

The Death Penalty Today

Edited by Robert M. Bohm



CRC Press
Taylor & Francis Group
Boca Raton London New York

CRC Press is an imprint of the
Taylor & Francis Group, an **Informa** business

2008

- Reuss-Ianni, E. (1983). *Two-Cultures of Policing: Street Cops and Management Cops*. New Brunswick, NJ: Transaction.
- Sandys, M. & McGarrell, E.F. (1994). Attitudes toward capital punishment among Indiana legislators: Diminished support in light of alternative sentencing options. *Justice Quarterly*, 11, 651-677.
- Sandys, M. & McGarrell, E.F. (1995). Attitudes toward capital punishment: Preference for the penalty or mere acceptance? *Journal of Research in Crime and Delinquency*, 32, 191-213.
- Skolnick, J. (1966). *Justice Without Trial: Law Enforcement in a Democratic Society*. New York: John Wiley and Sons.
- Toch, H. (1965). Psychological consequences of the police role. *Police* 10, 22-25.
- Van Maanen, J. (2002). Observations on the making of policemen. In R.G. Culbertson & R.A. Weisheit (eds.) *Order Under the Law, Readings in Criminal Justice* (6th ed.) Prospect Heights, IL: Waveland, pp.63-83.
- Whitehead, J.T. (1998). 'Good ol' boys and the chair: Death penalty attitudes of policy makers in Tennessee. *Crime and Delinquency*, 44, 245-256.
- Whitehead, J.T., Blankenship, M.B., & Wright, J.P. (1999). Elite versus citizen attitudes on capital punishment: Incongruity between the public and policymakers. *Journal of Criminal Justice*, 27, 249-258.
- Wilcox, N. & Steele, T. (2003). Just the facts: A descriptive analysis of inmate attitudes toward capital punishment. *The Prison Journal*, 83, 464-482.

The United States Can't Televise an Execution Because It Will Make Condemned Men Feel Bad about the Death Penalty: Issues Raised by the Suit to Make McVeigh's Execution Public

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Introduction

Throughout much of European history, executions were not just public, but they were conducted in public squares with pageantry and spectacle. At times, tens of thousands of people would attend an execution, and the atmosphere was so festive that one of the terms for celebration—gala—comes from the word gallows (Johnson 1998). The tradition of public executions was brought to the United States and persisted into the 20th century. Extra-legal executions (lynchings) attracted crowds and families even as states curtailed legal executions conducted with portable electric chairs set up so the local community could watch offenders be punished (Johnson, 1998).

States started the slow process of restricting public access to executions in the 1830s through "private execution" statutes, which Bessler (1993, p. 335) claims were aimed at reducing unsightly public spectacles and preserving the death penalty. Courts accepted paternalistic justifications about the detrimental effects on the public of witnessing executions and upheld laws limiting public access to them. One court, in upholding a fine for publishing

details of a hanging that took almost 15 minutes to complete, stated that the execution needed to be surrounded "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 enclosure, so as to debar the morbidly curious" (Bessler, 1993, p. 365). Even though they were denied direct access to the execution, people in states such as Mississippi during the 1940s gathered "late at night on the courthouse square with chairs, crackers and children, waiting for the current to be turned on and the street lights to dim" (Oshinsky 1996, p. 207).

Media representatives are no longer prohibited from publishing detailed accounts of executions, although lawsuits and other attempts to photograph or videotape an execution have not been successful. The press has filed several lawsuits, all after 1976 when the Supreme Court lifted its moratorium on executions and the death penalty again became the subject of widespread intense debate. The cases usually pit various arguments about the First Amendment against an array of concerns about prison security and the privacy of individuals involved in the process. So far, the courts have given deference to wardens and prison officials, based not only on a string of cases involving suits to televise executions, but also on suits where courts have upheld restrictions about media access to prisons in general.

The most recent case, which is the focus of this chapter, is McVeigh's execution for the bombing of the federal building in Oklahoma City. The execution was carried by closed circuit television to an auditorium of survivors and victim family members in Oklahoma City, but a judge denied a request to make it widely available through the Internet. McVeigh waived his privacy rights and endorsed making his execution more publicly available because he favored scrutiny of government actions. The gleefully pro-death penalty President Bush declined the chance to show the public how the government gets tough with terrorism. He had an opportunity to show European skeptics of the "barbaric" American death penalty the execution of a mass murderer with a pinprick in a case that involved no substantial lingering questions of factual innocence or embarrassing questions about racism in the criminal justice system. In short, McVeigh's execution was as legitimate as they get, and it was already being televised to a limited audience. But the Bush administration decided to prevent it becoming available on the Internet by defending the federal law—28 C.F.R. § 26.4—that criminalizes making a photographic recording of an execution. (Presumably, no one recorded the closed circuit broadcast, and the law would not be violated if it were shown but there was no photographic recording.)

