

# GHOSTS OF EXECUTIONS PAST: A CASE STUDY OF EXECUTIONS IN SOUTH CAROLINA IN THE PRE-*FURMAN* ERA

*John H. Blume*†

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## INTRODUCTION

During the waning months of the Trump Administration, thirteen persons on federal death row were executed.<sup>1</sup> They all maintained that the lethal injection protocol the federal government intended to use presented an unconstitutional risk of a torturous death. While lower federal courts determined that their allegations deserved additional scrutiny, and in several cases entered injunctions preventing the executions, an exasperated majority of the United States Supreme Court in *Barr v. Lee* summarily vacated the lower court’s decision and effectively “greenlighted” lethal injection executions if they can be carried out by a single dose of pentobarbital sodium.<sup>2</sup> The Court reasoned that this dosage is widely conceded to render a person “fully insensate” and does not carry the risks of pain that “some have associated with other lethal injection protocols.”<sup>3</sup> *Barr* is the most recent in a series of decisions by the Court upholding various forms of lethal injection against constitutional attack, and declaring that the federal government and the States, “[f]ar from seeking to superadd terror, pain, or disgrace to their executions,” have attempted to

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† Samuel F. Leibowitz Professor of Trial Techniques at Cornell Law School and Director of the Cornell Death Penalty Project.

<sup>1</sup> For a more detailed discussion of the federal death penalty generally and the recent federal executions specifically, see Hannah L. Freedman, *The Modern Federal Death Penalty: A Cruel and Unusual Punishment*, 107 CORNELL L. REV. 1689 (2022).

<sup>2</sup> 140 S. Ct. 2590, 2591 (2020) (per curiam).

<sup>3</sup> *Id.*

develop new ways to carry out executions that are “less painful and more humane than traditional methods, like hanging, that have been uniformly regarded as constitutional for centuries.”<sup>4</sup>

The protracted and (somewhat) ongoing debate over whether lethal injection—in some or all of its forms—is cruel and unusual punishment under the Eighth Amendment is the newest variation on the question of whether a particular form of capital punishment is inhumane and cruel.<sup>5</sup> The history of capital punishment in the United States over the last two centuries has been punctuated by attempts to find less painful and gruesome ways to kill persons society has condemned to die. Ironically, at least from a historical perspective, some recent executions have seen condemned inmates or their attorneys elect some of the older methods, i.e., electrocution,<sup>6</sup> or offer, as a potentially less painful alternative, the firing squad or death by lethal gas.<sup>7</sup> And some states, including the main subject of this Article, have resurrected electrocution and the firing squad because of a claimed inability or difficulty in obtaining execution drugs. In this Article, I will trace the

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<sup>4</sup> *Id.* (alteration in original) (quoting *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019)); see also *Baze v. Rees*, 553 U.S. 35, 54–56 (2008) (holding that “the risks [of administering an inadequate sodium thiopental dose are not] so substantial or imminent as to amount to an Eighth Amendment violation”); *Glossip v. Gross*, 576 U.S. 863, 867 (2015) (holding that “the prisoners failed to identify a known and available alternative method of execution that entails a lesser risk of pain . . . [and] the District Court did not commit clear error when it found that the prisoners failed to establish that Oklahoma’s use of a massive dose of midazolam in its execution protocol entails a substantial risk of severe pain”). The challenges to lethal injection, in (very) broad strokes, fall into two buckets. The first has to do with the use of particular drugs in a multi-drug lethal injection protocol, e.g., midazolam, and whether it will render a person fully insensate at the time of the administration of the drugs that kills the inmate. *E.g.*, *Glossip*, 576 U.S. at 867. More recent challenges have been to the use of a single drug, pentobarbital sodium, and whether it can cause “flash pulmonary edema, which can lead to a sensation akin to drowning and extreme pain, terror, and panic,” as Justice Sotomayor observed in her dissenting opinion in *Barr v. Lee*, 140 S. Ct. at 2593 (Sotomayor, J., dissenting) (internal quotation marks omitted).

<sup>5</sup> See Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, ATLANTIC, June 2015 (describing the botched and torturous lethal injection of Clayton Lockett in Oklahoma); see also *Glossip*, 576 U.S. at 867 (assessing whether the use of midazolam violates the Eighth Amendment).

<sup>6</sup> *Tennessee Inmate Chooses Electric Chair over Lethal Injection*, BBC NEWS (Dec. 7, 2018), <https://www.bbc.com/news/world-us-canada-46465038> [<https://perma.cc/NS9Z-74GL>].

<sup>7</sup> See *Bucklew*, 139 S. Ct. at 1129. In recent cases, the Supreme Court has held that an inmate raising an Eighth Amendment challenge to a state or federal government’s method of execution must offer a “feasible, readily implemented” alternative method of execution that would significantly lessen the risk of severe pain identified in the execution method the state or federal government proposes to use. *Id.* at 1121. The failure to do so renders the claim defective as a matter of law. *Id.*

history of execution methods in the pre-modern era of capital punishment (before 1972), primarily in South Carolina, pointing out the often-intractable problems with their implementation process (including specific “botches”), and then address other aspects of executions that have relevance to the current debate about the wisdom and efficacy of retaining the “modern” American death penalty in the twenty-first century.<sup>8</sup>

## I

### EXECUTIONS, BOTCHES AND THE SEARCH FOR MORE HUMANE METHODS

At some points in the past, in South Carolina and elsewhere, executions were *intended* to be brutal in order to increase their deterrent effect, for example, the burning or gibbeting of enslaved persons for plotting or participating in rebellions or crimes of violence against their owners, but such executions were relatively rare.<sup>9</sup> There are documented cases of such executions in South Carolina, although undoubtedly there were more than I have been able to establish. For example, the enslaved persons who participated in the Primus Rebellion in the 1720s were executed in public in brutal fashion and the alleged leader of the revolt was hung “in

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<sup>8</sup> Most scholars conceive of the death penalty as having a “modern” and pre-modern era. The line of demarcation is the United States Supreme Court’s decision in *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), which held that all then-existing death penalty statutes violated the Eighth Amendment’s ban on cruel and unusual punishment. See *id.* at 239–40. The Court did not, however, hold that the death penalty was under all circumstances unconstitutional; rather the defects were in the manner in which capital punishment was applied. See *id.* Four years later, the Court decided that the death penalty was not per se unconstitutional and also established the parameters of a constitutional capital sentencing scheme. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 206–07 (1976) (plurality opinion) (upholding Georgia’s newly enacted bifurcated, discretionary capital punishment law); *Woodson v. North Carolina*, 428 U.S. 280, 302–05 (1976) (plurality opinion) (finding North Carolina’s post-*Furman* mandatory constitutional scheme unconstitutional). For a more detailed discussion of *Furman* and *Gregg* and the modern era death penalty in South Carolina, see John H. Blume & Lindsey S. Vann, *Forty Years of Death: The Past, Present, and Future of the Death Penalty in South Carolina (Still Arbitrary After All These Years)*, 11 DUKE J. CONST. L. & PUB. POL’Y 183 (2016); John H. Blume, Sheri L. Johnson, Emily C. Paavola & Keir M. Weyble, *When Lightning Strikes Back: South Carolina’s Return to the Unconstitutional, Standardless Capital Sentencing Regime of the Pre-Furman Era*, 4 CHARLESTON L. REV. 479 (2010); John H. Blume, *Twenty-Five Years of Death: A Report of the Cornell Death Penalty Project on the “Modern” Era of Capital Punishment in South Carolina*, 54 S.C. L. REV. 285 (2002).

<sup>9</sup> WALTER EDGAR, *SOUTH CAROLINA: A HISTORY* 73–81 (1998); STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 70–72 (2002).

chains.”<sup>10</sup> The same was true of persons who were not summarily executed upon apprehension who participated in the 1739 Stono Rebellion near Charleston, which was the largest insurrection of enslaved persons in British North America.<sup>11</sup> Many of the participants were decapitated and their heads placed on large wooden poles at every milepost leading into the city.<sup>12</sup> An additional 150 enslaved persons were publicly hung at a rate of 10 people a day.<sup>13</sup>

Enslaved persons that attempted to run away were also generally executed, often brutally, in public and in front of other slaves, and the bodies were often left hanging in public for an extended period of time to (theoretically) maximize the deterrent effect.<sup>14</sup> Boatswain, an enslaved man, was burned at the stake in Charleston in 1741,<sup>15</sup> and two more were burned there in July of 1769, one for procuring poison used in the death of a white member of the household of his employer and the other for administering it.<sup>16</sup> A more detailed account exists of the execution of an enslaved person named Sam who was burned to death in Charleston on January 28, 1820. A witness observed that

[a]s the flames approached [Sam], the piercing shrieks of the unfortunate victim struck upon the heart with a fearful, painful vibration—but when the devouring element seized upon his body, all was hushed—yet the cry of the agony still thrilled in the ear, and an involuntary and sympathetic shudder ran through the crowd.<sup>17</sup>

Sam’s codefendant was hung, then decapitated and publicly displayed. And a large, festive crowd gathered in Greenville in 1825 to witness the immolation of William, a runaway enslaved

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<sup>10</sup> EDGAR, *supra* note 9 at 73.

<sup>11</sup> *Id.* at 74–74.

<sup>12</sup> Mark M. Smith, *Stono Rebellion*, in *THE SOUTH CAROLINA ENCYCLOPEDIA* 932, 933 (Walter Edgar ed., 2006); Leslie Alexander & Michelle Alexander, *Fear*, in *THE 1619 PROJECT: A NEW ORIGIN STORY* 97, 105 (Nikole Hannah-Jones, ed., 2021).

<sup>13</sup> Alexander & Alexander, *supra* note 12, at 105.

<sup>14</sup> BANNER, *supra* note 9, at 70–76.

<sup>15</sup> Boatswain was executed for arson when a fire started in Charleston in 1741. Another enslaved woman named Kate had been arrested and indicted for setting a fire with the intent to burn the whole city down. Facing execution, Kate implicated Boatswain, who purportedly had a reputation for having an “abiding hatred of whites.” Boatswain was burned to death for setting a fire even though such a punishment was not authorized by law at the time, either by South Carolina’s statutes or in England’s. THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW*, 1619-1860, at 332 (1996).

<sup>16</sup> Lowry Ware, *The Burning of Jerry: The Last Slave Execution by Fire in South Carolina?*, 91 S.C. HIST. MAG., Apr. 1990, at 100.

<sup>17</sup> *Execution*, CHARLESTON COURIER, Feb. 7, 1820, at 2.

man from Alabama, charged with murder.<sup>18</sup> Similarly in 1825 “Negro Jack,” was convicted of rape and murder by the Court of Magistrates and Freeholders (a special court for crimes committed by enslaved persons),<sup>19</sup> and in an effort to make a “dreadful example” of him, he was sentenced to be chained to a stake, soaked in turpentine and burned alive.<sup>20</sup> The last legal execution by burning of a convicted criminal in the United States was in 1830, when an enslaved person named Jerry was burned to death in Abbeville County for allegedly raping the wife of a person his owner “subcontracted” him out to work for.<sup>21</sup> In 1833, the South Carolina state legislature amended the Slave Code to limit execution “of a slave, or free person of color, for a capital offence” to “hanging, and not otherwise.”<sup>22</sup>

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<sup>18</sup> WILLIAM B. GRAVELY, *THEY STOLE HIM OUT OF JAIL: WILLIE EARLE, SOUTH CAROLINA’S LAST LYNCHING VICTIM 3* (2019).

