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Life and Death in Kentucky: Past, Present, and Future

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"All over the United States there is a growing sentiment to do away with capital punishment . . . . If their mood is reflected in the letters they write me daily, a large segment of the Kentucky people want capital punishment abolished, too."[2]
–Former Kentucky Governor Edward Breathitt, May 5, 1965

THE first officially recorded execution in Kentucky was carried out in 1780, the year after Kentucky County became the District of Kentucky of the

1 William T. Lafferty Professor of Law. Harvard Law School, JD(1986); University of San Francisco, BSBA (1981). I would like to thank third year law students Daniela Erazo and Rachel Warf, my Research Assistants, for the valuable contributions, research and data compilation, they made to this article. I also greatly appreciate the exceptional assistance provided by Beau Steenken, Instructional Services Librarian & Instructor of Legal Research, and Tina Brooks, Electronic Services Librarian. And a special thanks to Beau Steenken for sharing his immense knowledge of legal history. His mastery of English and colonial legal history made it much easier for me to think and write about certain topics in this article.

2 EDWARD T. BREATHITT, Address at University of Louisville Law Day (May 5, 1965), *in* THE PUBLIC PAPERS OF THE GOVERNORS OF KENTUCKY, PAPERS OF EDWARD T. BREATHITT 468, 469 (Robert F. Sexton ed., 1984). Edward "Ned" Thompson Breathitt, a Democrat, served as the Commonwealth of Kentucky's 51st Governor from December 10, 1963 – December 12, 1967. *Kentucky Governor Edward Thompson Breathitt*, National Governors Association, http://www.nga.org/cms/home/governors/past–governors–bios/page_kentucky/col2–content/main–content–list/title_breathitt_edward.html (last visited Nov. 5, 2013); List of Governors of Kentucky, http://en.wikipedia.org/w/index.php?title=List_of_Governors_of_Kentucky&oldid=566226955 (last visited Nov. 5, 2013). The two Governors of the Confederate State of Kentucky are excluded from the roster of Kentucky Governors. *See* Ron D. Bryant, *The Confederate Governors of Kentucky*, KENTUCKY GAZETTE, http://www.jkhg.org/kyconfgovs.htm (last visited Nov. 5, 2013). *See infra* at note 32 for information about the Confederate State of Kentucky.

State of Virginia,[3] when a man was hung for murder in Breckinridge County.[4] The next four executions also were carried out during Kentucky's tenure as the District of Kentucky.[5] These condemned and their predecessor had an attribute in common that is extremely germane to how the death penalty has been administered in Kentucky: their gender, which is male.[6] A prodigious gender bias, which disfavors male capital offenders, is evident in Kentucky's historic and contemporary death penalty practice. Since the first execution in 1780[7] and the last in 2008,[8] the Commonwealth has executed 427 people.[9] 415 males and 12 females.[10] The latter account for a paltry 3% of those executed by the Commonwealth, while men account for a whopping 97%! Amazingly the last time Kentucky executed a female capital offender was in the 19th century;[11]

3 On May 23, 1609, approximately two years after the founding of the British Colony of Virginia, King James of England and Scotland signed The Second Charter of Virginia. The Charter granted the Virginia Company "the land, throughout from sea to sea, west and northwest . . . ." The Second Charter of Virginia § VI (1609), *reprinted in* 1 Statutes at Large: A Collection of All the Laws of Virginia 80, 88 (William Waller Hening ed., 1823). "[A]s soon as it was apparent that the western country was to be settled," Virginia created Fincastle County in 1772 from these lands to the west. Thomas D. Clark, A History of Kentucky 65 (The Jesse Stuart Foundation 1988) (1937). Four years later, on the last day of the year America declared her independence from England, Kentucky County was formed out of Fincastle County. *Id*. at 46, 66. According to noted Kentucky historian Thomas D. Clark, the first permanent settlement of what would be Kentucky County had been established almost two years earlier on March 15, 1775. *Id*. at 42. In 1779, the Virginia legislature passed an Act making the County of Kentucky the District of Kentucky of the State of Virginia. 1779 Va. Acts 92, ch. XII, § VIII.

4 *See Kentucky Executions: 1780 – 1962*, http://web.archive.org/web/20080617225325/users.bestweb.net/~rg/execution/KENTUCKY.htm (last visited Nov. 5, 2013) [hereinafter *Kentucky Executions*] (identifying the man's surname as Baysinger); *Executions in the U.S. 1608 – 2002: The ESPY File, Executions by State* 120, http://www.deathpenaltyinfo.org/documents/ESPYstate.pdf (last visited Nov. 5, 2013) [hereinafter *ESPY File*].

5 *See ESPY File*, *supra* note 4, at 120 (stating that the second execution was in 1785, the third and fourth ones in 1787, and the fifth in 1791).

