


12-2002

Veil of Secrecy: Public Executions, Limitations on Reporting Capital Punishment, and the Content-Based Nature of Private Execution Laws

Nicholas Levi
Indiana University School of Law

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Recommended Citation

Levi, Nicholas (2002) "Veil of Secrecy: Public Executions, Limitations on Reporting Capital Punishment, and the Content-Based Nature of Private Execution Laws," *Federal Communications Law Journal*: Vol. 55 : Iss. 1 , Article 6.

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Veil of Secrecy: Public Executions, Limitations on Reporting Capital Punishment, and the Content-Based Nature of Private Execution Laws

Nicholas Levi*

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* B.A., 2000, Indiana University; Candidate for J.D., Indiana University School of Law—Bloomington, 2003.

I. INTRODUCTION

Few issues in America spark more robust debate and disagreement than capital punishment. The theoretical foundations of the penal system in this country (whether the role of the state towards criminals should be predominantly one of deterrence, rehabilitation, or retribution) stand at the forefront of the debate.¹ The finality of the penalty provides the most illustrative and arguably the most tragic examples of the insufficiencies of the American criminal process.² The death penalty, as “the ultimate act of state,”³ provides a forum for very refined moral arguments centering on the role of the state over those whom it governs. This list is certainly not meant to be exhaustive, but merely indicative of the several issues and arguments that often follow debates on capital punishment through the legislatures, courts, and public forums of this country.⁴

One issue that is often overlooked in the capital punishment debate is the policy, adopted in some form by every criminal jurisdiction with the death penalty, to shield the public from the specifics of the application, administration, and resolution of the death sentence. Many Americans place the fundamental theoretical concepts of the First Amendment at the very cornerstone of the American democratic system. The First Amendment secures “the paramount public interest in a free flow of information to the people concerning public officials.”⁵ It “assures the maintenance of our political system and an open society.”⁶ It is in stark contrast to these principles that private execution laws in this country prohibit the public from viewing, and in some cases even prohibit the press from reporting, on the administration of capital punishment.

This Note provides a brief historical and analytical account of capital punishment in this country. This discussion will highlight the legislation, administrative policy, and penal rules that have historically restricted access to the execution chamber for the express purpose of preventing the dissemination of information regarding capital punishment to the American voting public. Ultimately, this Note will argue that this historical backdrop forces courts analyzing these laws to characterize these regulations as content-based distinctions on free speech, rather than to grant the broad

1. THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES v (Hugo Adam Bedau ed., Oxford University Press, 1997).

2. *See id.*

3. Garrett v. Estelle, 424 F.Supp. 468, 471 (N.D. Tex. 1977).

4. THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES, *supra* note 1, at v.

5. Garrison v. Louisiana, 379 U.S. 64, 77 (1964).

6. Time, Inc. v. Hill, 385 U.S. 374, 389 (1967).

deference these regulations are typically given in the courts' right-of-access jurisprudence.

Part II of this Note will provide a brief background of the methods of capital punishment at the time of the country's founding through the early parts of the twentieth century. It will highlight trends in attitudes toward capital punishment and discuss major attempts to humanize or to abolish capital punishment. Part III will address the emergence of private execution laws and argue that these laws arose in direct response to anti-death penalty movements throughout the nineteenth century. Part IV will analyze the Supreme Court's freedom of the press jurisprudence, specifically focusing on the "right of access" to government proceedings. This is the context upon which challenges to private execution laws have historically been brought. Part V will address the most recent manifestation of this movement: attempts to broadcast executions to the general public. Part VI will argue that these challenges have ultimately failed because of their characterization as "access" cases. The historical tradition of shielding facts about executions from the public necessitates that the courts evaluate these cases under the Supreme Court's holdings involving content-based restrictions on speech.

II. THE HISTORICAL TRADITION OF CAPITAL PUNISHMENT IN THE UNITED STATES

A. *The Colonial Era*

During the early Colonial period, all thirteen American colonies imposed capital punishment for at least some crimes.⁷ The Colonial punishment scheme was modeled heavily after the system in England; however, the colonies imposed capital sentences for fewer crimes,⁸ and the officials administering the trials were generally more hesitant to impose the death sentence.⁹ New York's capital scheme was fairly representative of the colonies during the seventeenth century; the state imposed capital

7. THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES, *supra* note 1, at 4.

8. CAPITAL PUNISHMENT IN THE UNITED STATES: A DOCUMENTARY HISTORY 2 (Bryan Vila and Cynthia Morris eds., 1997).

9. VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT, 1787-1975 xiii (Philip English Mackey ed., 1976). During the mid-seventeenth century, England had fifty-five capital offenses, while the colonies generally had around a dozen. CAPITAL PUNISHMENT IN THE UNITED STATES: A DOCUMENTARY HISTORY, *supra* note 8, at 2.

sentences for eleven crimes.¹⁰ Pennsylvania and West Jersey were the most lenient of the colonies, authorizing capital sentences only for treason or murder.¹¹ Generally, the Southern states' capital laws imposed the death sentence for a wide variety of offenses, especially for slaves.¹²

Although harsh by today's standards, the colonies' capital laws were much more lenient than those of England or of continental Europe.¹³ Beginning around the turn of the eighteenth century, the colonies began to enact stricter capital punishment laws.¹⁴ This trend is primarily attributed to three factors: (1) population growth necessitated stricter criminal laws; (2) the absence of a prison system made capital punishment an attractive and economical alternative; and (3) the English Crown pressured Colonial governments for stricter criminal laws, especially in regards to capital sentences.¹⁵ By the Revolution, all thirteen American colonies prescribed capital sentences, and all but Rhode Island imposed it for at least ten separate offenses.¹⁶

