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Televised Executions

■ Introduction

The notion of televising executions is controversial in the contemporary United States, though this preference for privacy is an historical exception rather than the rule. In the early years of the United States, executions were publicized as a matter of course. Hanging days were well attended by the community, often by thousands of people, though they were not spectacles. Hangings were solemn events, surrounded by elaborate ceremony. The condemned would often be compelled to wear a special robe and marched to the gallows along established routes lined with crowds. Ministers delivered speeches. The condemned often delivered remarks of their own, generally contrite, occasionally defiant. In *The Death Penalty: An American History*, Stuart Banner offers this account of public executions:

Hangings were not macabre spectacles staged for a bloodthirsty crowd. A hanging was normally a somber event, like a church service. Hanging day was a dramatic portrayal, in which everyone could participate, of the community's desire to suppress wrongdoing. It was a powerful symbolic statement of the gravity of crime and its consequences. The whole ceremony was public, outdoors, and as conspicuous as any event could possibly be.

The policy benefit of public executions is obvious: they maximize the deterrent effect of capital punishment. The more it is known that the death penalty will be used, and the more humiliating the manner in which it is imposed, the greater its value in dissuading potential criminals. The offsetting cost to public executions is that some criminals may be martyred, especially those whose execution is controversial or who comport themselves in an especially sympathetic manner. Banner writes, "In the eighteenth century, sympathy had been accepted as an unfortunate but unavoidable aspect of capital punishment, but in the early nineteenth century people began to complain about it and to suggest that it provided a reason for abolishing public executions." It was also argued that viewing executions made citizens more prone to violence, an analogous argument to the contemporary concern with the brutalization effect of the death penalty. These complaints became more and more common as the nineteenth century wore on. In the 1830s, several northeastern states including New York and Massachusetts abolished public executions. Hangings moved into the jail yard. By 1860, public hanging had been abolished entirely in the northern United States. Most southern states followed suit by the end of the century. The few holdout states abolished public executions, partially by necessity, with the adoption of the electric chair.

Jail yard executions remain the status quo, though the policy debate—the trade-off between increased deterrence and the risk of desensitizing people to violence—is of continued relevance today. The debate flares up from time to time in contemporary society. In 1991, the public television station KQED sought permission to videotape and televise the execution of Robert Alton Harris by the state of California. Excerpts from Judge Schnacke's decision denying such permission appear in the Critical Documents section of this chapter.

The issue returned a decade later when Timothy McVeigh, sentenced to die for the 1995 Oklahoma City bombing that killed 168 people, requested that his execution be broadcast on television in a public letter to the *Oklahoman* newspaper. McVeigh said he had no objection to his execution being broadcast on closed-circuit television, as it was, but that the limited broadcast would keep others from witnessing his death. He wrote:

Because the closed-circuit telecast of my execution raises these fundamental equal access concerns, and because I am not otherwise opposed to such a telecast, a reasonable solution seems obvious: Hold a true “public execution”—allow a public broadcast.

McVeigh’s request was endorsed by Phil Donahue, among others. Donahue argued that “the free press establishment has an obligation to show this issue.”

In this chapter, John Bessler argues that executions must be televised to let the public fully scrutinize the propriety of capital punishment. George Will wonders whether televised executions will further desensitize Americans to violence. The Critical Documents section includes a proposal by Jeremy Epstein to require judges and juries to witness executions. The proposal is controversial but has its roots in the procedures attending to capital punishment prescribed in the Old Testament.

■ Critical Documents

KQED v. Vasquez

U.S. District Court for the Northern District of California (1991)

Opinion of Judge Robert H. Schnacke

In our courts, which are constitutionally mandated to conduct public trials, the press and the public are entitled to equal access. But neither the public nor the press have been found to have the right to bring cameras, still or television, into a courtroom. Indeed, until a very recent determination to allow limited testing of television in a few federal courtrooms, all federal courtrooms are under a mandate from the Supreme Court not to do so.