<sup>19</sup> See *An Act for the Better Ordering and Governing of Negroes and Other Slaves*, No. 476, §§ VIII–XX, reprinted in 7 *THE STATUTES AT LARGE OF SOUTH CAROLINA* (David J. McCord ed. 1840). The Court of Magistrates and Freeholders was composed of justices and freeholders—property-owning whites—and had the authority to impose a variety of corporal punishments, including branding a convict’s face “with a red hot iron,” lashings and death. *Id.* §§ X–XIV. Notably, when an enslaved person received a sentence of death from the Court of Magistrates and Freeholders for the crime of “mutiny or insurrection,” the method of execution was left in the hands of the sentencer:

[A panel of] two justices of the peace and three freeholders . . . who are hereby impowered and required to try the said slaves so offending, and inflict death or any other punishment upon the offenders, and forthwith, by their warrant, cause execution to be done by the common or any other executioner, in such manner as they shall think fitting . . . .

*Id.* § XIV.

<sup>20</sup> F. A. Burtner, Jr., *America’s Last Legal Burning at the Stake?*, 47 *J. CRIM. L. & CRIMINOLOGY* 580, 580 (1957).

<sup>21</sup> Ware, *supra* note 16, at 100–06.

<sup>22</sup> *An Act Abolishing Certain Punishments, and Amending the Law for the Trial of Slaves and Free Persons of Color*, No. 2602, § II, reprinted in 6 *THE STATUTES AT LARGE OF SOUTH CAROLINA* (David J. McCord ed., 1839).

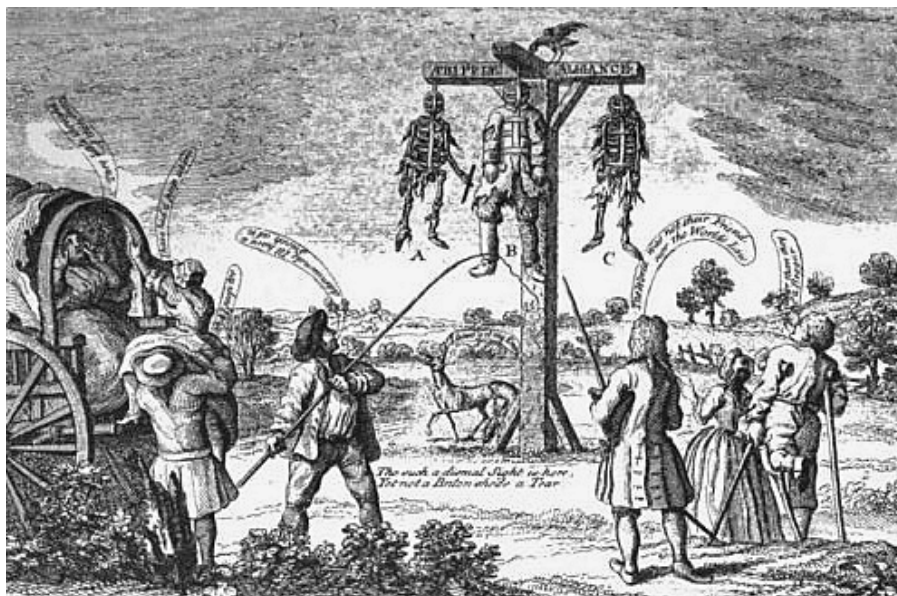


Figure 1 George Bickham the Younger, *An Odd Sight Sometime Hence* (c. 1756) (image courtesy of the British Museum). The satirical print demonstrates the operation of the gibbet.

But that type of public brutality in the execution of persons *legally* sentenced to die was the exception rather than the rule and was resorted to only when those in power believed that the situation required such an example.<sup>23</sup> The general expectation for most executions was that death itself was sufficient retribution, and consequently, that capital punishment should be carried out inflicting the minimal amount of physical pain possible. Thus, as I will discuss, hanging and the firing squad (which was never used in South Carolina but was in some Western states) gave way to the electric chair and gas chamber, which in turn were replaced in the “modern era” by lethal injection. The search for new and improved methods of dispatching condemned prisoners was often spurred on by executions which did not go as planned, of which there were many.

For most of the nation’s (and South Carolina’s) history, the dominant method of execution was hanging, which arrived along with the early colonists from England. The first recorded hanging in the New World was in 1623 in Jonestown, Virginia, when Daniel Frank was executed for stealing cattle. In an early example of the vagaries of justice, his codefendant’s life was

<sup>23</sup> BANNER, *supra* note 9, at 70–71 (“These more severe punishments were carefully handed out to apply terror where it was thought to be most needed.”).

spared because he was the town's only blacksmith.<sup>24</sup> The first known execution in South Carolina was that of Robert Tucker, who was hung for the offense of piracy in Charleston in 1718.<sup>25</sup> Hanging was the primary means to carry out executions because it required so little equipment: a rope and a tree. Even hanging, however, went through a metamorphosis. Early hangings involved putting someone on a ladder or wagon and then removing it.<sup>26</sup> However, because this method of execution depended on the condemned person dying of oxygen deprivation, it generally took about twenty minutes, and it could be quite garish, with the person swinging at the end of the rope and gasping for breath. Sometimes the person could still talk. Many defecated and urinated on themselves in the process of dying; often the person's eyes would bulge out, and men would have obvious penile erections.<sup>27</sup> Thus, in an attempt to eliminate public spectacles, hanging moved from trees to pre-made gallows where the drop was supposed to break the condemned person's neck, producing the "hangman's fracture," and result in a relatively quick and painless death.<sup>28</sup>

However, the theoretical effectiveness of the "long drop" method of hanging was hampered by a number of factors, the most significant being lack of expertise. For the most part, in the early years, executions were carried out by the local sheriff in the county where the crime and trial occurred, and no individual county executed enough persons for local law enforcement to develop sufficient experience in carrying out hangings to kill with precision.<sup>29</sup> Further complicating matters was the fact that many law enforcement officials did not like being responsible for putting persons to death, and thus "outsourced" the process to prisoners (or others) to carry out hangings.<sup>30</sup> The Sheriff of Charleston County in the early 1800s, for example, was reported to have enlisted the services of the town drunk, arresting him several days beforehand, sobering him up and promising unlimited alcohol once the

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<sup>24</sup> AMANDA HOWARD, *ROPE: A HISTORY OF THE HANGED 17* (2016).

<sup>25</sup> Tucker and other pirates were executed following an en masse trial. See Nic Butler, *The Charleston Pirate Trials of 1718*, CHARLESTON CNTY. PUB. LIBR. (Nov 30, 2018), <https://www.ccpl.org/charleston-time-machine/charleston-pirate-trials-1718> [<https://perma.cc/CU7A-5Y8H>].

<sup>26</sup> BANNER, *supra* note 9, at 45.

<sup>27</sup> *Id.* at 47.

<sup>28</sup> *Id.* at 48.

<sup>29</sup> *Id.* at 173.

<sup>30</sup> *Id.* at 173-76.

hanging was complete.<sup>31</sup> Moreover, gallows were generally not permanent and were built out of whatever was available at the time one was needed. For example, Robert McEvoy was put to death in Aiken County using a “trap door” contraption constructed under a jail cell.<sup>32</sup> Young Annie Tribble was executed in Newberry County where they created a scaffold by cutting a hole in the third floor corridor of the jail.<sup>33</sup> Thus, trying to calculate the drop necessary to break the condemned person’s neck and produce a hasty, painless death was often no more than a guessing game. Eventually a “drop” between four to six and a half feet became standard, but there were no clear rules or even guidance for how a person’s size and weight should affect the distance.<sup>34</sup>

An error in either direction could lead to gruesome deaths. If the drop was too great, there was a risk of decapitation. This risk came to fruition on more than one occasion: a South Carolina enslaved person named Ephraim had his head “severed from his body” after too long a drop.<sup>35</sup> But, the more typical “problem” was that the fall failed to break the neck, which generally resulted in a slow, agonizing strangulation. It has been estimated that only ten to twenty percent of hangings produced the desired “hangman’s fracture.”<sup>36</sup> Thus many hangings were, based on the contemporaneous reports, quite horrific and thus “botched.” Taylor Wilson for example, was executed in Charleston on April 5, 1872. The drop only raised him a few inches off the platform, and Wilson was slowly strangled for approximately five minutes until he managed to free one of his hands and raise himself up by the rope.<sup>37</sup> The Sheriff then stepped forward and held Wilson “until he was too weak to raise himself again, and was compelled to endure a slow death.”<sup>38</sup> The “bungl[ed]” execution was described as “one of the most horrible on record.”<sup>39</sup> Some individuals did die

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<sup>31</sup> DANIEL J. CROOKS JR. & DOUGLAS W. BOSTICK, CHARLESTON’S TRIAL: JIM CROW JUSTICE 130 (2008).

<sup>32</sup> McEvoy is an interesting character in a number of ways. Although he only had one leg, he escaped from the jail four times before he was put to death. He also obtained a temporary reprieve by claiming to have knowledge of another apparently unsolved murder. *McEvoy*, CHI. TRIB., Apr. 20, 1878, at 3; *McEvoy’s Execution*, CINCINNATI ENQUIRER, Apr. 20, 1878, at 2.

<sup>33</sup> Roger Christian, *Juvenile Executions in South Carolina (1894–1962)*, 10 (available at South Carolina State Archives).

<sup>34</sup> HOWARD, *supra* note 24, at 25.

<sup>35</sup> *Execution*, CHARLESTON COURIER, Feb. 7, 1820, at 2.

<sup>36</sup> HOWARD, *supra* note 24, at 27.

<sup>37</sup> *A Bungling Execution*, CHARLESTON DAILY NEWS, Apr. 9, 1872, at 1.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*



quickly, such as fourteen-year-old Milbry Brown. Sentenced to death for allegedly poisoning with carbolic acid a one-year-old white child under her care, Brown was led to the gallows in a white lace dress on October 7, 1892. Observers reported that her neck was broken and “not a muscle moved” after the drop.<sup>40</sup> But a significant number of other executions were more like the Taylor Wilson spectacle. For example, Joshua Nettles, while dangling at the end of the rope, broke loose one of his tied hands, lifted himself up, adjusted the angle of the knot and then dropped himself again, hastening his own death.<sup>41</sup> Samuel Vincent’s execution provides another particularly horrible example. After the drop failed to break his neck, Vincent was conscious and could be heard repeatedly saying, “Lord have mercy upon my soul.”<sup>42</sup> Eventually a ladder was placed beside the scaffold and “some humane man” climbed up and adjusted the noose down until it choked Vincent to death, and “the poor wretch’s sufferings were ended.”<sup>43</sup>

Not all executioners were so “humane.” In at least one case (and there likely were more), the person responsible for carrying out the execution intentionally set the drop to not break the neck in order to increase the executed individual’s suffering. A man named Wicker was in charge of the 1859 hanging of a Black woman (Fannie Stewart) and reportedly took “fiendish delight” in her slow strangulation.<sup>44</sup>

I also found reports of several instances where the hangman’s rope broke during the fall and the person had to go through the drop ordeal again. Lewis Berry and John Sweedenburg were executed the same day at the same time in Newberry County in 1870.<sup>45</sup> Through some “accidental cause,” one of the ropes broke, and both men fell to the ground.<sup>46</sup> Undeterred, the executioners pressed on and hung the two

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<sup>40</sup> Sheri Lynn Johnson, John H. Blume & Hannah L. Freedman, *The Pre-Furman Death Penalty in South Carolina: Young Black Life Was Cheap*, 68 S.C. L. Rev. 331, 338 (2017) (quoting *Three of a Kind*, SANDUSKY REG., Oct. 8, 1892, at 1). For a more detailed discussion of Milbry’s case, see *id.* The evidence that it was a homicide, as opposed to an accidental death, was weak. That, combined with her age, led to significant public interest in the case and a campaign for clemency, with many noting that if Milbry were white, she would not be executed. *Id.* at 337–38. Governor “Pitchfork” Ben Tillman was not moved, however, and allowed the execution to proceed. *Id.*

<sup>41</sup> CROOKS & BOSTICK, *supra* note 31, at 130.