Prior to the American Revolution, the colonies applied the death sentence in open forums that invited and encouraged public audiences, and generally used hanging as the method.¹⁷ Philip English Mackey described a common spectacle surrounding an eighteenth-century execution:

Felons were either hanged, often so clumsily that they died in slow agony, or burned at the stake (a method usually reserved for blacks and Indians). In either event, the execution took place in public, with rowdy onlookers jockeying for the best view. In some cases, the

10. VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT, *supra* note 9, at xi. The capital offenses in New York's Duke's Laws of 1665 included:

[D]enial of the true God; premeditated murder, slaying someone who had no weapon of defense, slaying by lying in wait or by poisoning; sodomy, buggery; kidnapping; perjury in a capital trial; traitorous denial of the king's rights or raising arms to resist his authority; conspiracy to invade towns or forts in the province; and striking one's mother or father (but only upon complaint of both).

Id.

11. VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT, *supra* note 9, at xii.

12. CAPITAL PUNISHMENT IN THE UNITED STATES: A DOCUMENTARY HISTORY, *supra* note 8, at 2. "[T]he Slave Codes enacted during the 1660s included a long list of behaviors that were considered crimes only if committed by blacks. Furthermore, slaves were subjected to numerous capital laws that did not apply to the free population." *Id.* (citation omitted).

13. VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT, *supra* note 9, at xiii.

14. CAPITAL PUNISHMENT IN THE UNITED STATES: A DOCUMENTARY HISTORY, *supra* note 8, at 3.

15. *Id.*

16. VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT, *supra* note 9, at xii.

17. THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES, *supra* note 1, at 4.

publicity of the punishment did not end with the criminal's death. The authorities sometimes ordered the corpse exhibited in a public place—in rare instances for periods exceeding a year—for the edification of potential wrongdoers.¹⁸

B. *Initial Reforms: 1776-1800*

The American Revolution did little, if anything, to change capital punishment laws in this country.¹⁹ The initial spark for reevaluation came not from war, but from philosophy. In 1763, the Italian jurist Cesare Beccaria published his treatise *Dei delitti e delle pene* (*On Crimes and Punishments*).²⁰ Beccaria advocated for punishments that were proportional to the crime.²¹ Furthermore, he argued that the barbaric nature of the death sentence promoted crime, rather than serving as a deterrent.²² The book was read extensively in Europe and the first English translation was available in New York in 1773.²³ Although initially, the work was not widely received in this country, it did help spark the first political debate over the use of capital punishment in the years following the Revolution.²⁴

Philadelphian Dr. Benjamin Rush was the first outspoken opponent of capital punishment in this country.²⁵ He published his treatise, *An Enquiry into the Effects of Public Punishments Upon Criminals and Upon Society*, in 1787.²⁶ Rush argued that capital punishment violated both reason and divine law, irrespective of the criminal offense.²⁷ Due in no small part to Rush, the initial battleground over capital punishment was the Pennsylvania legislative chamber. In 1794, the state abolished capital punishment for all crimes except first-degree murder.²⁸ New York followed

18. VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT, *supra* note 9, at xii-xiii.

19. *Id.* at xiii-xiv.

20. THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES, *supra* note 1, at 4.

21. CAPITAL PUNISHMENT IN THE UNITED STATES: A DOCUMENTARY HISTORY, *supra* note 8, at 4.

22. *Id.*

23. *Id.*

24. *Id.*

[D]ue to preoccupation with the Revolutionary War, it wasn't until several years later that Beccaria's book had an impact in America. When it did, that impact was significant. Their independence won, Americans were eager for political reform as they shaped the new government and system of laws. And thus began the first real debate over capital punishment in the United States.

Id. at 4-5.

25. *Id.* at 5.

26. *Id.* at 20.

27. VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT, *supra* note 9, at xv.

28. *Id.* at xv-xvi. The leader of this reform was the state's attorney general, William

with a major reform to its capital laws in 1796.²⁹ Advocated by leaders such as Thomas Eddy, Philip Schuyler, and Ambrose Spencer, New York abolished capital sentences for all crimes except treason and murder.³⁰ New York, however, unlike Pennsylvania, did not separate murder into degrees.³¹

C. *The First Abolitionist Movement: 1800-1860*

It is difficult to separate the movement against capital punishment in the early nineteenth century from the broader Western Enlightenment movement for prison reform.³² European philosophers such as Beccaria, John Howard, and Jeremy Bentham were very successful in arguing for a system of penal justice that emphasized reform.³³ The most important practical result of this movement was the development of penitentiaries. These new prisons were meant to be schools of reform that offered prisoners the opportunity to develop their character and rejoin society as “reformed” citizens.³⁴ “During the nineteenth century, the goals of abolitionists were intertwined with those of prison reformers in part because they tended to share a common view of humanity, but also because effective reform of prisoners provided for both groups an attractive alternative to execution.”³⁵

Although abolitionist thought grew out of a much larger movement for penal reform, it remained a distinct and separate argument in this country. While penal reform was driven by Enlightenment thinkers such as Bentham and Beccaria, the abolitionist movement in this country was fueled by “the tides of religious revival, social reform, and romanticism.”³⁶ Even as complaints against broad prison reform grew in number,³⁷ the

Bradford. He did not push for complete abolition, wishing to see it retained for murder. However, “he argued that capital punishment was useless in preventing some crimes. It was worse than useless, in fact, because it sometimes made convictions harder to obtain. A system of laws which encourages the acquittal of felons, Bradford reasoned, must be altered.” *Id.*

29. *Id.* at xvi-xvii.