In California, quite clearly executions aren’t public. Penal Code Section 3605 imposes clear limits on the persons who are to attend. While the press can’t be arbitrarily excluded, that doesn’t mean the media attendance may not be subject to reasonable restrictions.

A great many reasons have been advanced for excluding cameras. Some may very well question how compelling those reasons are. But it’s sufficient to say that whatever exclusions are appropriate for a public hearing such as a court trial, ought to be more compelling than those that are necessary to exclude them from a private execution.

The warden is designated under California law to operate and control the prison and to supervise executions. These are questions and activities that require the expertise of people who are trained in such matters. It’s really not a place for intrusion by well-meaning amateurs.

We heard from a number of wardens and they all agree that managing a prison isn’t an easy task. They all agree that the internal tensions that are created by a large number of criminals combined in close quarters presents, in the best of times, a wide range of problems and dangers. And, as they’ve pointed out, it’s particularly true at times of executions. They all agree that the prison population becomes extremely tense, hostile and aggressive during the period surrounding any planned or actual execution.

The wardens were unanimous in the fact that none has ever permitted cameras at an execution. There’s no evidence that any prison anywhere has ever permitted cameras in the United

States. All but one of the wardens who testified presented a number of reasons why cameras ought to be excluded.

First of all, the prison personnel who participate in the execution process frequently want their identities concealed. They fear, and apparently with some justification, that harm may come to themselves or to their families in retaliation from the prisoners, or their associates, or from gangs, or from any element of the public that is possibly hysterically offended by the fact of the execution, and the prison personnel deserve protection. They might well be disclosed, their identities revealed by a camera in the area at the time of an execution, and no rational way appears to prevent cameras that are there from getting either intentional or inadvertent photographs of the prison personnel.

The witnesses to executions, the warden further pointed out, aren't allowed to bring with them any heavy objects of any sort which might create any kind of threat to others. Cameras obviously are such heavy objects. Television cameras are heavier than still cameras in many cases.

The security of prisons is something that, as I say, has to be left to the people who are responsible for dealing with the problems that arise if security is breached and prisons very jealously guard their right to maintain security. People entering the prison or even the prison grounds are subject to search and strict limitations. And the warden is really not required to trust anybody.

In California we have a gas chamber, it's glass enclosed and it's sealed during the execution process, it's filled with a lethal gas. Now, any heavy objects striking the chamber could conceivably cause a leakage of that gas into the witness area or very least a threat of creating a fear of possible break in the seal which would require some long delay or examination of the chambers that would make it difficult to carry on the execution expeditiously.

Some of the wardens had a real fear they expressed that the circulation of a photograph of an execution within the prison even after the time of the execution, and more seriously the display on television of a live broadcast of the event within the prison, could spark severe prisoner reaction that might be dangerous to the safety of prison personnel.

Mr. Procnier, formerly a warden at San Quentin was the only person who ever had responsibilities in connection with prison or with executions who indicated any doubts about the risk involved in cameras in the execution chamber. He testified that he had not at any of the prisons, and he's been at a great many of them, he's moved from one to another and had significant positions in each of them, never in any of those prisons has he ever permitted cameras to be present at an execution. When he was asked why, he said "No one ever asked." Apparently he encountered press far less aggressive than they seem to have become lately, at least. But more significantly when he was asked how much risk he would tolerate in the execution procedure, he said flatly "None."

In my view, prison officials are the experts. Their reasonable concerns must be accommodated and I find that the concerns that they have expressed are reasonable. They not unreasonably see risks in permitting cameras in and I agree with Mr. Procnier that no risk should be tolerated. Prohibition of cameras still or television from the execution witness area is a reasonable and lawful regulation.

Now, I presume for purposes of this case that the press does have more rights in witnessing an execution than every other witness. That assumption may be open to serious dispute. After all the statute permits only the attendance of witnesses. The right of a witness is simply to witness.

It doesn't necessarily encompass the right to record in any other fashion than in the mind what is witnessed. There is no custom or usage in California or elsewhere that requires cameras in the execution chamber.

