

10-1-1995

## Forbidden Spectacle: Executions, the Public and the Press in Nineteenth Century New York

Michael Madow  
*Brooklyn Law School*

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Legal History Commons](#)

---

### Recommended Citation

Michael Madow, *Forbidden Spectacle: Executions, the Public and the Press in Nineteenth Century New York*, 43 Buff. L. Rev. 461 (1995).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol43/iss2/3>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact [lawscholar@buffalo.edu](mailto:lawscholar@buffalo.edu).

# Forbidden Spectacle: Executions, the Public and the Press in Nineteenth Century New York

MICHAEL MADOW†

## CONTENTS

Introduction .....	462
I. The Modernization of Execution Practice in Nineteenth Century New York: An Overview .....	469
A. Capital Punishment in New York: 1825 and 1892	469
B. A Comparative Analysis of "Traditional" and "Modern" Execution Practice .....	476
1. Privatization .....	476
2. Rationalization .....	479
3. Medicalization .....	486
II. The Abolition of Public Executions in Antebellum New York .....	490
A. The Decline of Public Punishments: The Contemporary Historiographic Debate .....	491
B. The Social and Cultural Origins of Privatization	498
C. The Resilience of Hanging Day: Popular Resistance to Legislative Reform .....	503
D. The End of Hanging Day?: The Act of 1835 ...	506
III. "Private" Executions in New York: 1835-1888 .....	511
A. Reconstituting the Execution Audience .....	512
1. Public Access to Executions after 1835 .....	512
2. Size and Composition of the Official Execution Audience .....	514
3. Press Access to "Private" Executions .....	519
B. The (Slow) Decline of Hanging Day Ritual .....	523

---

† Professor of Law, Brooklyn Law School. B.A., 1971, Amherst College; M.A., 1978, Harvard University; J.D., 1982, Columbia University. I owe thanks to C. Edwin Baker, Ursula Bentele, Deborah Denno, Paul Finkelman, Susan Herman, Beryl Jones, Gary Minda, and David Papke for their helpful comments on drafts of this Article. Andrea Hecht, Eric Wertzer, and especially Lorca Morello provided excellent research assistance. The generous financial support of the Brooklyn Law School Summer Research Fund is gratefully acknowledged.

C.	The End of the Rope: The Electrical Execution Act of 1888 .....	530
IV.	Electrocution, the Public and the Press .....	538
A.	The Anti-Publicity Provisions of the Electrical Execution Act .....	538
1.	Execution Site .....	539
2.	Visitation .....	539
3.	Execution Audience .....	539
4.	Disposition of the Corpse .....	540
5.	Restrictions on the Press .....	541
B.	The "Gag Law": Defiance, Debate, and Repeal .	542
V.	Conclusion .....	556

Our courts of justice must be open to the public; the deliberations of our legislature 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. But the American people will not long submit to this.<sup>1</sup>

[C]apital punishment remains fundamentally, even today, a spectacle that must actually be forbidden.<sup>2</sup>

## INTRODUCTION

Executions in America today are semi-covert events—closed to the general public, yet not altogether secret. In some states, the law expressly requires the inclusion of reporters among the official witnesses. In most others, press representatives routinely attend executions as a matter of administrative custom. Nowhere, however, may a reporter bring a camera or tape recorder with her into the death chamber. As a result, the little knowledge most of us have about how the State "does death" comes in "the most highly mediated way"—"as a rumor, a report, an account of the voiceless expression of the body of the condemned."<sup>3</sup>

Should we know more? Should ordinary citizens reclaim their traditional place in the execution audience—today as television viewers, rather than scaffold crowd? Would television have any im-

1. REV. THOMAS UPHAM, *THE MANUAL OF PEACE* 15 (1836) quoted in LOUIS P. MASUR, *RYTES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE 1776-1835*, 110 (1989).

2. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 15 (Alan Sheridan trans., 1977) (1975).

3. Austin Sarat, *Speaking of Death: Narratives of Violence in Capital Trials*, 27 *LAW & Soc'y Rev.* 19, 52 (1993).

pact on how executions are conducted or on what the public thinks of them? Would anybody want to watch? Could anybody bear to watch? These questions have taken on urgency of late, as television broadcasters—both the high-minded and the ratings-driven—agitate and litigate for access to America's death chambers.

This controversy began in earnest in 1991, when San Francisco public television station KQED was denied permission to videotape the execution of Robert Alton Harris in San Quentin's gas chamber.<sup>4</sup> Three years later, talk-show host Phil Donahue was refused permission to videotape the electrocution of David Lawson in North Carolina.<sup>5</sup> In each case, the courts held that the Warden's exclusion of television cameras from the death chamber did not violate the First Amendment.<sup>6</sup> These events, in turn, have generated a broad and spirited debate among legislators,<sup>7</sup> members of the bar,<sup>8</sup> editorialists,<sup>9</sup> pundits,<sup>10</sup> and legal scholars,<sup>11</sup> about the

4. Harris had previously given KQED his consent to the videotaping. KQED's stated intention was to include footage of the Harris execution in a comprehensive documentary about the death penalty. See William Bennett Turner & Beth S. Brinkman, *Televising Executions: The First Amendment Issues*, 32 SANTA CLARA L. REV. 1135, 1135-38 (1992); Ron LaBrecque, *Stay Tuned for the Execution of Robert Harris*, 13 WASH. JOURNALISM REV. 34 (1991).

5. See, e.g., Bruce Nolan, *Debate Rages Over Airing of Execution*, TIMES-PICAYUNE, May 22, 1994, at A1; Robert P. Laurence, *Donahue Believes in Spectacle of Execution*, SAN DIEGO UNION-TRIB., May 23, 1994, at E10; Walter Goodman, *Viewing an Execution from the Sofa*, N.Y. TIMES, June 13, 1994, at C15. As in the KQED case, the condemned man (Lawson) had consented to the videotaping. Indeed, he originated the idea, and joined with Donahue in the lawsuit against the prison warden. See Bernard Schwartz, *Death T.V.? Is There a Press Right of Access to News That Allows Television of Executions?*, 30 TULSA L. REV. 305, 305-06 (1994).

6. See KQED v. Vasquez, No. C 90-1383, 1991 U.S. Dist. LEXIS 21163 (N.D. Cal. 1991); Lawson v. Dixon, No. 198P94-2, 1994 N.C. LEXIS 314 (N.C. 1994) (denying plaintiff's petition for rehearing). A detailed account of the KQED litigation can be found in Turner & Brinkman, *supra* note 4. The KQED case was not the first constitutional challenge to a prohibition on television cameras at executions. See Garrett v. Estelle, 556 F.2d 1274 (5th Cir. 1977); Halquist v. Department of Corrections, 783 P.2d 1065 (Wash. 1989).

7. See, e.g., Jim Shumaker, *Hang 'Em High*, CHARLOTTE OBSERVER, March 6, 1994, at 9.

8. See, e.g., Naftali Bendavid, *As Viewers Tune to 'Cops' and 'Most Wanted', Is Death TV Next?*, RECORDER, May 31, 1994, at 1; Karl Olson & Erin Daly, *TV Station Fights to Show Execution*, CONN. L. TRIB., Feb. 18, 1991, at 16; Victoria Slind-Flor, *Film at 11? Lawyers Debate TV Executions*, NAT'L L. J., June 10, 1991, at 8; Gerald F. Uelman, *State-Made Snuff Films*, N.J. L. J., April 12, 1990, at 9. In July, 1992, the Young Lawyers Division of the ABA recommended to the House of Delegates that the ABA adopt a position opposing the enactment of any legislation that "would allow audio or video broadcasts, live or delayed, of the execution of individuals sentenced to death." See Pamela J. Roberts, *Report to the House of Delegates*, A.B.A. YOUNG LAW. DIVISION 124A (1992). This recommendation was strenuously opposed by the National Conference of Lawyers and Representatives of the Media. See Letter from Murray Richtel and J. Laurent Scharff, Co-chairs, National Conference of Lawyers and Representatives of the Media, to Pamela Roberts, Chair of the A.B.A.

practical wisdom and moral legitimacy of concealing executions from public view.

Many of those opposed to televised executions invoke the history of *public* executions to buttress their case. A televised execution, it is said, would be a lamentable regression to a less "civilized" and less "humane" mode of capital punishment. Public executions, we are told, were repudiated long ago because they came to be seen for what they were — barbaric and indecent spectacles that degraded and brutalized the condemned and the spectators alike. Large crowds of people — men, women, even children — gathered at the scaffold to cheer and leer, joke and laugh, drink and brawl. Do we really want to "go back" to *that*? Anthony Lewis, for example, recalls Charles Dickens' description of the callousness and unseemly levity — Dickens called it the "brutal mirth" — of the London crowd at the public hanging of the Mannings in 1849, and warns that if executions are televised people will "invite friends over for beer, pretzels, and death."<sup>12</sup> A law school

Young Lawyers Division (July 14, 1992) (on file with author). No action was taken at the 1992 ABA annual conference.

9. See, e.g., *Why Blindfold the Camera?*, N.Y. TIMES, May 22, 1991, at A24; *Television Has Right to View Executions*, USA TODAY, June 10, 1991, at A10.

10. See, e.g., Carl Rowan, *Hang 'Em on Television*, ATLANTA CONST., July 17, 1990, at A15; George F. Will, *Capital Punishment and Public Theater*, WASH. POST, May 12, 1991, at C7; Anthony Lewis, *Their Brutal Mirth*, N.Y. TIMES, May 20, 1991, at A15; Anna Quindlen, *TV Executions Will Force Us to Look Death in the Eye*, CHI. TRIB., May 21, 1991, at 19; Nat Hentoff, *Protecting Viewers from Awful Sights*, WASH. POST, June 15, 1991, at A23; William F. Buckley, Jr., *Televise Executions?*, NAT'L REV., June 24, 1991, at 54; Jacob Weisberg, *This Is Your Death*, NEW REPUBLIC, July 1, 1991, at 23.

11. In the law reviews, discussion has centered on whether the press has a constitutionally grounded right to videotape executions. A decided majority of commentators have concluded that the television media *does* have such a right. See, e.g., John D. Bessler, *Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to State Executions*, 45 FED. COMM. L. J. 355 (1993); Jeff I. Richards & R. Bruce Easter, *Televising Executions: The High-Tech Alternative to Public Hangings*, 40 UCLA L. REV. 381 (1992); Jeff Angeja, Note, *Televising California's Death Penalty: Is There a Constitutional Right to Broadcast Executions?*, 43 HASTINGS L. J. 1489 (1992); Jerome T. Tao, Note, *First Amendment Analysis of State Regulations Prohibiting the Filming of Prisoner Executions*, 60 GEO. WASH. L. REV. 1042 (1992); Neil E. Nussbaum, "Film at Eleven . . ." — *Does the Press have the Right to Attend and Videotape Executions?*, 20 N.C. CENT. L.J. 121 (1992); Gil Santamarina, *The Case for Televised Executions*, 11 CARDOZO ARTS & ENT. L.J. 101 (1992). But see Dane A. Drobný, Note, *Death TV: Media Access to Executions Under the First Amendment*, 70 WASH. U. L.Q. 1179 (1992) (arguing that the press does not have a First Amendment right to attend or televise executions). For an insightful recent discussion of press access issues generally, see Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927 (1992) (arguing for a special constitutional right of access for newsgatherers).

12. See Lewis, *supra* note 10. Fellow *New York Times* columnist Anna Quindlen envisioned the same inappropriately festive atmosphere, with a slightly different, but still decid-

dean reminds us that one of the last public hangings in the United States, the 1936 hanging of Rainey Bethea in Owensboro, Kentucky, drew a raucous crowd of ten thousand, many of whom stormed the gallows to tear off swatches of the dead man's shroud for souvenirs.<sup>13</sup> And the Young Lawyers' Division of the ABA bases its opposition to televised executions on the ground, among others, that an execution "should not serve today as public entertainment as it did in earlier times."<sup>14</sup>

In this Article, I attempt to show that the privatization of capital punishment in America was more complicated, contested, and morally ambiguous than is commonly assumed. The recent agitation for televised executions, I shall argue, is only the latest episode in an old struggle among the State, the press, and the public, for control over the practice and meaning of capital punishment. Indeed, perhaps the chief reason that the notion of televised executions has generated such intense resistance is that it threatens to destabilize the way the State has "done death" in America for over a century. Television would return to the public some of the power it lost to the State (and to the press) during the course of the nineteenth century—power to determine not only how executions are conducted but also what they *mean*. The text of the televised executions debate may be the First Amendment, but its unacknowledged subtext, I shall claim, is semiotic control.

For the most part, this Article will focus on developments in nineteenth-century New York. The most important reason for this choice of focus is that the "modern style" of capital punishment—furtive, hurried, wordless, cold, "professional"—was invented in New York during the latter part of the nineteenth century. In the early nineteenth century, executions in New York (as elsewhere in America) were still grand public ceremonies; they were elaborately staged, slowly paced, unashamedly passionate, and richly discursive. At once rituals of rule and dramas of reconciliation, public hangings in the early republican period were designed and orchestrated by civic officials and clergymen to buttress order, celebrate justice, and deter wrongdoing.<sup>15</sup> The condemned man was the leading player in a great public drama, and his demeanor, actions, and words were closely observed and widely reported.

---

edly plebeian menu. The KQED lawsuit, she said, "is about a vision of the future in which a few good buddies gather round the tube with a six-pack and a pepperoni pizza for a Fry 'Em party." See Quindlen *supra* note 10.

