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PUBLIC EXECUTIONS IN AMERICA SHOULD DEATH ROW INMATES BE ABLE TO CHOOSE BETWEEN PRIVATE AND PUBLIC DEATH

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On June 13, 1997, Timothy McVeigh was sentenced to death for the bombing of the Alfred P. Murrah Federal Building in Oklahoma City on April 19,1995.[73] The bombing resulted in the deaths of 168 people and the wounding of over 500 more.[74] McVeigh successfully petitioned U.S. District Court Judge Richard Matsch to put an end to his appeals and expedite his execution. At midnight on February 16, 2001 McVeigh let pass his deadline to petition President George W. Bush for clemency.[75] He is scheduled to die by lethal injection on May 16, 2001 at the federal penitentiary in Terre Haute, Indiana.[76]

Only eight seats are available in the Terre Haute facility for witnesses on behalf of the victims of the bombing.[77] However, approximately 250 survivors of the bombing and family members of those who died have asked for permission to witness the execution.[78] In order to accommodate all the victims and their families, the Federal Bureau of Prisons is considering a closed-circuit broadcast of the execution.[79] McVeigh, however, claims that broadcasting his execution only on closed-circuit television raises fundamental equal access concerns, and has therefore asked that his execution be publicly broadcast.[80] The Bureau of Prisons quickly rejected his request with the statement. It hasn't been considered. It won't happen.[81]

73. Cable News Network, *Jurors reach verdict on McVeigh's fate* (last modified June 13, 1997), http://www.cnn.com/US/9706/13/mcveigh.sentence/index.html.

74. Cable News Network, *Judge says McVeigh can drop appeals* (last modified Dec. 28, 2000), http://www.cnn.com/2000/LAW/12/28/mcveig.hearing.03/index.html.

75. *Id.*

76. Cable News Network, *McVeigh wants execution publicly broadcast* (last modified Feb. 11, 2001), http://www.cnn.com/2001/US/02/11/mcveighletter.ap/index.html (prior to publication of this article, newly discovered FBI documents resulted in a postponement of McVeigh's execution until June 11, 2001).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

McVeigh's request has once again raised the issue of public executions in America. In particular, the request has raised the question of whether or not the death penalty should be broadcast via television into the living rooms of the American public. This article will discuss the history of public executions in America, the arguments for and against public executions, and the reasons why inmates should have the option of dying in public or behind closed doors.

HISTORY OF THE PUBLIC EXECUTION IN AMERICA

Capital punishment was brought to the Americas by European settlers.[82] The first recorded execution in the new colonies was of Captain George Kendall in the Jamestown colony of Virginia in 1608.[83] Subsequent executions were typically held in a public forum and were for such offenses as striking one's mother or father, or denying the A true God.[84]

Beginning in the early 1800s, at approximately the same time states were restricting the number of crimes that were punishable by death, these same states were also turning away from public executions in favor of what they considered more humane private executions.[85] Following these trends, the United States Supreme Court ruled in *Holden v. Minnesota*,[86] that states could, in [their] wisdom, and for the public good, prohibit public and media access to state executions.[87] The Supreme Court put a halt to all executions in the United States in 1972 with its decision in *Furman v. Georgia*.[88] In invalidating 40[89]state death penalty statutes, the *Furman* court said that states could maintain their death penalty regimes only if they carried out prisoner executions in an organized manner and within the privacy and confines of prison walls.[90] The *Furman* decision was an invitation to the states to rewrite their death penalty statutes. Four years after *Furman*, the Court issued its

82. Death Penalty Information Center, *History of the Death Penalty* (last visited Feb. 16, 2001), http://www.deathpenaltyinfo.org/history2.html.

83. *Id.*

84. Philip R. Weise, Comment, *Popcorn and Primetime vs. Protocol: An Examination of the Televised Execution Issue*, 23 OHIO N.U. L. REV. 257, 260 (1996).

85. Weise, at 260.

86. *See* 137 U.S. 483 (1890).

87. *See* Holden v. Minnesota, 137 U.S. 483, 491 (1890).

88. , 408 U.S. 238 (1972); Death Penalty Information Center, *supra* note 10.