6 *See Kentucky Executions*, *supra* note 4. Five years after Kentucky's first execution, Peter Vigo was hanged for theft–stealing in Jefferson County. Two years later, in 1787, Daniel Coleman was hanged in Monroe County for arson and Cato Watts' life ended on the scaffold in Jefferson County for the crime of murder. The last execution carried out prior to Kentucky obtaining its statehood was in 1791 when twelve–year–old Bill James was hanged for murder in Woodford County. *Id.*

7 *See id*.

8 Marco Chapman, who died by lethal injection on November 21, 2008, was the last person, the 427,th executed by the Commonwealth. *Marco Chapman,* Death Penalty Information Center, http://www.deathpenaltyinfo.org/marco–chapman (last visited Nov. 5, 2013).

9 *See ESPY File*, *supra* note 4, at 120–131.

10 *Id.*

11 *See Kentucky Executions*, *supra* note 4. When 13–year–old Susan mounted the scaffold in Henry County on February 7, 1868 she became the last female and the 135th person executed by the state. She also is the third, as well as the second youngest and only female, of the ten juvenile capital offenders the Commonwealth executed. *Id.* Two juvenile capital offenders have been sentenced to death during the modern era of Kentucky's death penalty practice. *See infra* note 13 (discussing the commencement of the modern era of capital punishment in the United States).

while male capital offenders were executed for the remainder of the 19th century and in the 20th and 21st centuries.[12] Contemporary capital sentencing statistics aptly convey how deeply entrenched this bias is in the operation of the death penalty. Since 1972, when the United States Supreme Court handed down its seminal decision in *Furman v. Georgia*,[13] the Commonwealth has

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The first was Todd Ice, who was fifteen years old when he committed the offense for which he received a death sentence in 1980. American Bar Ass'n, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Kentucky Death Penalty Assessment Report app. at C (2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/final_ky_report.authcheckdam.pdf. Two years later Kevin Stanford was sentenced to death for a capital offense committed when he was seventeen years old. *Id.* at E. In 1984 the Kentucky Supreme Court reversed Ice's conviction when the case was there for mandatory review. *See* Ice v. Commonwealth, 667 S.W.2d 671, 680 (Ky. 1984). Ice was retried and convicted of a lesser offense and eventually served out his sentence. If, however, Ice had not received relief prior to June 29, 1988, his death sentence would have been invalidated that day by the United States Supreme Court's opinion in *Thompson v. Oklahoma*, where Five Justices agreed society opposed imposing death sentences on capital offenders who were younger than sixteen years old at the time the crime was committed; consequently, the Eighth and Fourteenth Amendments rendered this practice unconstitutional. *See* Thompson v. Oklahoma, 487 U.S. 815, 838 (1988). Kevin Stanford was not as fortunate as Ice because the Kentucky Supreme Court affirmed his conviction and his death sentence. Stanford v. Commonwealth, 734 S.W.2d 781, 793 (Ky. 1987). And, despite its ruling the year before in *Thompson,* the United States Supreme Court was not persuaded by Stanford's contention that the failure to exempt sixteen and seventeen year old capital offenders from the death penalty violated the Eighth and Fourteen Amendments. Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (plurality opinion). Close to a decade and a half later, Stanford found relief in the government's executive branch when former Kentucky Governor Paul Patton commuted his death sentence to life without the possibility of parole or pardon in 2003. *See Commutations in Capital Cases on Humanitarian Grounds*, Death Penalty Information Center, http://www.deathpenaltyinfo.org/clemency (last visited Nov. 5, 2013). Ice and Stanford are the only two juvenile capital offenders to have death sentences imposed in Kentucky during capital punishment's modern era: 1971 to the present. *See infra* note 13.

12 *See ESPY File*, *supra* note 4, at 124–131.

13 Furman v. Georgia, 408 U.S. 238 (1972) (per curiam). The year before the United States Supreme Court had decided *McGautha v. California*. 402 U.S. 183(1971). The Court's opinion in *McGautha* was featured in three of the four dissenting opinions in *Furman*, *Furman,* 408 U.S. at 375 (Burger, J., dissenting); *id.* at 405 (Blackmun, J., dissenting); *id.* at 413 (Powell, J., dissenting), and since *Furman* invalidated death penalty legislation in 39 states, including Kentucky, *id.* at 417 (Powell, J., dissenting), *McGautha* played a significant role in the effort by states to fashion a capital sentencing remedy that would comply with *Furman*. *See*, *e.g.*, Ky. Rev. Stat. § 532.030(1) (1974); Woodson v. North Carolina*,* 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). Even though McGautha and Crampton based their challenge to the total discretionary capital sentencing scheme on the Fourteenth Amendment's Due Process Clause, and the same challenge by Furman, Jackson, and Branch was based on the Eighth and Fourteenth Amendments, for the reasons stated above, I consider *McGautha* the case that ushered in the modern era of the practice of capital punishment in the United States. Although *Furman v. Georgia,* which imposed a four–year legal moratorium on executions, was on its heels, and then five years later by *Gregg v. Georgia*, 428 U.S. 153 (1976), where the Court upheld the constitutionality of Georgia's capital sentencing scheme.