30. *Id.*

31. *Id.*

32. CAPITAL PUNISHMENT IN THE UNITED STATES: A DOCUMENTARY HISTORY, *supra* note 8, at 31.

33. *Id.* at 32.

34. *Id.* at 31.

35. *Id.*

36. *Id.* at 34-35.

37. *Id.* at 31-32 (“In 1817, authorities in Philadelphia and Massachusetts reported that roughly a third of their current convicts had been released from the penitentiary system previously.”).

abolitionist movement continued to thrive, reaching its peak during the 1830s and 1840s.³⁸

During this period, the debate over capital punishment raged across the American press.³⁹ “Hundreds of books and pamphlets attacking the death penalty” were published during the 1840s.⁴⁰ William Cullen Bryan of the *New York Post* and Horace Greeley of the *New York Tribune* were perhaps the most influential abolitionist speakers.⁴¹ Numerous other newspapers and periodicals devoted extensive space to the debate,⁴² while two periodicals of the period were devoted exclusively to prison reform and abolishing the death penalty.⁴³

In addition to the formal press, there were numerous private “anti-gallows” organizations formed during the 1840s.⁴⁴ By 1845, the New York State Society, perhaps the most influential of the anti-gallows societies, founded a national organization against capital punishment.⁴⁵ The purpose of the organization was to centralize the movements within the states, and bring together a national campaign against capital punishment.⁴⁶ In 1845, death penalty opponents sponsored a convention in Philadelphia. Abolitionists from across the country gathered, where among others, U.S. Vice President George M. Dallas addressed the crowd.⁴⁷ Prominent politicians such as John Quincy Adams and Richard M. Johnson also verbally committed to the reform movement; however, their direct involvement was not particularly strong.⁴⁸

The abolitionists were not the only voices speaking on the issue of capital punishment. The strongest supporters of the death penalty were found in the Eastern religious establishment.⁴⁹ George B. Cheever was the most powerful of the death penalty advocates. Leading a small group of powerful clergymen, he resisted the reformers in the press, in the state

38. *Id.* at 34-35.

39. *Id.* at 35.

40. VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT, *supra* note 9, at xxiv.

41. *Id.* at xxii.

42. *Id.* at xxiv.

43. *Id.* at xxiv-xxv. Charles Spear’s *The Hangman* and George Baker’s *The Spirit of the Age* both dealt exclusively with the topic. *Id.*

44. *Id.* at xxv.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at xxii-xxiii.

49. *Id.* at xxiii (“Almost without exception, they were members of the orthodox Calvinist clergy—especially Congregationalists and Presbyterians—those who might be termed the religious establishment of nineteenth-century America.”).

capitals, and in sermons.⁵⁰ Cheever advocated for the retention of capital punishment primarily upon the ground that to do otherwise would violate divine law.⁵¹ He also defended the death penalty on the practical policy grounds of its immense deterrence value and the retributive nature of a death sentence attached to a serious criminal offense.⁵² One reformer of the era proclaimed that “the Church of America alone upholds the Gallows.”⁵³

Although the debate surrounding capital punishment was strong, the abolitionists failed to achieve any real success in the state legislative chambers.⁵⁴ Michigan was the only state to completely abolish capital sentences,⁵⁵ but this was primarily due to the fact that since statehood, it had never used the death penalty, even though it was legal.⁵⁶ The reformers nearly achieved success in Pennsylvania, New York, and Massachusetts,⁵⁷ but ultimately the crimes for which capital punishment was imposed in 1850 were not significantly different than they had been twenty years earlier when the movement caught fire.⁵⁸

D. *The Civil War and Beyond*

The reform movement against capital punishment began to slow in the 1850s.⁵⁹ However, it did not stall as much as it evolved to face a different issue: slavery.⁶⁰ “[T]he campaign against capital punishment had ground to a halt because, like most reformers, abolitionists had come to see slavery as the greatest evil plaguing the land and their moral and political energies were absorbed by the Civil War.”⁶¹

50. *Id.* at xxiii.

51. *Id.* at xxiv.

52. *Id.* See also CAPITAL PUNISHMENT IN THE UNITED STATES: A DOCUMENTARY HISTORY, *supra* note 8, at 54. In 1843, Cheever and John O’Sullivan held a series of public debates regarding New York’s use of capital punishment. The debates helped to spark an intense dialogue in the local newspapers in the following months. *Id.*

53. VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT, *supra* note 9, at xxiii.

54. *Id.* at xxv.

55. *Id.* at xxvi. Michigan completely abolished capital punishment in 1846. *Id.*

56. *Id.* (“[I]t was not necessary for reformers in Michigan to convince the legislature to end executions, but only to bring the laws into conformity with established practice in the state.”).

57. *Id.*

58. *Id.*

59. CAPITAL PUNISHMENT IN THE UNITED STATES: A DOCUMENTARY HISTORY, *supra* note 8, at 35.

60. *Id.*

61. *Id.*

Capital punishment did not return to the forefront of political debate in this country for several decades.⁶² The severity of the war, the increase in social violence during Reconstruction, and the immigration wave of the late nineteenth century all contributed to a continued policy of endorsement of capital punishment.⁶³

This trend began to change slightly with the Progressives of the early twentieth century, although they were not as successful as their predecessors had been nearly sixty years before.⁶⁴ But eventually the Progressive movement against capital punishment ultimately failed for the same reasons as the initial abolitionist movement. “When America’s entry into World War I fostered racism, nativism, suspicion, and fear that provided fertile soil for retentionist arguments, the abolition movement stalled out once again—as in the 1860s—a casualty of war.”⁶⁵

The history of capital punishment in this country certainly does not end with the first World War. In the years following the Depression and World War II, the fora for the death penalty debate shifted from the legislative chambers to the federal courts.⁶⁶ The purpose of this Note is to analyze trends in popular opinion regarding capital punishment. Therefore, the modern history of the political debate, with its emphasis on constitutional principles and legal theories, has little relevance to this argument.