In summary, Plaintiffs have failed to prove that the warden may not exclude cameras from the execution witness area.

Jeremy G. Epstein, “Require Judge and Jury to Witness Executions”

National Law Journal (December 11, 1995)

On September 1, 1995, New York’s new death penalty statute took effect. It spells out the mechanics of execution with ghastly precision. Death shall be imposed by lethal injection in a “suitable and efficient facility, enclosed from public view, within the confines of the designated correctional institution for the imposition of the punishment of death.”

That is not always the way it was done in New York. In 1842, Charles Dickens, only 30 years old and already a world-famous novelist, visited the United States. While in New York, Dickens visited the Tombs, which continued as a prison in lower Manhattan well into the 20th century. Executions had been conducted in public until 1835, when new legislation required that they be carried out within prison walls. Dickens described the conditions under which executions were carried out at the Tombs:

Into this narrow, gravelike place, men are brought out to die. The wretched creature stands beneath the gibbet on the ground; the rope around his neck; and when the sign is given, a weight at its other end comes running down and swings him up into the air—a corpse.

The law requires that there be present at this dismal spectacle, the judge, the jury, and citizens to the amount of 25.

Much has changed since 1842. The method of execution is different and, more “humane.” The law no longer requires the judge and jury to be present. No one under the age of 18 may attend the execution. The law also expresses a touching solicitude for the privacy rights—not, as one might expect, of the defendant, but rather of those who are delicately referred to as execution technicians: “The names of the execution technicians shall never be disclosed.”

I. Make Them Attend

New York should reinstate the practice of requiring the presence of the judge and jury at executions. If it was good enough for New York in 1842, why not now? Those to whom that argument seems absurd should know that a commonly invoked defense of the death penalty is fidelity to historical custom. Death penalty apologists frequently—and quite erroneously—claim that because the death penalty was in effect in 1791, it cannot now be deemed cruel and unusual. If this argument were correct, then whipping, the pillory, branding, ear-cropping and flogging, all common in 1791, would be acceptable today.

Historical precedents aside, requiring the presence of judge and jury at all executions would have many beneficial consequences. It would focus the attention of those imposing the punishment on the gravity of their act. Jurors could not simply depart from the courtroom and leave the state with the unpleasant task of disposing of the defendant. Now would this requirement constitute an unprecedented assault on the sensibilities of juries. During a murder trial, they are frequently exposed to as many photos of torture, mutilation, disfigurement or dismemberment as a prosecutor can persuade a judge to disclose. The only individual in the courtroom harmed by the experience is usually the defendant.

II. A Useful Trauma

If the experience of witnessing an execution is traumatic and leaves an impression that lasts a lifetime, so much the better. The impact of the act is at least as traumatic on the defendant and will also last what remains of his life. One of the purposes of any penal system is to teach that acts have consequences. It is fitting that judge and jury understand that their acts have consequences that reverberate far beyond the courtroom.

A judge and jury’s involvement in the actual execution might also remove from public debate some of the detachment with which the death penalty is viewed. Executions are at the point of being considered routine.

The taking of a human life by the state should never be considered a routine event, no matter how often it occurs. Requiring judge and jury presence will create a body of witnesses who can inform public discourse.

What would the impact on the spectator be? Is the suggestion merely an attempt to win the death penalty debate not by reasoned argument but through physical revulsion? It is not.

Execution by lethal injection is (one is told) comparatively uneventful: there is no burning flesh, no slow and agonized asphyxiation. The defendant receives an injection and loses consciousness. If the scene remains frightening, it is not because of the overt manifestations of death, but because of what the act itself signifies. The spectator has seen the state end a life. That is an event that can be witnessed in no other Western democracy.

The most beneficial consequence of this requirement is also the most obvious. Does anyone doubt that if judge and jury knew they were required to witness an execution that there would be fewer death sentences? If the answer is no, as I believe it is, what does that say about the public's true tolerance for the death penalty?

■ Perspectives

Issue—Should Executions Be Televised?

