

“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.¹ 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.² 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”.³ 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 In Canada, this version of the book has been superseded and the 1970 edition is no longer in print.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

(Modern Library, New York, 1994) 62 at 62. Parker was referring to the vagaries of suicide rather than that of capital punishment: “Razors pain you; / Rivers are damp; / Acids stain you; / And drugs cause cramp. / Guns aren’t lawful; / Nooses give; / Gas smells awful; / You might as well live.”

⁴ See below text accompanying nn 310–316.

⁵ See, eg, Marian J Borg and Michael L Radelet “On Botched Executions” in Peter Hodgkinson and William A Schabas (eds) *Capital Punishment: Strategies for Abolition* (Cambridge University Press, Cambridge (UK), 2004) 143.

⁶ See, eg, Geoffrey Abbott *The Executioner Always Chops Twice: Ghastly Blunders on the Scaffold* (St Martin’s Press, New York, 2002).

⁷ Eg, Julian Davis Mortenson “Earning the Right to Be Retributive: Execution Methods, Culpability Theory, and the Cruel and Unusual Punishment Clause” (2003) 88 Iowa L Rev 1099; Deborah W Denno “When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocutation and Lethal Injection and What It Says About Us” (2002) 63 Ohio St LJ 63.

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".¹⁰ 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.¹¹

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

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 killing¹² 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

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.

¹³ Philip Dray *At the Hands of Persons Unknown: The Lynching of Black America* (Random House, New York, 2002) at viii.

¹⁴ Edwin H Sutherland *Criminology* (JB Lippincott, Philadelphia, 1924) at 239; Dray, above n 13, at viii.

¹⁵ Thurston, above n 12, at 25; Michael J Pfeifer *Rough Justice: Lynching and American Society, 1874–1947* (University of Illinois Press, Urbana (Ill), 2004) at 6.

¹⁶ James Elbert Cutler *Lynch-Law: An Investigation into the History of Lynching in the United States* (Longmans Green, London, 1905) at 1.

¹⁷ Berg, above n 12, at ix–x. For a full discussion of the problems in defining the term “lynching”, see Christopher Wadrep “Word and Deed: The Language of Lynching, 1820–1953” in Michael Bellesiles (ed) *Lethal Imagination: Violence and Brutality in American History* (New York University Press, New York, 1999) 229; Christopher Wadrep “War of Words: The Controversy over the Definition of Lynching, 1899–1940” (2000) 66 *Journal of Southern History* 75.

¹⁸ 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.

¹⁹ Jacques Derrida “Force de Loi: Le ‘Fondement Mystique de l’Autorité’” (1990) 11 *Cardozo L Rev* 920 (translated ed: Mary Quaintance (translator) “Force of Law: The ‘Mystical Foundation of Authority’” (1990) 11 *Cardozo*

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,²⁰ 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.²¹ 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.²² 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.²³ Pain in general was a fundamental component of most justice

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- L Rev 921) at 927. In the original French, Derrida contrasts "*force de loi*" with "*la violence qu'on juge toujours injuste*". At 926.
- ²⁰ "Botch" in JA Simpson and ESC Weiner (eds) *Oxford English Dictionary* (2nd ed, Oxford University Press, Oxford, 1989) vol 2 at 427, citing John Palsgrave *Lesclarcissement de la langue francoyse* (Richard Pynson, London, 1530) at 461 ("To botche or bungyll a garment as he dothe that is nat a perfyte workeman.").
- ²¹ "Far Worse Than Hanging" *The New York Times* (New York, 7 August 1890) at 1. A witness to the event described Kemmler's electrocution as "an awful botch. Kemmler was literally roasted to death"; an attending doctor speculated that the company that supplied the electrical dynamo may have provided defective equipment in order to ensure that the execution "was a botch". At 2. For a discussion of Kemmler's execution, see below text accompanying nn 260–271.
- ²² United States Constitution, amendment VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."); *Re Kemmler* 136 US 436 (1890) at 447 ("Punishments are cruel when they involve torture or a lingering death It implies there something inhuman and barbarous, something more than the mere extinguishment of life.").
- ²³ Abbott has documented over 60 common methods of execution that have been used in recorded history. Geoffrey Abbott *Execution: The Guillotine, the Pendulum, the Thousand Cuts, the Spanish Donkey, and 66 Other Ways of Putting Someone to Death* (St Martin's Press, New York, 2006). The vast majority of these methods do not inflict death quickly. The methods documented by Abbott include: axe; bastinado; beaten to death; boiled alive; brazen bull; broken on the wheel; buried alive; burned at the stake; burned internally; cannibalism; cauldron; cave of roses; crucifixion; cyphon; diele; drowning; dry pan; eaten or otherwise killed by animals; electric chair; firing squad; flayed alive; fried to death; gas chamber; gibbet; gridiron; guillotine; gunpowder; Halifax gibbet; hanged alive in chains; hanged at the yard-arm; hanged, drawn and quartered; hanging; hara-kiri; impaled by stakes; iron chair; iron maiden; keel-hauling; lethal

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

injection; lime kiln; mannaia; mazzatello; mill wheel; nail through the ear; necklacing; over a cannon's muzzle; pendulum; poison; pressed to death; rack; sawn in half; scaphismus; Scottish maiden; sewn in an animal's belly; shot by arrows; Skeffington's gyves; Spanish donkey; starvation; stoned to death; strangulation; suffocation; sword; thousand cuts (*lingchi*); throat slitting; thrown from a great height; tied in a sack with animals; torn apart between two trees; torn apart by boats; torn apart by horses; and 24 cuts. Abbott also adds that this list is by no means exhaustive, since there have been numerous examples of "one-off" methods of execution being used. At 278.

²⁴ See John H Langbein *Torture and the Law of Proof: Europe and England in the ancien régime* (University of Chicago Press, Chicago, 1977) at 3; Michel Foucault *Discipline and Punish: The Birth of the Prison* (2nd ed, Alan Sheridan (translator), Vintage Books, New York, 1995) at 33–35.

²⁵ Timothy Brook, Jérôme Bourgon and Gregory Blue *Death by a Thousand Cuts* (Harvard University Press, Cambridge (Mass), 2008) at 10.

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.