<sup>42</sup> *The Gallows*, WILMINGTON J., Apr. 3, 1874, at 1.

<sup>43</sup> *Id.*

<sup>44</sup> *The Hanging of Anna Tribble*, NEWBERRY HERALD & NEWS, Oct. 12, 1892, at 3.

<sup>45</sup> *Execution*, NEWBERRY WKLY. HERALD, Nov. 9, 1870, at 2.

<sup>46</sup> *Id.*

men again.<sup>47</sup> James Black was put to death in Marion County on March 18, 1881, and suffered a similar fate.<sup>48</sup> During the initial fall the rope broke, so Black was picked up off the ground and brought back up to the top of the gallows “in a strangling condition” while a new rope was again prepared for round two.<sup>49</sup> According to witnesses, Black “appeared to suffer terribly” and was “spitting blood.”<sup>50</sup> Eighteen minutes later, the trap door opened for the second time; this time the rope held, but the fall did not break his neck.<sup>51</sup> After struggling for nine minutes, his pulse was still noticeable, and finally, twelve minutes after the second fall, the doctors pronounced him dead.<sup>52</sup>

One other bizarrely macabre hanging was discovered during our research. John Wright was put to death without incident, or so officials thought, in Darlington on December 10, 1897.<sup>53</sup> He was reported to be “quiet and composed to the end.”<sup>54</sup> He was pronounced dead by the attending physician and his body was placed in the jail.<sup>55</sup> Approximately an hour later, however, Wright was determined be alive.<sup>56</sup> He was returned to the gallows and hung again, until he finally (finally) died.<sup>57</sup>

South Carolina, and some other states, also experimented with the “upright jerker,” which made its way to Charleston in 1872.<sup>58</sup> The idea behind the upright jerker was similar to the one motivating use of the gallows—to quickly break the neck

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<sup>47</sup> *Id.*

<sup>48</sup> *See Hanged, and Hanged Again*, INTELLIGENCER (ANDERSON), Mar. 24, 1881, at 2.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* Much later, the Supreme Court would decide a case posing the question whether it was cruel and unusual punishment to execute a person after the first attempt fails. The State of Louisiana had failed to successfully electrocute Willie Francis on its first try due to a malfunction in the chair. *See Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 460 (1947). Lawyers challenged the second attempt to electrocute him, but the Supreme Court determined that the execution could proceed, and Francis was executed on May 9, 1947. *See id.* at 466. For a more detailed discussion of Francis’s case, see Deborah W. Denno, *When Willie Francis Died: The “Disturbing” Story Behind One of the Eighth Amendment’s Most Enduring Standards of Risk*, in *DEATH PENALTY STORIES* 17 (John H. Blume & Jordan M. Steiker eds., 2009).

<sup>53</sup> *See A Bungling Execution*, INTELLIGENCER (ANDERSON), Dec. 15, 1897, at 4.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> BANNER, *supra* note 9, at 171.

and cause death; it attempted to do so by jerking the person off the ground using a system of weights and pulleys.<sup>59</sup> A lever was pulled, dropping a weight far exceeding that of the person being executed. This lifted the person into the air, followed by a fall that snapped the neck.<sup>60</sup> It proved to be no more reliable—likely due to the same lack of expertise issues that plagued traditional hangings—and was no longer in use by the 1930s. Before the upright jerker was retired, Daniel Duncan, who went to his death in Charleston in 1910 proclaiming his innocence, was jerked up as planned, but his neck did not break; it took thirty-nine minutes, during which his body jerked and spasmed, before he was finally pronounced dead.<sup>61</sup> When seventeen-year-old James Kelly was hanged in Mount Pleasant in 1901, he weighed so little that “the heavy weight [that] was dropped[ ] sen[t] the boy high in the air and then dropp[ed] him until he was suspended like a speckled bass dangling from a fisherman’s line.”<sup>62</sup> His neck “was broken like a stick of brittle candy,” but even after the fall, “he quivered and squirmed, and his body shook with convulsions.”<sup>63</sup> James’s father watched the execution, “shivering in a ragged overcoat, and with tears of sorrow trickling down his cheeks” as the black cap “covered the face of his child for the last time in life.”<sup>64</sup>

The numerous “botched” hangings in South Carolina and across the nation drove the search for a new, more reliable way to kill those convicted of capital offenses.<sup>65</sup> Moreover, the increased number of lynchings after the Civil War led some proponents of capital punishment to search for a method of execution that did not so closely resemble the mode most commonly used by the white mobs that carried out extrajudicial acts of racial terror. The next new method was devised near the end of the 19th century when, in 1885, a New York State commission proposed using electricity to kill death sentenced inmates.<sup>66</sup> The Governor encouraged the Legislature to consider the following charge:

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<sup>59</sup> *Id.*

<sup>60</sup> *See id.*

<sup>61</sup> CROOKS & BOSTICK, *supra* note 31, at 144.

<sup>62</sup> *Saw the Hanging of His Son*, YORKVILLE ENQUIRER, Jan. 9, 1901, at 3.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Elbridge T. Gerry, *Capital Punishment by Electricity*, 149 N. AM. REV. 321, 322–24 (1889) (describing problems with beheading and strangulation which, in part, prompted the development of the electric chair).

<sup>66</sup> *In re Kemmler*, 136 U.S. 436, 444 (1890).

The present mode of executing criminals by hanging has come down to us from the dark ages, and it may well be questioned whether the science of the present day cannot provide a means for taking the life of such as are condemned to die in a less barbarous manner.<sup>67</sup>

The Governor then appointed a commission, which concluded that the “the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases” was to cause to “pass through the body of the convict a current of electricity of sufficient intensity to cause death.”<sup>68</sup>

The development of electrocution as the new method of execution was largely a historical accident. One of the commission’s members, Dr. Albert Southwick, was a dentist from Buffalo who witnessed what he perceived as a painless death when an individual accidentally touched an electric generator.<sup>69</sup> Southwick enlisted Thomas Edison to persuade the commission to propose electricity as its new, more humane alternative to hanging.<sup>70</sup> Edison was initially not interested in the project as he was opposed to capital punishment, but he soon saw a business opportunity.<sup>71</sup> Edison was losing the “battle of the currents,” as George Westinghouse’s alternating current (AC) was proving to be more efficient and less expensive than Edison’s direct current (DC).<sup>72</sup> Edison believed that if he could associate Westinghouse’s AC with death, then it would diminish consumer’s enthusiasm for it and give his DC electricity a leg up in the rapidly developing market for electricity in the United States.<sup>73</sup> So, Edison informed Southwick that AC machines, “even by the slightest contacts, produce[] instantaneous death.”<sup>74</sup> Given Edison’s fame, his opinion carried the day, and electrocution using AC became New York’s new method of execution.<sup>75</sup>

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*; Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century*, 35 WM. & MARY L. REV. 551, 567–70 (1994).

<sup>69</sup> Denno, *supra* note 68, at 567.

<sup>70</sup> *See id.* at 570.

<sup>71</sup> *See id.*

<sup>72</sup> *See id.* at 569.

<sup>73</sup> *See id.* at 571.

<sup>74</sup> *Id.* (alteration in original).

<sup>75</sup> *See id.* at 573–77 (describing the process by which the medical establishment recommended AC current).

William Kemmler was the first person sentenced to death after the electric chair was adopted in New York.<sup>76</sup> George Westinghouse funded the defense team representing Kemmler in an appeal challenging Kemmler's death sentence as cruel and unusual punishment.<sup>77</sup> But the team's arguments were rejected by both the New York state courts and by the Supreme Court of the United States. The New York courts acknowledged that electrocution was "unusual" because it was new, but concluded that it was not "cruel" as it was superior to hanging.<sup>78</sup> In the New York Supreme Court's view, "the evidence is clearly in favor of the conclusion" that "electrical science" had made it possible to "generate and apply to the person of the convict a current of electricity of such known and sufficient force as certainly to produce instantaneous, and, therefore, painless, death."<sup>79</sup>

Thus, on August 6, 1890, Kemmler was led into the execution chamber at Auburn prison and strapped into the new electric chair. It did not go well. Kemmler reportedly said: "[T]ake your time and do it all right."<sup>80</sup> The first seventeen-second jolt of one thousand volts of electricity did not kill Kemmler.<sup>81</sup> A second burst of seven hundred volts eventually did produce the desired death, but witnesses reported that blood-vessels beneath Kemmler's skin burst.<sup>82</sup> His hair and skin were visibly singed, and the stench of burned flesh was horrid.<sup>83</sup> A number of nauseated spectators present to watch the new age of executions tried unsuccessfully to leave the room, and one shouted, "For God's sake kill him and have it over!"<sup>84</sup> A doctor who witnessed the execution said, "I want never again to witness anything like that. You may kill a man—but kill him."<sup>85</sup> According to *The New York Times*, it was an "awful spectacle" and "far worse than hanging."<sup>86</sup> George Westinghouse further opined that the State (and Kemmler)

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<sup>76</sup> See *id.* at 577.

<sup>77</sup> BANNER, *supra* note 9, at 185; Denno, *supra* note 68, at 578.

<sup>78</sup> *In re Kemmler*, 136 U.S. 436, 443–44 (1890). The United States Supreme Court did not actually reach the Eighth Amendment issue because it had not yet been incorporated against the states. *Id.* at 448–49. The Court concluded that New York's selection of electrocution as a method of execution was "within the legitimate sphere of the legislative power of the State." *Id.* at 449.

<sup>79</sup> *Id.* at 443.

<sup>80</sup> BANNER, *supra* note 9, at 185.

<sup>81</sup> *Id.* at 186.

<sup>82</sup> *Id.* at 186–87.

<sup>83</sup> Denno, *supra* note 69, at 600 & n.322.

<sup>84</sup> BANNER, *supra* note 9, at 186.

<sup>85</sup> Denno, *supra* note 69, at 601.