III. PRIVATE EXECUTION LAWS: PATERNALISM AND SECRECY

As discussed *infra*, throughout the Colonial period and the initial decades of the American republic, executions were conducted in public, often in large fora that invited and encouraged attendance.⁶⁷ By the 1820s and 1830s public executions were a violent and commercially exploited spectacle that often led to drunken riots.⁶⁸

While the abolitionist movement of the era was unsuccessful in ending capital punishment, one practical result was the enactment of “private” execution laws.⁶⁹ Rhode Island became the first in 1833, followed

62. *Id.*

63. *Id.*

64. *Id.* at 37.

65. *Id.*

66. See THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES, *supra* note 1, at 11-16.

67. *Supra* notes 16-17 and accompanying text.

68. VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT, *supra* note 9, at xx.

69. *Id.*

by Pennsylvania, New York, Massachusetts, and New Jersey.⁷⁰ These laws moved the gallows from the public squares or commons to walled enclosures, or in some cases within penal institutions.⁷¹ By 1849, fifteen states held their executions within prisons, shielded from public view.⁷²

It is easy to characterize the development of private executions as a practical result of the prison reform movement. Private executions are certainly a more humane punishment, but this would not be a historically accurate account of the change.⁷³ The push for private executions came from the retentionists.⁷⁴ Historians have argued that death penalty supporters favored private execution laws out of a “fear that well-publicized executions would fan sentiment to abolish capital punishment altogether.”⁷⁵ Justice Marshall alluded to this fact in his concurring opinion in the landmark death penalty decision *Furman v. Georgia*: “[E]xecutions, which had once been frequent public spectacles, became infrequent private affairs. The manner of inflicting death changed, and the horrors of the punishment were, therefore, somewhat diminished in the minds of the general public.”⁷⁶

Most abolitionists actually opposed private execution laws.⁷⁷ Thomas C. Upham, a leading abolitionist in Maine, wrote that:

The occasion [public execution] is generally made one of great riot, noise, confusion, drunkenness, and every species of crime.—This is universally admitted to be the case. So much so that some of the United States have recently enacted, that executions shall not be public. A great anomaly this in a republican government! Our courts of justice must be open to the public; the deliberations of our legislatures

70. *Id.*

71. John D. Bessler, *Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to State Executions*, 45 FED. COMM. L.J. 355, 362 (1993).

72. VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT, *supra* note 9, at xx.

73. *See* Bessler, *supra* note 71, at 360-62.

During the 1830s, however, in response to a growing movement to abolish capital punishment, several states began to prohibit public executions. In New York, in 1834, for example, an assemblyman, Carlos Emmons, introduced a bill to abolish public executions. Initially, his idea met with bitter resistance from two groups. One faction, viewing public executions positively, felt that the practice should be continued. The other group, comprised of legislators who favored abolition of capital punishment altogether, rejected Emmons' proposal on Machiavellian grounds.

Id. at 360-61 (citations omitted).

74. *See id.* at 360-62.

75. *Id.* at 360 n.17 (quoting G. Mark Mamantov, Note, *The Executioner's Song: Is There a Right to Listen?*, 69 VA. L. REV. 373, 375 (1983)).

76. *Id.* (quoting *Furman v. Georgia*, 408 U.S. 238, 340 (Marshall, J., concurring)).

77. *Id.*

must be public; not even a poor freemasonry society is to be tolerated, because its ceremonies are secret; but when life is to be taken, when a human being is to be smitten down like an ox, when a soul is to be violently hurled into eternity, the most solemn occasion that can be witnessed on earth, then the public must be excluded. . . . If business⁷⁸ of this nature is done at all, it must be done in the light of day

Public sentiment against the death penalty dropped dramatically after the introduction of private execution schemes, and many abolitionists of the time felt that their cause ultimately failed because executions were no longer a public spectacle.⁷⁹ Horace Greeley stated that the private execution law in New York “subtracted much of the force” from the anti-gallows movement in the state.⁸⁰

Thus, the abolitionist movement against capital punishment was followed immediately by the reactionary movement to remove executions from public view. While the precise motivations of the advocates and legislators who enacted private execution schemes cannot be completely uncovered, their effect is irrefutable. Following the enactment of private execution schemes, the public debate surrounding capital punishment declined greatly. This was certainly due in part to the emerging tension that led to civil war; however, the historical evidence demonstrates that private execution laws contributed significantly to a decline in public debate on a core political issue.

IV. FREEDOM OF THE PRESS AND THE RIGHT OF ACCESS

Many scholars and lawyers attempt to argue for a right of access to the execution chamber for members of the media. While these specific challenges are addressed in the next Section, it is useful to describe the major holdings of the Supreme Court regarding access to the courtroom and access to prisons.

A. *Access to Courtrooms*

In *Richmond Newspapers, Inc. v. Virginia*, the U.S. Supreme Court held that the press has a constitutional right of access to attend criminal trials.⁸¹ More importantly, in his majority opinion, Chief Justice Burger held that the source of this right is not the Sixth Amendment’s guarantee of a public trial, but rather the First Amendment. “We hold that the right to

78. THOMAS C. UPHAM, *THE MANUAL OF PEACE* (1836), reprinted in *CAPITAL PUNISHMENT IN THE UNITED STATES: A DOCUMENTARY HISTORY*, *supra* note 8, at 50-51.