²⁷ Julius R Ruff *Violence in Early Modern Europe, 1500–1800* (Cambridge University Press, Cambridge (UK), 2001) at 109.

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,²⁸ 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”,²⁹ 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.³⁰ 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;³¹ having been used to dispatch common criminals since time immemorial, it became the regular form of capital punishment at English common law.³²

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.³³ Using the short

²⁸ For instance, if a condemned individual manages to somehow survive the execution and escape, there can be little doubt that the execution could be said to have been botched. Although uncommon, escape must be acknowledged as a possibility regardless of the chosen method of execution.

²⁹ See Megan Denver, Joel Best and Kenneth C Haas “Methods of Execution as Institutional Fads” (2008) 10 *Punishment and Society* 227.

³⁰ Hanging is mentioned in the Hebrew Bible as a form of execution permitted by the Torah and used by the early Israelites. Deuteronomy 21:22–23; Joshua 8:29.

³¹ Christopher Daniell and Victoria Thompson “Pagans and Christians: 400–1150” in Peter C Jupp and Clare Gittings (eds) *Death in England: An Illustrated History* (Rutgers University Press, New Brunswick (NJ), 2000) 65 at 82–83.

³² William Blackstone *Commentaries on the Laws of England* vol 4 at *376; JH Baker *An Introduction to English Legal History* (3rd ed, Butterworths, London, 1990) at 584.

³³ John Bellamy *Crime and Public Order in England in the Later Middle Ages* (Routledge and Kegan Paul, London, 1973) at 186–187; Alan Brooke and David Brandon *Tyburn: London’s Fatal Tree* (Sutton, Thrupp (Gloucestershire), 2004) at 181. Bellamy notes at 187 that “[h]anging by

drop, death was intentionally effected through slow strangulation rather than by neck breaking;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.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,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:³⁷ 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.³⁸ Hanging remains a legal form of execution in 55 countries and in limited circumstances may be used in the US states of Delaware, New

being hauled from the ground by a team of men was rare enough to excite comment”. In England, the wagon-removal method was seen as being particularly convenient, in that it allowed the prisoner to remain in the conveyance that transported them from the prison to the gallows.

³⁴ Bellamy, above n 33, at 187.

³⁵ The new drop was first developed in Boston, Massachusetts, in 1694. Stuart Banner *The Death Penalty: An American History* (Harvard University Press, Cambridge (Mass), 2002) at 45–46. It was first used in Great Britain in 1760 but was not adopted for general use in England until 1783. Leon Radzinowicz *A History of English Criminal Law and Its Administration from 1750* (Stevens, London, 1948) vol 1 at 203.

³⁶ See below text accompanying nn 135–139.

³⁷ Seán McConville *English Local Prisons, 1860–1900: Next Only to Death* (Routledge, London, 1995) at 411.

³⁸ Timothy V Kaufman-Osborn *From Noose to Needle: Capital Punishment and the Late Liberal State* (University of Michigan Press, Ann Arbor, 2002) at 87–88.

Hampshire, and Washington.³⁹

B Beheading

As with hanging, execution by beheading is an ancient form of capital punishment.⁴⁰ Traditionally, it was effected by use of an axe or sword,⁴¹ and in more recent times, by blade-bearing devices such as the Halifax gibbet, Scottish maiden, mannaia, or guillotine.⁴² In England and elsewhere in Europe, beheading was traditionally reserved for the nobility,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 1981.⁴⁴

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,⁴⁵ though use of the

³⁹ Hands Off Cain "Hands Off Cain Database" <www.handsoffcain.info>.

⁴⁰ See, eg, 2 Samuel 20:14–22; Smārta Vardhamāna *Dandaviveka of Vardhamāna* (MM Kamala Krsna Smṛtītīrtha (ed and translator), Oriental Institute, Baroda, 1931) at 20.

⁴¹ See Abbott, above n 23, at 13–28, 242–258.

⁴² At 73, 125–145, 147–152, 207.

⁴³ Jonathan Dewald *The European Nobility, 1400–1800* (Cambridge University Press, Cambridge (UK), 1996) at 29; Abbott, above n 23, at 13.

⁴⁴ For a popular history of the guillotine, see Robert Frederick Opie *Guillotine: The Timbers of Justice* (Sutton, Thrupp (Gloucestershire), 2003).

⁴⁵ There is one recorded instance in American history of a legal execution being carried out by beheading: in 1644, a convict was decapitated by sword in the Massachusetts Bay Colony. Nick Evangelista *The Encyclopedia of the Sword* (Greenwood Press, Westport (Conn), 1995) at 51. The only instance of an American jurisdiction formally adopting beheading is that of the Utah Territory's 1852 criminal code, which stated that those sentenced to death would "suffer death by being shot, hung, or beheaded as the court may direct, or as the convicted person may choose". 1852 Utah Laws 61. The statute was interpreted to mean that the convict was permitted to choose between the three modes of execution, and that if he failed to make a selection, the decision was to be made by the court. *Wilkerson v Utah* 99 US 130 (1879) at 136. No one convicted of a capital offence in Utah Territory ever selected beheading, and the option was removed in 1888. Martin R Gardner "Mormonism and Capital

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

Punishment: A Doctrinal Perspective, Past and Present" (1979) 12(1) Dialogue A Journal of Mormon Thought 9 at 13.