<sup>86</sup> BANNER, *supra* note 9, at 186.

would have been better off if it had just killed Kemmler with an axe.<sup>87</sup>

The botched execution, however, was not, or at least should not have been, a complete surprise. At court hearings preceding Kemmler's execution, other persons with expertise in electrical engineering had maintained that there was no way to accurately determine the electrical resistance of the human body (and thus what voltage, for what length of time would be needed to render the person immediately insensate, and then dead).<sup>88</sup> It also came to light that the animal experiments carried out by Harold Brown, the New York electrician who developed the apparatus, had not been uniformly successful.<sup>89</sup> The forty to fifty dogs, six to ten calves, and two horses electrocuted did not all die immediately based on differences in their skin and hair.<sup>90</sup> According to several persons who witnessed them, the animals "appeared to be suffering horrible agony."<sup>91</sup> Despite electrocution's rocky start, its supporters and the public seemed to accept Edison's assurances that the problem was not with electrocution itself but with the doctors who placed the equipment on Kemmler, and possibly the equipment itself.<sup>92</sup> The public and press were excluded from New York's next five executions by electrocution which purportedly, were more successful in bringing about close to immediate death.<sup>93</sup> Thus, the new method began to be adopted by other states.

Electrocution did not make its way to South Carolina until 1912, a date that coincided with the State assuming responsibility for carrying out all death sentences rather than having them take place in the county where the sentence was

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<sup>87</sup> Denno, *supra* note 69, at 603–04. Ironically (or perhaps not), this was in some respects a replay of an earlier legal challenge to the use of the firing squad. Wallace Wilkerson asked the Supreme Court to declare that execution by firing squad was cruel and unusual punishment. The Court, relying on the fact that death by firing squad had been used by the military for many years, declined to do so. *Wilkerson v. Utah*, 99 U.S. 130, 134–35 (1879). On the day of his execution, Wilkerson refused to wear a blindfold and reportedly flinched at the "fire" command. The sharpshooters missed, hitting only his arm and torso (but not his heart), and it took almost half an hour for Wilkerson to die from exsanguination in front of a group of horrified spectators. CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 27 (2016).

<sup>88</sup> Denno, *supra* note 69, at 580.

<sup>89</sup> Brown had no medical knowledge and only obtained a high school degree. *Id.* at 579–80. He was a completely self-taught electrical engineer. *See id.*

<sup>90</sup> BANNER, *supra* note 9, at 183.

<sup>91</sup> Denno, *supra* note 69, at 580.

<sup>92</sup> *Id.* at 601–02.

<sup>93</sup> *Id.* at 604–05.

imposed.<sup>94</sup> The then Governor, the virulent racist and lynching supporter Coleman Blease, supported the switch, stating that electrocution was a “much more humane manner of execution than the barbaric form of hanging.”<sup>95</sup> The State built a “death house” at Central Correctional Institution (CCI) in Columbia that came to be known as Cell Block II. It then purchased an electric chair from the Adam Electric Company in Trenton, New Jersey for the sum of \$2,800.<sup>96</sup> The new protocol called for executions to be both “within the walls of the state penitentiary” in Columbia and “under the direction of the superintendent of the penitentiary.”<sup>97</sup> The new Act authorized the construction of a “death chamber” and the purchase of “all necessary appliances for inflicting” death by electrocution. It also mandated the presence of an executioner and two assistants, the penitentiary surgeon and one other surgeon, an electrician, the condemned person’s relative (if desired), not more than three “ministers of the gospel,” and not less than twelve nor more than twenty-four “respectable citizens of th[e] state to be designated by the executioner.”<sup>98</sup>

The first person to die in the state’s new electric chair was William Reed. Reed, who was Black, was put to death on August 6, 1912, following his conviction for the attempted sexual assault of the white wife of a prominent farmer. A white mob had attempted to take him from the Anderson County Jail, but the lynching was thwarted as the number of vigilantes who showed up was insufficient to overpower the law enforcement officers barricaded inside the jail that housed Reed.<sup>99</sup> The number of law enforcement officials, combined with the victim’s father’s statement that he preferred to let the courts handle the case, bought Reed a temporary reprieve. Nonetheless, the case moved quickly and was for all intents and purposes what is sometimes referred to as a “show trial” or “legal lynching,” in which the result is preordained: Reed was arrested on February 28, indicted on March 27, and convicted and sentenced to death on April 1 when a “special term” of court was set to hear his case. Reed testified at trial, admitting

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<sup>94</sup> See S.C. CRIM. CODE § XXVII, *reprinted in* CODE OF LAWS OF SOUTH CAROLINA 222 (Andrew Jackson Bethea ed., 1912).

<sup>95</sup> Christian, *supra* note 33.

<sup>96</sup> *First Electrocution in this State Today*, NEWBERRY WKLY. HERALD, Aug. 6, 1912, at 3.

<sup>97</sup> *Malloy v. South Carolina*, 237 U.S. 180, 182 n.1 (1915) (quoting statute).

<sup>98</sup> *Id.*

<sup>99</sup> *The Mob Too Small Jail Not Stormed*, GREENWOOD DAILY J., Feb. 29, 1912, at 1.

he entered the house, but only to rob, not to rape. His story, according to news accounts, was given no credence.<sup>100</sup>

Thus, just a few months after being sentenced to death, Reed was ushered into the new death house and, by local press accounts, the first electrocution went off without a "hitch."<sup>101</sup> Reportedly Reed, who made no last statement, began to "falter" when he entered the new execution chamber, but then regained his composure, walked to the chair and "dropped into the seat."<sup>102</sup> Two electrodes were attached, one to his head and one to his ankle.<sup>103</sup> A helmet with a face mask was placed on his head. Shortly after 11:00 a.m. the first 1,900-volt burst was administered.<sup>104</sup> News accounts stated that Reed's "body strained at the straps."<sup>105</sup> A representative of the company that sold the State the electric chair ascribed Reed's contortions to "nervous reflex action."<sup>106</sup> After 9 seconds, the electric current was reduced to 200 volts, followed by another 1,900-volt burst for 60 seconds.<sup>107</sup> Several minutes later, Reed was pronounced dead.<sup>108</sup> No one claimed his body, and he was buried at the prison's graveyard.<sup>109</sup>

Soon thereafter, a person sentenced to death before the statutory change from hanging to electrocution challenged the new procedure on Ex Post Facto Clause grounds.<sup>110</sup> Joe Malloy, a Black man sentenced to death for murder in Marlboro County, argued that he could not be electrocuted since the sole legally sanctioned method of execution at the time of his offense was hanging.<sup>111</sup> Malloy's case was reviewed by the Supreme Court of the United States, which held that the new execution method did not increase his punishment, which was and remained death, but only changed the mode of carrying the sentence out, and did so in such a way that "the odious features incident to the old method were abated."<sup>112</sup> Malloy's execution was finally carried out (without reported incident) on

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100 *Id.*; *William Reed, Electrocuted Next Tuesday*, COLUMBIA RECORD, Aug. 1, 1912, at 1; *Fiend Was Caught*, TIMES & DEMOCRAT, Feb. 29, 1912, at 1.

101 *First Electrocution at the Penitentiary*, NEWBERRY WKLY. HERALD, Aug. 9, 1912, at 6.

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.*

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.*

110 *Malloy v. South Carolina*, 237 U.S. 180, 181 (1915).

111 *Id.* at 183.

112 *Id.* at 185.



September 29, 1915. Malloy maintained his innocence to the end; his final statement was “I knew nothing of the crime. I wouldn’t be guilty of such a thing, and God would not have me commit such a crime.”<sup>113</sup> He was one of five persons executed, in less than an hour and ten minutes that same day.<sup>114</sup>

Newspaper accounts detail a significant number of cases where death by electrocution did not go smoothly and others where the person almost certainly experienced an excruciating death. It took eleven minutes and multiple jolts to finish off George Washington in 1930; one observer fainted and another had to leave the room.<sup>115</sup> A witness to Thurmond Harris’s 1935 execution commented: “The smell of that burning human flesh, the stiffening of the body of that moronic youth as the 2,300 volts cursed through it, and the twisted face when the mask was lifted off it are something that will not be easily erased from the memory.”<sup>116</sup> When the switch was thrown at George Winyard’s execution in 1939, “his body tensed and banged into the back of the chair,” and flames danced on his skin.<sup>117</sup> The “current was turned off and on three times,” and his body was allegedly carried away “frozen into a seated position.”<sup>118</sup> Jesse Jones’s 1943 electrocution was also horrific. Jones, who was reported to be of very low intelligence, did not appear to understand what was happening until almost the very end when he said, “You’ve got the wrong man,” and began struggling with the correctional officers who were strapping him in the chair.<sup>119</sup> According to news accounts, when the first 2,200 volts of electricity hit him, the “negro was raised several inches out of the chair”; blisters formed on his legs, smoke drifted up around the metal headpiece and “a faint odor of burned human flesh could be smelled.”<sup>120</sup> After the second burst, blisters began forming on his forehead and grew larger until they burst.<sup>121</sup>

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<sup>113</sup> *Five Legal Executions*, WATCHMAN & SOUTHRON, Oct. 2, 1915, at 5.

<sup>114</sup> *Id.*

<sup>115</sup> *Pair Meet Death Admitting Crime and with Prayer*, INDEX J. (GREENWOOD), May 16, 1930, at 1. Colonel James H. Pearman, the superintendent of the state penitentiary in the 1930s, left before the execution. He reportedly never witnessed an electrocution. *Id.*

<sup>116</sup> Frederick Smith, *About South Carolina*, CHARLOTTE OBSERVER, June 16, 1935, at 44.

<sup>117</sup> BANNER, *supra* note 9, at 192.

<sup>118</sup> *Id.*

<sup>119</sup> CHARLES KELLY, NEXT STOP, ETERNITY 49–50 (2016).

<sup>120</sup> *Jesse Jones Is Executed for Murder*, GAFFNEY LEDGER, Apr. 6, 1943, at 5.

<sup>121</sup> *Id.* As one who had witnessed both hangings and electrocutions explained: To an onlooker electrocution appears to be less humane than hanging. The electric connection is made by placing a metal cap on

In late 1944, then-Governor Olin D. Johnston, who was troubled by some of these flawed state killings, sent the chaplain of Death Row to North Carolina to witness three executions in that state's gas chamber and to report back on whether he believed it was a more humane method of carrying out the death penalty.<sup>122</sup> Johnston, who was relatively moderate on the issue of the death penalty for his time, purportedly was concerned with inflicting as little pain as possible in the process of carrying out state executions.<sup>123</sup> No official document exists detailing the results of the chaplain's trip, but Johnston never attempted to jettison the electric chair for the gas chamber.

The failure to change the method of execution was not because of any improvements South Carolina made in the process of execution by electrocution. In fact, no scientifically or medically supported method for carrying out executions painlessly has ever been developed and likely never can be developed. The South Carolina history supports a continually changing electrocution protocol which follows botched executions ad nauseum. An electrical engineer who has reviewed accounts of all electrocutions in South Carolina estimates that as many as one-third of all persons executed in the electric chair endured excruciatingly painful deaths.<sup>124</sup>

Raymond Carney was executed in 1954, and news accounts stated that the water in the electrodes "sizzle[ed]" and the "chamber fast fill[ed] with the acrid odor of scorched flesh" that required "men [to] put handkerchiefs to their nose."<sup>125</sup> Carney was apparently a large, strong man and it took six

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the head and clamps on one leg. The cap and clamps are lined with wet felt. The body is securely strapped to the chair. When the current is applied, the body is suddenly jerked against the straps. . . . As the current is increased in intensity, the flesh fries and smokes, sparks fly, and great blisters are raised around the points of contact. This goes on for a minute or two, the electrician moving his switch back and forth, varying the intensity of the current. . . . The body has the appearance of being in great agony throughout the operations."