sentenced eighty–two people to death.[14] 96% were male and 4% were female.[15] Incredibly, these percentages are almost identical to those based on more than two centuries of execution data.[16] The existence of this bias, however, is not unique to Kentucky; nor has it gone unacknowledged.[17]

14 Prior to the Court's holding in *Furman*, Kentucky permitted the death penalty for multiple crimes, including murder, KY. REV. STAT. § 435.010 (1970), the rape of a child under the age of twelve, KY. REV. STAT. § 435.080(1) (1970), the rape of a female twelve or older, KY. REV. STAT. § 435.090 (1970), and lynching or mob violence, KY. REV. STAT. § 435.070(2) (1970). The penalty decision was left entirely to the discretion of the sentencing authority, typically a jury. In *Furman*, however, five of the nine Justices concluded that "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishments in violation of the Eighth and Fourteenth Amendments." *Furman v. Georgia*, 408 U.S. at 240. For three of the Justices concurring in the judgment "the imposition . . . of the death penalty in these cases," meant totally discretionary capital sentencing schemes. *Id.* at 240 (Douglas, J., concurring); *id.* at 306–07 (Stewart, J., concurring); *id.* at 310–14 (White, J., concurring). The other two concurring Justices, Brennan and Marshall, concluded the death penalty was *per se* unconstitutional. *Id.* at 257, 285, 305–06 (Brennan, J. concurring*); id*. at 314, 370–71 (Marshall, J. concurring). As a result, on June 29, 1972, the "capital punishment laws of no less than 39 States," *id.* at 417 (Powell, J. dissenting), including Kentucky's, were "nullified," *id.*, which also had the consequence of transforming all but one of the 50 states into abolitionist states. *Id.* at 417, note 2 (Rhode Island was the only remaining retentionist state because its sole capital statute called for a mandatory death sentence, which was beyond the purview of the Court's holding). Two years after *Furman* Kentucky's legislature enacted a new capital sentencing scheme**,** *see* KY. REV. STAT. § 532.030(1) (1974), that went into effect January 1, 1975. This statute was used to impose death sentences on Wallace Boyd, *Boyd v.* Commonwealth, 550 S.W.2d 507 (Ky. 1977), Jimmy Self, *Self v. Commonwealth*, 550 S.W.2d 509 (Ky. 1977), and Ronnie Meadows, *Meadows v. Commonwealth*, 550 S.W.2d 511 (Ky. 1977): the first three people condemned in Kentucky during the post–*Furman* era. On July 2, 1976, however, the Kentucky legislature learned the Court decided that a mandatory capital sentencing scheme, the type Kentucky adopted, *see* KY. REV. STAT. § 532.030(1) (1974), was incompatible with the rights guaranteed by the Eighth and Fourteenth Amendments. *See Woodson v. North Carolina,* 428 U.S. 280 (1976). Consequently, Kentucky, once again, found itself as a state without capital punishment. That same year Kentucky's legislature convened and enacted yet another post–*Furman* capital sentencing scheme. When the Court struck down mandatory death sentences, it upheld several guided discretion capital sentencing schemes, *see Gregg v. Georgia,* 428 U.S. 153) (1976) (joint opinion), *Proffitt v. Florida*, 428 U.S. 242 (1976), and *Jurek v. Texas*, 428 U.S. 262 (1976), and Kentucky's egislature decided to enact a guided discretion capital sentencing scheme modeled after Georgia's, *see* KY. REV. STAT. §§ 532.030(1), (4) (1976), KY. REV. STAT. § 532.025 (1976), and KY. REV. STAT. § 532.075 (1976), that went into effect December 22, 1976. Several months later the Kentucky Supreme Court reversed the death sentences imposed on Boyd, Self and Meadows and substituted terms of life imprisonment. *See Boyd v.* Commonwealth, 550 S.W.2d 507, 508–09 (Ky. 1977); *Self v. Commonwealth*, 550 S.W.2d 509, 510(Ky. 1977); *Meadows v. Commonwealth*, 550 S.W.2d 511, 513(Ky. 1977). Seventy–nine others in Kentucky were sentenced to death post–*Furman. See* AMERICAN BAR ASS'N, *supra* note 10, at B–F. Their death sentences, however, were imposed in accordance with the guided discretion capital sentencing statutes, KY. REV. STAT. §§ 532.030(1),(4) (1976), KY. REV. STAT. § 532.025 (1976), and KY. REV. STAT. § 532.075(1976). Thus, between 1974 and 2011 the Commonwealth has condemned eighty–two people.

15 *See supra* note 13.

16 *See supra* notes 8–10 and accompanying text.