13. See Uelman, *supra* note 8.

14. See Roberts, *supra* note 8, at 4.

15. See generally MASUR *supra*, note 1, 25-49.

Beginning in the 1830s, however, execution practice in New York was transformed in three important ways. First, capital punishment was relocated from public spaces to prison interiors, and the number of permitted witnesses was sharply restricted. Next, executions were progressively stripped of their ritualistic and religious aspects, and converted into hurried technical routines. Lastly, as Americans developed a keen dread of physical pain, medical professionals teamed up with electrical engineers to devise a purportedly "painless" method of administering the death penalty: electrocution. By the end of the century, capital punishment in New York had already become "death work." The condemned man, previously the central actor in a public theater of justice, had now become simply the object of medico-bureaucratic technique—his body read closely for signs of pain, but his voice muffled and barely audible.

The dominant legal, political, and cultural elites in New York in the late nineteenth century took considerable pride in this transformation of execution practice. Capital punishment, they believed, had finally been "civilized"; it had been made at once both more humane and more effective. One purpose of this Article is to address how and why these elites came to this view; how and why they moved from one model of execution practice to its near opposite. To that end, the Article examines the new conceptions of crime, criminals, and punishment, and the new understandings of pain, dignity, and death that underlay the modernization of execution practice.

This Article is not, however, limited to exploring changes in elite perceptions and sensibilities toward capital punishment. I will also attempt to determine how this radical "reform" of execution practice was seen and experienced by some of the people it most directly affected. The modernization of execution practice in New York, I will attempt to show, was not brought about by governmental fiat. To the contrary, it was contested and resisted by prison and law enforcement authorities, by convicts, by clergymen, by the press, and by those social groups (*viz.*, the plebeian classes and women) that were excluded from the execution audience after public hangings were abolished. Ultimately, to be sure, this resistance was successfully overcome and a distinctively modern model of execution practice was installed. But what we will see is that such resistance made the modernization of execution practice in New York more protracted and difficult, and ultimately less complete, than some self-styled "reformers" would have liked.

Another reason for my choice of focus is that nineteenth-century New York was the birthplace not only of the modern style of execution practice but also of the modern commercial press. These

developments, I will suggest, were not unrelated. The presence of a strong, assertive, commercially-driven press had a crucial effect on the politics of capital punishment practice in New York throughout the nineteenth century. For the most part, the press aggressively promoted the modernization of execution practice. For example, it warmly defended the exclusion of the general public from executions after 1835, and it campaigned vigorously for the end of hanging as a method of capital punishment in the decades after the Civil War. However, the New York press also helped keep alive many old Hanging Day forms and rituals long after executions were moved inside prison walls. Most importantly, the New York press consistently asserted and stoutly defended its "right" to witness state executions and to inform the public on how they were conducted. In 1888, the New York legislature, having grown impatient with what it believed were sensationalistic news reports, made it a crime for any newspaper to publish the details of an execution. The New York press defied the ban and waged a vigorous and successful campaign for its repeal on behalf of "the people's right to know." Our contemporary, semi-covert death penalty, as well as much of the rhetoric used today to debate its legitimacy, is the legacy of that end-of-the-century struggle for freedom of the press.

This Article is divided into four parts. Part I provides an overview of the modernization of execution practice in New York during the nineteenth century through a comparative analysis of two executions: one of the last public hangings in New York City, and one of the first electrocutions at Sing Sing prison. I show here that the modernization of execution practice had three interrelated elements: privatization; rationalization; and medicalization. Capital punishment was withdrawn from the presence and sight of the general public, and thus "privatized." It was "rationalized" through a stripping away of its ceremonial and dramatic elements. Finally, it was "medicalized" by a new technology conceived and designed in part by medical professionals to make execution painless.

In Part II, I examine the first step in this modernization process: the formal abolition of public executions by the New York legislature in 1835. Drawing on recent work by cultural and social historians, I contend that the elimination of public executions in the antebellum northeast had a wide range of contributing causes. Most obviously, it reflected official frustration with traffic congestion and crowd control, as well as elite anxiety about social disorder and about the criminogenic effects of public punitive rituals. However, the privatization of capital punishment in America was something more than a new strategy of social control. It was also



part of a broader effort by the antebellum middle classes to enforce preferred norms of privacy, gender, and class, and to remake public culture in their own image.

Part III examines the nature and evolution of so-called "private" executions in New York from the abolition of public hangings in 1835 to the adoption of the Electrical Execution Act of 1888. The central claim in this section is that the state legislature's attempt to modernize execution practice was largely thwarted at the local level in the decades before the Civil War. Officially, executions became "private" affairs in 1835. But in practice—as a result of popular resistance, official connivance, and journalistic opportunism—executions remained semi-public theatrical events. The only significant change brought about by the 1835 legislation was in the size and composition of the execution audience: admission to the "theater of justice" was now confined to professional and middle class men. Even during the decades after the Civil War, hangings in non-metropolitan parts of New York continued to look very much like the public hangings of the early nineteenth century. In the larger cities, however, the traditional forms and rituals of Hanging Day were slowly dismantled in the 1870s and 1880s. The pacesetter in this process was New York City, and it is on developments there that I will primarily focus.

Part IV examines certain neglected aspects of the Electrical Execution Act of 1888, the founding charter of modern execution practice. The Act of 1888 not only substituted electricity for hanging; it also attempted to complete the privatization of capital punishment by making it a criminal offense for the press to publish the details of any execution other than a statement that the convict was, on the day in question, duly executed according to law. Part IV recounts the neglected story of the New York press's defiance of this "gag law," and the ultimately successful campaign for its repeal.

In conclusion, I explore the relevance of this historical account to the contemporary debate on televised executions. In particular, I consider whether and how the introduction of television cameras might destabilize our current social practice of capital punishment. I conclude, albeit tentatively, that while the restoration of publicity would further accelerate the medicalization of capital punishment, it is likely to engender pressure to restore certain of the traditional or "pre-modern" features of executions. More generally, it would give the public, and probably the condemned as well, a greater share of power over how executions are conducted and understood. Whether that would be a welcome development—even a "civilizing" achievement—is a question I leave for another day.

## I. THE MODERNIZATION OF EXECUTION PRACTICE IN NINETEENTH CENTURY NEW YORK: AN OVERVIEW

Contemporary American executions are hurried technical routines, largely devoid of passion, drama, or ritual.<sup>16</sup> The overriding aim of the state functionaries charged with conducting executions nowadays is to "get the man dead" as quickly, uneventfully, impersonally, and painlessly as Nature and Science permit. For them, and for most of us as well I suspect, the *beau ideal* is the execution that occurs without a hitch; the execution that is barely noticed; the execution during which, and about which, almost nothing is said; the execution which most nearly resembles a hospital procedure. "It was like clockwork, as planned, as trained . . . There were no glitches, no problems," crowed the chief of a Maryland execution team after the lethal injection of John Thanos in May, 1994. "It was done professionally."<sup>17</sup>

This Part will show that this distinctively modern execution ideal was an invention of late nineteenth century New York. In Section A, I provide detailed descriptions of one of the last public hangings in New York City and one of the first electrocutions at Sing Sing prison. Then, in Part B, I use these two examples to identify and elaborate the central features of what I will refer to as "traditional" and "modern" execution practice.

### A. Capital Punishment in New York: 1825 and 1892

On a chilly Saturday afternoon in November, 1825, James Reynolds, a twenty-two year old seaman who had robbed and murdered his ship captain, was publicly hanged in New York City. According to a contemporaneous newspaper account,<sup>18</sup> "crowds of

---

16. See generally ROBERT JOHNSON, *DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS* (1990); STEPHEN TROMBLEY, *THE EXECUTION PROTOCOL* (1992).

17. See Paul W. Valentine, *Execution of Thanos Went 'Like Clockwork'*, WASH. POST, May 18, 1994, at D1.

18. The account that follows is taken, unless indicated otherwise, from a lengthy report in the *Commercial Advertiser*, a mercantile newspaper published daily in New York City. The *Commercial Advertiser* was founded in 1793 in New York City under the name *The American Minerva*. WILLARD GROSVENOR BLEYER, *MAIN CURRENTS IN THE HISTORY OF AMERICAN JOURNALISM* 112-115 (1927). By 1825, its name had been changed to the *Commercial Advertiser* and it had become what is known as a "six-penny paper," a publication catering to the needs and interests of commercial and political elites. MICHAEL SCHUDSON, *DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS* 16-17 (1978). The so-called "penny press," which retailed genuine news reports from the police, the courts, the streets, and private households at a price the working classes could afford, did not appear until the 1830s. *Id.* at 17-31; see also DAVID RAY PAPKE, *FRAMING THE CRIMINAL: CRIME, CULTURAL WORK, AND THE LOSS OF CRITICAL PERSPECTIVE 1830-1900*, at 34-35 (1987).

people" began to collect near the Bridewell,<sup>19</sup> the prison in lower Manhattan in which Reynolds was confined, as early as nine o'clock on the morning of the hanging. By ten o'clock, an infantry battalion from the artillery brigade and a company of dragoons had taken positions at the scene. Thirty minutes later, Reynolds' leg irons were removed, and he was led to a "small stage" in the prison yard, where the High Constable and a number of marshals were waiting. Reynolds was clad for the occasion in "white trousers with a white frock and cap of the same material trimmed with black." Because the morning was a cold one, Reynolds was permitted to wear a cloak and a cravat, which partially covered the halter that had already been placed around his neck.

After Reynolds took a seat on the platform near his father, Reverend Stanford, the Bridewell chaplain,<sup>20</sup> preached a "very solemn and affecting" sermon,<sup>21</sup> which "caused the tear to flow from many an eye." Reynolds "listened attentively" throughout. While he "wept but little," he struggled vainly to control the powerful emotions that "convulsed" his body. His father, "a respectable looking man," was not seen to weep at all, but (we are told) it was "easy to perceive that his aged bosom was a prey to 'that silent grief which eats into the soul.'"

At five minutes after eleven, the prison yard service having concluded, Reynolds shook hands with a number of his prison acquaintances and was placed in a barouche, in the company of the Reverends Somers and Roy, and also a Dr. Walker.<sup>22</sup> The crowd outside the prison "behaved very peaceably and did not press upon the gate." Shortly thereafter, the prison yard gates swung open and a procession, led by the Sheriff and his deputies on horseback, moved into the street and was joined by the military guard. Between the Sheriff and Reynolds' carriage were a group of marshals and a wagon bearing Reynolds' empty coffin.

---

19. The Bridewell, erected in 1775, was located in the Commons, just west of the site where City Hall now stands. See MARY L. BOOTH, HISTORY OF THE CITY OF NEW YORK, FROM ITS EARLIEST SETTLEMENT TO THE PRESENT TIME 522, 581 (1859); JOHN A. KOUWENHOVEN, THE COLUMBIA HISTORICAL PORTRAIT OF NEW YORK 95 (1953).

20. Stanford is identified as such in a broadside published after the hanging. See LAST DYING WORDS AND CONFESSION OF JAMES REYNOLDS FOR THE MURDER OF CAPTAIN W. M. WEST, TOGETHER WITH HIS LETTERS AND CORRESPONDENCE TO HIS WIFE AND OTHER RELATIONS, AS WRITTEN BY HIMSELF (1825) [hereinafter LAST DYING WORDS]. Included in this twenty-four page pamphlet is Stanford's account of his prison interviews with Reynolds in the six weeks prior to the hanging. *Id.* at 1-10.

21. On the "execution sermon" genre, see generally DANIEL A. COHEN, PILLARS OF SALT, MONUMENTS OF GRACE (1993).

22. Whether Walker was a doctor of medicine or divinity is not certain. The former interpretation seems more likely, however, inasmuch as the news account subsequently states that there were "two attending clergymen" at the scaffold.

The procession evidently moved quite slowly, taking over an hour to cover the more than two miles between the Bridewell and the scaffold site, which was on Second Avenue across from Bellevue Prison and the new Alms House.<sup>23</sup> At the scaffold, the Sheriff read the execution warrant. Then, as Reverend Somers prepared to ascend the scaffold to address "the multitude,"<sup>24</sup> Reynolds asked for permission to speak first. This departure from the customary script<sup>25</sup> was granted, and Reynolds mounted the scaffold, accompanied by two officers and two clergymen. After a "moment of suspense" Reynolds began to address the crowd in "the most cool, clear, and collected manner."<sup>26</sup> He warned them to heed "the awful spectacle" and to "shun the paths of vice." In a speech whose language was said to betray his want of education, Reynolds told the crowd that he had led a comparatively moral life until he had begun to visit "the houses of ill-fame at Corlear's Hook," a riverside section of New York City<sup>27</sup> then notorious for crime and moral depravity. This, Reynolds said, introduced him to drink and to evil company, and he was "led on the paths of guilt, step by step," in the very same manner as he had just climbed the steps to the scaffold. Reynolds concluded with "an exhortation to youth" and "a

---

23. The article in the *Commercial Advertiser* does not actually specify this as the scaffold site. However, it does indicate that Reynolds met his end in the same spot where "Johnson" had been executed. A year and a half earlier one Johnson was hanged for murder near the Alms House on upper Second Avenue. See *Johnson the Murderer*, *EVENING POST*, April 2, 1824, at 2. The *Post* article describes the spot as "about three miles from town." An 1824 map of New York City locates the Alms House on First Avenue between 26th and 28th Streets. (New York Historical Society collection).

Unfortunately, the account in the *Advertiser* says nothing about what happened along the route from the Bridewell to the scaffold site. Did the crowd jeer or cheer? Was the crowd unruly? Were stops made along the way — for a final drink or for speeches? It is interesting to ask why the *Advertiser* account says nothing on this score. Perhaps nothing noteworthy happened. Perhaps the reporter didn't accompany the crowd from the Bridewell to the scaffold site. Or perhaps the elite readers of the *Advertiser* simply were not interested in this (popular) aspect of the event.