Documentation for the Execution of Joe Malloy, *Last Moments of Joe Malloy*, M. WATT ESPY PAPERS, 1730-2008 (Oct 7, 1915), <https://archives.albany.edu/concern/daos/lz40m174g?locale=EN> [<https://perma.cc/SV9U-AKU2>]; <https://archives.albany.edu/concern/daos/h128nn59s?locale=EN> [<https://perma.cc/H5CR-ULKH>] (The quoted article extends across two pages in the Espy archive.).

<sup>122</sup> KELLY, *supra* note 119, at 91-95.

<sup>123</sup> *Id.*

<sup>124</sup> Aff. of John P. Wikswow, Jr., *Moore v. Stirling*, No. 3:22-cv-01213-JD (D.S.C. Apr. 4, 2022), ECF No. 1-5.

<sup>125</sup> Bob Weirich, *Carney Dies in the State Chair*, FLORENCE MORNING NEWS, May 8, 1954, at 1.

minutes and five 2,400-volt surges to bring about his demise.<sup>126</sup> The penitentiary physician attributed the length of the execution and the multiple applications of the current to the fact that “Carney had an exceptionally strong heart.”<sup>127</sup> A year later, two brothers, William and Clay Daniels, who were Black, were sentenced to death after both were found guilty of sexually assaulting a young white female.<sup>128</sup> They were executed several months later; William, the younger of the two, was executed first without any indication that anything went awry.<sup>129</sup> Clay did not go gently into the dark night, however, and struggled with as many as seven officers trying to force him into the electric chair. When they finally did so, several officers had to use a towel to pull his head back in order to get the electrical conducting metal cap on his head. The first shock of 2,400 volts for four minutes did not kill him; nor did the second of 1,350 volts; nor did the third application of 2,400 volts for two minutes. It took one final current application before his heart stopped beating. After witnesses reported what had transpired in the execution chamber, an op-ed in a South Carolina newspaper called for an end to electrocution and the adoption of the gas chamber as the State’s method of execution, offering the view that it “would be the humane, modern way to execute those condemned to death.”<sup>130</sup> There are (many) more similar stories to report, but the point has been made. Electrocution was (remains and always will be) a blunt and unpredictable instrument that cannot execute quickly and painlessly.

Sometimes modifications had to be made—or should have been made—due to the condemned person’s size. George Stinney Jr., a child of only fourteen at the times of his 1944 execution, making him the youngest person executed in the United States in the 20th century, was so small (5’1” tall and 95 lbs.) that the guards struggled to strap him to the chair. They had Stinney sit on a book (it is disputed whether it was a

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<sup>126</sup> *Id.*; Jack Orr, *A Minute-by-Minute Account of How Carney Spent Last Hour Before His Electrocution*, COLUMBIA RECORD, May 7, 1954, at 1, 10.

<sup>127</sup> Weirich, *supra* note 125.

<sup>128</sup> The two brothers were convicted and sentenced to death by an all-white jury that deliberated for twelve minutes before finding them guilty and sentencing them to death. Their court appointed attorney, as was also true in Raymond Carney’s case, did not file a notice of appeal. Thelma Smith, *Execution Date Is Set for Negro Men Guilty of Raping White Girl*, FLORENCE MORNING NEWS, Sept. 9, 1955, at 1.

<sup>129</sup> *South Carolina Needs Gas Chamber*, TIMES & DEMOCRAT (ORANGEBURG), Dec. 16, 1955, at 4.

<sup>130</sup> *Id.*

phone book or a Bible) so the electrodes and cap could be attached.<sup>131</sup> The first jolt of electricity knocked the mask from his face, revealing tears streaming down his face.<sup>132</sup> After Stinney was pronounced dead, and while he was being transported to a funeral home for burial, the hearse driver heard a loud sigh. He stopped, and after detecting a heartbeat, took Stinney to the coroner who indicated the heartbeat had ceased and Stinney was now in fact truly dead.<sup>133</sup> In order to carry out the 1943 execution of diminutive Sue Logue (who reportedly spent the night before the execution covered in her bed in the fetal position), the executioners had to punch additional holes in the straps to make them tight enough for the procedure to “work.”<sup>134</sup>

The other woman who died in South Carolina’s electric chair fared no better than Logue. Rose Marie Stinnette, who was Black (Logue was white), was executed in January of 1943 after being convicted of the murder of her husband. She went to her death denying she was the actual killer, and her final words were: “The man who killed him is on the chaingagn [sic].”<sup>135</sup> When State Electrician Sam Cannon pulled the switch, a short circuit caused a light to blow out, which, according to witnesses, created a “ghostly scene in the death house.”<sup>136</sup> Witnesses also reported seeing “sparks fly from [her] head and arms” in the dimly lit room before another spectator “struck a match to provide more light” to the spectators.<sup>137</sup>

The last persons executed in South Carolina prior to the Supreme Court’s 1972 decision in *Furman* were Douglas Thorne and Ray Landy Young, both of whom were convicted and sentenced to death in Greenville County. Thorne, a white Korean War veteran, received the ultimate punishment following his conviction for the rape of a teenage girl on her

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<sup>131</sup> Charles M. Blow, *Pursuing Justice for All*, N.Y. TIMES (Dec. 21, 2014), <https://www.nytimes.com/2014/12/22/opinion/charles-blow-pursuing-justice-for-all.html> [<https://perma.cc/2ESP-XVEY>].

<sup>132</sup> *Id.*; see also ELI FABER, *THE CHILD IN THE ELECTRIC CHAIR: THE EXECUTION OF GEORGE JUNIUS STINNEY JR. AND THE MAKING OF A TRAGEDY IN THE AMERICAN SOUTH 6* (2021) (“[H]is head went up and the mask came off of his face, and I remember that saliva and all was coming out of his mouth, and tears from his eyes, and there was an odor that I really couldn’t describe . . . but I hope I never smell such an odor again.” (second alteration in original)).

<sup>133</sup> KELLY, *supra* note 119, at 82.

<sup>134</sup> *Id.* at 20.

<sup>135</sup> *Electrocute Dixie Woman*, PITTSBURGH COURIER, Feb. 1, 1947, at 16.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

sixteenth birthday.<sup>138</sup> Young, who was Black, was found guilty by an all-white jury of killing a white liquor store owner with an ice pick.<sup>139</sup> Both juries convicted without offering a recommendation of mercy.<sup>140</sup> The two men were executed the same day in the state's new electric chair (the 252nd and 253rd to die in the electric chair overall). They dodged their initial date with death while a new "push button" control system was installed, replacing the old switches-and-levers method of administering the lethal current.<sup>141</sup> But, ultimately, on Good Friday 1962, their luck ran out, and following a last minute denial of clemency by Governor Fritz Hollings, the two men were led into the revamped execution chamber; a new glass partition had been added to screen out the smells of burning flesh, excrement and urine which frequently accompanied death by electrocution.<sup>142</sup> Then, in the presence of approximately ten reporters and thirty spectators ("citizens of good reputation"), the two were put to death in the new electric chair. Over the course of thirty minutes, Young and then Thorne were electrocuted and, after the bodies cooled, their remains were picked up by a funeral director.<sup>143</sup>

From that time until the Supreme Court's 1972 decision striking down the American death penalty, no other convicts were executed in South Carolina, in large part due to the dwindling number of new sentences, a trend that mimicked the national pattern and in part due to the NAACP Legal Defense Fund's "moratorium" strategy which involved appealing every

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<sup>138</sup> State v. Thorne, 121 S.E.2d 623, 623–24 (S.C. 1961). Thorne enlisted at fourteen and was sent into combat at fifteen. He suffered a head injury and his ex-wife testified at trial that when he had been drinking, he would become moody and talk about the "horrors of war," but when he sobered up he refused to talk about it. *Id.* at 625–26.

<sup>139</sup> State v. Young, 119 S.E.2d 504, 505–06 (S.C. 1961). Race permeated Young's trial. In addition to refusing to permit defense counsel to inquire during jury selection about bias against "negros," the trial judge also used an analogy to an episode of the then popular (and racist) *Amos 'n' Andy* television show in an attempt to explain the legal doctrine of accomplice liability. *Id.* at 506, 510.

<sup>140</sup> In South Carolina's pre-*Furman* "unitary" system, the jury decided the issues of guilt-or-innocence and punishment in the same proceeding. A verdict of guilty with a recommendation of mercy ensured that the defendant would be sentenced to life imprisonment. A verdict of guilty without a recommendation of mercy resulted in a death sentence. Blume, *supra* note 8, at 286.

<sup>141</sup> See *Thorne, Young to Be 1st Victims of State's New Electric Chair*, INDEX J. (GREENWOOD), Apr. 19, 1962, at 6 ("South Carolina's new electric chair is slated to claim its first two victims . . .").

<sup>142</sup> BRUCE L. PEARSON, *THE DEATH PENALTY IN SOUTH CAROLINA: OUTLOOK FOR THE 1980's* (1981).

<sup>143</sup> *Id.* As was true with the previous electrocution events discussed above, reporters noted the "jolting, stiffening and flexing" of the bodies each time the current was applied. *Id.*

death sentence in the country raising various constitutional challenges to the death penalty per se and to the manner in which it was administered.<sup>144</sup> In response to *Furman*, South Carolina initially adopted a mandatory death penalty statute which was subsequently deemed unconstitutional.<sup>145</sup> As a result, the six men who had been sentenced under that scheme had their sentences reduced to life imprisonment. One of the six was Donald H. ("Pee Wee") Gaskins. Gaskins, South Carolina's most infamous serial killer (and sometimes referred to as the "Redneck Charles Manson") was convicted of eight murders and sentenced to death in Florence County in 1976.<sup>146</sup> After the sentence was commuted to life-imprisonment, Gaskins was incarcerated on Cell Block II at the old CCI, which also housed those sentenced to death after the new 1977 statute went into effect. Tony Cimo, the son of the victims killed by death row inmate Rudolph Tyner, was aggrieved by the speed of the capital appeals process and hired Gaskins to kill Tyner. Gaskins attempted to poison Tyner (unsuccessfully), but eventually blew Tyner's head off with dynamite that Cimo helped smuggle into the prison.<sup>147</sup> Gaskins was tried, convicted and, at least technically, sentenced to death for Tyner's murder, which later gave Gaskins the added distinction of being the first white person in South Carolina sentenced to death for the murder of a Black victim. However, it is important to note that the prosecution's penalty phase presentation focused (much) more on the prior murders than Tyner's death; Gaskin's ultimate death sentence was generally understood to be more for the prior offenses against "innocent" victims, for which many South Carolina citizens thought he wriggled out from punishment via a "technicality." Further evidence of this is the fact that Cimo, who hired Gaskins to kill Tyner, was sentenced to eight years in prison and was paroled after serving only three years despite never exhibiting one iota of remorse for his participation in Tyner's murder.<sup>148</sup> Gaskins, the only person in South Carolina sentenced to death both before and after the beginning of the

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<sup>144</sup> See STEIKER & STEIKER, *supra* note 87, at 42-43.