17 In 1972, a year after the commencement of the modern era of capital punishment, *see supra* note 13, Justice Marshall identified gender as one of several forms of discrimination long associated with the administration of capital punishment in the United States. Justice Marshall succinctly

The first five people executed also represent another inveterate basis for discrimination found in Kentucky's historic and modern use of capital punishment: race. Baysinger, the first person to be executed, was white and the quartet following him were African–American.[18] Thus, 80% of those executed when Kentucky was still a District were of color. This specific bias, as well as its tenacity and pervasiveness, are easily understood when the quartet's status is considered: All were slaves.[19] The institution of chattel slavery in Kentucky greatly affected the "racialization" of the administration of capital punishment in the Commonwealth. "Slavery existed in Kentucky from its first days of settlement"[20] and was an important issue at the Convention to draft Kentucky's First Constitution.[21] Kentucky's strong pro–slavery sentiment was embodied in Article IX of the First Constitution, which prohibited "the passage of legislation which tended to abolish slavery in the state."[22] The Constitutions produced at the Second and Third Constitutional Conventions, held respectively in 1799 and 1849, reinforced this institution of inequality by codifying assurances to protect slavery from being abolished.[23] "The prominent

described the situation as one with "overwhelming evidence that the death penalty is employed against men and not women. Only 32 women have been executed [nationally] since 1930, while 3,827 men have met a similar fate." *Furman v. Georgia,* 408 U.S. at 365 (Marshall, J., concurring). The Justice goes on to note that since "[m]en kill between four and five times more frequently than women," *id.* at note 154, some of the incongruity might be attributed to differences in socialization, "[h]ence, it would not be irregular to see four or five times as many men executed as women. The statistics show a startlingly greater disparity, however." *Id.* Fifteen years later, the gender issue surfaced in an important case in the Court's body of capital jurisprudence. *See McCleskey v. Kemp*, 481 U.S. 279 (1987). Here the Court not only acknowledged that gender plays a role in the sentencing authority's decision to impose a death sentence, *see id.* at 315–17 & n.40, but also very likely the existence of this bias contributed toward the Court holding, despite statistical evidence of the racially discriminatory impact of the death penalty, findings the Court assumed were statistically valid, *see id.* at 291 n.7, Warren McCleskey**, an** African–American man, was not sentenced to death in a manner that violated either the Eighth or Fourteenth Amendments. *Id.* at 319.

18 *ESPY File*, *supra* note 4, at 120.

19 *Kentucky Executions*, *supra* note 4.

20 Lowell H. Harrison, *Slavery in Kentucky: A Civil War Casualty*, 5 Ky. Review 32, 32 (1983). Historian Thomas Clark notes "it was only natural that the early pioneers should transfer the institution [of chattel slavery] from Virginia to their farms west of the mountains." Clark, *supra* note 3, at 192.

21 *See* Harrison, *supra* note 20, at 32. In 1789 Virginia passed an Act supporting the District of Kentucky's quest to attain independent statehood status. 1789 Va. Acts 10, ch. XIV. Two years later the First United States Congress consented to the formation of a "new State . . . within the jurisdiction of the Commonwealth of Virginia," Act of Feb. 4, 1791, ch. 4, 1 Stat. 189 (1791), and to the admission of this new state "into this Union, by the name of the State of Kentucky." *Id.* Since the District of Kentucky was scheduled to be admitted into the Union by June 1, 1792, a constitution had to be drafted and approved before then. Clark, *supra* note 3, at 92. This deadline was met when Kentucky's First Constitution was approved April 19, 1792. Ky. Const. of 1792. Subsequently, on June 1, 1792 the District of Kentucky became the State of Kentucky and the fifteenth member of the Union. Clark, *supra* note 3, at 92.

22 Clark, *supra* note 3, at 95. *See also,* Ky. Const. of 1792, art. IX.

23 Clark, *supra* note 3, at 113, 210–11, 305, 308, 310, 340; *see also See* Harrison, *supra*

place given the institution [of slavery] in the first three constitutions"[24] led noted Kentucky historian Thomas Clark to describe Kentucky's "hold on slavery"[25] as "tenacious,"[26] but strangely, "[w]hen the Civil War began, Kentucky was one of four slave states that remained in the Union."[27] As the War progressed, however, more and more Kentuckians became outraged by what they perceived to be a federal government that was increasingly taking on the abolitionists' cause: "[t]hey were fighting for the preservation of the Union, not the destruction of slavery."[28] The mere suggestion of emancipation sent some to the verge of apoplexy. This fervor is illustrated by one newspaper editor's impassioned comments:

> [I]f the slaves were freed 200,000 soldiers would be required 'to retain Kentucky in the Union, and then the soldiers would be compelled to aid in exterminating the black race.' If the slaves were freed, he asserted, 'there is but one thing to be done with them; they must be wiped out—totally obliterated. It must be a merciless, savage extermination . . . . The two races . . . cannot exist in the same country, unless the black race is in slavery.[29]

Sentiments of this tenor were officially validated when the legislature passed a law permitting the enslavement of any African American entering Kentucky who stated they owed their freedom to the Emancipation Proclamation.[30] Kentuckians' anger escalated when President Lincoln decided to recruit African Americans to fight in the war because "it challenged the basic assumption that blacks were inherently inferior to whites."[31] While Kentucky did not end up

note 20, at 32 ("[T]he right of property is before and higher than any constitutional sanction, and the right of an owner of a slave to his property is the same and as inviolate as the right of an owner of any property whatsoever") (quoting Ky. Const. of 1850, art. XII, § 3).