John Bessler, *Death in the Dark: Midnight Executions in America*

Northeastern University Press

Executions in America are hidden from public view. Private execution laws severely restrict the number of execution witnesses, and television cameras are strictly forbidden in execution chambers. Throughout the United States, these laws effectively ensure that the vast majority of Americans will never watch an execution. Only official witnesses, hand-picked by governmental officials, will ever witness the ultimate act of the state. Many state laws also require that death row inmates be executed at night. From 1977 to 1995, over 82 percent of executions occurred between 11:00 P.M. and 7:30 A.M. These laws further inhibit the public's access to information about state-sanctioned killings because local television news programs are already over by the time many executions take place.

As Americans debate whether executions should be televised, the transition from public, daytime executions to private, nighttime executions must not be forgotten. By privatizing executions, nineteenth-century legislators, worried that executions might only incite criminal activity, sought to eliminate the spectacle of public executions. In those days, it was common knowledge that execution day crowds were often mischievous, with alcohol consumption and pickpockets regularly associated with public hangings. Rioting at public hangings also was not unknown. The "scientific" findings by skull-measuring phrenologists that public executions did not deter crime but actually caused more of it lent credence to the movement to privatize executions. The fear that well publicized executions might only cause crime certainly helps explain why many states passed laws prohibiting the publication of execution details.

By moving executions into prisons, paternalistic legislators and civic leaders also sought to protect society's sensibilities. Embarrassed by the spectacle of public hangings, and the drinking and rabble-raising that occurred at them, legislators passed laws requiring executions to take place within the confines of prisons beginning in the 1830s. Over the next one hundred years, hangings before large, boisterous crowds gradually ebbed, as civic leaders came to view public executions as corrupting of public morals and as incongruous with the occasion's solemnity. Women and children were seen as particularly unfit execution spectators, with some private execution laws excluding these groups from executions altogether. As in England, where even newspaper publicity of executions was thought to have a demoralizing influence on the

community, especially children, American legislators tried to shroud executions with secrecy to prevent what they viewed as the unhealthy effects of public executions.

Finally, private execution laws were sometimes passed to appease abolitionists after abolitionists made strong legislative efforts to abolish capital punishment. Many death penalty opponents, believing public executions would be instrumental in abolishing capital punishment, initially resisted the passage of such laws. However, abolitionists eventually relented and either acquiesced in the passage of these laws or pushed for their enactment. For instance, Minneapolis legislator John Day Smith, an ardent abolitionist, actually authored the law that privatized executions in Minnesota. He probably believed, like many other abolitionists of his time, that death penalty proponents would be deprived of their most powerful argument (that capital punishment deters crime) once executions were privatized. Ironically, the passage of private execution laws only removed the issue of capital punishment from public consciousness and made Americans apathetic toward executions.

In attempting to civilize society, private execution laws had the perverse effect of degrading America's democracy. Not only did these laws limit the number of execution spectators and restrict the public's access to information about capital punishment, but they often attempted to suppress public debate of the death penalty itself. In several states, laws were passed that prohibited newspaper reporters from attending executions or forbade newspapers from publishing any execution details. Only the bare fact that the prisoner was executed could be printed. Newspaper reporters who violated these laws could be criminally prosecuted as happened in the case of Minnesota and New York newspapers.

Laws requiring nighttime executions also were enacted with paternalistic and publicity-squelching zeal. In upholding the constitutionality of the "midnight assassination law," the Minnesota Supreme Court specifically found: "The evident purpose of the act was to surround the execution of criminals with as much secrecy as possible, in order to avoid exciting an unwholesome effect on the public mind. For that reason it must take place before dawn, while the masses are at rest, and within an inclosure, so as to debar the morbidly curious." In requiring after-dark executions, these laws only further denigrated America's democracy by suggesting that Americans have something to hide or fear carrying out their chosen public policy in broad daylight.