89. Death Penalty Information Center, *supra* note 10.

90. Weise, *supra* note 12, at 262.

opinion in *Gregg v. Georgia*,[91] holding that new death penalty statutes written in Florida, Georgia, and Texas were constitutional under the 8th Amendment.[92]

In his article on televised executions, Philip R. Wiese discusses three categories into which modern state death penalty regimes, have tended to fall.[93]The most restrictive category only allows individuals acting in an official capacity, or individuals chosen by the inmate himself, to witness the execution.[94] The second category is less restrictive than the first in that the state merely restricts the number of people attending the execution and not specifically who can attend the execution.[95] The third and most common category is a hybrid of the first two; states employing this regime provide for a fixed number of witnesses to the execution, but in that number is included certain slots reserved for members of the media.[96]

Even though the third category allowing the media to witness an execution is the most prevalent in the United States, Weise points out that no state has yet to allow reporters to use video or audio equipment in the witness room.[97] This position stems from two federal court decisions in the mid-1970s. In the first case, *Pell v. Procunier*,[98] journalists and prison inmates brought suit in the Northern District of California attacking the constitutionality of a state regulation that prohibited face-to-face interviews between the news media and the inmates. The Supreme Court found that the First Amendment did not guarantee the press a constitutional right of special access to information not generally available to the public.[99] Three years later, in *Garrett v. Estelle*,[100] a news cameraman brought suit seeking to force the state of Texas to allow him to film an execution for broadcast on television. The Fifth Circuit found that the news media had no constitutionally protected right to record an execution.[101] From these two cases, states codified their policies on media coverage of executions.

91. *See* 428 U.S. 153 (1976).
92. Death Penalty Information Center, note 10.
93. Weise, *supra* note 12, at 262.
94. *Id.*
95. *Id.* at 263.
96. *Id.*
97. *Id.*
98. 417 U.S. 817 (1974).
99. *Id.* at 833.
100. 556 F.2d 1274 (5th Cir. 1977)
101. *Id.* at 1279.

Most execution states allow journalists into the witness room. However, the states regulate the number of journalists viewing any one execution and what the journalist may bring into the witness room no video equipment, no audio equipment, pad and paper provided by the prison.

Of course, the news media was not prepared to let the issue of public executions die with *Garrett*. Three court cases between 1977 and the present illustrate the attempts of the news media to bring executions to the public through television and the judiciary's attempts to quash any such broadcasts. The first case is *Halquist v. Department of Corrections*.[102] In this case, petitioner Halquist sought permission to videotape an execution for broadcast on the grounds that citizens of Washington State have a constitutional right to attend executions and that journalists who witness executions have a constitutional right to videotape them.[103] The Supreme Court of Washington State held that: 1) the Constitution of Washington State only protects fundamental inalienable rights, of which attending and videotaping an execution are not, and 2) the Constitution of the United States does not prevent states from restricting access to information not generally available to the public nor does it require states to show a compelling state interest before restricting media access to information.[104]

In the second case, *KQED, Inc. v. Vasquez*,[105] here, KQED, a PBS station in California, argued that it had a First Amendment right to videotape an execution and a Fourteenth Amendment equal protection claim because the state regulation prohibiting video cameras in the witness room prevented the KQED reporters from using the tool of their trade.[106] Vasquez, the warden of San Quentin Prison at the time, put forth three arguments against KQED's claims. Vasquez argued: 1) the ban on cameras in the witness room protected the identity of prison employees involved in the execution from angry inmates and an angry public, 2) broadcasting an execution would incite violence in the prison, thereby threatening prison employees, and 3) video cameras could be used to break the heavy glass surrounding the gas chamber thereby threatening the lives of those individuals in the witness room.[107] The

102. 113 Wash.2d 818 (1989)

103. *Id.* at 820.

104. *See* Halquist, 113 Wash. at 822.

105. *See* 1991 U.S. Dist. LEXIS 21163.

106. *See* KQED, Inc. v. Vasquez, No. C 90-1383 RHS, 1991 U.S. Dist. LEXIS 21163, at *6 (N.D. Cal. June 7, 1991).

107. *Id.* at *7.

United States District Court for the Northern District of California found persuasive Vasquez's arguments for not letting KQED videotape an execution.[108] The Court held that the right of a witness to an execution, under California law, was simply to witness, not to videotape.[109]