⁴⁶ HB 1274, 143rd Gen Assem, Reg Sess (Ga 1996). The bill, which was sponsored by Representative Doug Teper, was more publicity stunt than earnest proposal, as evidenced by Teper's decision to grant an "exclusive interview" with the supermarket tabloid *Sun*, which referred to the legislator as "Assemblyman Doug 'Heads will roll' Teper". "US Politician's Shocking Demand ... Guillotine Death Row Inmates" *Sun* (United States, 27 February 1996). *The Atlanta Journal-Constitution* recognised Teper's proposal for what it was: "Someone in India may have stood on one foot for 10 years. God may have had a Chinese son. But, take it from us, there is no such thing as an exclusive interview with Doug Teper." Don Melvin "Read About Him in the Checkout Line: Tabloid Discovers Georgian's Bill to OK Guillotines" *The Atlanta Journal-Constitution* (Georgia, 26 February 1996) at B4. But outside of Georgia, Teper's bill was taken seriously and was positively cited in a law journal as evidencing support for the idea that death-row prisoners should be permitted to donate their organs for transplant after execution. Laura-Hill M Patton "A Call for Common Sense: Organ Donation and the Executed Prisoner" (1996) 3 Va J Soc Pol'y & L 387 at 432. *The Journal-Constitution* lamented the failure of non-Georgians to realise the joke: "Rep. Doug Teper of DeKalb County is a frivolous legislator sometimes. This is an example. We laughed. The rest of the country took the proposal seriously. They laughed too. At us." "A Special Editorial: This is Our Assessment of the Successes and Failures of This Year's General Assembly" *The Atlanta Journal-Constitution* (Georgia, 20 March 1996) at A16. Teper's next legislative pitch was to expand the list of legally designated service animals to include monkeys, and to draw attention to the proposal, he brought a monkey to the lobby of the Georgia State Capitol, which was said by *The Journal-Constitution* to "fit right in". Don Melvin "Squirting Coin Aside, Session Reflected Rest of Us" *The Atlanta Journal-Constitution* (Georgia, 20 March 1996) at B2.

⁴⁷ Hands Off Cain, above n 39.

⁴⁸ Abbott, above n 23, at 97.

either entirely miss the prisoner or wound him in such a manner that death is slow and painful.⁴⁹ 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.⁵⁰

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,⁵¹ and after the commission unanimously recommended using electricity,⁵² the New York State Legislature adopted electrocution as the state's official method of execution in June 1888.⁵³ 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.⁵⁴ 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.⁵⁵ 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.⁵⁶

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.⁵⁷ 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.⁵⁸ Today, the electric chair remains a possible form

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).

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

⁶⁴ Banner, above n 35, at 199.

⁶⁵ Hands Off Cain, above n 39.

⁶⁶ Abbott, above n 23, at 214.

⁶⁷ Banner, above n 35, at 202.

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.

⁶⁹ *Report of the Royal Commission on Capital Punishment, 1949–1953* (HMSO, London, 1953) at [749].

⁷⁰ *Gregg v Georgia* 428 US 153 (1976). US executions were temporarily halted in 1972. *Furman v Georgia* 408 US 238 (1972).

⁷¹ Banner, above n 35, at 297; Abbott, above n 23, at 203. Beginning in 2009, some US states have adopted a new “one-drug protocol”. See below, n 314 and accompanying text.

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.⁷³ 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,⁷⁴ with Texas following suit the very next day.⁷⁵ 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.⁷⁶ 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,⁷⁷ 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.⁷⁸ 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”.⁷⁹ Three regional governors – Hebrew men

denier Fred Leuchter, is often used to administer the three drugs using the correct dosages and timing. The Errol Morris documentary *Mr Death: The Rise and Fall of Fred A Leuchter, Jr* (Lions Gate Films, 1999) provides an interesting examination of Leuchter’s unusual life story.

⁷³ Abbott, above n 23, at 203.

⁷⁴ 1977 Okla Sess Laws c 41.

⁷⁵ 1977 Tex Gen Laws c 138.

⁷⁶ Hands Off Cain, above n 39.

⁷⁷ See above text accompanying nn 23–25.

⁷⁸ Modern scholarship generally dates the composition of the Book of Daniel to the second century BCE. PR Davies “Daniel” in John Barton and John Muddiman (eds) *The Oxford Bible Commentary* (Oxford University Press, Oxford, 2001) 563 at 564.

⁷⁹ Daniel 3:1–6.

named Shadrach, Meshach, and Abednego⁸⁰ – refuse to worship the idol and admit forthrightly to the king, “we will not serve thy gods”.⁸¹ The capital sentence is executed and Shadrach, Meshach, and Abednego are bound and cast into the fiery furnace.⁸² 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.⁸³ 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”.⁸⁴ 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.⁸⁵ 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”.⁸⁶

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”.⁸⁷ 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.⁸⁸ 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.⁸⁹ 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.⁹⁰ As with the incidents in the Book of Daniel, the account

⁸⁰ The Hebrew names of the three were Hananiah, Mishael, and Azariah. Daniel 1:7.

⁸¹ Daniel 3:8–18.

⁸² Daniel 3:19–23.

⁸³ Daniel 3:24–27.

⁸⁴ Daniel 3:28–29.

⁸⁵ Daniel 6:1–17.

⁸⁶ Daniel 6:19–23.

⁸⁷ *Martyrdom of Polycarp* 15:2 in Michael W Holmes (ed) *The Apostolic Fathers: Greek Texts and English Translations of Their Writings* (2nd ed, Baker House, Grand Rapids (Mich), 1992) 226 at 239.

⁸⁸ *Martyrdom of Polycarp* 15:2

⁸⁹ *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.

⁹⁰ 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 probably a supporter of Rhys ap Iaredudd, 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.

⁹¹ Martyrdom of Polycarp 16:1.

⁹² The details of the story of Cragh in this paragraph are taken from Robert Bartlett *The Hanged Man: A Story of Miracle, Memory, and Colonialism in the Middle Ages* (Princeton University Press, Princeton (NJ), 2004); Jussi Hanska “The Hanging of William Cragh: Anatomy of a Miracle” (2001) 27 *Journal of Medieval History* 121.

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 re-hanging.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.

⁹⁵ RC Finucane "Sacred Corpse, Profane Carrion: Social Ideals and Death Rituals in the Later Middle Ages" in Joachim Whaley (ed) *Mirrors of Mortality: Studies in the Social History of Death* (St Martin's Press, New York, 1981) 40 at 49.

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 Cnithon, 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 case¹⁰² and was often made conditional.¹⁰³ 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.¹⁰⁴ The persistence of such a belief is illustrated by the account of the botched hanging of David Evans in Carmarthen, Wales, in 1829.¹⁰⁵

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*,¹⁰⁶ Scottish

London, 1895) at 5 (pardon granted to Felicia de Whichull, who survived hanging after the rope broke “without help of man or fraud”).

¹⁰² Naomi D Hurnard *The King’s Pardon for Homicide Before AD 1307* (Clarendon Press, Oxford, 1969) at 43–44, 176; Bellamy, above n 33, at 188.