24 Clark, *supra* note 3, at 212.

25 *Id*.

26 *Id*.

27 Harrison, *supra* note 20, at 32.

28 *Id*. at 33.

29 *Id*. at 34; *see also id.* at 35–36.

30 *Id*. at 36.

31 *Id*. In fact, the "state protests were so violent that the order was suspended until February 1864." *Id.*

seceding,[32] the legislature did refuse to ratify the Thirteenth Amendment.[33] Even after the Secretary of State announced the Amendment had been ratified, the Kentucky legislature "refused to change its stance"[34] and again voted down ratifying the Amendment.[35] By all indications, racial inequality had become indelibly ingrained in Kentucky's social fabric, which adversely affected the workings of the state's criminal justice system; especially when deciding who should live and who should die.

As noted earlier, the Commonwealth has executed 427 people.[36] Racially, the overwhelming majority of people executed were either African–American, accounting for 54%, or Caucasian, accounting for 42%.[37] Even though female capital offenders benefit greatly from the death penalty's gender bias,[38] the group is responsible for generating one of the most remarkable race and the death penalty statistics: Kentucky has only executed one Caucasian female, while 83% of the females executed were African–American.[39] Another astounding statistic from this category is that "no white man in Kentucky died on the gallows or in the electric chair for the rape of a black woman."[40] In Kentucky, more African–American men, 222,[41] than Caucasian men, 177,[42] lost their lives

32 Although, slightly more than six months after the Civil War began**,** a group of Confederate sympathizers held a secession convention in Russellville, Kentucky. On November 20, 1861 the unelected group proclaimed Kentucky's secession from the Union and inaugurated George W. Johnson, who hailed from Scott County, as the first Governor of the Confederate State of Kentucky. Even though Jefferson Davis, President of the Confederate States of America, harbored doubts about the legality of Kentucky's secession on December 10, 1861, the Commonwealth of Kentucky became the thirteenth state of the Confederate States of America. After Governor Johnson died in battle on April 8, 1862, Richard Hawes, a resident of Bourbon County, became the second Governor of the Confederate State of Kentucky. He retained the position until the fall of the Confederacy. The tenure of the Confederate State of Kentucky was short–lived and had no effect on the Commonwealth of Kentucky's status as a member of the United States of America. *See* Bryant, *supra* note **2**.

33 Harrison, *supra* note 20, at 39.

34 *Id*. *at* 40.

35 *Id*. *See also* GEORGE C. WRIGHT, RACIAL VIOLENCE IN KENTUCKY, 1865 – 1940, at 20 (1990).

36 *See supra* note 9 and accompanying text.

37 African–Americans and Caucasians account for 96% of the total. One Native American male was executed, *see Kentucky Executions*, *supra* note 4 (see execution 104), and the races of 16 people, 3.7 % of those executed, are unknown. *ESPY File*, *supra* note 4, at 120–31.

38 *See supra* notes 6–17 and accompanying text (identifying and discussing the gender bias inherent in the administration of the death penalty).

39 *ESPY File*, *supra* note 4, at 120–23. Kentucky has executed twelve females. One Caucasian female, one female whose race is unknown, and ten African–Americans. *Id.*

40 WRIGHT, *supra* note 35, at 299.

41 *ESPY File*, *supra* note 4, at 120 – 131. This figure excludes extra–judicial lynchings. *See generally* WRIGHT, *supra* note 35, at 1–11, 13–14, 61–107, 166, 307–323.

42 *ESPY File*, *supra* note 4, at 120 – 131. *See also*, *Marco Chapman*, *supra* note 8. Although separated by more than two centuries, the first person and the last the Commonwealth executed were Caucasian men. *Id*.; *see also ESPY File*, *supra* note 4, at 120.

on the scaffold, in the electric chair, or on the gurney.[43] Eight men belonging to the former group, however, lost their lives because of how a facially race neutral law was applied. Action taken by the legislature in the early twentieth century fostered some hope that the execution of Roger Warren, an African–American male, on May 25, 1911 would be the last execution carried out by hanging.[44] The year before the legislature authorized switching the state's sole method of execution from hanging to electrocution.[45] In addition, executions were to "take place within the walls of the State penitentiary"[46] away from the purview of the public.[47] This hope was reinforced when eighteen year old James Buckner, African–American like his predecessor Roger Warren, christened Kentucky's electric chair "Ole' Sparky" on July 8, 1911.[48] Nine years later the outcome in a capital case in Lexington involving an African American man accused of murdering and raping a ten year old white female would land a cruel blow to hopes about transforming the relationship between the rope and violence. In February 1920, twenty three year old Will Lockett confessed to murdering young Geneva Hardman.[49] Given the circumstances, the sexual assault, the victim/defendant racial and gender paradigm: white female victim and black male defendant, and the girl's tender age, the authorities "[f]ear[ed] a mob might storm the jail [so they] . . . rushed [Lockett] to the state penitentiary in Frankfort."[50] The next day Lockett was indicted for murder and the judge

43 In 1965 Kentuckians were officially put on notice about their racially skewed death penalty when then Governor Breathitt informed them that "[s]ince the electric chair was placed in operation at Eddyville State Penitentiary in 1911, some 162 men have been electrocuted. Of this number, approximately one–half have been Negroes." BREATHITT, *supra* note 2, at 469.

