



‘MAY GOD HAVE MERCY UPON YOUR SOUL’: THE LIFE OF CAPITAL PUNISHMENT

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As the gavel crashes onto its block, a solemn statement issued by the judge: “May God have mercy upon your soul.” The clinking of handcuffs, familiar uniform, and scuffled walk to a jail cell await. The death penalty has been the ultimate punishment throughout the world for centuries.

The History

While the current list of crimes resulting in the death penalty is relatively small in the United States, the English originally used the death penalty for a much larger breadth of crimes. These crimes included arson, rape, manslaughter, robbery, and burglary, a tradition transferred to U.S. soil when the United States was colonized. While many of these crimes no longer qualify for the death penalty in today’s society, during colonial times, the colonies each instituted their own hierarchy to determine whether a prisoner was eligible for the death penalty. For example, manslaughter was not a capital offense in Pennsylvania and West New Jersey, nor was rape in Massachusetts, New York, or Pennsylvania. But in Virginia, the death penalty could be imposed for crimes against the tobacco industry, such as forging inspectors’ stamps, and for crimes such as receiving a stolen horse or upon the third conviction of stealing hogs. The discretion for each determination was left to the individual colony to decide.¹

Some of the leniency in the American Colonies, as compared to Europe, may have been due to the large number of hangings the colonists witnessed before making the voyage to America. Between

1530 and 1630, experts estimate approximately 7,500 people were hung throughout Europe.² In fact, until the 1830s, hangings were both common and popular in Europe. London alone boasted regular attendance of crowds ranging from 3,000 to 7,000 people, with more notable executions drawing crowds in excess of 30,000 attendees. A portion of these hangings were poorly done since little time went into calculating the correct length of rope for individual body weights. Additionally, the bodies of women who were hanged for murdering or conning their husbands were publicly burned after the hanging, causing the smell of burned flesh to pass through the town. The heads of men who had committed treason were cut off and shown to the crowd in a gory display. These violent exhibitions were intended to deter others from civil disobedience.³

Hanging High

In the colonies, as in England, hanging was the most common form of execution. It was an inexpensive and relatively effective method that was simple to carry out. Many of the first hangings were done by placing a rope around the prisoner’s neck and then removing the footing below the condemned, most commonly done by horse-drawn carts. The cart-removal method was relatively dangerous, given the crowd of people who usually attended a hanging and the swift movement of the horse and/or cart to necessitate the sudden removal of the cart. As a remedy, the platform-hanging method became more commonly used because it required little skill (just a simple lever to pull), the higher platform allowed increased visibility for those in attendance, and the heightened drop yielded more effective executions. Platform hangings were completed by walking the prisoner onto a raised platform, placing a noose around his or her neck, and

throwing a lever to open a trapdoor that the prisoner drops through.

The goal of platform hanging is to sever the spinal column, typically at the C2 vertebrae in the neck, which is still referred to as the Hangman's Fracture and today often occurs as a result of a car accident or fall. The knot of the noose was traditionally placed under the prisoner's ear, which was thought to hasten death. The severing of the spinal column causes instant, and assumed painless, death—but a perfect break was unlikely. While death by hanging was, in theory, simple to carry out, some executions neither went as planned nor provided for a quick passing from this world.

In some cases, prisoners were not hung high enough; the rope failed; decapitation occurred; or the footing was removed too slowly, thereby slowly suffocating the prisoner. Some stories tell of executioners who hung from the feet of suffocating prisoners to hasten their deaths. Suffocation induces unconsciousness within a short time but leaves the body twitching and writhing, eyes bulging, and heart beating for minutes afterward. To limit this sight, a sack was commonly placed over the head of the condemned. Occasionally the sack would come free and the members of the audience were forced to face the gruesome sight underneath.⁴

As times changed, society's opinion of hanging also changed. In 1793, Pennsylvania created the distinction between first-degree and second-degree murder as a compromise between the Quakers, who wished to remove the death penalty entirely, and those who wished to continue to use the death penalty.⁵ This distinction limited the number of people eligible for the death penalty. Due to the ever-growing concerns with rowdy crowds marring the importance of the event, in 1835, New York brought hangings within the prison walls and allowed only official witnesses to attend the event. Missouri allowed public hangings to occur until 1937.⁶

A Shift in Perspective

The imposition of multiple methods of execution was a way for many states to eliminate the placing of the burden of executions on the local sheriff. Five methods of execution have been used in the United States: electrocution, gas chamber, hanging, firing squad, and lethal injection. Of the 32 states that still use the death penalty today, all now use lethal injection as their primary method, with the remaining methods as backups or retained for prisoner preference.⁷