Although this situation raises many questions, one of the main issues examined by this chapter concerns why a photographer at an execution is a criminal? In McVeigh's case, why is it a crime to make a videotape of a mass murderer being put to sleep? Given the number of unsuccessful lawsuits filed

by media to televise an execution, a second aspect of analysis concerns not just the First Amendment but the larger issue of an open democratic society which nevertheless uses the coercion of the criminal law to prevent photographic recordings of executions. In McVeigh's case, it is particularly striking that the terrorist who blew up a day care center in the Oklahoma City federal building is the one in favor of public scrutiny of government actions, and the government putting him to sleep objects to public accountability.

These perplexing questions exist within the framework of the death penalty as a controversial legal, moral, and political and public policy issue, and the idea of televising executions—or making them more available to the public through streaming video on the Internet ("Webcasting")—creates additional legal, moral, and political and public policy controversies. To help examine these issues, this chapter starts by reviewing the lawsuits that have challenged the limitations on the media. Although courts have rejected a number of legal theories arguing in favor of televising an execution, the idea has gained advocates who are both for and against the death penalty. The odd alignments have the potential to create important coalitions for future episodes of potentially televised executions, so this section also provides a brief review and critique of the arguments about deterrence, the undermining of public support, and the desensitizing or brutalizing effect on the public.

The next section provides an overview of McVeigh's crime and the anti-government ideology behind it. Before being sentenced to death, he speaks only a few sentences, quoting a dissent from a Supreme Court case (*Olmstead v. U.S.*, 1928) about how, "Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example." Although President Bush amassed an impressive record for a large number of executions without any moral qualms, he declined to make this execution public to teach the world by this example, so the legal case played out between the Internet Entertainment Group suing for access and Warden Harley Lappin defending the federal law. This section examines the lawsuit, as well as the Bureau of Prison's contention that televising an execution would cause inmates to see executions as "sport" that dehumanizes them, and that they are likely to cause disturbances when they feel devalued. The court accepts this reasoning, which is critiqued in the conclusion.

Televised Execution Lawsuits and Democratic Values

The first lawsuit over a televised execution was *Garrett v. Estelle* in 1977, when a station wanted to televise the first execution in Texas since 1964. Although official witnesses to an execution include media representatives, the media policies prohibited cameras, so the First Amendment concern about prior restraints on the free press was limited to visual media. Thus,

the suit argued for access in terms of equal protection based on "reporting tools": if a print reporter with a notebook is allowed, then a photojournalist with a camera should also be allowed. Although Texas was willing to set up a closed circuit broadcast of the execution to accommodate reporters beyond the two official media representatives, the state defended its prohibition on all forms of recording.

The lower court in this case struck down the Texas law and ordered prison officials to allow the taping:

If government officials can prevent the public from witnessing films of governmental proceedings solely because the government subjectively decides that it is not fit for public viewing, then news cameras might be barred from other public facilities where public officials are involved in illegal, immoral, or other improper activities that may be "offensive," "shocking," "distasteful" or otherwise disturbing to viewers of television news. (Quoted in Bessler 1993, p. 375)

But the Appeals Court disagreed, arguing "the press has no greater right of access to information than does the public at large." (Indeed, "As the late Chief Justice Warren wrote for the Supreme Court, "The right to speak and publish does not carry with it the unrestrained right to gather information.") Much of the court's opinion rested on general precedents restricting media from access to prison and inmates, however, it also included a striking comment suggesting that actual footage of the event carried no more information than a re-enactment in terms of informing the public about executions:

In order to sustain Garrett's argument we would have to find that the moving picture of the actual execution possessed some quality giving it "content" beyond, for example, that possessed by a simulation of the execution. We discern no such quality from the record or from our inferences therein. Despite the unavailability of film of the actual execution the public can be fully informed; the free flow of ideas and information need not be inhibited. (Garrett, 1977)

KQED v. Vasquez is a 1992 case that arose when a public television station sued San Quentin's warden to tape the execution of Robert Alton Harris, California's first execution since 1967. Although the warden had prohibited the press from bringing pencils, notepads, and sketchbooks, part of KQED's suit was based on the "reporting tools" argument in *Garrett*. Warden Vasquez then expanded the ban to include all media representatives, with KQED responding that the role of the media is a watchdog, the eyes and ears of the public, so they should be allowed to attend. The television station based its claim on a series of Supreme Court rulings that allowed cameras into courtrooms. These rulings specifically allowed camera access to Harris' trial,

and "were being used to argue that such coverage should be extended, albeit for the first time in history, to the execution itself" (Lesser, 1993, p. 29).