¹⁰³ Eg, after the rope broke during Walter Mantell’s 1554 hanging for heresy, Mantell was told that Queen Mary would pardon him if he recanted his Protestant beliefs and agreed to receive Catholic communion. Mantell refused, and was immediately rehanged until he was dead. John Foxe *The Ecclesiasticall History Contaynyng the Actes and Monumentes of Thyngs Passed in Every Kynge’s Tyme in This Realme, Especially in the Church of England Principally to Be Noted, with a Full Discourse of Such Persecutions, Horrible Troubles, the Suffering of Martyrs, and Other Things Incident* (John Daye, London, 1570) at 1638.

¹⁰⁴ Ruff, above n 27, at 108.

¹⁰⁵ John Laurence *A History of Capital Punishment* (Citadel Press, New York, 1971) at 56–57.

¹⁰⁶ William Jackson “Account of the Very Singular Case of Margaret Dickson, Who Was Hanged for Murder, but Recovered After Execution” in *The New and Complete Newgate Calendar* (Alexander Hogg, London, 1795) vol 2 at 153. Some later versions of the *Newgate Calendar* print Dickson’s name as

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

"Dixon".

107

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.

109

JS Levi and GFJ Bergman *Australian Genesis: Jewish Convicts and Settlers, 1788–1850* (Rigby, Adelaide, 1974) at 58–59.

110

At 59.

111

GFJ Bergman "The Story of Two Jewish Convicts: Joseph Samuel, 'The Man They Couldn't Hang', and Isaac Simmons, alias 'Hickey Bull', Highwayman and Constable" (1963) 5 *Australian Jewish Historical Society Journal* 320.

112

Radzinowicz, above n 35, at 194.

113

At 194.

a resuscitation once the body had been cut down and turned over for burial.¹¹⁴

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 garçonneau" was given the axe.¹¹⁵ 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.¹¹⁶ 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.¹¹⁷ 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."¹¹⁸ Public

¹¹⁴ 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.").

¹¹⁵ Letter from Eustace Chapuys, Ambassador of the Holy Roman Emperor in England, to the Queen of Hungary (10 June 1541) in Pascual de Gayangos (ed) *Calendar of State Papers: Spain, 1538–1542* (HMSO, London, 1890) vol 6 at [166]; see also John Bellamy *The Tudor Law of Treason: An Introduction* (Routledge, London, 1979) at 206.

¹¹⁶ 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.

¹¹⁷ Tim Wales "Ketch, John (d 1686)" in HCG Matthew and Brian Harrison (eds) *Oxford Dictionary of National Biography* (Oxford University Press, Oxford, 2004) vol 31, 443 at 444.

¹¹⁸ 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”¹¹⁹ prompted the publication and circulation of a two-page *Apologie* from Ketch.¹²⁰ 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”.¹²¹ 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”.¹²² 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:¹²³

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.

spelling in original).

¹¹⁹ John Evelyn “21st July 1683” in Austin Dobson (ed) *The Diary of John Evelyn* (Dent, London, 1906) vol 3, 107 at 107.

¹²⁰ John Ketch *The Apologie of John Ketch, Esq, the Executioner of London, in Vindication of Himself as to the Execution of the Late Lord Russel [sic], on July 21, 1683* (John Browne, London, 1683).

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.¹²⁴ 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".¹²⁵ Ketch's bungling "so incensed the people, that had he not been guarded and got away, they would have torn him to pieces".¹²⁶ 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.¹²⁷ 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.¹²⁸ In a fit of pique, the hangman "grabbed the head and twisted it around several times, at last separating it from the body".¹²⁹

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,

¹²⁴ Margaret M Verney (ed) *Memoirs of the Verney Family from the Restoration to the Revolution, 1660 to 1696* (Longmans Green, London, 1899) vol 4 at 358 (irregular capitalisation in original).

¹²⁵ At 358 (irregular capitalisation in original).

¹²⁶ John Evelyn "15th July 1685" in Austin Dobson (ed) *The Diary of John Evelyn* (Dent, London, 1906) vol 3, 169 at 170.

¹²⁷ Clifford D Conner *Colonel Despard: The Life and Times of an Anglo-Irish Rebel* (Combined Publishing, Conshohocken (Penn), 2000) at 247.

¹²⁸ William Granger and James Caulfield "Particulars of Colonel Edward Marcus Despard, a Most Singular Character, Who Suffered for High Treason, with Six of His Associates, on the Platform, at the Top of the Front of the New Prison, Horsemonger-Lane, Southwark, Monday, Feb 21, 1803" in *The New Wonderful Museum, and Extraordinary Magazine: Being a Complete Repository of All the Wonders, Curiosities, and Rarities of Nature and Art, from the Beginning of the World to the Present Year* (Alexander Hogg, London, 1804) vol 2, 881 at 897.

¹²⁹ Conner, above n 127, at 258.

when hangman John Simpson bungled the hanging of convicted robber Robert Johnston.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"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".¹³² Order was restored as the police beat back the rioters and recaptured Johnston, who was revived, and subsequently hanged until dead.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."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.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.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

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

¹³¹ "Extraordinary Execution" *The Times* (London, 5 January 1819) at 3.

¹³² "Execution of Robert Johnston" *The Scotsman* (Edinburgh, 2 January 1819) 8 at 9.

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.

¹³⁴ Michael Jasper "'Hats Off!': The Roots of Victorian Public Hangings" in William B Thesing (ed) *Executions and the British Experience from the 17th Century to the 20th Century* (McFarland, Jefferson (NC), 1990) 139 at 142.

¹³⁵ Radzinowicz, above n 35, at 202–203.

¹³⁶ At 203.

drop "was to avoid the need to manœuvre horses and carts in congested surroundings and to impart greater solemnity to the occasion".¹³⁷ 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".¹³⁸ 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".¹³⁹ 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.¹⁴⁰

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 1829.¹⁴¹ Calcraft had a reputation for being "particularly incompetent at his job, clumsy, [and] bungling".¹⁴² 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.¹⁴³ With the adoption of the new drop, it had become 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.