79. *VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT*, *supra* note 9, at xxi.

80. *Id.*

81. 448 U.S. 555, 580-81 (1980).

attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.'"⁸² There are two aspects of the Chief Justice's reasoning which are relevant in the debate surrounding private execution laws. The Court based much of its holding first on the historical openness of courtrooms, both in England and the colonies,⁸³ and second on the necessary role the press must play in democracy—that of informing the public of government action.⁸⁴

In his opinion for the majority, Chief Justice Burger outlined a brief yet thorough overview of the history of criminal trials in England, the colonies, and the American republic.⁸⁵ "[T]he historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open."⁸⁶ In addition to the historical record, the Chief Justice discussed the justifications for holding public criminal trials:

The early history of open trials in part reflects the widespread acknowledgement, long before there were behavioral scientists, that public trials had significant community therapeutic value. . . . [P]eople sensed from experience and observation that, especially in the administration of criminal justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results.⁸⁷

After proceeding through the historical record of criminal trials, the Court turned to the First Amendment, rather than the right to a public trial in the Sixth Amendment, to defend its holding.⁸⁸ "Free speech carries with it some freedom to listen. . . . What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors"⁸⁹

B. *Access to Prisons*

While *Richmond Newspapers* grants the public and press a right of access to court proceedings, the Supreme Court has clearly stated that the

82. *Id.* at 580 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)).

83. *Id.* at 564-69.

84. *Id.* at 569-71.

85. *Id.* at 564-73.

86. *Id.* at 569.

87. *Id.* at 570-71.

88. *Id.* at 575-77.

89. *Id.* at 576.

press has no right of access beyond that of the general public.⁹⁰ In the companion cases of *Pell v. Procunier* and *Saxbe v. Washington Post Co.*, the Court rejected the press' argument that the right to gather information guaranteed a right to interview prison inmates.⁹¹ Both the state of California and the federal government prohibited the press from requesting and conducting interviews with specific inmates. After determining that the First Amendment speech rights of the inmates did not apply, the Court held that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public."⁹²

There are two important and interrelated factors in the Court's reasoning which bear on the present debate: First, these holdings depend on the presumption that the restricted access was not motivated by a desire to limit the public's information on the subject or to intentionally frustrate the media's newsgathering attempts. Second, the restrictions at issue were unrelated to the content of the information that was prohibited.

In the majority opinion in *Pell*, Justice Stewart began his discussion of the media's right to access specific inmates by evaluating the state's motivation for the prohibition: "We note at the outset that this regulation is not part of an attempt by the State to conceal the conditions in its prisons or to frustrate the press' investigation and reporting of those conditions."⁹³ The regulation at issue did not deny the press access to the prison, or even to inmates.⁹⁴ Journalists were allowed to visit prisons, speak to any inmate encountered during the visit, conduct confidential interviews with inmates at random, and if reporters were seeking information about a specific prison program, they could observe group meetings and interview participants.⁹⁵ Members of the media were simply prohibited from requesting interviews with specific inmates.⁹⁶ The state was not limiting the access of the media, and by proxy, of the public to information regarding prisons and the imposition of penal punishment. It was simply prohibiting specific contact with individuals.

90. *Pell v. Procunier*, 417 U.S. 817, 834-35 (1974); *accord Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974).

91. *Pell*, 417 U.S. at 834-35; *Saxbe*, 417 U.S. at 850.

92. *Pell*, 417 U.S. at 834.

93. *Id.* at 830. *See also Saxbe*, 417 U.S. at 851 ("The ban against press interviews is not part of any general news blackout in the federal prisons.").

94. *Pell*, 417 U.S. at 830.

95. *Id.*

96. *Id.* at 831 ("The sole limitation on newsgathering in California prisons is the prohibition in § 415.071 of interviews with individual inmates specifically designated by representatives of the press.").

More importantly, this restriction was in no manner motivated by a desire to suppress the content of these interviews. The regulation was adopted in response to violent episodes in the prison, which authorities partially attributed to press-requested interviews.⁹⁷ The “notoriety” that certain inmates received from members of the press encouraged disregard for prison rules by the inmates, and ultimately contributed to the deaths of two inmates and a prison guard.⁹⁸

These two distinctions are very important for the present analysis. The fundamental conclusion reached by the Court (that the press has no right of access beyond that of the general public) was premised on the specific fact that the government was restricting access for purely neutral reasons, and restricting access in a way that did not infringe on the ability of the press to observe and report on the administration of the public function of penal justice. Content-neutrality is a prerequisite to the Court’s access jurisprudence.

V. THE MODERN CHALLENGE TO PRIVATE EXECUTION LAWS: THE RIGHT TO BROADCAST

The most common arguments made against private execution laws today are arguments for broadcasting executions. The Fifth Circuit announced the first major statement on the issue in 1977, overturning a district court’s order to allow the public broadcast of Texas’s first execution in a dozen years.⁹⁹ Since the Fifth Circuit’s opinion, no court—state or federal—has ever held that there is a constitutional right to film and to broadcast executions. In *Halquist v. Department of Corrections*, the Washington Supreme Court declined the same argument under its state constitution; however, the court reached a factual distinction that no federal court has ever drawn—that the televised format of an execution is a content-based classification for First Amendment analysis.¹⁰⁰ In a highly publicized recent decision, a U.S. District Court in Indiana rejected an Internet broadcaster’s attempt to televise the execution of Oklahoma City bomber Timothy McVeigh.¹⁰¹ These cases are certainly not a complete survey of the decisions on the issue, but they illustrate the important arguments, and the reasons why these attempts inevitably have failed.