The state argued the prohibitions were grounded in various concerns about security, especially because the case had already inflamed public opinion: inmates may riot if they saw the execution, guards may be identified and be in jeopardy, and bulky camera equipment could break the glass on the gas chamber causing the release of poisonous gas (Lesser, 1993, p. 29). Apparently, "Prison Warden Daniel Vasquez even expressed concern that a television camera operator might become upset during an execution and throw the equipment against the glass to stop the execution" (Shipman 1995, p. 100).

Ultimately, the judge decided that the media should be able to witness the execution and report on it, but without cameras. In an ironic twist, Harris' "execution was videotaped by the state of California by order of a Federal District Court judge for use in any future cases involving the constitutionality of a gas chamber execution" (Yanich, 1996, p. 306). So, after a court denied KQED the right to tape the execution, another court, over the objection of the prison, ordered the execution to be taped because of its relevance to a debate about whether the gas chamber is cruel and unusual punishment. The court order was quite specific in requiring the camera to focus only on Harris and not show guards or witnesses. The tape was never used because the state of California did not challenge the statements of witnesses about the twitching and spasms that followed inhalation of lethal gas. Instead, the state called toxicologists and challenged the value of the lay witnesses who "did not have the scientific training to distinguish conscious pain from unconscious reflexes" (*New York Times*, 1994, p. 35). When the case was resolved, the tape was no longer relevant to the legal case, so the judge ordered the tape destroyed.

The 1994 case of *Lawson v. Dixon* involved a death row inmate suing the prison to allow then talk show host Phil Donahue to tape his execution. The footage was to air in a documentary about Dixon's life, which the inmate said he hoped could:

[S]erve as an example to others of the effects of child abuse, anxiety disorder, depression and the pitfalls of a life of crime; and that it be used as an educational medium to aid in the prevention of and hopefully as a deterrent to others who might fall into the same lifestyles and patterns of conduct which I followed. I also feel and am equally committed to do all within my power to inform the public of the true significance of the death penalty and thereby to make a meaningful contribution to the significant public debate over the use of the death penalty (quoted in *Lawson v. Dixon*).

The courts ultimately found that Dixon did not have a right to have Donahue as a witness with a camera, and that Donahue could attend as a

witness, but did not have a right to attend with a camera. Nothing prevented him from talking about what he witnessed, but access to the event with a camera was not part of the First Amendment right, or one that was outweighed by security concerns and the weight of precedent restricting media access to prison.

Based on this small number of cases, it is evident that prisons are generally opposed to taping an execution, although the Texas prison in *Garrett* seemed open to the closed circuit broadcast that was ultimately used in McVeigh's case. The one time an execution was taped, the tape was quickly destroyed. That prisons are willing to have cameras but not recordings of executions suggests the concern is not a security issue with cameras and photographers, but a reluctance to have images of executions be disseminated to the public because of an assumed power the images might have.

Suits by media and others have not focused on the likely results of showing the images to the public, but have been based on a right of access. The exception is *Lawson*, where Donahue became involved out of a belief that showing an execution would undermine public support for capital punishment (Goodman, 1994, p. C15). Although others who are anti-death penalty share this opinion, many who are pro-death penalty believe that public dissemination of an execution would be beneficial as part of a tough on crime campaign that would help achieve deterrence. Those who oppose televising executions are also on both sides of the death penalty debate and argue that the spectacle would brutalize people or desensitize them to violence. Thus, many people assume that an image of an execution would be quite powerful and have an effect on the public, but they disagree about what it would be.

Although the literature contains an extensive analysis and critique of these beliefs (Leighton, 2001a), it is worth noting that the possible effect of a televised execution could include all options: some people may be deterred by the reality of executions, some people may become less supportive of the death penalty when confronted by the reality of executions, some people may become more comfortable engaging in violence if they feel the message conveyed by state killing is that "a man's life ceases to be sacred when it is thought useful to kill him" (Camus 1960, p. 229), or if they think that killing will make them a criminal folk-hero (Kooistra, 1989).