¹³⁹ Barnard Turner and Thomas Skinner *An Account of Some Alterations and Amendments Attempted in the Duty and Office of Sheriff of the County of Middlesex and Sheriffs of the City of London, During the Sherifffalty of Sir B Turner and T Skinner, Esq* (Clark, London, 1784) at 27.

¹⁴⁰ Ryk James and Rachel Nasmyth-Jones "The Occurrence of Cervical Fractures in Victims of Judicial Hanging" (1992) 54 *Forensic Science International* 81; see also Catherine Hellier and Robert Connolly "Cause of Death in Judicial Hanging: A Review and Case Study" (2009) 49 *Med Sci L* 18.

¹⁴¹ David Brandon and Alan Brooke *London: The Executioner's City* (Sutton, Thrupp (Gloucestershire), 2006) at 197.

¹⁴² GC Boase and J Gilliland "Calcraft, William (1800–1879)" in HCG Matthew and Brian Harrison (eds) *Oxford Dictionary of National Biography* (Oxford University Press, Oxford, 2004) vol 9, 497 at 498.

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.”¹⁴⁴

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.¹⁴⁵

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.¹⁴⁶

[T]o the astonishment and horror of all the spectators, he a third time succeeded in placing his feet upon the platform, and again his hands vainly attempted to reach the fatal cord. Calcraft and two or three other men then again forced the wretched man’s feet from their hold, and his legs were held down until the final struggle was over. While this fearful scene was being enacted the bells of the different neighbouring churches were ringing merrily upon the announcement of peace,¹⁴⁷ offering a sad contrast to the melancholy proceeding.

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 afflicting scenes as those of yesterday.”¹⁴⁸ In no small part due to Calcraft’s bungling, “the gloomy festival of punishment [began] dying out” in England,¹⁴⁹ and the days of its public executions were numbered.

¹⁴⁴ Arthur Griffiths *The Chronicles of Newgate* (Chapman and Hall, London, 1884) vol 2 at 272.

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".¹⁵⁰ 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.¹⁵¹ Calcraft had received death threats prior to the execution,¹⁵² and he was uncharacteristically nervous and circumspect at Barrett's hanging. By all reports, Barrett died quickly, if not instantaneously,¹⁵³ and the event concluded without incident, apart from various abusive "yells and execrations" directed at Calcraft from the crowd.¹⁵⁴

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".¹⁵⁵ 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.

¹⁵¹ Patrick Quinlivan and Paul Rose *The Fenians in England, 1865–1872: A Sense of Insecurity* (J Calder, London, 1982) at 135–137. For a full discussion of political efforts to reform capital punishment in Victorian England, see David D Cooper *The Lesson of the Scaffold: The Public Execution Controversy in Victorian England* (Ohio University Press, Athens (Ohio), 1974); for a brief summary of the process of reform until 1868, see David D Cooper "Public Executions in Victorian England: A Reform Adrift" in William B Thesing (ed) *Executions and the British Experience from the 17th Century to the 20th Century* (McFarland, Jefferson (NC), 1990) 149.

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 cleanness 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.

¹⁵⁴ "The Execution of Barrett", above n 153, at 9.

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.¹⁵⁶ 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.¹⁵⁷ 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.¹⁵⁸

The Lee incident, combined with the accidental decapitation of a hanging victim in Norwich later that year,¹⁵⁹ led directly to Parliament's 1886 establishment of the Capital Sentence Committee, headed by HA Bruce, Lord Aberdare.¹⁶⁰ 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".¹⁶¹ 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".¹⁶² The executioner James Berry had been working to gradually develop his own table of drops through

¹⁵⁶ Brian Bailey *Hangmen of England: A History of Execution from Jack Ketch to Albert Pierrepont* (WH Allen, London, 1989) at 84; Harry Potter *Hanging in Judgment: Religion and the Death Penalty in England* (Continuum, New York, 1993) at 102.

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.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.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.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."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.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.¹⁶⁸ Eventually, the Home Office became the sole supplier of the rope and the other materials needed to carry out an execution.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.¹⁷⁰

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

¹⁶³ Kaufman-Osborn, above n 38, at 88.

¹⁶⁴ McConville, above n 37, at 423–427.

¹⁶⁵ It is telling that neither Berry nor the medical inspector was using the official table of drops found in the 1888 report.

¹⁶⁶ "Execution of Conway This Morning" *Liverpool Echo* (England, 20 August 1891) at 4.

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.

¹⁶⁸ McConville, above n 37, at 427.

¹⁶⁹ At 428.

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.

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.¹⁷¹ The Home Secretary brushed the question off as one that was indeed “full of interest”,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 1998,¹⁷³ 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”.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 Slaughter’s Nek Rebellion in the Cape Colony in 1815, four of the

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

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

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.

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.¹⁷⁵ In British India, one magistrate characterised the haphazard nature of hanging procedures there as "shocking",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.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.¹⁷⁸ Eventually, the cook of the South Australian Company was persuaded to act as the disguised "Jack Ketch".¹⁷⁹ The results of allowing an untrained cook to carry out a sentence of death were perhaps predictable: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":¹⁸¹ by hanging onto Magee's legs and shoulders for 13 minutes, the cook "choked him to death in mediæval style".¹⁸²

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

¹⁷⁵ Patricia Ashman "Slaughter's Nek" in James S Olson and Robert Shadle (eds) *Historical Dictionary of the British Empire* (Greenwood Press, Westport (Conn), 1996) vol 2, 1019 at 1020.

¹⁷⁶ FL Beaufort "Criminal Law in Bengal" (1849) 12 *Calcutta Review* 516 at 560.

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.

¹⁷⁸ T Horton James *Six Months in South Australia* (J Cross, London, 1838) at 57.

¹⁷⁹ Robert Clyne *Colonial Blue: A History of the South Australian Police Force, 1836–1916* (Wakefield Press, Netley (SA), 1987) at 18.

¹⁸⁰ James, above n 178, at 59–60.

¹⁸¹ At 60.

¹⁸² "The Death Penalty in South Australia" *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 The proposal went

¹⁸³ "Wellington Gossip" *The Wanganui Herald* (New Zealand, 7 June 1884) at 2.

¹⁸⁴ Sherwood Young *Guilty on the Gallows: Famous Capital Crimes of New Zealand* (Grantham House, Wellington, 1998) at 12–13.