24. The author of the *Advertiser* account does not provide an estimate of the size of the crowd that gathered at the Bridewell, marched in or observed the procession, or witnessed the hanging. But contemporary estimates offered for other public hangings in New York City at roughly the same time would suggest that several thousand people, at the least, were on hand for the occasion. See *infra* text accompanying notes 46-48.

25. The standard gallows script called for the clergyman's execution sermon to precede the condemned man's final speech. See THOMAS MCDADE, *THE ANNALS OF MURDER: A BIBLIOGRAPHY OF BOOKS AND PAMPHLETS ON AMERICAN MURDERS FROM COLONIAL TIMES TO 1900* at xxxii (1961).

26. Another contemporary source says that Reynolds "addressed the audience in a most beautifully pathetic strain, perfectly collected, and without faltering." See *Conduct of Reynolds on the Scaffold*, in *LAST DYING WORDS*, *supra* note 20, at 18.

27. According to an 1824 map of New York City, Corlear's Hook was located on the East River, at the very end of Grand Street. (New York Historical Society map collection).

fervent prayer.”

The clergymen now took center stage on the scaffold. Reverend Somers read the 51st Psalm (“Show pity Lord, O Lord forgive,”) and then made what is described as “an appropriate and impressive address.” He was followed by Reverend Roy, who offered a prayer. The end drawing near, Reynolds asked to speak to his father. This request was granted,<sup>28</sup> and his father ascended the scaffold for a moment of “private conversation.” Both Reynolds’s father and the clergymen then shook the condemned man’s hand and descended.

Now, the Sheriff and Under-Sheriff mounted the scaffold to remove Reynolds’ cloak and inform him that the time had come. Reynolds, hoping perhaps that a reprieve might yet arrive, requested permission to address the crowd once more. The Sheriff acceded to this unorthodox request and Reynolds held forth again, going over the same ground as before and closing with “a sort of ejaculatory prayer.” The cap was then drawn over his eyes, and at a quarter before one the drop fell. Reynolds, as the euphemism of the day had it, was “launched into eternity.”

Some sixty-six years later, in 1892, Charles McElvaine, convicted of first-degree murder for stabbing to death a Brooklyn grocer during a nighttime burglary,<sup>29</sup> became the seventh person put to death in New York by electricity.<sup>30</sup> Kept in solitary confinement at the Sing Sing state prison for a year and a half after his conviction, McElvaine bade farewell to his wife and mother on the afternoon prior to his scheduled execution. He spent the night that followed with two priests, who made strenuous, and ultimately successful efforts to elicit from him expressions of repentance.

In the early morning hours of February 8, 1892, about twenty invited guests arrived at the prison and gathered in the Warden’s office. Seven or eight of these guests were physicians. The other twelve were lay witnesses, including five reporters from New York City newspapers, three wire service reporters, a State Assemblyman, and A. F. Kennelly, a prominent electrical engineer who was

---

28. The request may have been granted because it underscored one of the chief messages intended by the Hanging Day authorities — the need to defer to and obey parental authority.

29. At his trial, McElvaine put forward a defense of insanity. In support of this defense, family members testified that when McElvaine was a boy, a bean somehow got into his ear, lodged permanently in his head, and impaired his mental stability. See *Dead After Two Minutes*, N.Y. SUN, Feb. 9, 1892, at 7.

30. The account that follows is a composite, drawn from detailed reports in the February 9, 1892, editions of the *New York Times*, *New York Daily Tribune*, and *New York Sun*. See *Two Shocks Were Needed*, N.Y. TIMES, Feb. 9, 1892, at 9; *His Death Was Painless*, N.Y. DAILY TRIB., Feb. 9, 1892; *Dead After Two Minutes*, N.Y. SUN, Feb. 9, 1892, at 7.

a close associate of Thomas Alva Edison.<sup>31</sup> The prison was closed to the general public, and armed guards turned away all but those who held invitations from the Warden.

At about eleven o'clock, Warden Brown led the invited guests from his office to a small brick building that had recently been constructed as an execution chamber. After the guests seated themselves on stools placed around the chamber, Brown stated that the execution was to be conducted under his supervision, with the technical assistance of Professor L.H. Laudy of the Columbia University School of Mines, and two state physicians, Dr. Carlos McDonald<sup>32</sup> and Dr. Samuel Ward. Brown further warned the invited witnesses that they were not to interfere in any way with the execution and, unless they were requested to speak, should remain silent throughout the execution. Dr. McDonald then explained that the method of contact to be used to electrocute McElvaine would differ from that used in the six prior electrocutions. This time, at the suggestion of Thomas Edison, the electrodes would be attached to McElvaine's hands instead of his head and legs. Edison had predicted that the electric current would encounter much less resistance in the hands than in the thick bone of the skull.<sup>33</sup>

At 11:08, Warden Brown ordered his assistants to fetch McElvaine, whose cell was down a short corridor from the death chamber. At 11:10, wearing a blue suit and a black satin tie, and accompanied by two priests, McElvaine entered the chamber "almost in a run." His eyes fixated on a small brass crucifix held tightly in both hands, McElvaine rapidly and repeatedly murmured a plea for divine mercy. He walked the short distance to the chair "with that indescribable dragging, going-all-to-pieces gait peculiar to condemned men," and sat down "of his own accord." In under a minute, the deputies strapped him into the chair, removed the crucifix from his hands, and attached the electrodes. McElvaine continued his feverish and barely audible prayers. The official physicians, Drs. McDonald and Ward, stood by, stopwatches in hand, while Professor Laudy manned the signal buttons, ready to order the current the instant the Warden commanded. Just as McElvaine cried out, "Let 'er go!", Warden Brown dropped his handker-

31. Kennelly assisted Edison from 1887 until 1894. He went on to become a professor at Harvard and the Massachusetts Institute of Technology. See Thomas P. Hughes, *Harold P. Brown and the Executioner's Current: an Incident in the AC-DC Controversy*, 32 HARV. BUS. REV. 143, 147 n.17 (1958).

32. Dr. MacDonald, formerly Superintendent of the Auburn Asylum, was the president of the recently created State Commission in Lunacy. See 4 JAMES J. WALSH, *HISTORY OF MEDICINE IN NEW YORK: THREE CENTURIES OF MEDICAL PROGRESS* 54 (1919).

33. As a precaution, however, the executioners also attached head and leg electrodes to McElvaine in case the hand electrodes failed to work in the way Edison predicted.

chief, signalling the start of the procedure.

At precisely 11:11:49, sixteen hundred volts of "alternating current"<sup>34</sup> was switched on. McElvaine's body "immediately became rigid" and "strained at the straps" of the chair. His facial muscles contracted and his lips turned purple. Fifty seconds later, at precisely 11:12:39, Dr. McDonald ordered the current shut off, and examined the body for a pulse. One of the witnesses was heard to whisper, "He's dead — wonderful." Just then a "strange sound . . . half moan, half sigh" came from McElvaine's body, and Dr. McDonald ordered the current restored, this time through the head and leg electrodes.

At 11:13:22, a current of fifteen hundred volts was applied. During the thirty-six seconds in which this second current remained on, white smoke came from the area around the leg electrode. "That is only steam from the wet sponge under the electrode," Dr. McDonald assured the visibly anxious witnesses. Finally, at 11:13:58, the current was shut off again. Dr. Ward, unable to find a pulse, pronounced McElvaine dead. The entire process, from the moment McElvaine entered the chamber to the pronouncement of death, had taken less than four minutes.

Almost immediately, a dispute broke out among the assembled physicians about the efficacy of the execution technique. The presiding state physician, Dr. McDonald — a "spin doctor" *avant la parole* — declared that everything had gone without a hitch:

I do not think there can be any question but that unconsciousness was instantaneous. The little scalding that occurred came long after life was extinct. The moan was caused by the expulsion of mucus, the result of reflex movement of the chest. . . . The contracted muscles of the face you will see give a painful look. *Pain that was not felt.* I think that all the physicians will agree with me that unconsciousness was *instantaneous* and death practically so. (emphasis added).<sup>35</sup>

---

34. The choice of alternating current was the outcome of a protracted and bitter conflict between Thomas Edison and George Westinghouse, and their respective economic allies. See *infra* note 333.

35. *Dead After Two Minutes*, *supra* note 30, at 7.

None of the physicians present controverted Dr. McDonald's claim that McElvaine's loss of consciousness was "instantaneous" and his death therefore painless. Interestingly, however, the lone elected political official among the invited witnesses, a State Assemblyman from New York City by the name of Meyer Stein, was openly skeptical of McDonald's claim. In an interview given later the same day, Stein told a reporter that when the current was turned on, McElvaine's mouth — which was the only part of his face that was visible — twitched as if the poor fellow was suffering the most terrible agony. Sounds like murmurs or half-smothered groans seemed to escape. . . . While I am no expert, I venture to say that the murderer suffered untold agony . . . and although the doctors said he was unconscious I can hardly believe it.

Dr. T. S. Robertson, a New York City physician who favored execution by lethal gas (and failing that, the guillotine), promptly challenged McDonald's assessment in one respect: "So far as unconsciousness is concerned I agree with you. As to instant death I don't agree." Robertson vehemently insisted that McElvaine was still alive until the second current was applied. At that point several doctors began to speak at once "in an argumentative mode." Robertson tried with only limited success, to put a halt to the discussion: "It is a scientific subject, and this is neither the time nor the place to discuss it."<sup>36</sup>

A dissecting table was then wheeled into the chamber and an autopsy conducted. Small blisters were found on McElvaine's temple, where the head electrode had been attached. There was a "great open burn, as big as a man's hand" and of "considerable depth," on McElvaine's leg.<sup>37</sup> When the autopsy was completed, McElvaine's body was turned over to his brother-in-law for burial.<sup>38</sup>

We have, then, two New York executions, separated by less than seventy years. The contrast between them could hardly be greater. In the years between these two executions, the social practice of capital punishment — the way in which New York "did" death — had been fundamentally transformed. Indeed, by the time of McElvaine's electrocution in 1892, a recognizably "modern" execution model had been put into place.<sup>39</sup> The three central aspects

*A Bill to Repeal the Electrical Execution Law*, N.Y. SUN, Feb. 9, 1892, at 1. So appalled was Stein by what he had witnessed that he vowed to introduce a bill to reinstate hanging as the sole mode of execution in New York. *Id.*

36. Later in the day, Dr. McDonald would lay the technical deficiencies in the McElvaine execution squarely at the door of Thomas Edison: "Edison probably reasoned all right from his standpoint as an electrician, but all wrong from the standpoint of a physician." *Two Shocks Were Needed*, *supra* note 30, at 9.

37. Incidentally, no bean was found in McElvaine's ear or head. *See supra* note 29.

38. *See Dead After Two Minutes*, *supra* note 30, at 7.

39. I do not mean to suggest that there are no important differences between McElvaine's execution and current execution practice. For one thing, it is very hard to imagine an eminent contemporary scientist or engineer like Edison or Kennelly, or an Ivy League academic like Professor Laudy, offering his services for the design, testing, or administration of novel capital punishment technologies. Indeed, state prison authorities have encountered great difficulty in recent years in finding skilled technicians willing to build new lethal injection systems or even to repair electric chairs. That difficulty may account in part for the increased incidence of "botched" executions, and for the reliance of prison officials on such self-trained designers of "execution hardware" as the now notorious Fred Leuchter. *See Michael deCourcy Hinds, Making Execution Humane (or Can It Be?)*, N.Y. TIMES, Oct. 13, 1990, at 1. For a chilling portrait of Leuchter and his work, see STEPHEN TWOMBLY, *THE EXECUTION PROTOCOL* 3-94 (1992).

Physicians nowadays are also very reluctant to play active roles, much less leading ones like Dr. McDonald's, in the actual imposition of the death penalty, or in the design and



of this modernization process — which I will refer to as “privatization,” “rationalization,” and “medicalization” — can be elucidated through a comparison of these two executions.<sup>40</sup>

## B. *A Comparative Analysis of “Traditional” and “Modern” Execution Practice*

1. *Privatization.* In early nineteenth century New York, state law prescribed the *mode* of execution — prisoners were to be “hanged by the neck until dead” — but significantly, did not specify the *site* of execution. Without exception, however, county sheriffs followed longstanding custom and conducted hangings in public places. In New York City, for example, gallows were erected at a variety of locations around the city. Pirates, and those whose occupations or crimes were linked to the sea, were often hanged at waterside — from the yardarm of a boat anchored in the East River,<sup>41</sup> or from a gallows erected for the occasion on one of the islands in New York harbor, such as Blackwell’s (now Roosevelt) or Gibbet<sup>42</sup> (now Ellis) or Bedloe’s (now Liberty). Landsmen were typically hanged across from the Alms House,<sup>43</sup> or in Potter’s Field near Washington Square,<sup>44</sup> or at various points outside the city’s limits.<sup>45</sup>

testing of “death-dealing” devices. The current position of the American Medical Association is that physicians should not take any part in the actual imposition of the death penalty, nor even “determine” the point at which death occurs. Physicians may, however, “certify” (i.e., confirm) that the prisoner is dead *after* another person has “pronounced” or “determined” death. See Council on Ethical and Judicial Affairs, American Medical Association, *Physician Participation in Capital Punishment*, 270 JAMA 365 (July 21, 1993). This represents a notable hardening of the AMA’s views on physician participation in executions. As recently as 1980, the AMA had stated that a “physician may make a determination or certification of death.” COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, CURRENT OPINION § 2.06 (1980).