New Technology, New Option

Execution by electrocution was initially well-received in the late 19th century. Many people felt that electricity was a more civilized and technologically advanced way to end a life. Even today, some states still allow the use of electrocution as an alternative to lethal injection.⁸ While originally applauded for its civilized killing, the electric chair eventually proved to be one of the more gruesome ways to kill a person. In the case of *In re Kemmler* in 1889, Thomas Edison testified in New York as to the use of electricity to kill an adult human.⁹ William Kemmler had been convicted of murder in the first degree and was sentenced to death by electrocution under N.Y. Crim. Proc. Law § 505.¹⁰ During Edison's testimony, he claimed he and his assistants had used electricity to successfully and painlessly kill approximately two dozen dogs, six calves, and two horses using 1,000 volts of electricity.¹¹

The court in *Kemmler* cited *Wilkerson v. Utah*,¹² when Justice Nathan Clifford reiterated: "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not

cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."¹³ While the courts of New York admitted that death by electrocution may be unusual, the purpose of passing N.Y. Crim. Proc. Law § 505 allowing electrocution was to provide a more humane and civilized way of carrying out the ultimate punishment.¹⁴ On Aug. 6, 1890, Kemmler became the first person to be executed in the electric chair. Accounts state that Kemmler was electrocuted at first for 17 seconds, a short jolt due to an issue with the apparatus. Kemmler appeared dead, but he then began breathing again. He was electrocuted a second time for approximately four minutes until his body was charred and smoldering. The reviews from Kemmler's execution were mixed. Approximately 27 witnesses were present at Auburn Penitentiary for the fateful event and their reports varied wildly. Some reported Kemmler had felt no pain and that the execution was a total success. Others stated that the barbaric nature of the execution made even the most gruesome hangings look more civilized than death by electricity.¹⁵

While electrocution was being experimented with for execution purposes, it was also part of an array of experiments aimed at a possible form of resuscitation.¹⁶ Scientists were using the bodies of those killed by hanging and animals to determine the possibility of reviving life through the use of electricity. The stories of animal and human bodies jolting as though awake and reports of them becoming animated as if alive is thought to have inspired the book *Frankenstein* by Mary Shelley in 1818.¹⁷ These electrical experiments failed to successfully revive either human or animal.

Fire Away

The use of a firing squad was a tradition commonly used by the military due to the proliferation of guns at close command and the success and speed with which it could be performed. One of the largest criticisms of death by firing squad is the lack of cleanliness with which it was performed. Death by firing squad resulted in bleeding gunshot wounds that were not cared for since that would defeat the purpose of the firing squad.¹⁸ Utah was the last state to use death by firing squad to execute a prisoner in 2010.

The Brief Stay of Executions

In 1972, the Supreme Court heard the case of *Furman v. Georgia* and determined that the death penalty constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.¹⁹ A deeply divided Court chilled the death penalty within the United States. Each justice wrote individual opinions in this case, resulting in a wide array of perspectives and reasonings about both the case at hand and the use of capital punishment.

In 1976's *Gregg v. Georgia*, the Supreme Court reversed their decision in *Furman* and determined that the imposition of the death penalty is not a per se violation of the Eighth or Fourteenth Amendments.²⁰ The Supreme Court decided the case of *Woodson v. North Carolina*²¹ the same day as *Gregg* and ruled that a mandatory death sentence was a violation of the Eighth and Fourteenth Amendment. The Court specifically held that a mandatory death sentence removes the power of the jury to exercise their discretion in deciding whether to impose the death sentence. One year later, the Supreme Court considered the case of *Coker v. Georgia* and determined that a death sentence for the crime of rape was disproportional such that it constituted cruel and unusual punishment.²²

Current Happenings

On the morning of April 30, 2018, the U.S. Supreme Court added a capital punishment case to its docket for the fall: *Bucklew v. Preythe*.²³ A very brief summary of the case is included below.

In March 2006, Russell Bucklew stole a car and had in his possession handcuffs, pistols, and a roll of duct tape. Bucklew followed his former girlfriend to the trailer she was sharing with another man: Michael Sanders. Upon entering Sanders' trailer, Bucklew brandished two pistols. Sanders moved the children to a back room of the trailer and grabbed a shotgun. Bucklew shot: two bullets hit Sanders and one narrowly missed a 6-year-old child. While Sanders lie bleeding to death on the floor, Bucklew hit, handcuffed, and took his former girlfriend from the home. Bucklew then raped her in his car. Highway patrol apprehended Bucklew after a gunfight in which both Bucklew and a trooper were injured. Bucklew was convicted of murder, kidnapping, and rape by a Missouri state court. His sentence was affirmed on direct appeal and by the Supreme Court of Missouri.²⁴ The Supreme Court of Missouri issued a writ of execution for May 21, 2014. After exhausting most appeal options, the Supreme Court of the United States granted a stay of execution on March 20, 2018.