¹⁸⁵ 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.

¹⁸⁶ "Execution of Winiata" *The New Zealand Herald* (Auckland, 5 August 1882) at 5.

¹⁸⁷ 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.

¹⁸⁸ "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.

¹⁸⁹ "Execution of Winiata", above n 186, at 5.

¹⁹⁰ "The Science of Hanging" *The Observer* (Auckland, 12 August 1882) at

nowhere,¹⁹¹ 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".¹⁹² Just seven years later, capital punishment for murder was formally abolished,¹⁹³ only to be reinstated in 1950 after a change of government.¹⁹⁴ It was abolished for murder again in 1961 after a conscience vote in the House of Representatives,¹⁹⁵ and in 1989 it was abolished for all crimes.¹⁹⁶

Unlike metropolitan Britain, public executions were common in many regions of the Empire until the 1930s,¹⁹⁷ which meant that reports of botched executions had not been extinguished in the colonies as early as they had been at home. In Nyasaland,¹⁹⁸ 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.¹⁹⁹ 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.²⁰⁰ 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.²⁰¹ A 1930 eyewitness

339.

¹⁹¹ 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.

¹⁹² Donald F MacKenzie *While We Have Prisons* (Methuen, Auckland, 1980) at 75.

¹⁹³ Crimes Amendment Act 1941, s 2.

¹⁹⁴ Capital Punishment Act 1950.

¹⁹⁵ Crimes Act 1961. The vote was 41:30 in favour of abolition. See (12 October 1961) 328 NZPD 2990.

¹⁹⁶ Abolition of the Death Penalty Act 1989.

¹⁹⁷ David Killingray "Punishment to Fit the Crime?: Penal Policy and Practice in British Colonial Africa" in Florence Bernault (ed) *Enfermement, prison et châtiments en Afrique: du 19e siècle à nos jours* (Karthala, Paris, 1999) 181 at 199.

¹⁹⁸ Present-day Malawi.

¹⁹⁹ Stacey Hynd "Killing the Condemned: The Practice and Process of Capital Punishment in Colonial Africa, 1900–1950s" (2008) 49 *Journal of African History* 403 at 410.

²⁰⁰ At 410 (citing *R v Jim and Makoshonga*, National Archives of Malawi Doc S1/264/23).

²⁰¹ 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:²⁰²

[W]ithin 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 rope was too long and she was completely decapitated.²⁰³ The public disgust led one member of Parliament to propose that Canada change its method of execution to lethal gas.²⁰⁴ This proposal ultimately resulted in a 1937 parliamentary

²⁰² David Johnathan *Strangled for 14 Minutes By Law!* PRO Doc CO 323/1111/6, quoted in Hynd, above n 199, at 416–417.

²⁰³ Carolyn Strange “The Undercurrents of Penal Culture: Punishment of the Body in Mid-Twentieth-Century Canada” (2001) 19 LHR 343 at 352.

²⁰⁴ At 352.

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

²⁰⁵ At 352.

²⁰⁶ At 357.

²⁰⁷ At 364.

²⁰⁸ At 377.

²⁰⁹ Criminal Law Amendment Act (No 2) SC 1976 c 105. Canada abolished the death penalty for all crimes in 1998. An Act to Amend the National Defence Act SC 1998 c 35. For a brief history of Canada’s move to abolitionism, see Andrew S Thompson “Uneasy Abolitionists: Canada, the Death Penalty, and the Importance of International Norms, 1962–2005” (2008) 42 *Journal of Canadian Studies* 172.

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: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 "*Tout condamné aura la tête tranchée.*"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.²¹⁵ On humanitarian grounds, Joseph-Ignace Guillotin and others had pressed for decapitation to be effected "by a simple mechanism",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".²¹⁷

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

1688–1847 (Chatto and Windus, London, 1876) vol 1 at 128.

²¹³ At 130.

²¹⁴ "Every person condemned [to death] shall have his head cut off." Code pénal (1791), art 3.

²¹⁵ Daniel Arasse *The Guillotine and the Terror* (Christopher Miller (translator), Allen Lane, London, 1989) at 11.

²¹⁶ At 11.

²¹⁷ Charles-Henri Sanson "Memorandum of Observations on the Execution of Criminals by Beheading" (1792), reprinted in John Wilson Croker *History of the Guillotine* (John Murray, London, 1853) 25 at 27.

²¹⁸ Victor Hugo *Les Misérables* (Norman Denny (translator), Penguin Books, London, 1982) at 32.

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 *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.²²⁰ 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”.²²¹ 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.²²² 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.²²³

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.²²⁴ 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.²²⁵ 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 Desfourneaux, who had only recently been appointed.²²⁶ 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

²²⁰ Paul R Hanson “Voices from the Streets in the French Revolution” in K Steven Vincent and Alison Klairmont-Lingo (eds) *The Human Tradition in Modern France* (SR Books, Wilmington (Del), 2000) 3 at 12–13.

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.

²²⁴ Simon Grivet “Executions and the Debate over Abolition in France and the United States” in Austin Sarat and Jürgen Martschukat (eds) *Is the Death Penalty Dying?: European and American Perspectives* (Cambridge University Press, Cambridge (UK), 2011) 150 at 160.

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), Desfourneaux 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.²²⁷

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.

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.²²⁸ 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.²²⁹ 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."²³⁰ But France nevertheless went on to abolish the death penalty in 1981, despite overwhelming majority support among the populace for retention.²³¹ 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,²³² and by the late-

²²⁷ Abbott, above n 6, at 101.

²²⁸ Grivet, above n 224, at 160.

²²⁹ At 151–152.

²³⁰ At 151.

²³¹ At 152.

²³² 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).

18th century, hanging was overwhelmingly the preferred method.²³³ 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".²³⁴ 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".²³⁵

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.²³⁶ 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".²³⁷

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

²³³ Trina N Seitz "A History of Execution Methods in the United States" in Clifton D Bryant (ed) *Handbook of Death and Dying* (Sage Publications, Thousand Oaks (Cal), 2003) vol 1, 357 at 357–358.