<sup>145</sup> Brian K. Duncan, *Gaskins: From Vicious Child to Killer*, DAILY ITEM (SUMTER), Apr. 7, 1983, at 2B.

<sup>146</sup> *Id.*; see also *Gaskins Case Could Set Precedent for Juries*, STATE (COLUMBIA), Apr. 20, 1978, at 12 ("Most of all, however, we agree with Mr. Summerford that if the death penalty were ever applicable, it was applicable in this case . . .").

<sup>147</sup> Tony Burton, *Revenge Was His*, DAILY NEWS (NEW YORK), Mar. 25, 1986, at 70.

<sup>148</sup> *Paroled in Plot*, PITTSBURGH PRESS, Mar. 20, 1986, at 23.

“modern era” of capital punishment was represented by the author of this Article, and was eventually executed on September 6, 1991.<sup>149</sup>

Gaskins always said he would not let the State take his life and—true to his word—attempted suicide the night before his scheduled execution with a razor he smuggled into the Capital Punishment Facility, referred to by staff and inmates alike as the “Death House” at the Broad River Correctional Institution. As the fates would have it, Gaskins would have cheated the executioner had he not rolled over on the most serious wound when he passed out from loss of blood. His body weight acted like a tourniquet and prevented him from dying from his injuries. Discovered unconscious in his cell, he was rushed to the hospital, his wounds were stitched shut, he received a blood transfusion and then was returned to the Death House where he died in the electric chair at 1:10 a.m.<sup>150</sup> His last words were: “I’ll let my lawyers talk for me. I’m ready to go.”<sup>151</sup>

“Pee Wee,” even from the grave, had one more trick up his sleeve. While on death row, he told his “story” to journalist Wilton Earle. Earle published the resulting book, *Final Truth*, after Gaskins’ death.<sup>152</sup> In the book, Earle claims Gaskins maintained that he killed between 100 and 110 people.<sup>153</sup> Many people believe that much of what Gaskins told Earle was fiction, designed to promote his legend (and possibly financially benefit his surviving children) after his execution. Given the history of his case, in many respects, Gaskins’ execution was the final gasp of the pre-*Furman* death penalty.

In South Carolina, the first person to die in the “modern” post-*Furman* era was J.C. Shaw, who was put to death in the electric chair on January 10, 1985.<sup>154</sup> According to media accounts, the execution, like many conducted prior to 1972, was marked by Shaw “clench[ing] his fist” when the current was turned on, rocking in the chair during the execution, and smoke emerging from the electrode on his ankle.<sup>155</sup> Shaw and

<sup>149</sup> *South Carolina Executes Man for Murder*, N.Y. TIMES, Sept. 6, 1981, at 18A.

<sup>150</sup> Margaret N. O’Shea, *Suicide Try, Last-Minute Appeals Fail*, STATE (COLUMBIA), Sept. 6, 1991, at 1A, 8A.

<sup>151</sup> *Id.*

<sup>152</sup> DONALD H. GASKINS & WILTON EARLE, *FINAL TRUTH: THE AUTOBIOGRAPHY OF A SERIAL KILLER* (1992).

<sup>153</sup> *Id.*

<sup>154</sup> *Killer Apologizes to Families of His Victims, Is Executed*, WASH. POST (Jan. 12, 1985), <https://www.washingtonpost.com/archive/politics/1985/01/12/killer-apologizes-to-families-of-his-victims-is-executed/9a0ffb21-5c69-48c5-a23d-4227d450f9cd/> [<https://perma.cc/47PR-M3G2>].

<sup>155</sup> *Id.*

his co-defendant Terry Roach, who was executed one year later, were also the last two people to be executed at Cell Block II of CCI in downtown Columbia, which was where executions were carried out from 1912 until Roach's electrocution in January 1986.<sup>156</sup> Roach, who was seventeen years old at the time of the offense, was also the last juvenile executed in South Carolina. Death row was moved from CCI to Broad River Correctional Institution just outside of Columbia, and a new Capital Punishment Facility (CPF) was built there. The first person to die in the new CPF was Ronald "Rusty" Woomer, who was executed in the electric chair on April 27, 1990.<sup>157</sup> The CPF is still in use and was recently "retrofitted" to be able to accommodate the legislature's recent adoption of the firing squad as a method of execution.<sup>158</sup>

Electrocution remained the State's only method of execution (as it had been since 1912) for almost a decade after the new death penalty law was approved in 1977, but on June 8, 1995, South Carolina became the twenty-fifth state to adopt lethal injection as a method of execution.<sup>159</sup> As electrocution was developed after years of gruesome hangings, lethal injection became an execution method because of the significant number of electrocution executions that were bungled. The first state to adopt it was Oklahoma, and they did

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<sup>156</sup> Jim Faile, *Witness to Execution Details Last Moments*, DAILY ITEM (SUMTER), Jan. 10, 1986, at 12A. Witnesses to Roach's execution noted the same body stiffening, fist clenching and straining at the straps mentioned in Shaw's execution (and countless others). Smoke was also noted to rise from the electrodes, and the flesh around the ankle electrodes exhibited signs of charring. *Id.* CCI was built in 1865. South Carolina did not even have a prison at all until after the Civil War. However, it was one of the legislature's first acts at the end of the War, as they needed a place to house the recently emancipated formerly enslaved persons. Kevin Krause, *The Big House and the Madhouse: Institutional Reform in Tillman Era South Carolina*, 115 S.C. HIST. MAG., July 2014, at 217-20.

<sup>157</sup> *Rusty Woomer Put to Death*, STATE (COLUMBIA), Apr. 27, 1990, at 1A. Woomer had become a very devout Christian while on death row, and then-Governor Carrol Campbell's chief of staff, Bob McAlister, advocated unsuccessfully for Woomer to be granted clemency based on his Christian faith, transformation and deep remorse. *Id.* Woomer's last words were, "I'm sorry. I claim Jesus as my savior. My only wish is that everyone in the world could feel the love I have felt from Him." *Id.* During the execution, the victim's husband was heard to say, "That was too easy." *Id.*

<sup>158</sup> See S.C. CODE § 24-3-530 (2021); see also Kathleen Parker, *Opinion, The Return of the Firing Squad*, WASH. POST (Mar. 22, 2022), <https://www.washingtonpost.com/opinions/2022/03/22/firing-squad-execution-south-carolina/> [<https://perma.cc/JY3M-SAJS>]. According to this and other press accounts, the Department of Corrections spent more than \$50,000 to add a new metal chair with restraints that faces a hole built into the opposite wall to accommodate three volunteer marksmen. *Id.*

<sup>159</sup> S.C. CODE ANN. § 24-3-530 (1995).



so in 1977, expressly stating that it was intended to be an alternative to the “inhumanity, visceral brutality, and cost of the electric chair.”<sup>160</sup> Very little thought went into developing a “protocol” for lethal injection; several Oklahoma lawmakers simply asked a local anesthesiologist whether it would work. He said yes and suggested a three-drug “cocktail” consisting of sodium thiopental (a sedative to put the person to sleep); pancuronium bromide (a paralytic to render the person unable to move so it looks like he is peacefully going to sleep); and potassium chloride (to stop the heart and cause cardiac arrest).<sup>161</sup> And that, as they say, was that. A number of other states soon embraced the new method of execution.

When initially proposed in South Carolina, lethal injection was rejected by the state legislature as not being sufficiently retributive, but it finally passed with one of the legislation’s sponsors explaining that lethal injection was “more humane than dying in the electric chair,” and thus it became an option a convicted death-sentenced inmate could choose.<sup>162</sup> The first person executed using the new “three drug cocktail,” was Sylvester Adams, an intellectually disabled Black man from York County who was put to death on August 18, 1996.<sup>163</sup> Since then, all remaining death row inmates, with the exception of James Neil Tucker, Larry Gene Bell and James Reed, all three of whom chose the electric chair, have been executed by lethal injection.<sup>164</sup>

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<sup>160</sup> AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA’S DEATH PENALTY 117 (2014).

<sup>161</sup> *Baze v. Rees*, 553 U.S. 35, 42–44 (2008). The drugs and protocols have changed over the years as manufacturers have quit making some of the drugs, e.g., sodium thiopental, or refused to sell them to states if they intend to use them for execution purposes. While a majority of the Supreme Court has blamed the drug manufacturers’ refusal to sell the drugs to states on death penalty activists’ shaming strategy, there is very little evidence supporting that as the actual reason they have been reluctant to do so.

<sup>162</sup> *Education Reform Headed List of ‘85 State Legislation*, ANDERSON INDEPENDENT MAIL, Mar. 10, 1985, at 8A; *Legislative Watch*, TIMES & DEMOCRAT (ORANGEBURG), Mar. 2, 1995, at 14.

<sup>163</sup> *South Carolina Executes Man for Killing Neighbor*, N.Y. TIMES (Aug. 19, 1995), <https://www.nytimes.com/1995/08/19/us/south-carolina-executes-man-for-killing-neighbor.html> [<https://perma.cc/W6AH-V74E>].

<sup>164</sup> Larry Gene Bell and James Reed were both persons with severe mental illness. *Man Who Killed Two Executed*, UPI (Oct. 4, 1996), <https://www.upi.com/Archives/1996/10/04/Man-who-killed-two-executed/1199844401600/> [<https://perma.cc/9Q2L-RVA3>]; Jill Coley, *Reed Executed in Electric Chair*, POST & COURIER (June 20, 2008), [https://www.postandcourier.com/news/reed-executed-in-electric-chair/article\\_0a545c34-bff0-5dd5-8713-6ddd1346cd26.html](https://www.postandcourier.com/news/reed-executed-in-electric-chair/article_0a545c34-bff0-5dd5-8713-6ddd1346cd26.html) [<https://perma.cc/8S74-DC39>]. Tucker apparently refused to select a method of execution, believing that to do so would make him complicit in his own death, and so, due to the wording of the execution law, meant he would

## II PUBLIC EXECUTIONS

Up until the latter half of the nineteenth century, executions were local and public events. The colonies adopted the English tradition of public executions, where a hanging often drew a large, boisterous crowd.<sup>165</sup> They were often attended by huge crowds, sometimes numbering in the thousands. In South Carolina, the largest documented crowd to attend an execution was the 1850 hanging of Martin Posey, which drew four to five thousand people in the town of Edgefield.<sup>166</sup> A few “drunken broils” that included “fisticuffs,” and resulting minor injuries, were reported, but supposedly nothing that disturbed “the calmness and melancholy of the day.”<sup>167</sup> More generally, in Charleston, only “Race Week”—the annual thoroughbred races held in February—drew more people than a hanging.<sup>168</sup> Executions were well advertised in the paper and in pamphlets. Hanging days had a street carnival atmosphere, with vendors turning out and selling all kinds of food and boxed lunches. Writers sold various programs that included gruesome accounts of the crime and sketches of the condemned. “Spectators arrived early to gain the best vantage point.”<sup>169</sup> The public executions, especially the earlier ones, also bore substantial religious trappings, with hymns being sung by the crowd, prayers offered on the condemned prisoner’s behalf and even sermons preached by local ministers.

