 2008).
275 Louisiana ex rel Francis v Resweber 329 US 459 (1947) at 464.
276 At 462, 465.
277 Dawson v State 554 SE 2d 137 (Ga 2001) at [7].
278 At [6], [8].
determined that 10 of the 149 electrocutions – or 6.7 per cent – had been botched.\textsuperscript{279} Incidents of electrocution where unexplained flames and sparks have erupted and burned the prisoner have occurred in Alabama, Florida, Indiana, and Virginia.\textsuperscript{280} Some of the more recent incidents of botched electrocutions have been particularly dramatic. In 1990, when Jesse Tafero was put to death in Florida’s electric chair, three charges of electricity were required and witnesses reported fire, smoke, and sparks bursting from the prisoner’s head.\textsuperscript{281} It was widely assumed that Florida’s electric chair – by this time affectionately nicknamed “Old Sparky” – had somehow malfunctioned,\textsuperscript{282} but the chair was tested and was found to be working properly.\textsuperscript{283} In this case, it was discovered that human error had caused the botch: the wrong type of sponge was used on Tafero’s head, and the sponge had caught fire, which resulted in flames and smoke.\textsuperscript{284} Seven years later, a similar event occurred with the Florida chair when a mask covering Pedro Medina’s face ignited, causing foot-long blue and orange flames to shoot from his head.\textsuperscript{285} In this instance, what garnered nearly as much attention as the incident itself was the reaction of Bob Butterworth, the state Attorney General: “People who wish to commit murder, they better not do it in the state of Florida because we may have a problem with our electric chair.”\textsuperscript{286} In 1997 and again in 1999, the Florida Supreme Court held that the use of electrocution in general – and Old Sparky in particular – did not constitute cruel or unusual punishment.\textsuperscript{287} In 1999, Florida’s 76-year-old electric chair was quietly replaced,\textsuperscript{288} but after yet another incident in which a prisoner bled from the nose and appeared to continue to breathe after being electrocuted,\textsuperscript{289} Florida went on to adopt lethal injection as its principal method of execution.\textsuperscript{290}

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\textsuperscript{279} Borg and Radelet, above n 5, at 150.  
\textsuperscript{280} At 154.  
\textsuperscript{281} Ellen McGarrahan “3 Jolts Used to Execute Killer” \textit{The Miami Herald} (Florida, 5 May 1990) at A1.  
\textsuperscript{282} See, eg, “Convicted Killer Electrocuted in Faulty Chair” \textit{San Francisco Chronicle} (California, 5 May 1990) at C11.  
\textsuperscript{286} At B9.  
\textsuperscript{287} \textit{Jones v State} 701 So 2d 76 (Fla 1997); \textit{Provenzano v Moore} 744 So 2d 413 (Fla 1999).  
\textsuperscript{288} Mark Silva “Old Sparky Replaced by a Newer Model” \textit{The Florida Times-Union} (Jacksonville, 8 May 1999) at A1.  
\textsuperscript{289} Rick Bragg “Florida’s Messy Executions Put the Electric Chair on Trial” \textit{The New York Times} (New York, 18 November 1999) at A14.  
\textsuperscript{290} 2000 Fla Laws c 2 (“A death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution.”).  
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2 Firing squad and lethal gas botches

Perhaps primarily because of their infrequent use, executions by firing squad and lethal gas have only rarely been botched in the United States. Unlike lethal gas, firing squad was not a new method of execution that had been adopted to replace hanging; rather, it was simply an alternative to hanging that was rarely used in the United States. The most notorious firing squad incident occurred in May 1879 at the execution of Wallace Wilkerson in Provo, Utah Territory. Wilkerson refused to be strapped to his chair but allowed the sheriff to pin a paper target to his chest. Just prior to the shots being fired, Wilkerson proudly straightened his spine and threw his shoulders back, which had the effect of raising the paper target to a position that was just above his heart. Three bullets struck the paper target, with a fourth shattering Wilkerson’s arm: the prisoner leaped from the chair, howling “My God! My God! They missed it!” No coup de grâce was administered, and Wilkerson took 27 minutes to bleed to death on the dusty ground.

Botched executions using lethal gas have been slightly more common. California performed its first gas chamber executions in December 1938 with the double execution of Albert Kessell and Robert Lee Cannon, but the two did not go quietly: they shouted and protested in the gas chamber until they started retching with convulsions, which they suffered for well over 10 minutes. In this case, if the executions could be said to have been botched it was clearly the fault of the prisoners, but an attending physician expressed doubt as to whether the new method of execution was more humane than hanging:

The idea that cyanide kills immediately is hooey. These men suffered as their lungs no longer absorbed oxygen and they struggled to breathe. They died of an internal suffocation against which they had to fight and from which they must have suffered.