One issue raised by Bucklew is that his execution by lethal²⁵ injection may result in a death that would be "gruesome and painful far beyond the pain inherent in the process of an ordinary lethal injection." The reasoning behind this claim is due to Bucklew's medical history: He suffers from congenital cavernous hemangioma.²⁶

Cavernous hemangioma is a rare congenital condition that causes malformed blood vessels. In general, those affected with cerebral cavernous malformations can experience headaches, seizures, paralysis, hearing or vision loss, and cerebral hemorrhage (bleeding in the brain). If the condition was not passed from parent to child, but instead arose randomly, the affected individual will typically experience the growth of only one malformation. However, the congenital form of this condition commonly results in the formation of multiple cavernous malformations. The National Institute of Health has determined there are three genes that cause cerebral cavernous malformations and, while their exact functions are not fully understood, it is thought that these genes are responsible for making the proteins that connect neighboring blood vessels and prevent blood vessel leakage.²⁷

Bucklew's body has formed multiple blood-filled tumors in his head, neck, and throat. These tumors are inoperable and unstable, meaning they could burst without warning, causing a sudden release of blood. Since the tumors are unstable, Bucklew avers that a tumor located within his throat could burst during lethal injection causing him to suffocate on his own blood. Additionally, Bucklew argues that the malformation of the peripheral veins in his hands and arms would prevent the lethal drug from properly circulating throughout his body in a reasonable amount of time, therefore increasing the chance of a prolonged and especially painful execution.

The Department of Corrections (DOC) has offered some alternatives to Bucklew. The DOC proposed adjusting the gurney so Bucklew would not be lying completely flat on his back for the procedure. Bucklew states he coordinates his swallowing to move the tumor out of the way to breathe effectively when lying flat, but during the time between sedation and death, Bucklew would be unable to consciously coordinate his breathing and swallowing, causing increased friction. Bucklew's experts noted that the period of consciousness without mobility could last anywhere from 52 to 240 seconds. This

increased friction could lead to the rupture of the tumor.

There was no detailed determination of the angle that the gurney would be raised to and the dissent noted that there was no certainty that the gurney could be adjusted in this way. In response, between 2000 and 2003, Bucklew underwent general anesthesia eight times successfully and in December 2016 Bucklew laid flat on his back for over an hour while an MRI was taken to determine the size of the tumor, which had shrunk since 2010.

The DOC has also proposed the use of a central venous line because of Bucklew's compromised peripheral veins. A central venous line is typically a catheter that enters a large vein, the right atrium or the thoracic portion of the vena cava. A central line is used to provide solutions quickly as they enter much larger portions of the vascular system than a traditional IV. A traditional IV is placed in a smaller vein located in the arm or hand. The insertion of a central line would allow the lethal injection to circulate more quickly and efficiently because it would directly enter major blood vessels within the body rather than the compromised peripheral veins in Bucklew's arms and hands. A traditional IV may cause an increase in suffering since the lethal injection would not circulate properly and would take longer to be absorbed by the body, possibly leaving Bucklew to suffer throughout the procedure.

An alternative method may solve most of Bucklew's concerns: execution by lethal gas. Under Missouri law, lethal gas, also known as nitrogen hypoxia, is an authorized method of execution. Missouri used the gas chamber to execute 40 inmates between 1937 and 1989, but the state has not used the gas chamber since 1965 and no longer has a protocol for its use.²⁸ A portion of Bucklew's justification for the use of the gas chamber is based on his ability to remain in an upright position during the administration of lethal gas, which may reduce the risk of choking. The director of corrections replied that the medical team overseeing a lethal injection execution reviews the medical records of the prisoner before the execution and makes adjustments to the execution protocol as necessary to accommodate each prisoner; therefore, Bucklew does not need an entirely different method of execution but rather a tailored plan for lethal injection. Bucklew responded that he is concerned with the expertise and ability of the medical personnel to handle his particular condition and wished to discover the credentials of certain members of the medical team. The Eighth Circuit court denied this inquiry and stated, "The potentiality that something may go wrong in an execution does not give rise to an Eighth Amendment violation."²⁹

While the process by which capital punishment is carried out has evolved with society's notions of what is civilized and fair, the general concept has remained the same: The taking of life is the ultimate penalty for failure to abide by the rules. As society continues to evolve and change with the times, a collateral change in our methods of execution may also be waiting in the wings. ☉

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Quite the opposite: There is every reason to embrace them. Requiring that appeal rights waivers specify the issues to be conceded will lend greater certainty and clarity to the criminal justice process. Mandating that prosecutors actually negotiate these provisions with defendants will ensure that, when accepted, they are knowing and voluntary. And allowing courts to review waivers for errors that are “plain” will avoid the risk—troublingly common in our current system—of a serious miscarriage of justice in any given case.