The third case is *Lawson v. Dixon*.[110] This case is famous because Lawson wished to have his execution televised on the Phil Donahue show; Mr. Donahue is also a plaintiff in this case. Lawson, Donahue, and Arnold, a third plaintiff, argued the same First and Fourteenth Amendment claims that KQED argued two years earlier when it attempted to videotape and broadcast an execution.[111] Dixon, a warden of the North Carolina prison where Lawson was being held, put forth the same arguments that Vasquez had put forth earlier.[112] The Supreme Court of North Carolina reached the same holding as the U.S. District Court found in *KQED*: the prison warden had valid reasons for excluding video cameras from the witness room and more importantly, the plaintiffs had no valid First or Fourteenth Amendment claims.[113] However, the Fourth Circuit Court of Appeals, while not required to address the merits of Lawson's claim, called into question the validity of the North Carolina Supreme Court's determination that Lawson did not have any constitutional guarantee to either 1) select those persons whom he wished to witness his execution, or 2) to require that his execution be filmed.[114]

ARGUMENTS FOR AND AGAINST PUBLIC EXECUTION

In his article, Weise gleans from the cases mentioned above several arguments in support of televised executions and several arguments in opposition to televised executions. Wiese suggests that proponents of public executions typically rely on four central arguments in support of their position.[115] The first argument, as evidenced by the above cases, asserts that televised executions are mandated by the First and

108. *Id.* at *12.
109. *Id.*
110. *See* 1994 U.S. App. LEXIS 14594 (1994).
111. *See* KQED, Inc. v. Vasquez, No. C 90-1383 RHS, 1991 U.S. Dist. LEXIS 21163, at *11.
112. *See* Lawson v. Dixon, No. 94-6640, 1994 U.S. App. LEXIS 14594, at *2 (4th Cir. 1994).
113. *Id.* at *3.
114. *Id.* at *4.
115. *Id.* at *15; Weise, *supra* note 12, at 268-270.

Fourteenth Amendments to the United States Constitution.[116] Clearly, the courts have rejected this argument. Fortunately, proponents have other arguments to proffer. The second argument asserts that televised executions ought to be legally mandated because of the potential deterrent effect on future criminal offenders.[117] The third argument asserts that televised executions ought to be legally mandated to fully educate the public about the political and physical effects of capital punishment.[118] The final argument asserts that televised executions ought to be legally mandated in order to show the public at large that swift and certain punishment is being carried out by the state.[119]

Wiese also lists several arguments proffered by opponents of televised executions. This list not only includes the arguments put forth in the *KQED* and *Lawson* cases above,[120] but also these arguments: 1) it would be shocking and upsetting to viewers;[121] 2) it would be tasteless entertainment;[122] 3) it would make the inmate appear as the victim;[123] 4) the inmate should have some right of privacy to protect his death from indignity;[124] 5) there is insufficient space within the execution chamber.[125]

As Wiese correctly points out, the arguments in support of televised executions, based on the cases above, will always be rejected in favor of the arguments in opposition to televised executions, otherwise termed compelling state interests.[126] In other words, if the arguments against public execution can be framed in a compelling state interest context, then they will prevail. Likewise, if the arguments in favor of public execution outweigh a compelling state interest, then they will prevail. Clearly, most courts have found that First and Fourteenth Amendment claims—as well as any other claims brought forth thus far by televised execution proponents—do not outweigh the compelling state interest of, for example, preventing a backlash against the prison officials performing the execution. Therefore, any request to televise an

116. Weise, *supra* note 12, at 270.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. Weise, *supra* note 12, at 270.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 272.

execution is apparently dead on arrival.

IN SUPPORT OF TELEVISED EXECUTIONS

As stated above, the Fourth Circuit Court of Appeals, in *Lawson v. Dixon*, while not required to address the merits of Lawson's request for an televised execution, did call into question the rulings of the Supreme Court of North Carolina.[127] Specifically, the North Carolina Supreme Court held that Lawson did not have a guaranteed constitutional right to have his execution televised.[128] However, as the Court of Appeals notes, the North Carolina Supreme Court based its decision on a series of cases that dealt with the First and Fourteenth Amendment rights of journalists in attempting to gain access to executions in order to film them.[129] Lawson's claims though are based on his First Amendment right to freedom of expression and the restrictions based on his freedom to communicate his message via videotape.[130] While the Fourth Circuit did not discuss the validity of Lawson's claims, the court did say that the state offered no evidence for its prohibition against allowing a video recording of Lawson's execution.[131] This decision seems to indicate that First and Fourteenth Amendment claims in support of televised executions may succeed if they are brought on behalf of the condemned inmate and not on behalf of the journalists wishing to film the execution. The difference in *Lawson*, as opposed to *Halquist* or *KQED*, is that in *Lawson* the condemned inmate himself was requesting the broadcast of the execution the request was not coming from journalists. Therefore, the issue becomes not the rights of the journalists but the rights of the inmate.