Furthermore, the idea that the image of an execution would be powerful is an assumption rather than a taken-for-granted conclusion. For example, the argument for greater deterrence from more public executions rests on a rational choice model that does not apply to many homicides done by perpetrators who are drunk, on drugs, with brain damage or impulse control problems, and so on. Images of lethal injections may create complacency with executions, especially because they focus on the moment of execution rather than on a decade or more of confinement enduring conditions on death row. New evidence suggests that lethal injection may amount to "chemical

asphyxiation" and "the conventional view of lethal injection leading to an invariably peaceful and painless death is questionable" (Zimmers et al., 2007), but images would not convey that information. More generally, some believe that by the time execution footage has

been dissected and analyzed and shown again and again on news programs, and by the time it makes its way to MTV and some sort of music video that's supposed to make us think deeply about ourselves as a society, so what, it won't—it will lose its power to scare us and stop us and make us think about, hey, we're killing a guy today. (in Lesser 1993, p. 95)

Understanding the possible effect of a televised execution is important (especially if it might cause additional violence through a brutalization dynamic), however, the fundamental issue is whether a democratic society that conducts executions should allow cameras at the event. Capital punishment is an ultimate act of state power, so people should have maximum information in order to decide whether they want the state to kill in their name. Certainly the public has access to information other than pictures and video, but in the age of C-SPAN, COPS, and Court-TV, executions and Supreme Court oral arguments remain two areas of government noticeably resistant to video coverage. Even those who do not want to watch a video of an execution should scrutinize justifications for government minimizing openness and transparency, especially when protecting morally questionable activities.

McVeigh and Government Teaching by Example

Timothy McVeigh was convicted and executed for the 1995 bombing of the Alfred P. Murrah federal building in Oklahoma City. The "deadliest terrorist attack in United States history" (Kittrie and Wedlock, 1998, p. 776) to that time killed 168, including children in the day care center directly above the blast. McVeigh's motivations appear to be rooted in an anti-government ideology fueled by the government's killing of Randy Weavers' wife and child at Ruby Ridge, and 76 Branch Davidians (including children) at Waco, an event occurring exactly two years prior to Oklahoma City. He believed government actions were growing "increasingly militaristic and violent, to the point where at Waco, our government—like the Chinese—was deploying tanks against its own citizens" (Vidal, 2001, p. 410).

McVeigh is described as having a high IQ and a relatively normal childhood that included playing war with the children he babysat, including variations such as Star Wars: "What seemed to attract him was the battle of good and evil," in which McVeigh "always took the side of the good guys" (Michel and Herbeck, 2001, p. 26). His growing fascination with guns and survivalism

led to his enlisting in the Army in 1998. While in the military, McVeigh first read *The Turner Diaries*, a fictional racist account of Earl Turner's resistance to the "Zionist Occupied Government" that overtakes the United States and disarms white citizens. McVeigh did not share the book's racism, but identified with "the *Diaries*' obsession with guns and explosives and a final all-out war against the 'System'" (Vidal 2001, p. 409).

During Operation Desert Storm, McVeigh killed for the first time, although he took no pride in killing Iraqi citizens who had been coerced into fighting (Michel and Herbeck, 2001, p. 75). The military awarded him a Bronze Star for valor, among other commendations (Hamm, 1997, p. 149). After the Persian Gulf War, he washed out of Special Forces training, an event filling him with bitterness that began a period of time when he became a drifter. With a "postwar hangover," post-traumatic stress, and possibly Gulf War Syndrome, McVeigh spent the next years leading up to the bombing traveling the gun show circuit, making contacts in the survivalist right, discussing *The Turner Diaries* and possibly taking methamphetamine (Hamm, 1997; Michel and Herbeck, 2001). When police arrested McVeigh near Oklahoma City, he was wearing a shirt with a quote attributed to Thomas Jefferson: "The Tree of Liberty must be refreshed from time to time with the blood of patriots and tyrants."

McVeigh's trial was shown via closed circuit TV to an overflow crowd of survivors of the bombing and victims' relatives. The jury convicted him on all 11 counts after four days of deliberations, and after the hearings in the penalty phase the jury deliberated two more days before handing down the death sentence (Michel and Herbeck, 2001). McVeigh believed the media would edit his comments before sentencing to distort his point and make him look crazy, so he uttered only four sentences, including a quote from former Supreme Court Justice Louis D. Brandeis: "Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example" (*Olmstead v. U.S.*, 1928). The case involved government wiretaps, and Brandeis dissented from the majority opinion because he found that the government had gone too far. Brandeis wrote about the importance of the "right of personal security, personal liberty and private property" and penned his classic phrase about how the Bill of Rights conferred "the right to be let alone." McVeigh thought his execution would be an example of government overstepping its bounds, which Brandeis said: "breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy—[and] would bring terrible retribution" (*Olmstead v. U.S.*, 1928).