97. *Id.*

98. *Id.* at 831-32.

99. *Garrett v. Estelle*, 556 F.2d 1274 (5th Cir. 1977).

100. 783 P.2d 1065 (Wash. 1989).

101. *Entm’t Network, Inc. v. Lappin*, 134 F. Supp. 2d 1002 (S.D. Ind. 2001).

A. Garrett v. Estelle

Following the reintroduction of the death penalty in Texas, a television news reporter petitioned the state to record, and later broadcast, the state's first execution after the law was changed.¹⁰² His request was denied, as state law prohibited the recording of executions by any mechanical means.¹⁰³ The District Court invalidated the law as repugnant to the First and Fourteenth Amendments, and the state appealed to the Fifth Circuit.¹⁰⁴

The Fifth Circuit reversed, citing extensively to *Pell* and *Saxbe*, holding that "the protection which the first amendment provides to the news gathering process does not extend to matters not accessible to the public generally, such as filming of executions in Texas state prison."¹⁰⁵ In order to support this holding, the court found that the filming of an execution did not possess any quality that would classify it as "content" under First Amendment analysis.¹⁰⁶ The court stated that nothing in the record or through logical inference justified the content-based argument.¹⁰⁷ The court reasoned: "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."¹⁰⁸ Having disposed of the media's content-based claim, the Fifth Circuit overturned the District Court's decision as directly analogous to the prison access cases.¹⁰⁹

B. Halquist v. Department of Corrections

In 1989, the Supreme Court of Washington addressed a challenge identical to that faced by the *Garrett* court.¹¹⁰ Halquist, a documentary filmmaker seeking to film an execution, argued for a constitutional right to do so. He, however, based his argument under the state constitution rather than the First Amendment to the federal constitution.¹¹¹ He premised his argument on two separate grounds: first, that the citizens of Washington

102. *Garrett v. Estelle*, 424 F. Supp. 468 (N.D. Texas 1977), *rev'd* 556 F.2d 1274 (5th Cir. 1977).

103. *Id.*

104. *Garrett*, 556 F.2d at 1277.

105. *Id.* at 1276.

106. *Id.* at 1278.

107. *Id.*

108. *Id.*

109. *Id.* at 1280.

110. *Halquist v. Dep't of Corr.*, 783 P.2d 1065 (Wash. 1989).

111. *Id.* at 1065.

had a constitutional right to attend executions; and second, that a journalist permitted by the state to witness an execution has a right to videotape it.¹¹²

The Washington high court dismissed both arguments. Initially, it determined that under state constitutional interpretation, the public had no right to attend the execution.¹¹³ Halquist argued for this right under the state's guarantee of retained rights by the people,¹¹⁴ not under the state constitutional provision guaranteeing freedom of speech.¹¹⁵ The court found no such retained rights in the state's constitutional jurisprudence.¹¹⁶

Next, the court evaluated the restriction on speech under the express guarantee of free speech in the state constitution. The court held that the prohibition against the filming of an execution was inherently a content-based classification of speech.¹¹⁷ "[C]ommon experience suggests that a videotape of an execution is information that is qualitatively different from a mere verbal report. . . . [A] taping ban is a limitation on access to substantive information, not a limitation on dissemination."¹¹⁸ The court ultimately found this fact to be insufficient grounds on which to grant Halquist's request.¹¹⁹ The court viewed the restriction as a limitation on access, and since the public did not have a right to observe the execution, the state could foreclose access, citing directly to *Garrett*, *Pell*, and *Saxbe*.¹²⁰

The Washington court's analysis, although certainly an authoritative judgment under the state constitution, cannot be reconciled with First Amendment analysis in the federal courts. *Pell* and *Saxbe* require that restrictions on access must be content-neutral. Once the state enacts laws to restrict the dissemination of information on the basis of its content, *Pell* and *Saxbe* cannot control. If a federal court were ever to adopt the central factual finding of the *Halquist* court, the case could not be evaluated under *Pell*, *Saxbe*, or *Garrett*.

112. *Id.* at 1066.

113. *Id.*

114. *Id.* (quoting WASH. CONST. art. 1, § 30 ("The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people.")).

115. WASH. CONST. art. 1, § 5 ("Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.").

116. *Halquist*, 783 P.2d at 1066.

117. *Id.* at 1067.

118. *Id.*

119. *Id.* at 1067-68.

120. *Id.* at 1067.

C. Entertainment Network, Inc. v. Lappin: *The Execution of Timothy McVeigh*

Federal regulations prohibit the “visual or audio recording” of a federal execution.¹²¹ Seeking to televise the execution of Oklahoma City bomber Timothy McVeigh, Internet broadcaster Entertainment Network, Inc. (“ENI”) brought an action in the District Court for the Southern District of Indiana to challenge the constitutionality of the regulation.¹²² The court rejected ENI’s argument, accepting both of the key holdings from *Garrett*, that the regulation was content-neutral, and that the public had no right of access.¹²³

The decision was premised on the Fifth Circuit’s holding in *Garrett* that video images of an execution contain no content beyond the written word.¹²⁴ The court reasoned, relying directly on *Garrett*, that “the free flow of ideas and information” was uninhibited.¹²⁵ However, the *ENI* court recognized the two distinct elements to content-neutral analysis under the First Amendment: (1) that the restriction must not make reference to the content; and (2) that the restriction serves purposes unrelated to the content.¹²⁶ Dismissing both requirements, the court pointed directly to *Garrett* and held that the visual depiction of the execution did not possess “content” as defined under the First Amendment.¹²⁷