44 For 130 years, hanging was the state's official method of execution. *See ESPY File*, *supra* note 4, at 127. Since rope was an item commonly used to lynch people, a sense of incongruity associated with the state's "official" method of execution developed because it too called for a rope. In fact, in the context of lynching, someone aptly described the rope as a "white man's death." WRIGHT, *supra* note 35, at 92. For example, one Christmas Day, the day before a black man's murder trial was scheduled to start, even though "[t]he county judge and prosecuting attorney [were] . . . *confident* that the law would have punished [the man]," *id.* at 74 (emphasis added), a mob extracted him from the jail and "*hanged him from a tree in the courthouse yard*." *Id.* (emphasis added). That same week, but in a different part of Kentucky, another black man was removed from the local jail and "carried to the *courthouse yard and hanged*." *Id.* at 75 (emphasis added). Given this longstanding "connection" between hanging and lynching, the hope was that adopting a different method to use for state sanctioned killing would eventually check the strength of the rope's ability to legitimize lethal violence.

45 *See* Act of March 15, 1910, ch. 38, §1, 1910 Ky. Acts 111.

46 *Id*.

47 *See* WRIGHT, *supra* note 35, at 255–56.

48 *See Electric Chair Used in Kentucky*, N.Y. TIMES, July 9, 1911. WRIGHT, *supra* note 35, at 275 & n.27.

49 WRIGHT, *supra* note 35, at 194.

50 *Id*. Wright mentions Lockett might also have sexually assaulted little Geneva, but to expedite the process, Lexington officials decided to only indict Lockett on murder. *Id.* at 256. Documents containing information about the 427 people executed in Kentucky, however, list murder and rape as the capital crimes Lockett was found guilty of committing. *ESPY File*, *supra* note 4, at

vowed "there would be no delay . . . and that the trial would start . . . Monday, [February 9, 1920] only five days after the murder."[51] The Governor promised "Lexington officials that *troops would be sent to protect Lockett on his return to the city.*"[52] The press did its best to quell the public's call for mob violence by assuring people that "Lockett's trial would be quick and *the outcome certain*"[53] and they were: in less than thirty minutes Lockett was convicted, though by pleading guilty he helped honor the pledge that justice would be swift,[54] and "sentenced . . . to die in the electric chair."[55] "Although elated . . . a number of Lexington whites expressed the belief that . . . Lockett *should have been made to suffer by dying at the end of a rope* [in public for sexually assaulting Geneva]."[56] The legislature's response to this suggestion was extraordinarily fast and a week after Lockett died by electrocution[57]the legislature approved an Act to amend section one of the execution by electrocution statute by adding the following: "Except in cases where the accused has been adjudged to suffer a death sentence for the crime of rape or attempted rape, in which event sentence shall be executed by hanging the condemned in the county in which the crime was committed."[58] The hanging was supposed to be done "within an enclosure"[59] and before no more than "one hundred persons."[60] Although this law was race neutral, its application decidedly was not. Nine men were executed in accordance with this law and all were men of color.[61]

127; *Kentucky Executions*, *supra* note 4.

51 WRIGHT, *supra* note 35, at 195.

52 *Id*. (emphasis added).

53 *Id*. (emphasis added).

54 *Id*. at 195.

55 *Id*.

56 *Id.* at 256 (emphasis added).

57 Will Lockett was executed in the electric chair on March 11, 1920. *See ESPY File*, *supra* note 4, at 127.

58 *See* Act of March 17, 1920, ch. 163, §1, 1920 Ky. Acts 693; Kentucky Statutes § 1137–1 (1920).

59 *See* Act of March 17, 1920, ch. 163, §1, 1920 Ky. Acts 693.

60 *Id.* at 693. George Wright recounts occasions when this provision was blatantly disregarded. *See* WRIGHT, *supra* note 35, at 256–57. Rainey Bethea's public hanging in Owensboro, Kentucky on August 14, 1936 attracted thousands of people. *Id.* at 257–58. It should also be noted that Kentucky was "the last state in which public hangings were conducted." *Id.* at 258.