40. The approach I take in the following discussion owes much to John Lofland, *The Dramaturgy of State Executions, in STATE EXECUTIONS VIEWED HISTORICALLY AND SOCIOLOGICALLY* 275 (1977).

41. George Brown, a seaman who had murdered his ship captain, was hanged from a ship’s yardarm in the East River. THE COLUMBIAN, Oct. 25, 1819.

42. In 1834, Charles Davis was hanged from a gallows erected on Gibbet Island. See COMMERCIAL ADVERTISER, Jan. 10, 1834.

43. See, e.g., *Johnson the Murderer*, EVENING POST, April 2, 1824, at 2. The Alms House was then located on First Avenue at Twenty-Seventh Street.

44. Rose Butler, one of the few women executed in New York in the nineteenth century, was hanged in 1820 in Potter’s Field. See CHARLES SUTTON, THE NEW YORK TOMBS, ITS SECRETS AND MYSTERIES: BEING A HISTORY OF NOTED CRIMINALS, WITH NARRATIVE OF THEIR CRIMES, AS GATHERED BY CHARLES SUTTON, WARDEN OF THE PRISON 150 (James B. Mix & Samuel A. MacKeever eds., 1874).

45. For example, in 1816, Ishmael Frazer was hanged on a gallows at the intersection of Bleecker and Mercer streets. See *id.*

The crowds that gathered for these events were said to be very large, although contemporary estimates may have been inflated. In 1819, for example, George Brown was hanged for the murder of his ship captain at the yardarm of the schooner *Retrieve*, which was moored in the East River across from Fulton Street. A contemporaneous account describes as "immense" the "concourse of people" which collected on the wharves, climbed the rigging of nearby ships, and viewed the proceeding from other boats in the river.<sup>46</sup> In 1824, a crowd estimated to be "at least 50,000 . . . many of them from New Jersey and Long Island," gathered along the procession route from the Bridewell to as far north as Grand Street, in order to steal a glimpse of Johnson being driven to the gallows site on upper Second Avenue.<sup>47</sup> Five years later, a double hanging on Blackwell's Island drew an estimated four or five thousand spectators, who lined the shore and boarded boats to witness the event.<sup>48</sup>

Execution crowds outside New York City — in cities like Albany and Buffalo, towns like Cooperstown, and even tiny rural hamlets — were, if anything, even larger. An estimated twelve thousand people flocked into Cooperstown in 1805 to witness the hanging of Stephen Arnold, a schoolteacher who had beaten his young niece to death when she would not, or perhaps could not, pronounce the word "gig."<sup>49</sup> A crowd said to be upwards of thirty-thousand gathered in Albany in 1827 to witness the hanging of Jesse Strang, a fieldhand who had murdered the husband of his aristocratic lover.<sup>50</sup> And thirty-thousand people reportedly watched the hanging of the three Thayer brothers in Buffalo in 1825.<sup>51</sup> In rural areas farm people came from considerable distances, sometimes camping in the vicinity for days.<sup>52</sup> As McDade has noted, "perhaps no single event [in early nineteenth century America] brought more spectators . . . than a public hanging."<sup>53</sup>

Moreover, at least until the late 1820s, county sheriffs did nothing to discourage people from attending executions. On the contrary, as the account of James Reynolds' hanging reveals, officials deliberately arranged the proceedings to enhance, if not maxi-

46. See THE COLUMBIAN, October 25, 1819.

47. See *Johnson the Murderer*, EVENING POST, April 2, 1824, at 2.

48. See EVENING POST, May 8, 1829.

49. See LOUIS C. JONES, THE CRIME AND PUNISHMENT OF STEPHEN ARNOLD 19 (1966).

50. See LOUIS C. JONES, MURDER AT CHERRY HILL: THE STRANG-WHIPPLE CASE, 1827, at 108 (1982).

51. See EVENING POST, June 24, 1825.

52. See, e.g., PHILIP ENGLISH MACKAY, HANGING IN THE BALANCE 108 (1982) (discussing an 1835 crowd of between eight and sixteen thousand in the "insignificant" town of Mayville, Chautauqua County).

53. McDADE, *supra* note 25, at xxx (1961).

mize, their public visibility. Thus, Reynolds' hanging was scheduled for the early afternoon and the scaffold was erected on an elevated stage. Further, a long, meandering urban procession from the Bridewell to the site of the scaffold brought the fact of the execution to the attention of many citizens who were unable or disinclined to attend the main event. In all these respects, the Reynolds hanging typified early nineteenth century practice,<sup>54</sup> which was still organized on the theory that the larger the number of people who witnessed an execution the greater would be its salutary deterrent effect.<sup>55</sup>

All this had changed by the time of McElvaine's execution in 1892. Executions were now purposefully detached, both physically and existentially, from the general life of the community. Between 1825 and 1892, capital punishment was relocated in three ways. First, and most obviously, capital punishment was moved *spatially* — from an outdoor space open to the public, to the interior of a high-walled, well-guarded prison, access to which was limited to specially invited "guests." Second, executions were moved *geographically* (and jurisdictionally), from the county in which the murder occurred to one of three specially designated State prisons. Thus, whereas Reynolds was hanged within a few miles of the place he had committed his crime before a crowd that included family members, friends, and others who probably knew him or at least knew of his crime, McElvaine was executed in a distant upstate prison in front of a group of complete strangers. Third, and as a direct result of the spatial and geographic changes, capital punishment was relocated *epistemologically* — from the domain of firsthand, everyday experience and sense perception to the sphere of "abstract consciousness."<sup>56</sup> Executions had ceased to be some-

---

54. In upstate counties, executions might be held on a "Gallows Hill," or at the bottom of a hollow or ravine, so that the entire community could view the proceeding. For examples, see Jones, *supra* note 50, at 108 and Jones, *supra* note 49, at 19.

55. See MASUR, *supra* note 1, at 25. Underlying this theory was the premise, probably based on a Lockean sensationalist psychology, that a punishment could deter only insofar as it made an impression on the senses. On this view, the mere idea or secondhand report of a hanging could have little emotive power or moralizing influence. For a hanging to have deterrent efficacy, people had to actually see a twisting, writhing, gasping figure on the gallows.

For this reason, secular and religious authorities in this period did not attempt to exclude or discourage anyone — members of the lower and "dangerous" classes, women, young persons — from attending the Hanging Day ceremony. In fact, it was not unusual in some places for schools and businesses to close for the day so that parents and masters might bring their children and apprentices to learn a "lesson" of a grimmer and more important kind. In this connection, note that Reynolds concluded his scaffold speech with a special "exhortation to youth." See *supra* text accompanying notes 27-28.

56. See FOUCAULT, *supra* note 2, at 9.

thing ordinary New Yorkers could see for themselves and had become something they could only imagine.<sup>57</sup>

A related change that emerges from a comparison of these two executions is in the social composition of what I will refer to as "the execution audience." Whereas Reynolds was hanged before a large, heterogeneous crowd, McElvaine was put to death by prison officials in front of a small group of specially selected witnesses, all of whom were adult men, and all of whom were members of the professional or middle classes. There were eight press representatives and about an equal number of physicians, one electrical engineer, and one elected official. Moreover, the witnesses to McElvaine's electrocution were purportedly present not because they wanted to be, not out of the morbid curiosity and bloodthirstiness said to have impelled the crowd to attend public hangings in the past, but only because professional duty (duty to Science, duty to their readers) compelled their presence. They were all there, as it were, "on business."

2. *Rationalization.* The public hanging of Reynolds in 1825 was a richly ceremonial civico-religious spectacle. It was designed and staged by political officials and clergymen whose purpose it was to display their own authority, strengthen communal order, reaffirm central values, and deter wrongdoing.<sup>58</sup> For this reason, the spectators heard a great deal of talk, both from clergymen and the condemned man himself,<sup>59</sup> about mortality, about the sole power of God to redeem the sinful, about the need for repentance, and about the "slippery slope" that carried men and women from small vices to vile crimes.<sup>60</sup> This moral and religious discourse was not a

57. In imagining an execution, of course, people were not left entirely to their own devices. Newspaper reporters were permitted to attend the execution and provided the public with detailed and graphic accounts of the event. Nevertheless, the essential point is that ordinary New Yorkers could no longer witness executions themselves, or hear about them directly from neighbors or acquaintances who had attended the event. Reading a newspaper account of the execution was now the *only* way in which they could learn the details of what had been done in their name.

58. See generally MASUR, *supra* note 1, at 25-49.

59. Throughout this Article, I will use the gendered term "condemned man" (rather than, say, "the condemned" or "the condemned person" or "the prisoner") simply because the vast majority of persons executed in New York during the 19th century were men. See *Seven Other Women Executed in State*, N.Y. TIMES, Jan. 1, 1928 (total of five women hanged in New York state in the 19th century).

60. In a recent essay, Karen Haltunnen has explored the Calvinist underpinnings of the slippery slope notion that figured prominently in early American execution sermons. The heart of the classical New England execution sermon, she suggests, was that the man about to be hanged was *not* fundamentally very different from the rest of humankind: He was not a monster, a thing apart, but rather an exemplar of the universal condition of postlapsarian

marginal or ancillary element of the event: It was essential in upholding the social meaning of the hanging. In the early nineteenth century, a hanging was more than a utilitarian crime-control measure or a retributivist settling of accounts. It was also a drama of salvation and a ritual of reconciliation between the criminal and the community, which had to be publicly enacted and declared.<sup>61</sup>

While the civil authorities tended to be quite reticent at these occasions — typically contenting themselves, as they did in the Reynolds hanging, with a reading of the execution warrant — they used Hanging Day to demonstrate the power of the state and to warn of the dire consequences of law violation. Unlike the clergy, however, their message was relayed more through ritual<sup>62</sup> and dramatic display rather than through discourse. At Reynolds' hanging, for example, an entire battalion of infantry and a company of dragoons led the gallows procession from the Bridewell to the scaffold site. True, such a marshalling and display of armed force may have had some immediate functional value — discouraging any attempt to rescue Reynolds or impede his execution,<sup>63</sup> and clearing a path for the procession through crowded urban streets. However, as Jonathan Cole argues, the military guard “primarily served a ceremonial function.”<sup>64</sup> The main reason the military were in-

humanity. Karen Halttunen, *Early American Murder Narratives*, in *THE POWER OF CULTURE: CRITICAL ESSAYS IN AMERICAN HISTORY* 67, 68-76 (Richard Wightman Fox & T.J. Jackson Lears eds., 1993). In this way, the standard execution sermon attempted to foster a strong moral and psychological *identification* between the members of the scaffold crowd and the condemned criminal. *Id.*

61. Clergymen generally presented the condemned — as Rev. Somers presented Reynolds — as “examples not only of deep depravity but of spiritual hope, pointing to their spiritual progress and dying confessions as models for the larger community to emulate.” *Id.* at 73.

62. “Ritual” is a very difficult term to capture in a tidy definition. However, the historian Peter Burke’s definition will serve nicely: Ritual is “the use of action to *express meaning*,” as opposed to instrumental or utilitarian action, on the one hand, or the expression of meaning through words or images, on the other. PETER BURKE, *POPULAR CULTURE IN EARLY MODERN EUROPE* 180 (1978) (emphasis added).

63. It is very unlikely, however, that any such danger was actually feared in this particular case. Indeed, according to Masur, there is no evidence of an attempt *ever* having been made to rescue a prisoner at the scaffold or en route thereto in the colonial or early national periods. See MASUR, *supra* note 1, at 46. One reason for the absence of conflict between spectators and State, Masur suggests, is that the condemned during this period were typically “outsiders.” Blacks, transients, soldiers, and youths were those most frequently executed. Thus, there was “no obvious constituency to challenge the probity of the hanging.” *Id.* However, Steven Wilf has found that in 1797 the New York City sheriff requested Governor Jay to call out the militia for an execution because he feared a rescue attempt. See Steven R. Wilf, *Anatomy and Punishment in Late Eighteenth-Century New York*, 22 *J. Soc. Hist.* 507, 520 (1989).

64. Jonathan Cole, *Remembering Murder: Execution Rituals and Murder Narratives in New York, 1800-1895*, at 15 (paper presented at the Legal History Colloquium, New York

cluded by the Sheriff, who had primary responsibility for organizing the Hanging Day ceremonies, was to provide a visible display of the government's power. The show of armed force, in other words, was a reminder that every crime constituted rebellion against the law and that the criminal was an enemy of both the people and the state. In addition, the standard order of precedence in the execution procession, with the Sheriff at the procession's head,<sup>65</sup> had a representational character.<sup>66</sup> The gallows procession was quite clearly a ritual of rule, designed to reinforce and legitimize the prevailing political and social hierarchy.

There was abundant Christian symbolism as well in the traditional Hanging Day ceremony. For an early nineteenth century populace, deeply imbued with the imagery of Christianity, a public execution — especially, an execution by hanging — had inescapable associations with the Crucifixion. The long execution procession, therefore, may have called to mind Christ's *via dolorosa*.<sup>67</sup> Additional elements of religious symbolism may be seen in the condemned's attire<sup>68</sup> and perhaps in the wagon bearing the open coffin.

Again, the contrast with McElvaine's execution is quite stark. McElvaine's executioners made no discernible effort to use the occasion to generate and circulate meanings and values. They were already, in an important sense, death work "professionals"; their actions were instrumental rather than symbolic. The clergymen, who occupied center stage at Reynolds' hanging, were here just bit

University Law School) (Spring 1993) (copy on file with author).

65. Typically, too, it was the Sheriff who had the privilege of signalling the moment for "launching the prisoner into eternity." The conventional signal was the dropping of a handkerchief.