Today, laws requiring private, nighttime executions continue to stifle execution publicity and keep the public in the dark about the facts surrounding capital punishment. By cloaking executions in secrecy, these laws leave the public uninformed about capital punishment and unable to judge for themselves the morality of the death penalty. In addition, these laws leave politicians free to cry out for the use of capital punishment without having to live with the real life-and-death consequences of their get-tough-on-crime rhetoric. As Sister Helen Prejean aptly observes: "Beyond the rhetoric of all the legislators who score their political points for being tough on crime, what it all boils down to is that a handful of people are hired to kill a guy in the middle of the night."

To restore accountability to America's death penalty debate, several remedial steps must be taken. First, judges or jurors who sentence criminal defendants to death (or governors who refuse to exercise their clemency powers) must be required to pull the triggering switch at executions, and all of those individuals must be required to attend them. This will inject some much needed accountability and personal responsibility into capital sentencing and clemency decisions. Alex Kozinski, a conservative judge on the Ninth Circuit and a death penalty supporter, has wondered aloud whether judges "who make life-and-death decisions on a regular basis should not be required to watch as the machinery of death grinds up a human being." Kozinski writes: "I ponder what it says about me that I can, with cool precision, cast votes and write opinions that seal another human being's fate but lack the courage to witness the consequences of my actions."

Second, no longer can jurors who oppose the death penalty be excluded from jury service. The death penalty is the most severe sanction that any society can impose, so the notion of

excluding potential jurors from service solely because they oppose its use is like stacking a deck of cards before playing a game of poker when the ante is a human being's life. Juries should reflect a fair cross-section of community views on this issue.

Third, the practice of allowing politically sensitive, elected state court judges to override jury verdicts of life imprisonment and impose death sentences must be outlawed via legislation. Only juries, which reflect a better sampling of a community's conscience, must be allowed to make life-and-death decisions.

Fourth, the few remaining death penalty states that do not authorize the punishment of life imprisonment without the possibility of parole for murder must do so at once, and jurors in capital cases must always be made aware of that sentencing option. It is simply unconscionable that some sentencing juries continue to be faced with the Hobson's choice of voting for death, which they might find undesirable, or returning verdicts that they fear would let violent criminals walk the streets again.

Finally, executions must be televised. Americans must acknowledge the critical role that television plays in our society and admit that printed accounts of executions are a woefully inadequate substitute for television news coverage of them. Concurrently, broadcast journalists must recognize their ethical obligation to keep the public fully informed about capital punishment issues and redouble their efforts to put executions on television so that the news is no longer sanitized. The executions-are-too-gruesome-for-television argument must be rejected. The public has a right to know when and how the state takes a human life, and both advocates and opponents of capital punishment should be able to agree that news reporting in America should not be censored by the government. If Americans want executions, they should have nothing to hide. As columnist Anna Quindlen has remarked about capital punishment, "Having it on television makes it no worse. It simply makes the reality inescapable, and our role undeniable. If we want it, we should be able to look at it. If we can't bear to look at it, maybe it's time to rethink our desires." Televised executions are necessary to let the public fully scrutinize the propriety of capital punishment. Without televised executions, Americans will always lack complete information as they debate the morality of the death penalty.

When the freedom of the press is curtailed, as it has been by private execution laws, the public is left uninformed about newsworthy events, and democracy is threatened. Indeed, it is a tragic commentary on America's democracy when governmental policies—especially those involving life and death—are carried out behind thick prison walls in the middle of the night. As James Madison warned, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Because an informed citizenry is essential to America's democracy, Americans can no longer afford to tolerate death in the dark. The press must be allowed to put executions on television, lest Americans relinquish to their government "the power which knowledge gives"—something that should happen only in a George Orwell novel, not in America.

George F. Will, "Capital Punishment and Public Theater"

Washington Post (May 12, 1991)

State-inflicted death used to be public theater with didactic purposes, and it may be again if KQED, the public television station here, wins its suit asserting a right to film executions.