61 *ESPY File*, *supra* note 4, at 128–29. After the Rainey Bethea fiasco, it was decided John Montjoy and Harold Venison, the last two men who had their death sentences imposed under the 1920 amendment, should still die on the gallows but not in public venues. WRIGHT, *supra* note 35, at 258. Even though legislation repealing this amendment to Kentucky Statute § 1137–1 was passed and approved in March 1938, *see* Act of March 12, 1938, ch.131, 1938 Ky. Acts 640, only a few months before Venison's execution was scheduled, he still had to be executed by hanging, which was done on June 3, 1938. *ESPY File*, *supra* note 4 at 129. Electrocution was restored as Kentucky's sole method of execution. *See* Kentucky Statutes § 1137–1 (1938). In 1998 Kentucky made lethal injection the state's second method of execution. KY. REV. STAT. § 431.220. However, both methods are only available to people sentenced to death on or before March 31, 1998. *Id.*

This law's success, as well as securing death sentences against African American capital offenders in general, was greatly dependent upon having accommodating juries. This was best achieved by seating all white juries, which was easy to accomplish when African Americans were statutorily expressly barred from being jurors. In the late 19th century, however, the United States Supreme Court created two obstacles in an effort to end this long–standing discriminatory practice: it held that statutes expressly prohibiting African Americans from serving on juries, and racially neutral statutes applied in a manner that accomplishes the same result, violate the accused's and the excluded potential jurors' right to equal protection under the Fourteenth Amendment.[62] As a result, a greater cost was attached to seating an all white jury: violating the defendant's and potential jurors' constitutional rights. *Smith v. Commonwealth*[63] and *Hale v. Commonwealth*[64] are representative of the problem. Smith, "a negro,"[65] was indicted for murder by an all white grand jury and another all white jury found him guilty as charged and sentenced him to death. On appeal he contended his conviction was invalid because it was no accident that he, "a negro," was indicted, tried, and convicted by all white juries. Smith apprised the Kentucky Court of Appeals that about twenty percent of the voters in Hardin County were African American and fifteen percent of them were eligible for jury service; yet, the jury commissioners, white men, never selected them.[66] The court gave short shrift to Smith's argument, "finding no error" and affirmed the judgment.[67] Three decades later another "negro,"[68] Joe Hale, **also** convicted of murder and sentenced to death, revisited the issue with the Kentucky Court of Appeals. Hale had evidence to prove that "going back as far as 1906, no member of the African race had been summoned or served on a grand or a petit jury in McCracken county."[69] He argued:

> [T]he foregoing facts, when proved, show a long continued, unvarying and wholesale exclusion of negroes from jury service in this county on account of their race and color; that it has been systematic and arbitrary on the part of the officers and commissioners who select the names for jury service, *for a period of fifty years or longer*.[70]

62 *Strauder v. West Virginia*, 100 U.S. 303 (1879); *Neal v. Delaware,* 103 U.S. 307 (1880).

63 *Smith v. Commonwealth*, 91 S.W. 742 (Ky. 1906).

64 *Hale v. Commonwealth*, 108 S.W.2d 716 (Ky. 1937), *rev'd*, 303 U.S. 613 (1938) (per curiam).

65 *Smith v. Commonwealth*, 91 S.W. at 742.

66 *Id*.

67 *Id*.

68 *Hale v. Commonwealth*, 108 S.W.2d at 716.

69 *Id.* at 717.

70 *Id.* at 718 (emphasis added).

The court detected problems with Hale's proof, starting with his failure to include evidence in the record proving he "was a member of the African race,"[71] but the court was forgiving of this evidentiary omission and conceded that "the court no doubt by observation knew that fact to be true."[72] The court's greatest concern was about what it deemed Hale's "failure to charge therein as grounds therefore, that such exclusion of members of the African race from service on juries was superinduced and occurred 'solely because they were members' of that race."[73] The United States Supreme Court, however, saw the evidence offered by Hale in an entirely different light: "We are of the opinion that the affidavits . . . sufficed to show a systematic and arbitrary exclusion of negroes from the jury lists solely because of their race or color, constituting a denial of the equal protection of the laws guaranteed to petitioner by the Fourteenth Amendment."[74] The Court reversed the judgment and remanded the case for "further proceedings not inconsistent with this opinion."[75] Unfortunately, Kentucky did not heed the Court's admonishment that "proceedings not be inconsistent with that opinion" because in 1986, almost half a century later, the state found itself back in front of the Court for the same practice: excluding African Americans from being jurors.[76] In this round, the state's exclusionary strategy involved exercising peremptory challenges as a way to get rid of African Americans[77] [in order to seat an all white or as close to all white jury as possible]. Once again, the Court chided the Commonwealth for violating constitutional rights that are guaranteed to everyone, regardless of color, creed, gender or religion.

Discriminatory practices continue to plague the administration of capital punishment in Kentucky,[78] despite the fact the Commonwealth was at the vanguard with respect to following a recommendation made by the Supreme Court in 1987 that racial problems associated with the use of the death penalty be resolved through legislation.[79] And in 1998, Kentucky became the first jurisdiction in the United States to enact a Racial Justice Act.[80] Yet, there are

71 *Id.* at 717.

72 *Id*.

73 *Id.* at 718.

74 *Hale v. Kentucky,* 303 U.S. 613, 616 (1938) (per curiam).

75 *Id*.