66. Cf. Mary Ryan, *The American Parade: Representations of the Nineteenth-Century Social Order*, in *THE NEW CULTURAL HISTORY* 131-153 (Lynn Hunt ed., 1989) (analyzing the representational character of nineteenth century American urban parades); Paul A. Gilje, *The Common People and the Constitution: Popular Culture in New York City in the Late Eighteenth Century*, in *NEW YORK IN THE AGE OF THE CONSTITUTION 1775-1800*, at 48-49 (Paul A. Gilje & William Pencak eds., 1992) (explaining how the order of precedence in the Grand Federal Procession, held in New York City in July 1788 to celebrate the ratification of the Constitution, was designed to strengthen the social distance between various urban groups and occupations and to reinforce the legitimacy of the reigning social hierarchy).

67. This is evident in William Hogarth's great 18th century painting, "The Idle 'Prentice,'" which depicts the Tyburn procession.

68. The standard execution attire in the first part of the nineteenth century was a long white burial shroud covering the whole body of the condemned. The black trimming on Reynolds's garb was somewhat less common, but hardly unprecedented. See McDade, *supra* note 25, at xxxi; see also JONES, *supra* note 50, at 108-109 (1982). On the meaning of the black trim, see MASUR, *supra* note 1, at 47. According to McDade, the shroud disappeared by mid-century. Thereafter, black became the preferred color, and prisoners began to wear suits. McDade, *supra* note 25, at xxxi.

players, confined to private and unrecorded exhortations to the condemned man. Gone altogether was the Christian symbolism and imagery of Hanging Day. It was not the condemned man who wore white now, but the doctors; McElvaine was decked out in a dark business suit.

The McElvaine electrocution then, exemplifies a capital punishment practice that has been almost<sup>69</sup> entirely de-ritualized and secularized — emptied of visible moral purpose, shorn of imagery and symbolism, stripped of passion and emotional content. Most simply put, by the 1890s, the imposition of the death penalty had already ceased to point to anything beyond itself. The authorities were now primarily concerned with “getting the man dead” as quickly, smoothly, efficiently, and impersonally as possible. And no one else present — neither the clergymen, the witnesses, nor the condemned man himself — challenged that agenda. Even the newspaper reporters focused on the purely technical aspects of the execution. McElvaine’s “last words” were reported rather perfunctorily, as were the clergymen’s exhortations. The reactions of McElvaine’s family went wholly unnoted, as did those of the relatives of the murder victim. For the newspaper reporters — as for Warden Brown, Dr. McDonald, and the other physicians present — the focus of interest was not how well McElvaine had died, but how well he had been killed.

A related respect in which McElvaine’s execution differs sharply from Reynolds’ is in its pace and dramatic structure. The Reynolds hanging was a leisurely paced affair, beginning at ten-thirty with the jailyard prison service and ending shortly before one o’clock. Moreover, the entire proceeding, while following a customary script,<sup>70</sup> had a dramatically “open” and fluid quality to it. The authorities tolerated a fair amount of improvisation along the way. Most obviously, they granted Reynolds three rather unusual requests — to speak out of turn, to have his father ascend the scaffold for a final parting, and to address the crowd a second time.<sup>71</sup>

---

69. Isolated remnants of the older rituals do remain: For example, at McElvaine’s execution, Warden Brown gave the signal for the switch to be thrown by dropping a handkerchief. This had been the customary signal in the Hanging Day ceremony.

70. It was not until 1835 that the state legislature gave county sheriffs some guidance on the procedures to be followed in conducting an execution. Before then, state law simply prescribed the mode of execution (hanging) and left the sheriffs to their own devices in conducting the proceedings on Hanging Day. As Jonathan Cole rightly notes, sheriffs in various parts of the State tended to incorporate similar elements (military procession, execution sermon, etc.) “because they had to accommodate similar local authorities.” See Cole, *supra* note 64, at 13.

71. Accommodations of this sort were by no means uncommon. According to McDade, “reasonable requests by the condemned” were generally indulged. McDADE, *supra* note 25,

What is more, the duration of the proceeding (over 2 hours), the length of the procession (upwards of 2 miles), and the size of the crowd invited popular participation of various sorts. Along the processional route, for example, people could converse with Reynolds — inquiring about his state of mind, bolstering his courage, urging him to repentance or defiance, or whatever. Both the relaxed pace and spatial openness increased the risk that something might go awry. Yet the authorities were willing — or perhaps compelled by tradition and popular expectations — to take this risk. As a result, a public execution like Reynolds' had a certain aleatory quality to it. Almost anything might happen — and sometimes did.<sup>72</sup>

Perhaps most striking in this connection is that the Hanging Day ceremony provided the condemned man with considerable space for what the literary critic Stephen Greenblatt might call "self-fashioning." The prisoner had abundant opportunity on Hanging Day to "establish for himself a *public character*"<sup>73</sup> — be it heroic or craven, penitent or defiant, devout or blasphemous. Through his choice of attire, his gestures, his mien and deportment, and above all his scaffold speech, the condemned man could attempt to give public meaning to the event and to individualize his death.<sup>74</sup> True, he was encouraged, if not pressured, by religious and secular authorities to enact (as Reynolds reportedly did) the ideologically preferred drama of repentance and redemption — to make a full and public recantation of his sins, plead for the mercy of God, and warn the crowd (especially its youthful members) to learn from his example.<sup>75</sup> But the condemned was free — free, I think, in a non-trivial sense — to reject the role prescribed for him and choose another. He could choose instead, as some did, to die "game" — joking, unrepentant, defiant, or indifferent. And, what is perhaps most important, the opportunity to take and play a part — to cut a figure, if only in his own eyes — may have made the

---

at xxxii. He gives two examples of unusual requests that were satisfied by the presiding officials: In one case the Sheriff agreed to have the scaffold painted red (although he declined to do the same to the rope!); in another, the processional band played "Bonaparte's Retreat from Moscow." *Id.* at xxxi-xxxii.

72. Cf. Thomas W. Laqueur, *Crowds, Carnival, and the state in English executions, 1604-1868*, in *THE FIRST MODERN SOCIETY* 305, 309 (A.L. Beier et al. eds., 1989) (English public executions were "the most aleatory of occasions and those responsible did very little to make them otherwise, to insure the triumph of a prescribed interpretation."). For a variety of reasons, however, public executions in the northeastern United States were characterized by less "generic slippage" and more "authorial control" than their English counterparts. *Id.* at 309.

73. See Lofland, *supra* note 40, at 308.

74. See *id.* at 307 for some examples.

75. Clergymen in turn offered the prisoner's display of true repentance as "proof of the saving grace of God." MASUR, *supra* note 1, at 41.



event somewhat less terrifying or humiliating for him. In his scaffold speech in particular, the condemned man had a wide range of options: he could confess his guilt or protest his innocence, mock or bless authority, forgive or curse his judges and executioners, blame or exculpate his parents. He could seek the sympathy and support of the crowd, excoriate enemies, incriminate confederates, or simply prolong his life a few extra minutes. He could even lambaste his lawyer, as Warren Wood did in 1854,<sup>76</sup> or give a sales pitch for the pamphlet containing his Confession, as Jesse Strang did in 1827.<sup>77</sup> And whatever the condemned man chose to say, he could be fairly confident that no one would intervene to stop him, at least not for a while. True, the available evidence suggests that prisoners in early America almost invariably played the part expected of them at public executions.<sup>78</sup> Most of our sources, however, are parties who identified with the civic and religious authorities and therefore would have been loath to publicize subversive or blasphemous scaffold speeches.<sup>79</sup> In any event, the mere *possibility* that a condemned man, with "nothing more to lose," might "curse the judges, the laws, the government and religion"<sup>80</sup> probably supplied much of the dramatic suspense of these occasions.

76. The lawyer whose competence Wood questioned subsequently brought a successful libel suit against the newspaper that printed Wood's scaffold speech. See *Sanford v. Bennett*, 24 N.Y. 20 (1861).

77. See *Jones*, *supra* note 50, at 112.

78. Contemporaneous accounts usually reported that "the unhappy man was penitent, and made a full confession of his guilt, and met his fate with fortitude." THE COLUMBIAN, October 25, 1819 (execution of George Brown). However, there are some recorded examples of convicts in New York City who refused to "play ball" with the authorities. In 1797, a man named Young, about to be hanged for killing a deputy sheriff who had attempted to arrest him for non-payment of debt, "transformed the literary form of the dying speech and last confession into an attack on those who used credit to destroy the honest working man." See *Wilf*, *supra* note 63, at 518. Young's last warning — unlike the customary admonition to avoid sin and wrongdoing — was not to let one's papers fall into the "hands of those tolerated leeches that call themselves sheriffs' officers." *Id.*

In 1829, a condemned man named Richard Johnson made his exit with a great show of bravado and indifference. A contemporaneous news account reported that "[f]rom an early hour in the morning, Johnson seemed inclined to be jocosé." See *EVENING POST*, May 8, 1829. En route by boat to Blackwell's Island, where the gallows had been constructed, Johnson made "several observations of a very unbecoming and improper character. He at one time observed that the whole excursion seemed to him like a Lafayette frolic." *Id.* To the very end, Johnson maintained "the same apathy and coldness of manners . . . He viewed the scenery, remarked upon its beauty, and made several observations upon passing occurrences." *Id.* He walked up the steps to the "fatal beam" with "a firmness and self-possession deserving a better cause . . ." *Id.*

79. See *MASUR*, *supra* note 1, at 43-45. Suppose, for example, Reynolds' final words had been curses, directed at God or Justice. Would they have been reported in contemporaneous news accounts? Probably not.

80. *FOUCAULT*, *supra* note 2, at 60.

In sum, while in one sense the Sheriff and other officials were the *auteurs* of Hanging Day — in charge, running the show — the affair still had a good deal of the dramatic openness and political instability characteristic of much of the urban “street theater” of the time. Hanging Day was, to a significant extent, semiotically up-for-grabs — a text with multiple authors. There was sufficient “space” in the ceremony for the condemned — and the crowd, too — to ignore, resist, or subvert the “preferred meanings”<sup>81</sup> of the event. Even in democratic America, the “great spectacle of punishment” ran the ever-present “risk of being rejected by the very people to whom it was addressed.”<sup>82</sup> That possibility, however remote, must have made the authorities a bit skittish. It also may have given the crowd a delicious sense of solidarity and collective power.

Whereas Reynolds’ hanging was loosely structured, leisurely paced, dramatically open, discursively rich, and unashamedly passionate, McElvaine’s electrocution was precisely the opposite: It was carefully planned, tightly controlled, dramatically closed, virtually wordless, and coldly unemotional. It was an almost purely technical task, performed by men whose eyes were trained on their stopwatches and whose chief anxiety was that something unexpected would happen. Not only did these officials make no pronouncements about Justice or Morality, they also carefully arranged things so that there was virtually no “space” in which meanings, oppositional or otherwise, could be generated and circulated by others.

The impact of this change on the condemned man himself was significant. McElvaine was taken from his nearby cell, briskly escorted into the death chamber, rapidly strapped into the chair, and promptly dispatched. He was given no real opportunity to speak,

---

81. This term has its origin in a seminal essay by the British writer Stuart Hall. See Stuart Hall, *Encoding/Decoding*, in *CULTURE, MEDIA, LANGUAGE* 128-139 (Stuart Hall et al. eds., 1980). Hall starts from the post-structuralist premise that “meaning” is not an inherent property of a cultural text or object. Television programs, for example, do not have a single meaning; they are relatively open texts, capable of being “read” in different ways by different people. According to Hall, however, cultural products generally do “prefer” a set of meanings which serve to strengthen the “dominant” ideologies. *Id.* A recipient whose social location, particularly her class location, aligns her with the dominant ideology, will — Hall argues — tend to accept the “preferred” meaning. *Id.* But some recipients, whose social position sets them in direct opposition to the dominant ideology, will “resist” the text’s preferred meaning and instead produce what Hall calls an “oppositional” reading. They will “infect” or “recode” it in such a way that it serves their own particular needs and interests. *Id.* I will use “preferred” and “oppositional” meaning/reading in roughly this manner, without intending thereby to endorse Hall’s view that class location is the primary determinant of how cultural products are “read.”

82. See FOUCAULT, *supra* note 2, at 63.

much less to establish a "public character" for himself.<sup>83</sup> The time that elapsed between his first entry into the death chamber and the first electric current was somewhere between one and two minutes — hardly enough time for "the actor in [him to] come to the aid of the terrified animal."<sup>84</sup> Previously the leading player in a public theater of justice, the condemned man had now become a "patient" — the passive object of a medico-bureaucratic technique.

3. *Medicalization.* The lengthy account of Reynolds' hanging in the *Commercial Advertiser* ended with this statement: "The cap was then drawn over his eyes and at a quarter before one o'clock while he was earnestly crying to God for pardon the drop fell and he was launched into eternity." What is interesting here is what was left *unreported*. Did Reynolds' neck vertebrae snap, killing him quickly? Or did he die a slow death by strangulation? Did he struggle? Did he suffer? We are not told. The reporter's narrative account, so detailed in other respects, is entirely silent on this one point. For whatever reason, the speed and painfulness of Reynolds' death were evidently not considered important parts of "the story." It was Reynolds' soul, not his body, that claimed the narrative's center — just as it was the clergymen (Revs. Somers and Roy), and not the physician (Dr. Walker), who claimed center stage in the hanging ceremony.