The Bureau of Prisons made arrangements to show his lethal injection via closed circuit TV to victims back in Oklahoma, in the same way as his trial. McVeigh requested that his execution be broadcast more publicly and

the Internet Entertainment Group (IEG), best known for titillating Webcam footage of dorm rooms, sued the Bureau of Prisons (BOP) for access to the video feed of McVeigh's execution so they could provide streaming video (Webcast) to the public (Leighton, 2001b). The IEG proposed using video provided by the BOP from cameras controlled by the federal government, and making it accessible through the Internet. The plan for the execution already called for cameras to provide footage to the audience in Oklahoma City, and using the footage taken by BOP officials should have helped with questions about media access, security, and privacy. To help ensure minors did not access the footage, The IEG proposed charging a small fee to be paid by credit card, which they would donate to a charity to help victims of McVeigh's bombing. McVeigh supported the arrangement, noting that he favored public scrutiny of government actions.

The stridently pro-execution President Bush made no comments on the option of making the execution available to the public, so an interesting unanswered question is why the administration defended the law that prevented the IEG from broadcasting the execution. McVeigh's confidence that his execution would teach the public by being an example of unjust government action would certainly meet its match in President Bush's confidence about the example of justice set by using lethal injection on a terrorist who killed 168 people. After all, as governor of Texas, Bush presided over the executions of 152 inmates, more than any other governor and more in five years, "than in any other state in all of the past 24 years since the death penalty was reinstated" (Deiter, 2002). Even as other states had experience with exonerations of those wrongfully convicted and considered halting executions, Governor Bush indicated he would not follow their lead. He seems to have had no moral qualms about the executions and, "when Bush left the governor's office, he had denied clemency in all cases and refused to commute from death to life imprisonment a single death sentence but one—that of Henry Lee Lucas—and that because knowledge of Lucas's innocence of the murder for which he was about to be killed had become the subject of such national scrutiny that Bush could not afford politically to ignore it" during the 2000 election (Prejean, 2005). When a journalist asked Alberto Gonzales (then state attorney general) "directly whether Bush ever read the clemency petitions, he replied that he did so 'from time to time'" (Prejean, 2005).

Bush even denied the clemency petition of Karla Faye Tucker, whose abusive childhood and drug addiction led to a double murder with a pick-ax before she found God and became born again. Normally pro-death penalty evangelists such as Pat Robertson and Jerry Falwell urged commutation, as did Pope John Paul II. Bush let the execution proceed and according to Tucker Carlson, a journalist who had admired Bush, the Governor even mocked the

condemned woman's pleas for mercy: "I must look shocked—ridiculing the pleas of a condemned prisoner who has since been executed seems odd and cruel, even for someone as militantly anticrime as Bush—because he immediately stops smirking" (Carlson, 1999).

Bush's run for the presidency raised many questions about executions because his time as Governor of Texas included "executions of juvenile offenders, the mentally retarded, foreign nationals not informed of their rights under international treaties, defendants with sleeping lawyers, and others with serious doubts about their guilt" (Deiter, 2002). But what better way to silence critics, both domestic and the more vocal Europeans, than by showing McVeigh's execution? Here was a terrorist, a mass murderer who blew up a day care center being put to sleep by lethal injection (the executioners even swabbed his arm with alcohol to prevent infection!). Here was an execution with no questions of guilt, no problematic race issues, no sleeping lawyers, no retardation or mental illness questions, and no religious conversion issues to raise the mercy question.

In short, McVeigh's execution was as legitimate as they get in the United States. The execution was already being filmed by the Bureau of Prisons for the people in Oklahoma City, and the lawsuit could provide cover to turn the upstart new media Internet companies into a vehicle for state-created, state-controlled, and state-supplied footage of a controversial social issue. One can even imagine a speech, invoking the sanctity of victims' rights, to argue that a nation victimized by domestic terrorism should be able to partake in the (alleged) therapeutic benefits of watching the perpetrator be executed. (One can acknowledge the primary victimization of those in Oklahoma City while arguing for a more widespread indirect victimization, although because this argument is based on 168 deaths it may be difficult to appreciate with a post-September 11 mindset.)

Despite the confident swagger and willingness to unflinchingly defend an expansive death penalty, it is Bush who seemed to feel uncomfortable with the broader public scrutiny of this execution. President Bush stayed removed from the situation, so the case played out between the Internet Entertainment Group and Warden Lappin, who became responsible for arguing the reasonableness of the federal law prohibiting the photographic recording of an execution. The affidavit submitted by the warden is the longest contemporary legal argument for not televising executions. Judge Tinder summarizes the Bureau of Prisons' position as being based on:

- (i) the prevention of the sensationalizing of executions, (ii) the preservation of the solemnity of executions, (iii) the maintenance of security and good order in the Federal Prison System, and (iv) protection of the privacy rights of a condemned individual, the victims, their families and those who participate in carrying out the execution. (*Entertainment Network v. Lappin*, 2001)