Reporters have always attended California executions. A press sketch was made of the most recent one, in 1967. But before KQED filed suit, prison policy was changed to require reporters to be empty-handed (no note or sketch pads, tape recorders or cameras). After the suit was filed, the rules were revised again to ban all reporters from any executions.

This comprehensive ban may protect San Quentin's warden against KQED's original contention that he was unconstitutionally discriminating against graphic journalism because of its content. However, the ban opens him to another charge: He is unconstitutionally infringing the newsgathering right by abolishing a historic access to a government function without serving a compelling government interest.

The First Amendment is not a blanket freedom of information act. The constitutional newsgathering freedom means the media can go where the public can, but enjoys no superior right of access. Courts have recently protected press access to particular government functions when there is a history of openness and when openness would facilitate the function. Journalists claim no right to witness, say, Federal Reserve meetings or Supreme Court conferences. But executions are scripted rituals, not deliberative processes. Every other aspect of California's criminal justice system—trials, parole and clemency hearings, press conferences by condemned prisoners—can be televised.

The warden's real concerns, for the dignity of the occasion and for society's sensibilities, are serious. Solemnity should surround any person's death, and televised deaths might further coarsen American life.

There has not been a public execution since 1937 (a hanging in Galena, Mo.). At the time the Constitution was adopted, public executions were morality pageants, featuring civil and clerical orators, designed to buttress order and celebrate justice. But by the 1830s most states, alarmed by "animal feelings" aroused by public executions, moved executions behind prison walls, inviting representatives of the proliferating penny newspapers to be society's surrogate witnesses.

KQED says television conveys an "immediacy and reality" that is lost when events are "filtered through a reporter and conveyed only in words." It would be more accurate (and less obnoxious to writers) to say pictures have unique saliency and increasing importance in a decreasingly literate society. No camera can make capital punishment more troubling than Orwell ("A Hanging," just six pages long) and Camus ("Reflections on the Guillotine") did while working "only in words." Still, KQED could argue that Orwell and Camus are rarities and public understanding should not depend on literary genius being common in journalism.

It is dismaying but undeniable: Most Americans get most of their information, such as it is, from television. But televised executions would transmit peculiar "information," and for a problematic purpose. Information is normally valued as nourishment for reason. Many advocates of televised executions hope the horrifying sight would stir passions, particularly revulsion.

Attempts to proscribe capital punishment as unconstitutionally "cruel and unusual" have foundered on two facts: The Founders did not consider it so (the Constitution assumes its use) and society's "evolving standards of decency" have not made it so. Society's elected representatives continue to enact capital punishment.

KQED says it would not exercise a right to broadcast an execution live or without permission of the condemned. But although a court can affirm the journalistic right KQED asserts, it cannot mandate KQED's scrupulousness. Whether broadcast executions would be in bad taste or excite prurient interests are editorial concerns beyond the proper purview of government.

Televised executions might accelerate the desensitization of America. However, much death has been seen on American television: foreign executions (of the Ceausescues; a Saudi beheading), the Zapruder film of President Kennedy's exploding skull, Robert Kennedy bleeding onto a hotel kitchen floor, the explosion of the shuttle *Challenger*, Hank Gathers' death on a basketball court. Would tape of an execution be more lacerating to the public's sensibilities than the tape of Los Angeles police beating a motorist nearly to death?

There have been 143 executions since capital punishment was resumed in 1977. They have lost their novelty, hence much of their news value: A recent Texas execution (by lethal injection) did not even draw the permitted number of reporters. Perhaps this distresses those who support

capital punishment for its deterrent power. If KQED prevails, publicity will be ample, at least for a while.

However, the dynamics of the public mind, and hence the consequences of a KQED victory, are unpredictable. Perhaps the unfiltered face of coolly inflicted death would annihilate public support for capital punishment. But perhaps society values capital punishment because of its horribleness, from which flows society's cathartic vengeance. All that is certain is that the constitutionality of capital punishment is linked to the public's values, which are malleable.

■ Discussion Question

1. Should executions be televised? Whatever your answer, is it supported by utilitarian considerations or some other notion of fairness?