Just the opposite is the case in McElvaine's execution. There it is the physicians who dominate the scene, while the (unnamed) clergymen are marginalized. The central, if not only, question addressed by contemporaneous news accounts is how fast McElvaine died and whether he suffered any physical pain. The presiding state physician, Dr. McDonald, lost no time in trying to persuade the reporters who were present that, contrary to appearances, "pain was not felt." And the newspaper accounts exhibited little interest in the state of McElvaine's soul. For the journalists — as for Dr. McDonald and the other physicians present — it was the body that alone mattered. For them, too, the only questions of importance were medical ones: Exactly when did McElvaine die? When did he lose consciousness? Did he feel any pain? Was there any burning of the flesh? And so forth.

Part of the reason for this radical change in focus was the novelty of the technology employed to execute McElvaine. As will be discussed below, the first electrocution had been performed only a

---

83. As the sociologist John Lofland has remarked, it is very hard "to be anybody in but nine, fifteen, or sixty seconds." Lofland, *supra* note 40, at 309.

84. Albert Camus, *Reflections on the Guillotine*, in *RESISTANCE, REBELLION, AND DEATH* 174, 204-05 (1961).

year and a half earlier, and the technique had yet to win public acceptance. It is therefore not surprising that the main point of journalistic interest in the McElvaine execution was whether it was a "success." But success is not a concept that defines itself. What is significant, and what needs explaining, is that everyone in the room at Sing Sing — journalists included — operated with pretty much the same notion of what a successful execution was. It was an execution which produced a quick, clean, certain, and above all, *painless* death.

How and why had this medicalized death become the execution ideal? Why did late nineteenth-century physicians — sworn to abide by the Hippocratic Oath ("Primum non nocere": "First of all, do no harm") — feel free, or even obligated,<sup>85</sup> to involve themselves in the conception, design, testing, and actual administration of a new mode of "dealing death"? Part of the answer lies in a major shift in attitude toward physical pain that swept Europe and America in the nineteenth century. As early as 1836, J.S. Mill observed that the sight, even the idea, of physical pain had become so "revolting," especially to the more "refined" classes, that "all those necessary portions of the business of society which oblige any person to be the immediate agent or ocular witness of the infliction of pain, are delegated by common consent to the peculiar and narrow classes: to the judge, the soldier, the surgeon, the butcher, and the executioner."<sup>86</sup> A half century later, Nietzsche noted that "almost everywhere in Europe today we find a pathological sensitivity and receptivity to pain."<sup>87</sup> There is, he lamented, "a deadly hatred of suffering generally," which leads to, among other things, a "mistrust of punitive justice."<sup>88</sup> And the American pragmatist philosopher William James, writing in 1901, opined that a great "moral transformation" had "swept over our Western world" in the nineteenth century: "We no longer think that we are called on to face physical pain with equanimity." Accounts of suffering now "make[]

---

85. A prominent New York City physician and leading member of the New York City Medico-Legal Society, opined in 1888 that:

it behooves the medical profession, which, more than any other class, has knowledge of the processes of living and dying, to consider the means adopted by the legal authorities for taking lives which have been forfeited to the State; to decide whether or not these methods are humane, and to advise the law-makers concerning improvements, if any are necessary and possible.

J. Mount Bleyer, *Best Method of Executing Criminals*, 5 MED.-LEGAL J. 424, 427-28 (1888).

86. See John Stuart Mill, *Civilization*, reprinted in MILL'S ESSAYS ON LITERATURE AND SOCIETY 148, 163 (J.B. Scheenwind ed., 1965).

87. Friedrich Nietzsche, *Beyond Good and Evil*, reprinted in BASIC WRITINGS OF NIETZSCHE 421 (Walter Kaufmann ed., 1968).

88. *Id.* at 306.

our flesh creep morally as well as physically."<sup>89</sup>

These observations have been amply borne out by the recent work of social historians. It is now conventional wisdom that it was in the nineteenth century that people "for the first time" developed "that dread of pain — that 'instinctive' revulsion from the physical suffering even of others," which is "uniquely characteristic of the modern era."<sup>90</sup> This new horror of physical pain — "not only of pain in oneself but of pain wherever found"<sup>91</sup> — contributed to the emergence and rapid growth of a "humane" sensibility, and generated activity on a number of fronts. It underlay the introduction of the first "painkillers" — patent medicines designed not to cure disease, but simply to relieve pain.<sup>92</sup> It motivated campaigns against such "blood sports" as bull and bear baiting, cock-fighting, and bare-knuckle prize-fighting.<sup>93</sup> It gave rise to the first societies for the prevention of cruelty to animals<sup>94</sup> and children.<sup>95</sup> It powered the mid-nineteenth century movement to curtail the use of corporal punishment in the schools, armed forces, prisons, and homes.<sup>96</sup>

The influence of this "revolution in feeling"<sup>97</sup> can be seen as well in a profound reorientation in the professional values and practices of nineteenth century physicians.<sup>98</sup> Prior to that time, the majority tradition in Anglo-American medical ethics had resolutely opposed any effort to relieve suffering that involved even a slight risk to life.<sup>99</sup> Indeed, in the late eighteenth and early nineteenth century, professional duty was generally defined as the unhesitat-

89. See WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* 239-40 (1901).

90. JAMES TURNER, *RECKONING WITH THE BEAST: ANIMALS, PAIN, AND HUMANITY IN THE VICTORIAN MIND* at xi-xii (1980).

91. *Id.* at 79.

92. See MATTHEW S. PERNICK, *A CALCULUS OF SUFFERING: PAIN, PROFESSIONALISM, AND ANESTHESIA IN NINETEENTH CENTURY AMERICA* 72 (1985) (describing the introduction of the first nationally marketed pain cures in the 1840s).

93. See TURNER, *supra* note 90. For a discussion of nineteenth century efforts to abolish prize-fighting, see ELLIOTT J. GORN, *THE MANLY ART: BARE-KNUCKLE PRIZE FIGHTING IN AMERICA* (1986).

94. The first American society for the prevention of cruelty to animals was established by Henry Bergh in New York in 1866. See TURNER, *supra* note 90, at 46-52. On the emergence of anti-cruelty legislation during the 19th century, see generally David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800s*, 1993 *DET. C.L. REV.* 1 (1993).

95. Societies for the prevention of cruelty to children generally "hived off" SPCAs. See TURNER, *supra* note 90, at 123.

96. See generally MYRA C. GLENN, *CAMPAIGNS AGAINST CORPORAL PUNISHMENT: PRISONERS, SAILORS, WOMEN, AND CHILDREN IN ANTEBELLUM AMERICA* (1984).

97. TURNER, *supra* note 90, at 139.

98. See generally PERNICK, *supra* note 92.

99. *Id.* at 104-05.

ing infliction of extreme suffering to save life.<sup>100</sup> Steeped in this tradition, most early nineteenth century physicians, for example, believed the use of drugs to relieve suffering at the risk of life to be ethically impermissible.<sup>101</sup>

Around the middle of the nineteenth century, however, a growing number of American physicians began to develop what the historian Matthew Pernick has described (a bit tendentiously) as a "more balanced" view of professional duty<sup>102</sup> — one in which the relief of suffering, *for its own sake*, became a permissible, even laudable, goal of medical practice. This view — that it was "as much the business of a physician to alleviate pain, and to smoothe the avenues of death, when unavoidable, as to cure diseases"<sup>103</sup> — reflected the new societal horror of physical pain<sup>104</sup> that has already been described. It also reflected "a technical revolution" in the means available for the alleviation of physical pain that occurred in the first half of the nineteenth century — the isolation of morphine, the invention of the hypodermic syringe, and, above all, the discovery of inhalation anesthesia.<sup>105</sup> Together these developments produced a significant alteration in the professional values and practices of nineteenth century physicians. Mid-nineteenth century doctors embraced anesthesia swiftly and enthusiastically,<sup>106</sup> prescribed alcohol and opiates to relieve suffering, and even began to administer drugs to provide painless deaths for terminally ill patients. They also designed new and less painful methods for the "euthanasia" of unwanted animals. It was only a short step — albeit a step not all physicians were willing to take<sup>107</sup> —

100. *Id.* at 109.

101. *Id.*

102. *Id.*

103. *Id.* at 112 (quoting the eighteenth century Scottish essayist John Gregory).

104. Turner notes that by the latter part of the nineteenth century "the alleviation of pain seemed . . . among the noblest, most urgent of human endeavors. Here Philistines closed ranks with philosophers. In 1891 an advertisement for a laxative inquired lilyingly: 'What higher aim can man attain than conquest over human pain?'" See TURNER, *supra* note 90, at 81.

105. See PERNICK, *supra* note 92, at 104.

106. The use of inhalation anesthesia (ether) to prevent the pain of surgery was first demonstrated in 1846 by a Boston dentist named William T. G. Morton. Its use spread very rapidly throughout the medical world — more rapidly than had earlier innovations such as smallpox vaccination. See PERNICK, *supra* note 92, at 3-4; see also TURNER, *supra* note 90, at 82 (observing that "doctors seized upon ether and chloroform with extraordinary haste, born of indescribable relief").

107. In 1890, a physician who had designed a "lethal chamber" for the "euthanasia of the lower creation," strenuously objected to the participation of physicians in the design and administration of the electric chair. In a letter to *Scientific American*, which anticipates the official position taken by the medical profession today, see *supra* note 39, Dr. B. W. Richardson wrote:

from these new practices to involvement in the development, design, and administration of a purportedly "painless" mode of capital punishment.

The various changes in nineteenth century execution practice identified in the preceding discussion — the change in the site and visibility of the execution; in its pace, dramatic structure, and social meaning; in the social composition of the execution audience; in the role of the press as surrogate for the public; in execution technology; and so on — were related to one another in complex and important ways. The overall modernization process began, however, with the formal abolition of public executions in the 1830s. So that is where I will begin the discussion.

## II. THE ABOLITION OF PUBLIC EXECUTIONS IN ANTEBELLUM NEW YORK

The rare occurrence of capital punishment in America makes it always an event of great interest.<sup>108</sup>

The movement to abolish public executions in antebellum America has often been treated as an aspect of a larger movement to abolish capital punishment.<sup>109</sup> Negley Teeters, for example, characterized the relationship between the two movements this way: "Within the movement to abolish capital punishment, the movement to abolish public hangings operated. It became a movement within a movement. One became a dynamic of the other."<sup>110</sup> There is, of course, some basis for viewing the matter this way. Certainly, many death penalty foes vigorously agitated for the privatization of executions, because they believed that hiding executions from public view would undercut, both intellectually and politically, the only legitimate justification for capital punishment: deterrence.<sup>111</sup> Furthermore, the most powerful and influential ar-

---

Ought the members of the great profession of medicine, who live to prevent pain, disease, death—ought they to lend themselves, under any circumstances, to the loathsome act of playing the part of public executioner? I, for one, answer emphatically, *no* . . . . I protest most strongly against any method of execution like electricity, or other, that shall call for the necessary aid of any man of science to carry it out. It is high time for our gaol surgeons to ask themselves whether they ought any longer to condescend to perform the miserable so-called duty of professionally witnessing capital murder. But to take the leading part in it, *never*.

63 SCI. AM. 200 (1890).

108. FRANCES M. TROLLOPE, *DOMESTIC MANNERS OF THE AMERICANS* (1832).

109. See, e.g., MACKAY, *supra* note 52.

110. NEGLEY K. TEETERS, *HANG BY THE NECK* 152 (1967).

111. The abolition of publicity, they argued, was tantamount to a confession that executions did not deter.

guments for abolition of public executions came from writers, like Edward Livingston, who urged a complete end to capital punishment. What is more, many opponents of capital punishment viewed the legislative abolition of public executions in the antebellum period as a great victory, portending an imminent end to the death penalty itself.

Nonetheless, the matter is somewhat more complicated than Teeters' neat formulation suggests. Like the issue of televised executions today,<sup>112</sup> the question whether or not to move executions "indoors" cut across abolitionist and retentionist camps. Not only did some leading abolitionists strenuously oppose the privatization of executions, but many of those who promoted or voted for this "reform" did so in the hope that it would "save" the death penalty, by strengthening its deterrent efficacy and removing its most objectionable features. In America, then, as in England,<sup>113</sup> the movement to abolish public executions "had an identity and history of its own."<sup>114</sup>

#### A. *The Decline of Public Punishments: The Contemporary Historiographic Debate*

The abolition of public executions in antebellum America was an aspect of a much broader transformation of penal practice that occurred throughout the Western world in the late eighteenth and early nineteenth centuries. For reasons that are still hotly disputed, the governments of England, France, and America moved during this period to eliminate punishments involving the public infliction of death, pain, and shame. By 1850 or thereabouts, such practices as branding,<sup>115</sup> whipping,<sup>116</sup> the pillory,<sup>117</sup> the public exposure of corpses,<sup>118</sup> and punitive public dissection,<sup>119</sup> had been

112. See *supra* text accompanying notes 7-14.

113. See DAVID COOPER, *THE LESSON OF THE SCAFFOLD* (1974).

114. *Id.* at ix.

115. Branding was abolished in England in 1779, by the same act of Parliament that authorized the construction of penitentiaries. See MICHAEL IGNATIEFF, *A JUST MEASURE OF PAIN* 90 (1978) [hereinafter IGNATIEFF, *A JUST MEASURE*]. France abolished branding in 1832. See FOUCAULT, *supra* note 2, at 10.

116. The whipping of women was ended in England in 1820. See J.J. TOBIAS, *CRIME AND POLICE IN ENGLAND, 1700-1900*, at 150 (1979).

117. In Massachusetts, for example, the pillory, along with branding and whipping, was abolished in the 1804-1805 session of the legislature, at roughly the same time that the state prison commenced operation. See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 74 (1993) (citing MICHAEL S. HINDUS, *PRISON AND PLANTATION* 100 (1980)).