Defendants across the nation face precisely that risk in light of the prevalence, and in some districts ubiquity, of appeal rights waivers adopted under the current system. This situation must change. The time for change is now. ☉



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Endnotes

- ¹See Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73 (2015).
- ²See, e.g., *United States v. Khattak*, 273 F.3d 557, 560-61 (3d Cir. 2005).
- ³See, e.g., *United States v. Erwin*, 765 F.3d 219, 223-29 (3d Cir. 2014).
- ⁴See, e.g., *Khattak*, 273 F.3d at 560-61.
- ⁵See, e.g., *United States v. Tanner*, 721 F.3d 1231, 1233 (10th Cir. 2013); see also, e.g., *Khattak*, 273 F.3d at 560-61.
- ⁶See, e.g., *Jamison v. Klem*, 544 F.3d 266, 277-79 (3d Cir. 2008).
- ⁷See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); see also Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801 (2003).
- ⁸See, e.g., *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 809 F.2d 979, 989 (3d Cir. 1986) (citing *INS v. Chadha*, 462 U.S. 919, 963 (1983) (Powell, J., concurring in judgment)).
- ⁹See, e.g., *Khattak*, 273 F.3d at 563 (holding that appeal rights waiver deprives the court of “jurisdiction” to consider issues on appeal).
- ¹⁰See, e.g., *Palmore v. United States*, 411 U.S. 389, 400-01 (1973).
- ¹¹See, e.g., *United States v. Goodson*, 544 F.3d 529, 540 (3d Cir. 2008).

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Endnotes

- ¹STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 5 (3d ed. 2003).
- ²P. Jenkins, *From Gallows to Prison? The Execution Rate in Early Modern England*, CRIM. JUSTICE HIST. 7 (1986).
- ³V.A.C. GATRELL, *THE HANGING TREE: EXECUTION AND THE ENGLISH PEOPLE 1770-1868* 7 (1994).
- ⁴*Id.* at 46.
- ⁵HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 4 (1997).
- ⁶GATRELL, *supra* note 3, at 46.
- ⁷DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org> (last visited July 17, 2018).
- ⁸BEDAU, *supra* note 5, at 4.
- ⁹MARK ESSIG, *EDISON AND THE ELECTRIC CHAIR: A STORY OF LIGHT AND DEATH* 2 (2003).
- ¹⁰*In re Kemmler*, 136 U.S. 436 (1890).
- ¹¹ESSIG, *supra* note 9, at 2.
- ¹²*Wilkerson v. Utah*, 99 U.S. 130, 135 (1878).
- ¹³*In re Kemmler*, 136 U.S. at 447.

- ¹⁴*Id.*
- ¹⁵RICHARD MORAN, *EXECUTIONER'S CURRENT: THOMAS EDISON, GEORGE WESTINGHOUSE, AND THE INVENTION OF THE ELECTRIC CHAIR* xix (2003 ed.).
- ¹⁶ESSIG, *supra* note 9, at 2, 42.
- ¹⁷*Id.* at 2.
- ¹⁸LOUIS J. PALMER JR., *THE DEATH PENALTY: AN AMERICAN CITIZEN'S GUIDE TO UNDERSTANDING FEDERAL AND STATE LAWS* 180 (1998).
- ¹⁹*Furman v. Georgia*, 92 S. Ct. 2726 (1972).
- ²⁰*Gregg v. Georgia*, 458 U.S. 153 (1976).
- ²¹*Woodson v. North Carolina*, 428 U.S. 280 (1976).
- ²²*Coker v. Georgia*, 97 S. Ct. 2861 (1977).
- ²³*Bucklew v. Precythe*, 138 S. Ct. 1706, 1323 (2018).
- ²⁴*Missouri v. Bucklew*, 973 S.W. 2d. 83, 86 (Mo. 1998).
- ²⁵*Bucklew*, 138 S. Ct. at 1323.
- ²⁶*Bucklew v. Precythe*, 883 F.3d 1087, 1090 (8th Cir. 2018).
- ²⁷*Genetics Home Reference*, NAT'L INST. OF HEALTH: U.S. NAT'L LIBRARY OF MED., <https://ghr.nlm.nih.gov> (last visited July 17, 2018).
- ²⁸Mo. Rev. Stat. § 546.720.1.
- ²⁹*Bucklew v. Precythe*, No. 17-3052 (8th Cir. 2018) (citing *Zink v. Lombardi*, 783 F.3d 1089, 1101(2015)).

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