Publicity was initially considered to be a virtue as it increased (so it was believed) the deterrent function of capital punishment, especially in the Black community. According to one account, some “believe[d] that nothing would so impress the sanctity of human life upon the large body of ignorant negroes, who are continually quarreling and fighting, as to

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die in the electric chair. Tucker’s execution confirmed, if there was any doubt, that electrocution is not “fixable” as a humane method of execution. When the button was pressed administering the current, Tucker’s head shot back, his body convulsed and the smell of burning flesh filled the room. When the electrocution team took the hood off his head, his face was black, his mouth wide open and his body was locked in a seated position. Complaint for Temporary, Preliminary, and Injunctive Relief and Declaratory Judgment at 15, *Sigmon v. Sterling*, No. 3:21-cv-016510RBH (D.S.C. June 3, 2021), ECF No. 1.

<sup>165</sup> G. Mark Mamantov, *The Executioner’s Song: Is There a Right to Listen?*, 69 VA. L. REV. 373, 375 (1983).

<sup>166</sup> BANNER, *supra* note 9, at 147.

<sup>167</sup> *Id.*

<sup>168</sup> CROOKS & BOSTICK, *supra* note 31, at 129.

<sup>169</sup> *Id.*

witness an execution.”<sup>170</sup> But, in the 1830s, as the abolitionist movement began to gather some momentum, capital punishment’s supporters advocated for making executions private affairs due to a fear that well-publicized hangings might further fan the flames of abolition.<sup>171</sup> Several Northeastern states passed statutes that limited the number of witnesses and required local law enforcement to provide an enclosed area for the execution shielded from public view. Other states in the West and Midwest followed suit. But, the Southern states, including South Carolina, were much more reluctant to outlaw public executions because of the widespread belief among white politicians that the citizenry demanded it, especially in rape cases.<sup>172</sup> Even after they were outlawed, the occasional practice of public executions persisted due to a combination of financial pressures on local sheriffs (who did not have the resources to build a dedicated place for executions), loose enforcement and the desire for exceptions in cases when a public message was deemed necessary, which was often the case when Black men had been convicted of sexual offenses against white women.

It was not until 1878 when the state-wide Department of Corrections took control of the execution process that public executions were completely abolished. The new law mandated that executions take place within the jail enclosure and limited observers to the sheriff, his assistants, clergy, the solicitor, defense counsel, the condemned person’s family members and not more than ten discreet persons. But even then, the ban on spectators was loosely enforced depending on the nature of the crime and where it occurred. After executions moved to the jail, a permit procedure was used in some counties to determine which members of the public could attend, rendering the executions less than public, but hardly private. At one execution in Charleston in 1906, that of William Marcus, more than 500 people crowded into the jail yard to watch.<sup>173</sup> And local law enforcement would often leave the body hanging so persons could file in to see it and allow photographs to be taken of the body still attached to the rope.<sup>174</sup> The prosecutor chafed at the rule following the execution of Will Sanders, a sixteen-year-old Black youth in

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170 THE ADVERTISER (LAURENS), Mar. 9, 1887, at 2.

171 CROOKS & BOSTICK, *supra* note 31, at 129.

172 STEIKER & STEIKER, *supra* note 87, at 24.

173 CROOKS & BOSTICK, *supra* note 31, at 134.

174 Christian, *supra* note 33, at 9.

York County in 1933. Sanders, who was said to have the mental age of a seven- or eight-year-old, was convicted of the murder of a prominent white female. Sanders was executed sixty-one days after the murder. His trial took seventy-seven minutes, his court appointed attorney called no witnesses and he filed no notice of appeal. Not content with obtaining a hasty conviction, death sentence and execution, the prosecutor wanted to put Sanders' body on display to "send a message to the negroes" of the community.<sup>175</sup>

The last public execution in the United States took place on August 14, 1936, in Owensboro, Kentucky, when Rainey Bethea, a twenty-two year-old Black man, was put to death for the rape of a seventy-year-old white widow.<sup>176</sup> Bethea had also killed the victim, but the local prosecutor elected only to try Bethea for rape in order to permit a public execution; a recently enacted statute required that persons convicted of murder be put to death by electrocution at the state penitentiary, but allowed persons convicted of rape to be executed by hanging in the county of conviction. The all-white jury deliberated less than five minutes before finding Bethea guilty without a recommendation of mercy. An enormous crowd (estimated at twenty thousand people) gathered to watch Bethea die.<sup>177</sup> News reports described it as a "Roman Holiday carnival" type atmosphere with spectators (many of whom were described as "alcohol marinated") feasting on hot dogs and lemonade and straining to get a clear view of the gallows. The executioner arrived drunk, dressed in a white suit and Panama hat and initially failed to pull the lever after the hood was placed over Bethea's head, until another spectator yelled "do it now." According to some news accounts (although disputed by others), bedlam ensued when several hundred observers rushed the gallows after Bethea's final drop to look for souvenirs and ripped off pieces of the black hood that was placed on Bethea's head. Not long thereafter, the Governor of

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<sup>175</sup> *Id.* at 86–91.

<sup>176</sup> *The Last Hanging: There Was a Reason They Outlawed Public Executions*, N.Y. TIMES (May 6, 2001), <https://www.nytimes.com/2001/05/06/weekinreview/the-last-hanging-there-was-a-reason-they-outlawed-public.html> [<https://perma.cc/64TR-KHJQ>].

<sup>177</sup> While public executions were often large events, this one was of special interest because it was supposed to be the first execution presided over by a woman, recently elected Sheriff Florence Thompson, a mother of four who had inherited the job only weeks before when the former sheriff, her husband, had died. People came from neighboring towns, counties and even states to watch Thompson pull the gallows lever dispatching Bethea to the next world. *Id.*

Kentucky signed legislation eliminating public executions in the State, and the era of public executions came to a close.<sup>178</sup>

### III MULTIPLE EXECUTIONS

Aside from several mass executions of enslaved persons following uprisings, for example, the Primus and Stono Rebellions described earlier, the largest number of people (legally) executed in South Carolina in one day was six. This happened on two occasions. The first was in 1931, when six Black men from Lexington County were put to death on February 27.<sup>179</sup> George Bird, Lindsey Cantrell, Robert Eldridge, James Hickman and Ernest Thomason were all executed for the murder of Bill Hendrix, a white store owner, who was supposedly killed when he resisted an armed robbery. The sixth person put to death that day was Tillman Poozer, who was convicted of and sentenced to death for the axe murder of C.D. Mills, a night watchman at a local factory.<sup>180</sup> Contemporary accounts of the executions noted that they were witnessed by four women including Hendrix's widow, Mills' two daughters and a fourth woman who came out of "curiosity."<sup>181</sup>

The second time six men were executed in one day was in 1939, when six white inmates were electrocuted for killing a prison guard during a poorly conceived and even more poorly implemented attempted escape from CCI.<sup>182</sup> According to the six condemned men, they did not kill the guard, J. Olin Sanders, until the state militia threw tear gas into the room where they were holding him in an attempt to break the "standoff." The six escapees were indicted on January 10, 1938; the trial commenced on January 18 and concluded on the 22nd with guilty verdicts. The trial judge imposed death sentences on January 24 and set the execution date for March 25. But the executions were stayed while appeals were pursued, and the death sentences were not carried out for another year. After their appeals were rejected, the six men were put to death within approximately forty-eight minutes.<sup>183</sup>

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178 *Id.*

179 KELLY, *supra* note 119, at 9.

180 Miles H. Wolff, *Six Die in Chair This Morning*, THE ITEM (SUMTER), Feb. 27, 1931, at 1.

181 *Id.*

182 KELLY, *supra* note 119, at 9.

183 *Id.* at 223.

There were numerous other days where more than one (and as many as five) condemned inmates were put to death in South Carolina prior to 1972, but in the post-1977 era, only once has there been more than one execution on the same day. In 1998, two brothers, Larry Gilbert and J.D. Gleaton, were put to death by lethal injection for the 1977 robbery-murder of Ralph Stoudemire, a white gas-station convenience store owner in Lexington County. The brothers, who were Black, were represented by the same retained lawyer at trial and were convicted and sentenced to death by an all-white jury. Given a long history of racial violence in Lexington County, and the publicity surrounding the homicide, their lawyer, who was also Black, was so afraid of reprisal for representing the two brothers that he literally left the County as soon as court ended each day. A conservative federal district court judge determined that the brothers' trial was fundamentally unfair and granted them a new trial, a decision that was affirmed by a panel of the United States Court of Appeals for the Fourth Circuit but then vacated by the en banc court.<sup>184</sup> Thus, having exhausted their appeals, they were executed on December 4. They died thirty-nine minutes apart (Gilbert at 6:37 p.m. and Gleaton at 7:16 p.m.), both expressing deep remorse for their role in Stoudemire's death.<sup>185</sup> Their mother waited in the prison parking lot until she was officially notified by Gleaton's attorney, the author of this Article, that her sons were dead. Gilbert and Gleaton were part of a group of six men of color executed in seven weeks in December of 1998 and January of 1999.<sup>186</sup>

#### IV

#### THE NUMBERS AND DEMOGRAPHICS OF EXECUTION<sup>187</sup>

No reliable data exists on the numbers of executions in the pre-Civil War era, in South Carolina or nationally. This is so for a number of reasons, including the fact that most county court houses where the records were stored were destroyed during

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<sup>184</sup> *Gilbert v. Moore*, 134 F.3d 642, 645–46 (4th Cir. 1998).

<sup>185</sup> Jesse J. Holland, S.C. *Executes Brothers After 2-Decade Wait*, CHARLOTTE OBSERVER, Dec. 5, 1998, at 21.

<sup>186</sup> The other persons executed during that several-week period were Louis Truesdale (Dec. 11, 1998); Andy Smith (Dec. 18, 1998); Ronnie Howard (Jan. 8, 1999); and Joseph Ernest Atkins (Jan. 22, 1999). Gilbert, Gleaton, Truesdale, Smith and Howard were all Black. Atkins was Native American.

<sup>187</sup> This Article is part of an ongoing book project, with co-authors Sheri L. Johnson and Hannah L. Freedman, tracing the history of the death penalty in South Carolina. All data in this section is on file with the Author.

the War.<sup>188</sup> It is also difficult to know what to call an execution. For example, if an enslaved person was put to death for something that was not then, and is certainly not now, considered a crime, should that be counted?

From 1865 to 1972, however, our knowledge is significantly better.<sup>189</sup> Of the estimated 859 people sentenced to death in that 107-year period, 542 (63%) were actually executed. Of those 542, 472 were Black (87%), sixty-seven were white (12%) and two were Native American. The number of Black people executed is artificially low because, until the end of the 19th century, Black men accused of raping or attempting to rape white women never (and I mean *never*) made it to trial. The first legal execution of a Black man for sexual assault or attempted sexual assault did not occur until 1899, when the ironically named Ed Lucky, and his co-defendant Tom Mitchell, were hung in Darlington County.<sup>190</sup> A lynching was allegedly narrowly avoided at the time of their arrest, and they were convicted and sentenced to death two weeks later. On the scaffold, Lucky confessed (again), but insisted that Mitchell played no role in the crime. Mitchell protested his innocence at the time of arrest, at trial and immediately before he was put to death.<sup>191</sup> It was to no avail, and on November 29, 1899, the two men were executed.