118. See JUSTIN ATHOLL, *SHADOW OF THE GALLOWES* 37 (1954) (Public exposure of hanged body, usually known as "gibbeting," was ended in England in 1834.).



abolished or sharply curtailed, and "reformatory" imprisonment had been installed as the punishment of first resort for most crimes.<sup>120</sup> In the same period, capital punishment was confined to a few very grave crimes,<sup>121</sup> and a variety of measures were adopted to reduce its public visibility and "spectacular" character.<sup>122</sup>

Until fairly recently, historians tended to read this sweeping transformation of penal practice as a simple and inspiring narrative of "progress" or "reform." The penitentiary was widely seen as a considerable moral achievement, the work of philanthropists and reformers whose thoroughly admirable intention was to make penal practice both more "rational" (i.e., more effective) and more "humane" (i.e., less cruel).<sup>123</sup> The abolition of public executions

119. *Id.* Public anatomization ended in England in 1832.

120. "Imprisonment had been used as punishment on a selective but insubstantial scale prior to 1770." Michael Ignatieff, *State, Civil Society, and Total Institutions*, in 3 *CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH* 153, 159 (1981) [hereinafter Ignatieff, *State, Civil Society*]. In England judges began to make frequent use of sentences of imprisonment after the suspension of transportation in 1776. *See id.* at 159-60. France and America began to make imprisonment the punishment of first resort only after their respective revolutions. *See id.* at 160-61.

121. *See* FRIEDMAN, *supra* note 117, at 73-74.

122. England led the way here. In 1783, the Sheriffs of London abolished the traditional three mile gallows procession from Newgate through the streets of London to the Hanging Tree at Tyburn. From that year, until the abolition of public executions by Parliament in 1868, hangings in London were usually held just outside Debtor's Door at Newgate Prison. In nineteenth century Paris, too, public executions were gradually made less "spectacular." The site of the guillotine was moved about, on each occasion to a less central location, and executions were scheduled earlier in the morning, and on very short notice, to reduce the size of the crowds that gathered. In 1832, the capital prisoner detention center was moved to the outskirts of the city (Bicetre) in order to shorten the distance between it and the execution site. In 1870, the scaffolding was eliminated and the guillotine was mounted directly on the ground, so that fewer people could get a clear view. It was not until 1939, however, that public executions were abolished altogether. *See generally* DANIEL ARASSE, *THE GUILLOTINE AND THE TERROR* (1987) (Christopher Miller trans., 1989); JACQUES DELARUE, *LE METIER DE BOURREAU* (1979).

In America, or at least in its more "advanced" northeastern states, public executions were abolished very early. Connecticut acted first in 1830, followed quickly by Pennsylvania (1834), New Jersey (1835), and New York (1835). By 1845, every state in the northeast, and a number elsewhere, had followed suit. In the southern and western sections of the country, however, the abolition of public executions came much later, in some places, in the 1930s. *See, e.g.*, WILLIAM M. KING, *GOING TO MEET A MAN: DENVER'S LAST PUBLIC EXECUTION*, 27 *JULY 1886* (1990); George C. Wright, *Executions of Afro-Americans in Kentucky, 1870-1940*, 1 *GA. J.S. LEGAL HIST.* 321, 326-27, 336-39 (1991). For a news account of one of the last public hangings in America, see *10,000 See Hanging of Kentucky Negro*, *N.Y. TIMES*, Aug. 15, 1936, at 30.

123. *See* Ignatieff, *State, Civil Society*, *supra* note 119, at 153-54. This traditional account, which credits the expressed good intentions and high purposes of the reformers, has recently been defended with considerable force and sophistication. *See* ADAM HIRSCH, *THE RISE OF THE PENITENTIARY* (1992).

was conventionally "explained" in similar fashion. According to the stock story, political elites, steeped in the writings of such progressive thinkers as Bentham, Beccaria, Rush, and Livingston, came to view public executions as "barbarous" and "indecent" spectacles, degrading and brutalizing to the condemned and the spectators alike.

In the 1970s, however, a trio of theoretically ambitious and powerfully argued books, Michel Foucault's *Discipline and Punish*,<sup>124</sup> David Rothman's *The Discovery of the Asylum*,<sup>125</sup> and Michael Ignatieff's *A Just Measure of Pain*,<sup>126</sup> took dead aim at this Whiggish story of Reform Triumphant. Although these books differed markedly in focus, approach, and intellectual style, their accounts converged in a number of crucial and suggestive respects. Most importantly, all three seemed to agree that "the motives and program of [eighteenth and nineteenth century penal] reform were more complicated than a simple revulsion at cruelty or impatience with administrative incompetence."<sup>127</sup> While differing to some extent among themselves about the sincerity (and significance) of the reformers' declared intentions,<sup>128</sup> they shared the view that the "humanitarian" critique of eighteenth century punishment derived "from a *more* not less ambitious conception of power."<sup>129</sup>

The penitentiary in particular, these revisionist historians argued, was best understood as a new and more potent method of *social control*, which aimed for the first time in history at altering — "reforming" or "rehabilitating" — the criminal's personality.<sup>130</sup> The aim of the penitentiary's sponsors, Foucault said, was "not to punish less, but to punish better; to punish with an attenuated severity perhaps, but in order to punish with more universality and

124. FOUCAULT, *supra* note 2.

125. DAVID ROTHMAN, *THE DISCOVERY OF THE ASYLUM* (1971).

126. IGNATIEFF, *supra* note 115.

127. Ignatieff, *State, Civil Society*, *supra* note 120, at 156.

128. Ignatieff and Rothman place more emphasis on, and give more credence to, the religious beliefs and humanitarian intentions of the reformers than does Foucault. Here, as elsewhere, Foucault takes a militantly anti-psychological approach, "setting aside the whole issue of intentions." See Randall McGowen, *The Body and Punishment in Eighteenth-Century England*, 59 *J. Mod. Hist.* 651, 653 (1987). For Foucault, neither morality nor social institutions are grounded in the tactics of individual actors. All psychological motivation is the *result* (rather than the source) of "strategies without strategists." See HUBERT L. DREYFUS ET AL., *BEYOND STRUCTURALISM AND HERMENEUTICS* 109 (1982) ("Instead of origins, hidden meanings, or explicit intentionality, Foucault the genealogist finds force relations working themselves out in particular events, historical movements, and history.")

129. Ignatieff, *State, Civil Society*, *supra* note 120, at 156 (emphasis added). The reformers' criticism, as Foucault put it, was "directed not so much at the weakness or cruelty of those in authority, as at a bad economy of power." FOUCAULT, *supra* note 2, at 79.

130. Ignatieff, *State, Civil Society*, *supra* note 120, at 156.

necessity; to insert the power to punish more deeply into the social body."<sup>131</sup> Similarly, Rothman argued that the sponsors and architects of the penitentiary in early nineteenth century America were motivated less by "humanitarian" concerns than by anxiety about the perceived breakdown of the colonial social order and the emergence of a new, restless, socially and geographically mobile population. The penitentiary, Rothman argued, was the creation of people who believed that they were facing a "crisis of order," and who subscribed to environmentalist theories of crime that rendered "obsolete" such traditional methods of social control as corporal punishment and public shaming.<sup>132</sup>

While these revisionist historians were chiefly concerned with explaining the emergence of the carceral system, they also provided a parallel and equally iconoclastic account of the elimination of public executions. On their view, public executions were abolished or curtailed not (or at least not only) because they were suddenly felt to be "barbaric" or "degrading" or "inhumane," but because they were semiotically unstable and socially disruptive. Public executions may once have functioned to terrorize and edify the scaffold crowd. But by the end of the eighteenth century, public executions seemed to inspire more crime and social deviance than they deterred. Executions in France in the eighteenth century, Foucault says, had taken on the aspect of "carnival": "[R]ules were inverted, authority mocked and criminals transformed into heroes."<sup>133</sup> Public executions had become "centres of illegality: [O]n execution days, work stopped, the taverns were full, the authorities were abused, insults or stones were thrown at the executioner, the guards and the soldiers; attempts were made to seize the condemned man, either to save him or to kill him more surely; fights broke out, and there was no better prey for thieves than the curious throng around the scaffold."<sup>134</sup> Worse still, the crowds that gathered for a spectacle intended to instill awe and

---

131. Foucault, *supra* note 2, at 82.

132. See ROTHMAN, *supra* note 125, at 57-58, 105. Unlike their Calvinist predecessors, who had located the cause of crime in an innately evil human nature, the reformers of the 1820s and 1830s subscribed, Rothman argued, to an "environmentalist" theory of deviant behavior. *Id.* at 62-66. Crime was now seen as a product of disordered social relations. *Id.* at 66. On this view, Rothman suggests, the traditional response to crime, the infliction of physical pain and shame, was bound to fail, because it could not alter the offender's character or dispositions. Only if the offender were isolated from bad environmental influences could he be "rehabilitated and rendered law-abiding." *Id.* at 82. The invention of the penitentiary, according to Rothman, followed logically from the reformers' environmentalist etiology of deviance. *Id.* at 79.

133. FOUCAULT, *supra* note 2, at 61.

134. *Id.* at 63.

terror came away instead with a heightened sense of their own solidarity and collective power. More than anything else, Foucault seems to suggest, it was the "political danger" posed by this experience of popular solidarity and power that explains why late eighteenth and early nineteenth century authorities adopted measures to reduce the visibility and "spectacular" character of punishments and executions.<sup>135</sup>

Ignatieff, focusing on England rather than France, offered a similar explanation for the abolition of the Tyburn procession in London in 1783. Prior to that year, offenders had been drawn by cart for two miles through the crowd-thronged streets of central London to the Hanging Tree at Tyburn. In theory the procession was supposed to enhance the deterrent effect of the execution. But "[i]n practice the ritual was taken over by the crowd and converted into a thieves' holiday and poor people's carnival."<sup>136</sup> The ribaldry and violence of "Tyburn Fair" had been the subject of sharp criticism since the early eighteenth century.<sup>137</sup> However, it was only in 1783, at the height of a severe crime wave,<sup>138</sup> and with the memory of the Gordon Riots of three years earlier still fresh, that the Sheriffs of London and Middlesex abolished the Tyburn procession. They did so, says Ignatieff, not from some "humanitarian" impulse, but rather "to regain control of a ritual that had slipped out of their hands into the clutches of the mob."<sup>139</sup> The gallows were removed from Tyburn to the portals of Newgate in order to deny offenders "the opportunity for public defiance" and to deny the scaffold crowd "the chance to turn the ritual to its own purposes."<sup>140</sup> On Ignatieff's view, then, the shift away from public punishment was in reality a new strategy of power. Although its sponsors presented it as a "humanitarian reform," it was actually a method of social control better adapted than its predecessor to the conditions and demands of an increasingly urban, industrial, and democratic society.

This revisionist account of the decline of public punishment has not wanted for critics of its own. The Dutch historian Pieter

135. *Id.*

136. IGNATIEFF, A JUST MEASURE, *supra* note 115, at 88.

137. *See, e.g.*, BERNARD MANDEVILLE, AN ENQUIRY INTO THE CAUSES OF THE FREQUENT EXECUTIONS AT TYBURN (1725).

138. This crime wave had its origins in the end of the war in the American colonies. "Demobilization, accompanied by a trade depression following the loss of the colonial market, resulted in the most serious increase in crime since the 1720s." IGNATIEFF, A JUST MEASURE, *supra* note 115, at 82 (citing PHYLLIS DEANE & W. A. COLE, BRITISH ECONOMIC GROWTH, 1688-1959 (1969)).

139. *Id.* at 89.

140. *Id.* at 90.

Spierenburg, in particular, has put forward a self-styled "counter-paradigm" that attributes the decline of public punishment not to the need for more potent means of social discipline and control, nor to the political danger of public executions, but rather to the changing "sensibilities" of the middle and upper classes.<sup>141</sup> What Spierenburg has argued is that beginning in the eighteenth century, the upper and middle classes in Europe<sup>142</sup> grew markedly more "sensitive" to the infliction, and even the sight of, physical suffering. Even "the pain of delinquents who had committed serious crimes and whose guilt was not in doubt" began to produce "feelings of anxiety" in some middle and upper class spectators.<sup>143</sup> Consequently, public punishments of a kind that had always been taken in stride, such as branding, flogging, and the pillory, now became very difficult for these elites to witness or inflict.<sup>144</sup>

Following the lead of Norbert Elias,<sup>145</sup> Spierenburg traces this sea change in sensibilities to developments in state-formation. He contends that late eighteenth and early nineteenth century elites became more sensitive, squeamish, and empathetic because of the emergence of strong, stable, and internally peaceful modern states.<sup>146</sup> Moreover, as impersonal and bureaucratic forms of rule displaced personal and unstable ones, political elites increasingly found sanguinary punitive displays to be unnecessary. In the weak states of early modern Europe, such spectacles had been needed as

141. See PIETER SPIERENBURG, *THE SPECTACLE OF SUFFERING* 183-99 (1984) [hereinafter SPIERENBURG, *THE SPECTACLE OF SUFFERING*].

142. Spierenburg did not examine American developments in *The Spectacle of Suffering*, but in a subsequent article, he extended his theory to include America. See Pieter Spierenburg, *From Amsterdam to Auburn: An Explanation for the Rise of the Prison in Seventeenth-Century Holland and Nineteenth-Century America*, 20 *J. Soc. Hist.* 439 (1987).

143. SPIERENBURG, *THE SPECTACLE OF SUFFERING*, *supra* note 141, at 185.

144. Spierenburg writes:

The privatization of repression meant first and foremost the removal from public view of a spectacle that was becoming intolerable. . . . [T]he fact that the criminals were still seen as wicked underlines *the change in sensibilities* which is involved. It means that the spectacle of punishment, even though it was inflicted upon the guilty, was still becoming unbearable. By the end of the eighteenth century some of the audience could *feel the pain of the delinquents on the scaffold*. The implication, paradoxically, is that inter-human identification had increased.