The judge then characterizes and quotes from the warden's affidavit:

Drawing from his experience in corrections, Warden Lappin makes the following points: *first*, that to maintain security and good order in a prison setting, it is important that inmates understand and believe that they will be treated like human beings and not dehumanized; *second*, that the government's interests in not sensationalizing and preserving the solemnity of executions is based upon the danger that if prison inmates were to see the execution on television or receive word of the televised event through other means, the inmates may well see the execution as "sport" which dehumanizes them; *third*, that when inmates feel that they are dehumanized or devalued as persons, agitation amongst the inmates is frequently fomented, which in turn can lead to prison disturbances; *fourth*, that a broadcast would violate the privacy of condemned persons, and would also 'strip[] away' the privacy and dignity of victims and their families; and *fifth*, that "a public broadcast of the execution would violate the privacy and seriously put at risk the safety of those charged with implementing the sentence of death." (*Entertainment Network v. Lappin*, 2001, pp. 24–25)

Although there is much to analyze and critique here (Leighton, 2001b), the government's interest in "preserving the solemnity of executions" is a novel argument in the case law about televising executions. The BOP has a great deal of power to define conditions of incarceration and protocols of execution, however, this rationale takes a dangerous step when the BOP claims control of news and images because they might undermine perceptions of justice. In essence, the argument is that government-preferred interpretations of justice have primacy when threatened by possible accurate, but negative, understandings about the administration of "justice."

The argument is also curious because it is not the presence of the camera and act of broadcasting the solemn execution to a theater in Oklahoma City that turns it into a dehumanized sport, but rather something about the release of the program to the wider audience that radically transforms executions. Apparently, even when the cameras are controlled by the BOP, the opportunity basically to make a government propaganda video about the lethal injection of a terrorist still results in the perception of executions as dehumanized sport precisely because the video is widely disseminated.

The court's decision in favor of the BOP and the Bush administration did not go into privacy rights, which makes sense because the cameras would be controlled by BOP employees who could be issued guidelines about privacy. For example, it would be easy to specify that the faces of executioners not be shown and that the camera should not be turned on the audience, the same rules that governed taping of the Harris execution. The court's decision does not mention the protection of those who participate in executions, but more

generally finds “it appropriate, and indeed virtually imperative, to defer to the BOP” in the area of security concerns. According to Judge Tinder:

Warden Lappin’s explanations depict an environment which has been characterized as one of unremitting tension between guards and inmates, who are forced to co-exist “in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so.” *Wolff v. McDonnell*. When a measure is taken or a measure is limited by recognition of this fact, and in so doing promotes the security of the prison, see *Hewitt v. Helms*, (“[t]he safety of the institution’s guards and inmates is perhaps the fundamental responsibility of the prison administration”); *Pell*, (security is “central to all other corrections goals”), it is difficult to gainsay the judgment of prison administrators. (*Entertainment Network v. Lappin*, 2001, pp. 25–26, internal citations omitted)

The judge found that matters of execution procedures are especially within the province of prison administrators, and courts should defer to their judgment unless there is substantial evidence indicating an exaggerated response.

The court did have before it a declaration from Raymond K. Procnier, who had 50 years of experience in corrections, had been chief correctional officer in five states, had previously consulted with the Federal Bureau of Prisons, and was the named party in several cases upholding the right of prison administrators to control press access. Procnier, who had presided over executions, disagreed with the warden about a televised execution causing the inmates to see the death penalty as sport: “To the contrary, inmates have the same reactions to heinous crimes and injustices as the general public. Inmates frown upon terrorist acts the same as do persons in general society” (Procnier declaration, 2001). He took pains to indicate that he is in favor of the death penalty, and made the same point he did as a witness for the television station in the KQED case: “Any prison properly administered is aware of possible prison disturbances and has the ability to prevent them or to control them quickly” (Procnier declaration, 2001). Procnier concluded that: “Understanding the prison system, as well as security and privacy concerns, the only conclusion I can come to as to why the government would not permit the broadcast of an execution is that the government wishes to interfere with the free flow of information relating to an execution” (Procnier declaration, 2001).

The judge characterized this affidavit in general terms but dismissed it quickly because Warden Lappin was more familiar with both the Federal BOP and the specific facility in Terre Haute where the execution was to occur. In this context, Procnier’s views did not provide substantial evidence of an exaggerated response. Indeed, the judge concluded in very sweeping terms that the “setting in which this case arises, and in which any foreseeable challenge to § 26.4(c) would arise, controls the outcome” (*Entertainment*

Network v. Lappin, 2001). In other words, as long as executions happen in prisons, the regulation on prohibiting the broadcast of executions makes sense if prison administrators say it does. The law is “reasonably related to legitimate penological interests,” so “no other conclusion is warranted—nor indeed would another conclusion be possible—in the circumstances here” (*Entertainment Network v. Lappin*, 2001).