The Court in *Lawson*, pointed out that the state had produced no evidence justifying its ban on televised executions.[132] Recall that the state must show a compelling interest in maintaining the ban; if the state shows a compelling state interest, it will prevail.[133] The arguments listed by Weise as typical arguments for opponents of televised execution are generally thought to be winning arguments in terms of compelling state

127. *Id.*
128. Weise, *supra* note 12, at 273.
129. *Id.* at 269.
130. *Id.*
131. Lawson v. Dixon, No. 94-6640, 1994 U.S. App. LEXIS 14594, at *16 (4th Cir. 1994).
132. *Id.*
133. *Id.*

interests.[134] Again, these arguments include: 1) the media has no right to access beyond that of the general public; 2) photographed prison officials could be subject to retribution; 3) prisoners may riot; 4) cameras could be used to damage the gas chamber; 5) it would be shocking and upsetting to viewers; 6) it would be tasteless entertainment; 7) it would make the inmate appear as the victim; 8) the inmate should have some right of privacy to protect his death from indignity; 9) there is insufficient space within the execution chamber.[135] These arguments are seen as winners for states wishing to prohibit the broadcast of executions.

However, the argument could be made that several, if not all, of the nine arguments could be neutralized so as not to invoke a compelling state interest? For example, argument number eight, referring to the privacy of the inmate, and argument number one, referring to the right of access of the public and the press, both become moot when the *inmate himself* requests that execution be televised. Similarly, several arguments could be addressed while still accommodating the inmate's First Amendment rights. For example, the faces of prison officials on the videotape could be blocked out prior to broadcast, prisoners could be prohibited from watching the broadcast, security officials could be present in the witness room to prevent the suicidal cameraman from damaging the gas chamber with his camera, the victims of the inmate's crime could have their story told, and additional space could be provided to accommodate witnesses, media representatives, and camera equipment. As for the arguments that the execution would be shocking and tasteless, these seem to be arguments less in support of any compelling state interest, and more an effort to prevent any political opposition to the death penalty. Capital punishment is gruesome, but if television viewers wish not to see an execution, they can simply change the channel. The fact that some viewers may be emotionally affected by an execution should not prohibit an inmate or the press from exercising their First Amendment rights.

Therefore, if the condemned inmate himself requests his execution be televised and all compelling state interests are neutralized, then courts may be willing to grant the request for broadcast. However, neutralizing all compelling state interests to the satisfaction of the court may be a difficult, if not impossible, task. Also, as a public policy matter, courts

134. *Id.*
135. *Id.*

may simply be unwilling to allow a televised execution to occur and will therefore go out their way to prevent it from happening.

CONCLUSION

Timothy McVeigh has not made a formal request to have his execution televised, but the convicted Oklahoma City bomber has questioned the fairness of limiting the number of witnesses to his execution.[136] Given the crime for which McVeigh was convicted, it seems logical to assume that his motives in wishing to have his execution televised are simply to undermine the legitimacy of the federal government by broadcasting a horrific act that the government sanctions. However, if the government sanctions such an act, then by definition (at least in this country), the people sanction it. Clearly, if the public wishes to continue to sanction executions, it is going to have to come to grips with the nature of the procedure. It is gruesome. Executions behind closed doors serve one legitimate purpose; that is protecting the privacy and the dignity of the condemned individual. For that reason, courts have rightly held that prisoners cannot be forced into public executions.

However, for those individuals who wish to have a public execution, courts should not stand in their way. The public has a right to know the true nature of a procedure it sanctions. Moreover, public executions serve as a check on the prison officials conducting the execution. If the public is going to sanction an execution, it should be assured that the execution is being carried out in as humane a manner as possible given the situation. If the procedure is gruesome, so be it. If execution horror stories[137] are shown on television, then so be it. The public has a right to know what it is authorizing. Some people may find the procedure barbaric and may be moved to protest further executions. Some people may see the execution as a just and rightful end to a barbaric human being. Either way, if the condemned individual wishes to have his message broadcast, if the news media wishes to facilitate that broadcast, and if citizens choose to watch that broadcast, then they should be able to exercise that choice free from any unreasonable restrictions placed on

136. Weise, *supra* note 12, at 273.
137. *Id.* at 272.

them by the state.[138]

138. *Id.* at 272, 273; Cable News Network, *supra* note 4; Michael L. Radelet, *Post-Furman Botched Executions* (last visited Feb. 16, 2001), http://deathpenaltyinfo.org/botched.html.