²³⁴ Cotton Mather *Pillars of Salt: An History of Some Criminals Executed in This Land, for Capital Crimes* (Samuel Phillips, Boston, 1699) at 66 (irregular capitalisation in original). See also Cotton Mather *Magnalia Christi Americana: or, The Ecclesiastical History of New-England* (Thomas Parkhurst, London, 1702) vol 6 at 38.

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.

²³⁷ Louis P Masur *Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776–1865* (Oxford University Press, Oxford, 1989) at 109–110. Not all states were equally enthusiastic about making executions private, however: the last official public execution in the United States was held in Kentucky in August 1936. Kudlac, above n 236, at 17.

public executions.²³⁸ 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”.²³⁹ 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,²⁴⁰ 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.”²⁴¹ 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”.²⁴² 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.²⁴³

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.²⁴⁴ 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.²⁴⁵ No trapdoor scaffold was available, so officials threw the rope over a branch of a tree and hoisted McCaffary off

²³⁸ Banner, above n 35, at 175.

²³⁹ “Did They Revive Him?” *The New York Times* (New York, 31 July 1886) at 2.

²⁴⁰ The sheriff had complied, and the drop was only 12 inches. At 2.

²⁴¹ Banner, above n 35, at 173.

²⁴² “Execution in Newark” *The New York Times* (New York, 3 January 1868) at 8.

²⁴³ For a summary of some such incidents, see Banner, above n 35, at 173.

²⁴⁴ David Brion Davis “The Movement to Abolish Capital Punishment in America, 1787–1861” (1957) 63 *American History Review* 23 at 43.

²⁴⁵ Carrie Cropley “The Case of John McCaffary” (1952) 35 *Wisconsin Magazine of History* 281 at 286.

the ground.²⁴⁶ McCaffary struggled on the rope and was reported by the local newspaper to have taken at least 20 minutes to die.²⁴⁷ 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.²⁴⁸ 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.²⁴⁹ 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.²⁵⁰ 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.²⁵¹

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.²⁵² Three quick-thinking deputies took hold of the rope and cinched Williams up so that his feet were off the floor.²⁵³ Newspapers violated a state law that prohibited detailed reports of executions by relating how Williams had slowly strangled to death as the deputies suspended him over a period of 14-and-a-half minutes.²⁵⁴ 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.

²⁴⁹ Edward Schriver “Reluctant Hangman: The State of Maine and Capital Punishment, 1820–1887” (1990) 63 *New England Quarterly* 271 at 283–284.

²⁵⁰ John F Gallihier and others *America Without the Death Penalty: States Leading the Way* (Northeastern University Press, Boston, 2002) at 56.

²⁵¹ 1887 Maine Laws c 133; Gallihier, 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.²⁵⁵ An abolition bill was defeated in 1909, but in 1911 Minnesota enacted a law that abolished capital punishment.²⁵⁶ As in Maine, over three-quarters of legislators voted in favour of abolition,²⁵⁷ and the outcome was at least to some extent a direct result of the fallout of Williams's botched hanging.²⁵⁸

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.²⁵⁹

1 *Electrocution botches*

New York adopted the electric chair in 1888 and thereby became the first US jurisdiction to abandon hanging.²⁶⁰ 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,²⁶¹ 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

²⁵⁵ John D Bessler "The 'Midnight Assassination Law' and Minnesota's Anti-Death Penalty Movement, 1849-1911" (1996) 22 Wm Mitchell L Rev 577 at 665-666.

²⁵⁶ 1911 Minn Laws c 387.

²⁵⁷ Galliher, above n 250, at 82.

²⁵⁸ John D Bessler *Legacy of Violence: Lynch Mobs and Executions in Minnesota* (University of Minnesota Press, Minneapolis, 2003) at 177-180; John F Galliher, Gregory Ray and Brent Cook "Abolition and Reinstatement of Capital Punishment during the Progressive Era and Early 20th Century" (1992) 83 J Crim L & Criminology 538 at 553.

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!", as he fainted to the floor.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

²⁶² Essig, above n 52, at 252.

²⁶³ "Far Worse Than Hanging", above n 21, at 1.

²⁶⁴ At 1.

²⁶⁵ At 1.

²⁶⁶ At 1.

²⁶⁷ Essig, above n 52, at 253.

²⁶⁸ "Far Worse Than Hanging", above n 21, at 1.

²⁶⁹ "Kemmler's Death Was Disgusting" *Buffalo Express* (New York, 7 August 1890) at 1.

²⁷⁰ Banner, above n 35, at 187.

²⁷¹ At 187.

²⁷² Edw Anthony Spitzka "Observations Regarding the Infliction of the Death Penalty Using Electricity" (1908) 47 *Proceedings of the American Philosophical Society* 39 at 43.

rare.²⁷³ 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.²⁷⁴ 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”.²⁷⁵ “Accidents happen for which no man is to blame”, the majority sniffed, and “[l]aws cannot prevent accidents”.²⁷⁶ 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”.²⁷⁷ 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”.²⁷⁸

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

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.²⁷⁹ Incidents of electrocution where unexplained flames and sparks have erupted and burned the prisoner have occurred in Alabama, Florida, Indiana, and Virginia.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.²⁸¹ It was widely assumed that Florida's electric chair – by this time affectionately nicknamed "Old Sparky" – had somehow malfunctioned,²⁸² but the chair was tested and was found to be working properly.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.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.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."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.²⁸⁷ In 1999, Florida's 76-year-old electric chair was quietly replaced,²⁸⁸ but after yet another incident in which a prisoner bled from the nose and appeared to continue to breathe after being electrocuted,²⁸⁹ Florida went on to adopt lethal injection as its principal method of execution.²⁹⁰

²⁷⁹ Borg and Radelet, above n 5, at 150.

²⁸⁰ At 154.

²⁸¹ Ellen McGarrahan "3 Jolts Used to Execute Killer" *The Miami Herald* (Florida, 5 May 1990) at A1.

²⁸² See, eg, "Convicted Killer Electrocuted in Faulty Chair" *San Francisco Chronicle* (California, 5 May 1990) at C11.

²⁸³ "Electric Chair Tested on Vat of Water" *The New York Times* (New York, 25 July 1990) at A9.

²⁸⁴ "Killer, 38, Is Executed in Florida" *The New York Times* (New York, 28 July 1990) at 9.