Photographer-Free Executions and Democratic Values

This chapter started by asking the question, Why is a photographer at an execution a criminal? The answer in *Entertainment Network v. Lappin* was that televising McVeigh’s lethal injection beyond the auditorium in Oklahoma City might cause 20 inmates on the maximum security federal death row to riot because televising the execution of a terrorist makes the death penalty seem like dehumanized sport. The United States cannot show an execution, even of a mass murderer, because it will make inmates feel bad about executions. State control of the camera does not matter and, apparently, there are no readily available alternatives in the way of death row reforms that can be tried instead of banning the photographer.

Even if it were true that televising executions would lead to disturbances in prison, the court should have investigated whether it is the act of televising the execution that causes the problem, or if inmates will feel as if executions are sport that dehumanizes them because television shows the reality of a process that involves the planned killing of a helpless individual by a group. A policy banning cameras is better supported if the bad effects are related to the act of making the images of execution available to the public as opposed to the content of those images, but that conclusion should not be automatically assumed. The credible alternative argument is that cameras show an ugly reality of executions which conflicts with the officially held position that executions are solemn spectacles of justice. Prohibiting cameras because they show the ugly reality of government actions is an affront to democratic notions of openness and transparency. The government should not decide which of its activities are acceptable for public viewing, which was exactly the concern expressed in the district court’s opinion in *Garrett v. Estelle*. By not examining this question, the court overlooked the possibility that television coverage, even when the camera is controlled by the state, would show the death penalty for the dehumanized sport it is. Rather than dealing with that potential truth, the court sought to avoid prison disturbances by suppressing images that could lead to accurate negative evaluations of government actions.

The judge also abdicated responsibility for critical thought by not exploring why the closed circuit broadcast of an execution does not lead to the perception of the death penalty as dehumanized sport, but the creation of a

photographic image does. A credible argument can be made that the presence of a video camera and theater full of people watching on a big screen would undermine the solemnity of the act. Certainly wider distribution creates the possibility for execution tailgate parties, Happy Hours, and other questionable forms of entertainment that would undermine the solemnity of the event and mirror crowd behavior of a century earlier. But prohibiting information and images because of potential unseemly public reaction is once again questionable in terms of democratic values, especially when that image could be relevant to a serious ongoing public policy debate as well. Once again, the judge's uncritical acceptance of the government's position foreclosed discussion of meaningful distinctions that are crucial in a democratic society.

Furthermore, men living under sentence of death develop some intense feelings about the justice of executions, and it is difficult to see how a televised execution would make them more cynical. Indeed, if the death penalty is seen as sport, it might have something to do with George Bush mocking Carla Fay Tucker after the Pope asked for clemency; calls for executing juveniles and mentally ill people, tailgate parties to celebrate others being "fried", continued errors in imposing death sentences, an egregiously poor system for providing effective defense counsel that the United States refuses to remedy, and a long history of racial and class discrimination. Part of what makes the death penalty seem like dehumanized sport is how people trained to "think like a lawyer" follow politically infused rules to reach bizarre and disastrous conclusions (e.g., in *Herrera v. Collins* (1993), the Supreme Court ruled that a claim of actual innocence based on newly discovered evidence is not grounds for granting a further hearing in federal court, even if the failure to grant such a hearing could lead to the execution of an innocent person).

The judge in *Entertainment Network v. Lappin* took no notice of the larger "tough on crime" political environment, where the "execution card" is played more frequently and more cynically than the "race card." The actions of (Governor, then President) Bush and (Texas, then U.S., Attorney General) Gonzales have both reflected and substantially contributed to the political environment in which the death penalty can legitimately be seen as dehumanized (political) sport. But they now have become defenders of all that is solemn and dignified about executions. Executing people who had sleeping lawyers, or who are retarded, crazy, young, born again, or potentially innocent, and not reading clemency petitions; all that is fine, but televising an execution is going too far. Apparently, the photographer at an execution is the problem, so it is their duty to defend the law making it a crime to photograph an execution.

That is not a great day for democracy. Camus noted, "One must kill publicly or confess that one does not feel authorized to kill" (1960, p. 187). So perhaps it is an unacknowledged great day for those who believe state killing lacks moral legitimacy.