The nature of the first gassing by California prompted the San Francisco Chronicle to speculate that it would likely inspire a new wave of abolitionism in the state.
The Kessell and Cannon incident did not lead to abolition in California, but in more recent times, states began the process of abandoning the gas chamber after two particularly disturbing executions occurred. In December 1983, Mississippi executed Jimmy Lee Gray using lethal gas. After Gray initially inhaled the fumes, his body began to twitch and convulse; as his head jerked backwards, he smashed it against a metal pole “so violently that the chamber seemed to shake from the impact”. After eight minutes of Gray repeatedly banging his head against the pole, the witnesses were asked to leave the execution chamber. Within six months, the Mississippi Legislature had enacted a law that stated that lethal injection would be used to carry out all capital sentences pronounced after 1 July 1984.

The same response was prompted in Arizona after the execution of Donald Eugene Harding in April 1992. Harding took over 10 minutes to die, and he violently thrashed in the chair with spasmodic jerks, “gasping, shuddering and desperately making obscene gestures with both strapped-down hands”. Press witnesses described the execution as “ugly”, “extremely violent”, and “not a clean and simple death”. Although the police chief who presided at the execution challenged such characterisations, the damage had been done, and in the November 1992 election, Arizona voters approved a constitutional amendment that introduced lethal injection as a legal method of execution.

3 Lethal injection botches

Since the widespread adoption of lethal injection in the United States, botched executions have been relatively uncommon. In his Internet list of well-publicised botched executions in America, Michael Radelet has included 31 incidents of lethal-injection botches between 1985 and 2010. While this raw number may leave the impression that there is an epidemic of botched lethal injections, the 31 examples represent less than three per cent of the 1,060 lethal injection executions administered

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298 Christianson, above n 295, at 211.
299 At 211.
300 1984 Miss Laws 448.
302 Charles L Howe “Arizona Killer Dies in Gas Chamber” San Francisco Chronicle (California, 7 April 1992) at A2.
303 At A2.
in the United States between 1982 and 2010. And unlike the often physically gruesome nature of botched hangings, shootings, gassings, and electrocutions, botched lethal injections have been comparatively tame. Spending an inordinate amount of time searching for a suitable vein on the prisoner is undoubtedly an unexpected delay that may cause psychological distress and suffering for the condemned and witnesses alike, but such an incident is not the type of botch that stokes public outrage against the death penalty. For example, in 2000, after it was reported that Bennie Demps had complained in his dying statement that he had been “butchered” by the 33-minute search for a suitable vein in his arm, the public’s anger was directed more at Demps than at the death penalty. The letters to the editor of the *St Petersburg Times* published a week after the execution are telling: while some argued that what Demps had suffered was no different than what was endured daily by hospital patients and blood donors across the country, others pointed out that the botch was inconsequential when compared to the horrific nature Demps’s crimes. The reasonably efficient execution method of lethal injection has given the abolitionist who would rely on the horror of botched executions a particularly difficult row to hoe.

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306 Death Penalty Information Center “Execution Database” <www.deathpenaltyinfo.org>. While Radelet emphasises that his Internet list is not intended to be comprehensive, the three per cent rate for lethal injection botches is roughly equivalent to the 3.8 per cent rate Radelet identified in his more formal study of 584 lethal injection executions performed between 1977 and 2001. See Borg and Radelet, above n 5, at 150. Other death penalty opponents have argued that the number of lethal injection botches is much higher. One expert in anaesthesiology argued in 2001 that “[w]e know that in about 40 percent of cases where lethal injection has been used, there has been misuse in one way or another”. Charles M Madigan “A Federal Killing Q&A with Dr Edward Brunner” *Chicago Tribune* (Illinois, 22 April 2001) at 1.


308 Catherine Sypniewski “Bennie Demps’ ‘Ordeal’ was Nothing Unusual” *St Petersburg Times* (Florida, 13 June 2000) at A11; Steven Davis “Many Endure the Same Process” *St Petersburg Times* (Florida, 13 June 2000) at A11 (“Uncomfortable? Yes. Painful? Yes. Torture? No. My ‘torture’ was endured to save lives [as a blood donor]. Demps’ ‘torture’ was endured because he chose to take a life. Justice? Yes, without a doubt!”).