²⁸⁵ "Condemned Man's Mask Bursts into Flame During Execution" *The New York Times* (New York, 26 March 1997) at B9.

²⁸⁶ At B9.

²⁸⁷ *Jones v State* 701 So 2d 76 (Fla 1997); *Provenzano v Moore* 744 So 2d 413 (Fla 1999).

²⁸⁸ Mark Silva "Old Sparky Replaced by a Newer Model" *The Florida Times-Union* (Jacksonville, 8 May 1999) at A1.

²⁸⁹ Rick Bragg "Florida's Messy Executions Put the Electric Chair on Trial" *The New York Times* (New York, 18 November 1999) at A14.

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.").

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.²⁹¹ 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.²⁹² 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!"²⁹³ No coup de grâce was administered, and Wilkerson took 27 minutes to bleed to death on the dusty ground.²⁹⁴

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 Kessel 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.²⁹⁵ 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:²⁹⁶

The idea that cyanide kills immediately is hokey. 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.²⁹⁷

²⁹¹ "Execution of Wallace Wilkerson" *The Deseret News* (Salt Lake City, 21 May 1879) at 245; Harold Schindler "Taylor's Death was Quick ... But Some Weren't So Lucky" *The Salt Lake Tribune* (Utah, 28 January 1996) at A1.

²⁹² R Michael Wilson *Legal Executions in the Western Territories, 1847-1911: Arizona, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington and Wyoming* (McFarland, Jefferson (NC), 2010) at 170-171.

²⁹³ At 171.

²⁹⁴ "Execution of Wallace Wilkerson", above n 291, at 245; Schindler, above n 291, at A1.

²⁹⁵ Scott Christianson *The Last Gasp: The Rise and Fall of the American Gas Chamber* (University of California Press, Berkeley (Cal), 2010) at 121; Abbot, above n 23, at 117.

²⁹⁶ Christianson, above n 295, at 121.

²⁹⁷ "Killers Executed in Gas Chambers" *San Francisco Chronicle* (California,

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".²⁹⁸ After eight minutes of Gray repeatedly banging his head against the pole, the witnesses were asked to leave the execution chamber.²⁹⁹ 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 1984.³⁰⁰

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".³⁰¹ Press witnesses described the execution as "ugly", "extremely violent", and "not a clean and simple death".³⁰² Although the police chief who presided at the execution challenged such characterisations,³⁰³ 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.³⁰⁴

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 2010.³⁰⁵ 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

3 December 1938) at 1.

²⁹⁸ Christianson, above n 295, at 211.

²⁹⁹ At 211.

³⁰⁰ 1984 Miss Laws 448.

³⁰¹ "Gruesome Death in Gas Chamber Pushes Arizona Toward Injections" *The New York Times* (New York, 25 April 1992) at 9.

³⁰² Charles L Howe "Arizona Killer Dies in Gas Chamber" *San Francisco Chronicle* (California, 7 April 1992) at A2.

³⁰³ At A2.

³⁰⁴ Judicial Council of the Ninth Circuit *Capital Punishment Handbook* (Judicial Council of the Ninth Circuit, San Francisco, 2006) at 30. The Arizona Legislature formally amended the death penalty statute in February 1993. Those convicted prior to the change may select lethal injection or lethal gas, but lethal injection must be used on those convicted after 1992. Arizona Constitution art XXII, s 221; 1993 Ariz Sess Laws c 2.

³⁰⁵ Michael L Radelet "Some Examples of Post-*Furman* Botched Executions" (1 October 2010) <www.deathpenaltyinfo.org>.

in the United States between 1982 and 2010.³⁰⁶ 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,³⁰⁷ 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,³⁰⁸ others pointed out that the botch was inconsequential when compared to the horrific nature Demps’s crimes.³⁰⁹ 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.

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.

³⁰⁷ Shelby Oppel “Inmate Claims Injection Bungled” *St Petersburg Times* (Florida, 8 June 2000) at A1.

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.³¹⁰ Governor Ted Strickland was contacted about the difficulties, and by executive action Broom’s execution was postponed by one week.³¹¹ 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.³¹² 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:³¹³

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.³¹⁴ Although the US

³¹⁰ Alan Johnson “Effort to Kill Inmate Halted; 2 Hours of Needle Sticks Fail; Strickland Steps In” *The Columbus Dispatch* (Ohio, 16 September 2009) at A1.

³¹¹ At A1.

³¹² Bob Driehaus “Ohio Plans to Try Again as Execution Goes Wrong” *The New York Times* (New York, 17 September 2009) at A16. For a discussion of the Francis botch, see above text accompanying nn 274–276.

³¹³ “Botched Executions” *The New York Times* (New York, 3 October 2009) at A22.

³¹⁴ Ian Urbina “Ohio Is First to Change to One Drug in Executions” *The New York Times* (New York, 13 November 2009) at A10. The initial “Ohio protocol” was that only sodium thiopental – the first of the three traditionally used drugs – would be used in executions. In 2010, Washington also began using sodium thiopental alone in lethal injections. Recently, due to a nation-wide shortage in sodium thiopental brought on by the sole American manufacturer’s decision to cease its production,

Supreme Court has ruled that use of the three-drug protocol does not constitute cruel or unusual punishment,³¹⁵ 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.³¹⁶

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”?³¹⁷

The answer is straightforward. In most cases, a botched execution is

Ohio began using pentobarbital as the sole drug in its executions. Rob Stein “Man Executed with Single-drug Method” *The Washington Post* (Washington DC, 11 March 2011) at A2. By October 2012, Arizona, Georgia, Idaho, Kentucky, South Dakota, Texas, and Washington had also adopted a one-drug pentobarbital protocol, and Missouri had adopted a one-drug protocol using propofol. Death Penalty Information Center “State By State Lethal Injection” <www.deathpenaltyinfo.org>. See also below, n 316.

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Baze v Rees 553 US 35 (2008).

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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. *Beatty v FDA* 853 F Supp 2d 30 (DC 2012).

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Borg and Radelet, above n 5, at 143.

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.³¹⁸ 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.

³¹⁸ Kenneth D Kochanek and others “Deaths: Final Data for 2009” (2011) 60(3) National Vital Statistics Report 1 at 65.