References

- Bessler, J.D. (1993). Televised executions and the Constitution: Recognizing a First Amendment right of access to state executions. *Federal Communications Law Journal* 45:355.
- Camus, Albert (Justin O'Brien, trans). (1960). *Resistance, Rebellion, and Death*. New York: Alfred A. Knopf.
- Carlson, Tucker. (1999). Devil May Care. *Talk* (September).
- Deiter, Richard. (2002). 2002 Presidential Candidates "Views on the Death Penalty." Available at <http://www.deathpenaltyinfo.org/article.php?scid=18&t=235>. Website consulted August 3, 2007.
- Goodman, Walter. (1994). Viewing an execution from the sofa. *The New York Times* 13 June, C15.
- Hamm, Mark. (1997). *Apocalypse in Oklahoma*. Boston: Northeastern University Press.
- Johnson, Robert. (1998). *Death Work: A Study of the Modern Execution Process*, 2nd ed. Pacific Grove, CA: Brooks/Cole.
- Kittrie, Nicholas and Wedlock, Eldon (Eds). (1998). *The Tree of Liberty: A Documentary History of Rebellion and Political Crime in America*, Vol. 2 (revised ed.). Baltimore: Johns Hopkins University Press.
- Kooistra, Paul. (1989). *Criminals as Heroes: Structure, Power and Identity*. Bowling Green: Bowling Green State University Popular Press.
- Leighton, Paul. (2001a). Fear and loathing in an age of show business. In P. Leighton and J. Reiman (Eds.) *Criminal Justice Ethics*. Upper Saddle River, NJ: Prentice Hall. Available at <http://paulsjusticepage.com> > CJ Ethics > Televised Executions. Website consulted August 3, 2007.
- Leighton, Paul. (2001b). Why is a photographer at an execution a criminal? *The Critical Criminologist*, Vol. 11, 3. Available at <http://paulsjusticepage.com> > CJ Ethics. Televised Executions. Website consulted August 3, 2007.
- Lesser, Wendy. (1993). *Pictures at an Execution*. Cambridge: Harvard University Press.
- Michel, Lou and Herbeck, Dan. (2001). *American Terrorist*. New York: HarperCollins.
- New York Times*. (1994). Videotape of a California execution is destroyed, February 13, p 35.
- Oshinsky, David. (1996). "Worse Than Slavery": *Parchman Farm and the Ordeal of Jim Crow Justice*. New York: Simon and Shuster.
- Prejean, Sister Helen. (2005). Death in Texas. *New York Review of Books*, Vol. 52, 1. January 13.
- Rimer, Sara and Bonner, Raymond. (2000). Bush candidacy puts focus on executions. *New York Times on the Web*, May 14. Available at <http://partners.nytimes.com/library/politics/camp/051400wh-gop-bush.html>. Website consulted August 3, 2007.
- Shipman, Marlin. (1995). Ethical guidelines for televising or photographing executions. *Journal of Mass Media Ethics*, Vol. 10, 2.
- Vidal, Gore. (2001). The meaning of Timothy McVeigh, *Vanity Fair*, September, pp. 347-415.
- Yanich, Danielo. (1996). Making the movies real: The death penalty & local TV news. *Crime, Law and Social Change*, Vol. 26, 4.

Zimmers, T.A., Sheldon, J., Lubarsky, D.A., López-Muñoz, F., Waterman, L., Weisma, R., and Koniariset, L. (2007). Lethal injection for execution: Chemical asphyxiation? *PLoS Med* 4(4): e156 doi:10.1371/journal.pmed.0040156. Available at <http://medicine.plosjournals.org/perlserv/?request=get-document&doi=10.1371/journal.pmed.0040156>. Website accessed August 3, 2007.

Cases Cited

Entertainment Network v. Lappin NO. TH01-0076-C-T/H. Decided 4/18/2001. Available at <http://www.insd.uscourts.gov/opinions/BK076001.PDF> p 24-5.

Entertainment Network v. Lappin. Declaration of Raymond Proconier. Available at <http://www.findlaw.com>.

Garrett v. Estelle, 556 F2d 1274 (1977).

Herrera v. Collins, 506 U.S. 390 (1993).

Lawson v. Dixon, 25 F.3d 1040 (C.A.4(N.C.), 1994).

Olmstead v. U.S., 277 US 438 (1928).

"Let's Do It!": An Analysis of Consensual Executions

9

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Introduction

Between January 1977, when Gary Gilmore faced a Utah firing squad with the words, "Let's do it," and the execution of Angel Diaz in Florida in December of 2006, 123 condemned prisoners have been executed after refusing to pursue their appeals. This is not an insignificant proportion of modern executions; the inmates who have dropped their appeals are nearly 12 percent of the 1057 inmates put to death in the last 30 years. Executions have occurred in 28 of the last 30 years; in all but three of those 28 years, at least one inmate has been executed after dropping his or her appeals (Death Penalty Information Center, 2006a).