76 *Batson v. Kentucky*, 476 U.S. 79 (1986).

77 *Id.* at 79–80.

78 *See* American Bar Ass'n, *supra* note 10, at 345–378.

79 *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987).

80 The Racial Justice Act went into effect on July 15, 1998. Ky. Rev. Stat. § 532.300. More than a decade passed before another retentionist state followed Kentucky's lead. In August 2009, North Carolina became the second state to enact a Racial Justice Act for capital cases. *See Race and the Death Penalty,* Death Penalty Information Center, http://www.deathpenaltyinfo.org/race–and–death–penalty (last visited Nov. 5, 2013). For more information about Kentucky's Racial Justice Act see Gennaro Vito*, The Racial Justice Act in Kentucky,* 37 N. Ky. L. Rev. 273, 276–78 (2010).

lingering concerns about the Act's effectiveness.[81] The pervasiveness of gender discrimination is disheartening; especially when one remembers that the proportion of women and men sentenced to death in Kentucky during capital punishment's modern era is almost the same as the proportion of the women and men executed over a period of time exceeding two centuries.[82] Is history repeating itself? Or, is it simply that little has changed at the core in the use of the death penalty? If so, then perhaps now is the time to implement real tangible change. Certain considerations indicate change might be warranted. In 1962 Kelly Moss was executed.[83] The following year the people of Kentucky elected Edward Breathitt to serve as the Commonwealth's Chief Executive and he "brought an already strong aversion to capital punishment with him to the governorship."[84] "In the 1964 General Assembly he endorsed a bill abolishing the death penalty."[85] He also "announced a general stay of execution for all condemned state prisoners until he could place the measure before the legislature once again in 1966."[86] So, for several years, Kentucky could be considered a de facto abolitionist jurisdiction. Three decades passed before Kentucky carried out another execution.[87] These thirty plus years include periods of time when Kentucky actually did not have capital punishment [88]and when Kentuckians decided to partially abolish the death penalty by forbidding it to be imposed on a segment of the population.[89] Only two people have been executed since McQueen was in 1997 and both were volunteers.[90] Therefore,

81 *See, e.g.,* Vito, *supra* note 80, at 279–80; *See* American Bar Ass'n, *supra* note 11, at 345–378.

82 This is the period of time between the first execution in 1780 and the last one in 2008. *See ESPY File*, *supra* note 4, at 121; *Marco Chapman*, *supra* note 8.

83 Breathitt, *supra* note 2, at 471, n. 3; EPSY File, *supra* note 4, at 131. Moss was the last person the state executed prior to capital punishment's modern era. *See supra* note 13.

84 Breathitt, *supra* note 2, at 471, n.3.

85 *Id.* The measure, however, was unsuccessful.

86 *Id.*

87 Harold McQueen was executed by electrocution on July 1, 1997. He was the first person the Commonwealth executed in more than thirty decades . *ESPY File*, *supra* note 4, at 131.

88 Kentucky was a non–retentionist state from June 29, 1972 until December 31, 1974 and from July 2, 1976 until December 21, 1976. *See supra* note 14.

89 In 1990 the people of the Commonwealth decided to abolish the death penalty for intellectually disabled individuals. *See* Ky. Rev. Stat. §§ 532.130, 532.135, 532.140. This is another instance where Kentucky was one of the first jurisdictions to dismantle part of its death penalty practice. *See Penry v. Lynaugh*, 492 U.S. 302, 334 (1989) (noting that in 1988 Georgia had partially abolished the death penalty in the same way and Maryland had but the law did not go into effect until July 1, 1989)**.**

90 Edward Harper Jr. and Marco Chapman, respectively executed in 1999 and 2008, *ESPY File*, *supra* note 4, at 131, *Marco Chapman*, *supra* note 8, were volunteers, *see* Information on Defendants Who Were Executed Since 1976 and Designated as "Volunteers", Death Penalty Information Center, http://www.deathpenaltyinfo.org/information–defendants–who–were–executed–1976–and–designated–volunteers (last visited Nov. 5, 2013), which in some cases is considered tantamount to "suicide by state." *See* Michael Blume, *Killing the Willing: "Volunteers,"*

it has been sixteen years since Kentucky has used its execution machinery on a non–volunteer. During what collectively amounts to a significant period of time, there was not nor has there been a public outcry when the death penalty has been absent, de jure or de facto, from the Commonwealth. Perhaps that means the time is ripe for changes to be made; specifically, those of the magnitude sufficient to stop Kentucky from going round and round and round on the death penalty wheel, continually repeating the longstanding problems associated with the state's death penalty practice.

Suicide and Competency, Death Penalty Information Center, http://www.deathpenaltyinfo.org/documents/BlumeVolunteerArticle.pdf. Currently, Kentucky has 33 condemned inmates. All but one are male. *See* Kentucky Department of Corrections, *Death Row Inmates*, http://corrections.ky.gov/communityinfo/pages/deathrowinmates.aspx (last visited Nov. 5, 2013).