The *ENI* court held, in addition to the content analysis, that the federal regulation was a valid “‘time, place, and manner’ restriction.”¹²⁸ Primarily, the court relied upon the Seventh Circuit’s opinion in *United States v. Kerley*.¹²⁹ In *Kerley*, restrictions against filming trial proceedings in federal courtrooms were upheld.¹³⁰ The District Court in *ENI* determined that restrictions against the use of cameras in courtrooms, “which by tradition are perhaps the most open public places in our society,” are directly analogous to the use of cameras in the execution chamber.¹³¹

After determining that the restriction was both a content-neutral ban on speech and a valid time, place, and manner restriction, the court found

121. 28 C.F.R. § 26.4(f) (2001).

122. *Entm’t Network, Inc. v. Lappin*, 134 F. Supp. 2d 1002 (S.D. Ind. 2001).

123. *Id.*

124. *Id.* at 1014-15.

125. *Id.* at 1015.

126. *Id.* at 1014.

127. *Id.* at 1014-15.

128. *Id.* at 1015 (quoting *United States v. Yonkers Bd. of Educ.*, 747 F.2d 111, 114 (2d Cir. 1984)).

129. *Id.* (citing *United States v. Kerley*, 753 F.2d 617 (7th Cir. 1985)).

130. *Kerley*, 753 F.2d at 621-22.

131. *Entm’t Network*, 134 F. Supp. 2d at 1015.

that the prison access cases of *Pell* and *Saxbe* were controlling, and held that the regulation was constitutional.¹³²

VI. A QUESTION OF CONTENT RATHER THAN ACCESS

Historical analysis is nothing new to the debate over televised executions.¹³³ Several commentators have argued that the historical tradition of capital punishment in England, in the colonies, and in the early years of the republic necessitates that the public does have a right of access, based on the holding of *Richmond Newspapers*. In *Richmond Newspapers*, Chief Justice Burger stated:

It is not crucial whether we describe this right to attend criminal trials to hear, see, and communicate observations concerning them as a 'right of access' The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily.¹³⁴

It is this very statement that drives most of the arguments for a "right of access" to film executions. Commentators have argued that at the time private execution laws were adopted, the public had an explicit, guaranteed right of access to attend executions. This argument is persuasive, stating that because the public could witness executions at the time of the adoption of the First Amendment, there was a constitutional right to do so.¹³⁵ When the right was arbitrarily foreclosed, it was a blatant violation of the Constitution, and remains so, even if it has been unchallenged for 160 years. This avoids the access problems of *Pell* and *Saxbe* because the *public* has a right to view executions; therefore, the state may not prohibit the media from acting as the public's representative. This argument, however, has repeatedly failed in the courts, and efforts to televise executions ultimately have lost because the courts have characterized them as access cases.

This Note does not attack the validity of the access argument, but merely suggests a related alternative: by privatizing executions in the mid-nineteenth century, the state might or might not have interfered with an implicit First Amendment right,¹³⁶ but the state's motivations certainly violated the First Amendment as a content- and viewpoint-based restriction

132. *Id.* at 1010-1014.

133. *See* Bessler, *supra* note 71.

134. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576-77 (1980).

135. *See infra* Section I.

136. *Id.* at 580. Burger stated, "We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment . . ." *Id.* This was based on the strong historical tradition of openness that was present at the adoption of the First Amendment. *Id.* at 569.

on speech. The proper emphasis should not be on the historical tradition of openness, but rather on the reasons why public executions were ceased in this country. The systematic and direct effort to shield the public from the imposition of capital punishment necessitates that the courts evaluate these questions not as access cases, but as content- and viewpoint-based restrictions on speech. In other words, much like the “access” argument, the *public* has a right to witness executions; however, this right is not a derivative of the historical tradition of openness, but upon the content and viewpoint justifications for enacting private execution laws.

The primary factor in content-neutral analysis is whether the restriction on speech is based upon a disagreement with the content of the message.¹³⁷ Government regulation of speech, however, is content neutral where it is justified without reference to the content.¹³⁸ In both *Garrett* and *ENI*, the courts unequivocally stated that there was no inherent “content” at issue in the recorded visual images that were not available in the reporter’s description of events.¹³⁹ In the abstract, this argument is constitutionally permissible; the Supreme Court has never explicitly stated that visual images contain a content quality beyond the printed account of events.¹⁴⁰

In order to make the core First Amendment argument, one must get around the central holding of *Garrett* regarding content-neutrality. Both *Garrett* and *ENI* explicitly held, relying upon the same language, that a prohibition against a televised execution fails to make a content distinction on speech:¹⁴¹

[A]ccess is provided except for one purpose, to film 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.¹⁴²

There are two responses to this holding: first is an empirical response that it is, in fact, a false assertion in the context of the death penalty. The second response is that the viewpoint nature of the regulation necessitates the harshest of constitutional inquiries.

137. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

138. *Id.*

139. *Garrett*, 556 F.2d at 1278; *accord ENI*, 134 F. Supp. 2d at 1014-15.

140. *See Bessler*, *supra* note 71, at 400-02.

141. *Garrett*, 556 F.2d at 1278; *accord ENI*, 134 F. Supp. 2d at 1014-15.

142. *Garrett*, 556 F.2d at 1278.