309 Dave Bothwell “Who Cares What Demps Said?” *St Petersburg Times* (Florida, 13 June 2000) at A11 (“Who cares what Bennie Demps said about how he was executed? He was a three-time convicted murderer. What of the pain he caused in those he killed or among the surviving family members?”); Shirley Blake “Thinking About the Pain” *St Petersburg Times* (Florida, 13 June 2000) at A11 (“Bennie Demps killed three people and then complained about the pain inflicted on his veins. Get real. I guess he wasn’t thinking about the pain he was inflicting on the people he killed. If he had known about the pain of those needles and had any idea how torturous it would be, I guess he would’ve thought twice about taking someone’s life.”).
However, in late 2009, the American abolitionist cause did gain some traction after officials in Ohio thoroughly botched the execution of Romell Broom. Over the course of two hours, Broom was jabbed with the needle 18 times as officials searched for a suitable vein. Governor Ted Strickland was contacted about the difficulties, and by executive action Broom’s execution was postponed by one week. Broom’s case was the first instance of a prisoner subjected to lethal injection failing to die, and his case was compared in the media to that of Willie Francis, the man who survived Louisiana’s first attempt to electrocute him. As Broom’s lawyers commenced a legal action, which has now resulted in a temporary stay of his re-execution, a *New York Times* editorial fumed:

Ohio’s attempt to execute Romell Broom last month by lethal injection was the death penalty at its most barbaric. Even after that horribly botched failed execution, the state wants to continue putting people to death, starting next week. Ohio should at the very least call a moratorium so it can ensure that it has the technical competence to put people to death humanely. But every state should use this shameful moment to question whether they ought to be putting people to death at all.

Ultimately, every state should pause and consider that ending the life of a healthy man or woman is no simple matter and that even in the 21st century, executioners do not have their job down to anything like a science. No government should put people to death until it can show that the condemned person will not be racked with pain, catch on fire or prove so difficult to kill, as in Mr. Broom’s case, that the executioners are forced to try again another day.

While Broom’s constitutional challenge remains unresolved at this writing, the fallout from the case has already led to an attempt to simplify execution procedures. Two months after the botched execution, Ohio became the first jurisdiction to abandon lethal injection’s traditional three-drug cocktail in favour of a one-drug protocol. Although the US
Supreme Court has ruled that use of the three-drug protocol does not constitute cruel or unusual punishment,\footnote{Baze v Rees 553 US 35 (2008).} the move to simplify lethal injection will likely be continued by other US jurisdictions as supplies of “death penalty drugs” gradually begin to dry up.\footnote{See generally John Schwartz “Seeking Execution Drug, States Cut Legal Corners” The New York Times (New York, 14 April 2011) at A14; Katie Zezima “2 More States Turn Over a Drug Used in Executions” The New York Times (New York, 2 April 2011) at A12; Robert Patrick “Execution Drug May Become Unavailable” St Louis Post-Dispatch (Missouri, 28 September 2012) at A1. In addition to the problems with domestic American supplies of the drugs, the United Kingdom has started to block all sales to the United States of drugs that may be used in lethal injections. David Batty “Britain Bans Export to US of Execution Drugs” The Guardian (London, 15 April 2011) at 13. Denmark has requested through diplomatic channels that US states stop using pentobarbital, which is manufactured by Lundbeck, a Danish pharmaceutical company. Jeanne Whalen “Denmark Seeks to Halt Drug’s Use for Executions” The Wall Street Journal (New York, 15 April 2011) at A6. In 2012, a US federal judge issued a ruling that prohibits the use of imported sodium thiopental in executions because the federal Food and Drug Administration has not approved the drug for importation. Beaty v FDA 853 F Supp 2d 30 (DC 2012).}

**Conclusion**

Since the 18th century the botched execution has consistently played a role in public and governmental debates over capital punishment. While botched executions have led to abolition in a small number of instances, the more usual response has been the institution of reforms in death penalty practices and procedures. Most significantly, botched executions have played a central role in motivating many jurisdictions to abandon particular methods of execution in favour of the adoption of a new method developed by science that, it is always hoped, will be less prone to botches.

Given these trends, why then do botched executions continue to the present day? At least in the United States, why has not the ongoing scientific refinement of the method of judicial killing led to the end of the botched execution? To invoke the usual example of those frustrated by the limits of technology: if we have the ability to send men to the moon, why can we not “shoot people to the hereafter with similar precision”?\footnote{Borg and Radelet, above n 5, at 143.}

The answer is straightforward. In most cases, a botched execution is
essentially a consequence of a mistake or an accident, and although most mistakes are indeed avoidable in practice – especially when a situation is assessed with hindsight – they nevertheless remain ubiquitous throughout society because of the fallibility of human beings and the occasional failing of technology. And as is well known, mistakes do not discriminate when we are dealing with death: every year in the United States alone, over 110,000 people die as a result of mistakes and accidents.\footnote{Kenneth D Kochanek and others \textit{``Deaths: Final Data for 2009''} (2011) 60(3) National Vital Statistics Report 1 at 65.} So it should come as no surprise that the same rules will apply when we turn the tables, and that there will be occasional instances in which something goes wrong when a society punishes a prisoner by attempting to kill him. Botched executions can be minimised and managed, but they are never completely eliminated in any jurisdiction until capital punishment is abolished. For 21st-century Jack Ketches and the governments that employ them, this should be a sobering thought.