There is also a stark race of victim effect, which is also artificially reduced by the number of lynchings.<sup>192</sup> Of the persons executed, 380 (70%) of the cases involved white victims, with only five cases involving both Black and white victims. Moreover, the percentage of white victim cases would almost certainly be higher, but in some cases, despite my best efforts, I have not been able to ascertain the race of the victim.

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<sup>188</sup> According to one source during the five and a half decades for which the author claimed to have records, 296 enslaved persons were executed for the crimes of murder, rape, poisoning and arson. MICHAEL STEPHEN HINDUS, *PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767–1878*, at 156 (1980). The individuals put to death were overwhelmingly male (only 5.5% female where gender was known). They were also “bundled” around times of racial turmoil; the years with the most executions were 1823, following the Denmark Vesey rebellion, and 1851, following the first secession. *Id.* at 156, 158.

<sup>189</sup> However, I have reason to believe that the number of people executed during Reconstruction (1865–1878) is much higher than previously reported. Archival data is currently being reviewed which may shed additional light on Reconstruction era executions.

<sup>190</sup> *Two Hanged for Assault*, MANNING TIMES, Nov. 29, 1899, at 6.

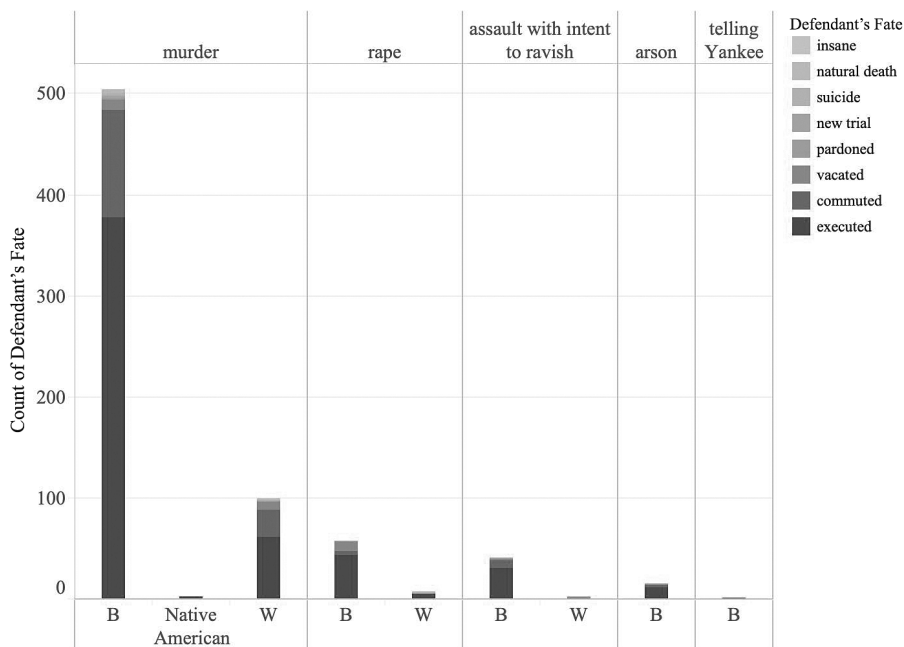
<sup>191</sup> *Id.*

<sup>192</sup> Overall, I have documented 230 lynchings in South Carolina; 92% of the lynching victims were Black, and 12% were white.

In only four cases were white men executed for the murder of someone who was Black, and all four of those cases occurred between 1870 and 1880, which was during Reconstruction when Black people served on juries.

Most executions were for the crime of murder (83%), but seventy-nine men (and boys) were executed for rape or assault with intent to ravish (attempted rape). Seventy-four of the eighty men (94%) executed for rape were Black, and all thirty-two persons executed for assault with intent to ravish were Black; each and every case in both categories involved white female victims. Put differently, no white man has ever been executed (or even sentenced to death) in South Carolina for the rape or attempted rape of a Black woman. There were also a small number of executions (again of Black persons) for arson (2%).

CASE OUTCOME BY OFFENSE BY DEFENDANT RACE



South Carolina executed thirty-one juveniles, all of whom were Black and twenty-eight of whom were still juveniles at the time the execution was carried out.<sup>193</sup> Six women (of the twenty who were sentenced to death) also died on the gallows or in the electric chair. The available information reflects that

<sup>193</sup> Johnson, Blume & Freedman, *supra* note 40, at 363–66.



five persons sentenced to death committed suicide after being sentenced to death and before being executed and three died of natural causes. The youngest person executed in South Carolina, and in the United States, was George Stinney Jr. (though Milbry Brown might have been younger) and the oldest was sixty-six-year-old Charles T. Smith, who was electrocuted after being found guilty of stabbing a police officer during an attempted arrest. The average number of days that elapsed from the date the sentence was imposed until the sentence was carried out was 178; yes, less than six months.

How do these numbers compare to those from the modern era of capital punishment in South Carolina? From 1977 through 2021, 185 people have been sentenced to death, and there have been forty-three executions in the state, the most recent of which occurred on May 6, 2011, when Jeffrey Motts waived further appeals and was executed by lethal injection.<sup>194</sup> Overall, only 24% of those sentenced to death actually lost their life to the electric chair or lethal injection needle; most were removed from death row after their convictions and/or death sentences were reversed during the capital appeals process.<sup>195</sup> Ten, including Motts, were “volunteers,” by which we mean that they waived all or part of their appeals and chose to be executed.<sup>196</sup> Six death-sentenced inmates died of natural causes, one was killed by another inmate and two committed suicide.

No women have been executed in South Carolina since *Furman*; one woman, Rebecca Smith, was sentenced to death, but her case was reversed on appeal, and she was resentenced to life in prison.<sup>197</sup> Of the executed persons in the modern era, twenty-six (60%) were white, seventeen (37%) were black and one (2%) was Native American. The same race of victim effect noted in the earlier era persists. Seventy-five percent of those executed in South Carolina were put to death for killing a white person. One juvenile, James Terry Roach, was executed in 1986 for a crime that occurred when he was seventeen years old.<sup>198</sup> Four other juveniles were sentenced to death, but their

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<sup>194</sup> Blume & Vann, *supra* note 8, at 193.

<sup>195</sup> *Id.* at 195.

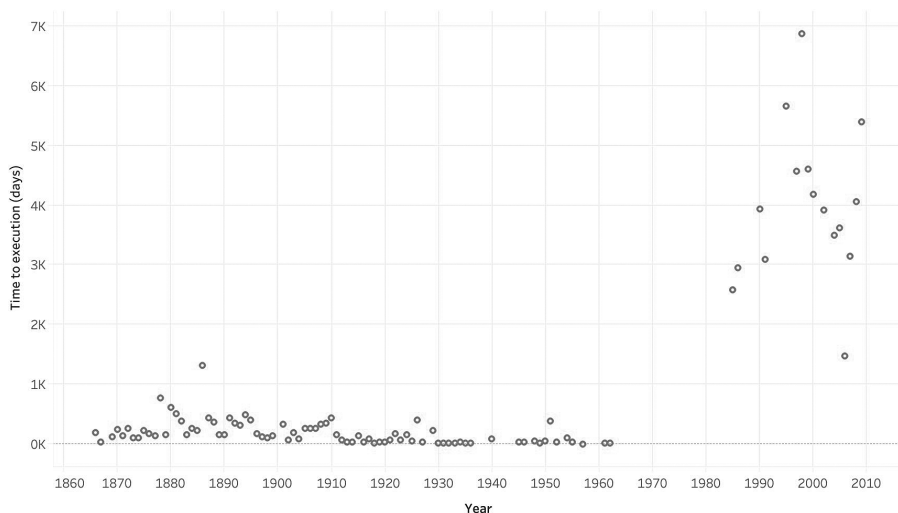
<sup>196</sup> See John H. Blume, *Killing the Willing: “Volunteers,” Suicide and Competency*, 103 MICH. L. REV. 939, 939–40, 1005 (2005).

<sup>197</sup> Blume & Vann, *supra* note 8, at 247.

<sup>198</sup> Colman McCarthy, *A Last Talk with a Condemned Man*, WASH. POST (Jan. 13, 1986), <https://www.washingtonpost.com/archive/politics/1986/01/13/a-last-talk-with-a-condemned-man/55a874ed-b75c-4593-a03a-471fbd7a907a/> [https://perma.cc/PJ2E-8BTT].

sentences were modified to life imprisonment after the United States Supreme Court's decision barring the practice in *Roper v. Simmons* in 2005.<sup>199</sup>

#### TIME FROM ARREST TO EXECUTION



The average number of days that transpired between the individual initially being sentenced to death and their execution being carried out has been 3,967, or almost 11 years, as compared to less than 6 months in the pre-*Furman* era. For all practical purposes there was no system of appeals in the pre-Civil War and Reconstruction periods, and also no constitutional right to an appeal (which many readers may be surprised to know is still not settled) and, equally importantly, no right to counsel on appeal. The Supreme Court did not create any right to counsel on appeal until 1963,<sup>200</sup> which was very near the end of the period on which this Article focuses. Thus, until the organized campaigns by LDF and other organizations on behalf of condemned prisoners, many went to their deaths without any judicial review of their convictions or sentences.

<sup>199</sup> 543 U.S. 551, 560 (2005).

<sup>200</sup> *Douglas v. California*, 372 U.S. 353, 355 (1963). *Douglas* did not create a per se right to counsel on appeal, but it required states to provide counsel on appeal to indigent defendants if they created a right to appeal where defendants with means had the advantage of counsel.

## CONCLUSION

As this Article goes to press, the ten-plus-year hiatus in executions in South Carolina may be about to end. Eight death-sentenced inmates have either completed, or are about to complete, the final stages of the federal appeals process, and at least some of them, likely most, will be put to death, assuming the South Carolina Supreme Court upholds execution by electrocution or the firing squad against several pending state constitutional challenges or if the South Carolina Department of Corrections obtains the drug(s) needed to carry out death sentences, which, at least at present, they insist they cannot do. The same stark race patterns I have discussed are also present in this subgroup of condemned prisoners: six of them are Black, and seven of the eight cases had a white victim. This pernicious, persistent pattern of devaluing Black life has proven itself intractable and will be a feature, not a bug, of the death penalty as long as it remains a legal method of punishment. Thus, any belief that the post-*Furman* capital sentencing statutes somehow fixed the problems with the death penalty the *Furman* Court identified is misguided. And the same is true for the belief that the government can kill condemned inmates humanely while preserving the “commitment to dignity” and the “duty to teach human decency as the mark of a civilized world” the Eighth Amendment was intended to safeguard.<sup>201</sup> The ghosts of executions past still haunt, and will always haunt, the American and South Carolinian death penalty systems as long as it remains part of government’s punishment arsenal.

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<sup>201</sup> Hall v. Florida, 572 U.S. 701, 724 (2014).