First, in the private execution context, the historical evidence strongly suggests that the purposes served by private execution laws are directly related to the content of a *visual* and *live* execution.¹⁴³ This historical record was acknowledged by Justice Marshall in death penalty analysis under the Eighth Amendment.¹⁴⁴ Furthermore, although not dispositive of the matter, the evidence of this malicious intent to shield a political message should be a major factor in any court's content-neutral analysis of a private execution regulation:

[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."¹⁴⁵

The principal inquiry on challenges to private execution laws should not be whether the public has a right of access because of the historical tradition of openness, but whether the public has a right of access because the state has made a regulation that suppresses speech, at least in part, because of disagreement with the message. The mere fact that there is the *potential* for making such a determination indicates that, inherently, there must be sufficient content in the prohibited message to trigger strict scrutiny.¹⁴⁶ Although this Note posits that the justification for the first private execution was in fact to shield the public from the imposition of the death penalty, the mere fact that it is possible to make such a determination in the context of the execution chamber indicates that there must be some form of "content" to the live viewing of an execution. The tradition of capital punishment laws in this country, and the evidence of their effect—suppressing public debate on an issue of national importance—demonstrate

143. See discussion *infra* Part III.

144. *Furman v. Georgia*, 408 U.S. 238, 333-42 (1971) (Marshall, J., concurring).

145. *Chicago Police Dep't v. Mosley*, 408 U.S. 92, 95-96 (1972) (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

146. See *Am. Amusement Mach. Ass'n v. Kendrick*, 115 F. Supp. 2d 943, 953 (S.D. Ind. 2000). In holding that certain video games contain sufficient "content" for First Amendment analysis, the court stated:

As a further indication that at least some video games contain protected forms of expression, it would be theoretically possible for a law to engage in "viewpoint discrimination" in regulating video games. One can imagine a law requiring that, in games involving conflict and/or combat of some type, the player not be associated with forces of evil, darkness, or authoritarianism. . . . The fact that it is possible even to consider a "viewpoint" of "good guys" and "bad guys" in these games is a significant indication that there are at least some aspects of plot and character that may be entitled to at least some degree of First Amendment protection.

Id.

that characterizing these restrictions as content-neutral is incompatible with the Supreme Court's opinions on neutral legislation.

More importantly, these regulations go beyond mere implication of the content of an execution—the regulations restricting live reproductions of executions are a viewpoint distinction on a political issue. The Supreme Court shows strong hostility toward legislation that discriminates against speech on the basis of its content, but the Court is even more resistant to speech that takes a particular viewpoint on a political issue:¹⁴⁷ “The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.”¹⁴⁸ The historical evidence on private execution laws indicates clearly that the states were not just barring the public from the gallows to prevent them from seeing executions, but the states were doing so because it reinforced a political *viewpoint* on the use of capital punishment. This evidence must be a factor in analyzing the content neutrality of private execution laws. Ultimately, the public has a right to see executions because the state prohibits the visual images from reaching the public at least partially due to disagreement with the message. “The rationale of the general prohibition [against content-based classifications of speech], after all, is that content discrimination ‘raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace.’”¹⁴⁹ The prohibition against the visual broadcast of an execution rises far above Justice Scalia's “specter” of fear; the historical evidence suggests affirmatively that these restrictions have, in fact, partially accomplished the goal of driving a political viewpoint from the promised marketplace of the First Amendment.

This analysis does not continue to the logical end: strict scrutiny review of private execution laws. There are arguments to be made that the state might have an interest in suppressing the speech based upon strictly “neutral” justifications such as prison security and an inmate's privacy right.¹⁵⁰ There is an argument that the historical justifications for silencing speech are overshadowed in today's world by compelling justifications, fashioned in the most restrictive manner possible. The ultimate conclusion

147. See *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

148. *Id.* at 392.

149. *Id.* at 387 (quoting *Simon & Schuster v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

150. See Jerome T. Tao, Note, *First Amendment Analysis of State Regulations Prohibiting the Filming of Prisoner Executions*, 60 GEO. WASH. L. REV. 1042 (1992), for an analysis of arguments used to support private execution laws as “neutral” restrictions on speech. See also *Entm't Network, Inc. v. Lappin*, 134 F. Supp. 2d 1002, 1017 (S.D. Ind. 2001).

reached by this Note is not that there is a constitutional right to film executions, but that where the state seeks to prohibit televised executions, it must make and defend its arguments before the Supreme Court's highest constitutional hurdle—strict scrutiny review of a content- and viewpoint-based restriction on speech.

VII. CONCLUSION

The history of capital punishment in this country is a long and divided account of support and strong public outcry. The trends in public opinion are certainly not linear, shifting in both directions at several points in our history. Much of the history of the death penalty is unclear, even to the most dedicated scholars on the subject. However, this point is obvious: in the 1830s and 1840s there was a strong, grass-roots movement pushing for the abolition of capital punishment. The states enacted "private" execution laws, and there is evidence to suggest that these laws were enacted for the express purpose of limiting the public's access to the brutality of the death penalty. Following the enactment of these laws, opposition to capital punishment dropped, and the death penalty remains a part of the American criminal justice system 160 years later.

Courts have unanimously denied the media's requests to film and televise executions. The cases have been summarily classified as "access" cases under the U.S. Supreme Court's holdings in *Pell* and *Saxbe*. Because the media has no general constitutional right of access beyond that of the general public, private execution laws have been upheld. The historical evidence suggests, however, that these are not access cases. The restrictions on filming executions are neither content- nor viewpoint-neutral. For this reason, the public maintains a right to see an execution because the state may not prohibit public debate by suppressing a particular side or viewpoint on an issue. If the language of the Supreme Court's First Amendment jurisprudence means anything, it holds that the state may not take a position on an issue of public concern through the suppression of speech.