*Id.* at 184 (emphasis added).

145. See NORBERT ELIAS, *THE HISTORY OF MANNERS* (1978); NORBERT ELIAS, *POWER AND CIVILITY* (1982). For a good brief summary of Elias' approach to cultural history, see JOHN F. KASSON, *RUDENESS AND CIVILITY: MANNERS IN NINETEENTH-CENTURY URBAN AMERICA* 9-12 (1990).

146. "[R]elative pacification," Spierenburg says, "produced domesticated elites." SPIERENBURG, *THE SPECTACLE OF SUFFERING*, *supra* note 140, at 201. John Stuart Mill made the very same point in his unjustly neglected early essay, *Civilization* (1836). See *supra* note 86.

manifestations of authority, but eighteenth and nineteenth century states were strong and confident enough to do without them. The political authorities could now "afford to show a milder and more liberal face."<sup>147</sup> In short, punishment was privatized because the "spectacle of suffering" had become simultaneously "distasteful" and superfluous.<sup>148</sup>

What we have, then, are three paradigms, three distinct ways of understanding the decline of public punishments in general, and of public executions in particular. The first, the "traditional" or "Whig" model, emphasizes moral ideas and individual conscience as the motors of institutional change. The second, the "revisionist" paradigm, views changes in penal practice as shifting strategies of social control. The third, which Spierenburg's work exemplifies, traces the decline of public punitive rituals to the changing "sensibilities" of politically and culturally dominant elites.<sup>149</sup>

A "Whiggish" account of the abolition of public executions in antebellum America might begin, for example, in 1773, with the American publication of Beccaria's *An Essay on Crimes and Punishments*, which provided many of the arguments subsequently used by Edward Livingston and others to explain why public hangings did little to deter crime;<sup>150</sup> or in 1787, with the publication of

147. SPIERENBURG, THE SPECTACLE OF SUFFERING, *supra* note 141, at 205.

148. *Id.*

149. In a provocative recent article, the historian Steven Wilf has suggested that Spierenburg's counter-paradigm has helped to swing the "historiographic pendulum back towards the traditional account of late eighteenth-century discontent with public executions." See Steven Wilf, *Imagining Justice: Aesthetics and Public Executions in Late Eighteenth-Century England*, 5 YALE J.L. & HUMAN. 51, 52 (1993). "Newfound sensibility," Wilf says, "like old-fashioned benevolence, rests upon the humanitarian motives of legal reformers." *Id.*

This is, I think, somewhat misleading. Spierenburg does not simply reinstate the traditional Whig history of eighteenth and nineteenth century punishment in new and more sophisticated language. Whatever the ultimate merits of his arguments, he offers a distinct way of thinking about the "modernization" of penal practices in general, and of execution practices in particular, one which attempts to avoid both the hyper-idealism of Whig history and the reductionism of some "critical" approaches. Unlike the traditional Whig historians, Spierenburg does not emphasize "conscience" as the motor of institutional change. Nor does he assume that the "rehabilitative" penal practice proposed by the reformers was more "humane" in intention or result than the "retributive" practices of the 18th century. Indeed, he stresses the complexity and moral ambiguity of what is conventionally taken to be "progress."

150. Beccaria relied on an associationalist psychology to explain why the spectacle of capital punishment had very little deterrent effect. The crux of his argument was that the human mind is shaped more effectively by moderate and frequent impressions than by powerful but infrequent ones: "It is not the intensity of punishment that has the greatest effect on the human spirit, but its duration, for our sensibility is more easily and more permanently affected by slight but repeated impressions than by a powerful but momentary action." CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 46-47 (1963). While the sight of an execution may be powerful and arresting, its effect is fleeting due to "the rapid forgetfulness

Benjamin Rush's pamphlet, *An Enquiry Into the Effects of Public Punishments Upon Criminals, and Upon Society*, which provided many of the arguments subsequently used by American legislators and writers to explain why public executions had a "brutalizing" and "demoralizing" effect on spectators.<sup>151</sup> Without intending, however, to deny the importance of these writings and ideas to the abolition of public executions, I can see no good purpose in retelling this familiar intellectual history here. What I shall do instead in the next section is to consider whether the abolition of public executions in antebellum New York can be usefully explained by means of either of the other two paradigms I have described. In other words, to what extent was the abolition of public executions in New York "a strategy of social control" and/or an expression of "changing middle-class sensibilities"?

### B. *The Social and Cultural Origins of Privatization*

In 1828, just three years after James Reynolds' hanging,<sup>152</sup> New York's Law Revisors decided that county sheriffs should be given the discretionary authority to conduct executions within the confines of prisons or prison yards. In their Notes, the Revisors explained that this provision was "drawn with a view to avoid the consequences frequently attending the parade of public executions." What were these untoward "consequences," which were so well known at the time that no further explanation was deemed necessary?

One such consequence is vividly illustrated by the newspaper account of a public hanging in New York City in 1824. The *Evening Post* described the execution procession from the Bridewell to the site of the gallows as follows:

An immense concourse of people, many of them from N. Jersey and Long Island, assembled this forenoon in the neighbourhood of the Bridewell, to witness the removal of Johnson to the place fixed on for his execution this day. From the Park as high up as Grand street, the crowd was so great that

---

that is natural to man." The example of a criminal imprisoned at hard labor, in contrast, is a more effective deterrent because it makes a "lasting impression": "The most powerful restraint against crime is not the terrible but fleeting spectacle of a villain's death, but the faint and prolonged example of a man who, deprived of his liberty, has become a beast of burden, repaying the society he has offended with his labors." *Id.* at 49.

151. Rush argued that public punishments, "so far from preventing crimes by the terror they excite in the minds of spectators, are directly calculated to produce them." Benjamin Rush, *Essays, Literary, Moral, and Philosophical*, 139 (2d ed. 1806). He reached this conclusion from an analysis of the psychological effects of the sight of the criminal's punishment on those who witness it.

152. See *supra* text accompanying notes 18-28.

carriages could not pass. On a moderate calculation, this large body is supposed to have consisted of at least 50,000 human beings. At 12 o'clock, the prisoner was taken from his cell and placed on a wagon with his coffin, which proceeded up Broadway, accompanied by the Sheriff and guarded by a strong body of troops . . . . So great was the interruption, that the military could not proceed more than a few yards at a time before they were obliged to stop to clear away the rabble. The gallows, we understand, is erected on the second avenue, near the Alms House, about three miles from town . . . .<sup>153</sup>

As was the case with James Reynolds' hanging a year later, the official arrangements here -- the 3-mile procession at midday through the city's busiest districts -- had the effect of maximizing the event's visibility. However, in the 1820s demographic change began to put considerable strain on this dramaturgical strategy.

The 1820s culminated a period of explosive population growth in America, especially in its cities. In the forty years from 1790 to 1830, the population of New York increased more than sixfold, from 33,000 to 215,000.<sup>154</sup> The rural population was growing rapidly as well, and this, coupled with improved transportation, meant that Hanging Day crowds, both in the metropolis and elsewhere, grew much larger.<sup>155</sup>

In New York City the large crowds began to create serious headaches for the authorities. One common problem, as the news account just quoted suggests, was traffic congestion.<sup>156</sup> Another was the increasing incidence of serious accidents. For example, in Cooperstown in 1827, a stand erected to accommodate spectators collapsed, killing two people and injuring several others.<sup>157</sup> A year later, great numbers of people took to boats to view a double hanging on Blackwell's Island in New York harbor. Several boats overturned, reportedly resulting in the drowning of a number of

153. EVENING POST, Apr. 2, 1824 (emphasis added).

154. See PAUL BOYER, *URBAN MASSES AND MORAL ORDER IN AMERICA, 1820-1920*, at 3-4 (1978) (citing George Rogers Taylor, *American Urban Growth Preceding the Railway Age*, J. ECON. HIST., Sept. 1967, at 311).

155. The 50,000 figure cited in the newspaper account quoted above is probably inflated, however. That figure would represent almost a quarter of the city's population.

156. In 1829, the *Evening Post* reported that on the morning of a double hanging, large crowds gathered outside the Bridewell at an early hour: Broadway was "blocked up with spectators, so much so as to make it difficult for carriages to pass; and for a short time before the procession moved every avenue leading to the prison was completely closed." EVENING POST, May 7, 1829.

157. TEETERS, *supra* note 110, at 40 (citing THOMAS McDADE, *THE ANNALS OF MURDER* 550 (1961)). This incident prompted a Cooperstown newspaper editor to lament: "[T]hese public executions always bring with them more or less disasters." PAUL O. WEINBAUM, *MOBS AND DEMAGOGUES* 109 (1977).



persons.<sup>158</sup>

In the late 1820s New York City authorities began to experiment with ways of reducing the size of Hanging Day crowds. Execution processions were started earlier in the morning.<sup>159</sup> Attempts were made to quicken the procession's pace in order to prevent the crowd from keeping up with it.<sup>160</sup> With increasing frequency, the authorities had the scaffold erected on islands in the harbor.<sup>161</sup> The result was that Hanging Day in the late 1820s began to look more and more like a spectacle *in flight from its audience*. Halfway measures, however, proved useless. Large crowds continued to gather, especially for the more glamorous executions. Resourceful and determined spectators took to boats to get a view of hangings conducted on the harbor islands. Traffic congestion and accidents thus remained serious problems.

The authorities' concerns, however, went well beyond simple crowd management and traffic control. The late 1820s and early 1830s was a period when demographic, social, and economic change generated what David Rothman has referred to as a "crisis of order." In the cities especially, political and cultural elites worried about what seemed to them to be a breakdown of the colonial social order and the emergence of a new class of rootless and undisciplined people. Believing that the traditional mechanisms of social control had become obsolete, these elites devised new methods, "the asylum"<sup>162</sup> and the voluntary moral-reform association<sup>163</sup> foremost amongst them, to keep this population orderly, productive, and virtuous.

Elite fears of social unrest and disorder reached "a feverish pitch" in the late 1820s and early 1830s. Editorialists, "with increasing frequency and elevated hyperbole," expressed anxiety about the nature and extent of riotous and disorderly conduct.<sup>164</sup> Whereas collective violence had once been widely tolerated as a legitimate, even healthy, form of "republican" action, social elites and political authorities now grew very fearful of crowds, even

158. EVENING POST, May 7, 1829.

159. For example, in 1829, the prisoners were removed from the Bridewell and placed in carriages at half past eight. See EVENING POST, May 8, 1829.

160. See *id.* ("It was the intention of the authorities to have left the Bridewell with such rapidity as to prevent the rabble from keeping pace with the cavalcade. . . ."); see also COM. ADVERTISER, May 7, 1829 (describing how the prisoners were transported by carriage "with a rapidity that totally baffled the attempts of the crowd to follow the melancholy procession").

161. See WEINBAUM, *surpa* note 157, at 110.

162. See generally ROTHMAN, *supra* note 125.

163. See generally BOYER, *supra* note 154.

164. MASUR, *supra* note 1, at 100.

those which gathered for official occasions like hangings.<sup>165</sup> This shift in elite attitudes can be attributed in part to a change in the nature of rioting itself. Prior to this time, most popular rioting in America was actually under the control, and often at the behest of, elite groups, and certain norms of traditional rioting behavior were generally observed. In the 1830s, however, urban mobs began to move out "from under the restraints of upper-class paternalism," and collective violence began to look more and more like class conflict.<sup>166</sup>

At the same time there was a sharp rise in the reported incidence of rioting.<sup>167</sup> Newspaper reports of riots and other popular disturbances increased in many cities, including New York, throughout the decade of the 1820s, peaking in the very period (1833-1835) when the state legislatures of Pennsylvania, New Jersey, and New York abolished public executions.<sup>168</sup> Whether or not this reflected an actual increase in the number of riots, or a change in journalistic practice reflective of heightened middle class sensitivity to social disorder is not entirely clear.<sup>169</sup> Nevertheless, the widespread *perception* that social unrest and collective violence were increasing, even reaching crisis proportions, in the late 1820s and early 1830s probably contributed to the demand for the abolition of public executions.<sup>170</sup> Against the background of widespread collective disorder, the increasingly large Hanging Day crowds, however festive they might seem, could not but make the authorities skittish.

It would be a serious mistake, however, to view the abolition of public executions in New York, and in other northeastern states, solely as an expression of elite anxiety about crowd violence and social disorder, or about the criminogenic effect of public hangings.<sup>171</sup> Whatever may have been the case in Europe, the privatiza-

165. *Id.* at 101.

166. See Bruce A. McConachie, *Pacifying American Theatrical Audiences, 1820-1900*, in FOR FUN AND PROFIT 52 (Richard Butsch ed., 1990).

167. See generally WEINBAUM, *supra* note 157. According to Weinbaum, the chief causes of collective violence during this period were abolitionism, nativism, and labor strife. See *id.* at 55.

168. See *id.* at 55, 65 (citing figures for New York City).

169. See MASUR, *supra* note 1, at 101.

170. It can hardly be a coincidence that the first wave of state laws moving executions "indoors" occurred at precisely the time (1833-1835) when news reports of disorder peaked. See WEINBAUM, *supra* note 157, at 65 (table 2) (listing incidents of riot in New York City from 1821 to 1837). In New York City alone there were fifteen reported disturbances between August 1834 and January 1836. See *id.* at 55.

171. By the 1820s, it was widely believed that public hangings inspired more crime and social deviance than they deterred. Editorialists, legislators, and writers frequently cited examples of crimes committed by the spectators of public hangings. See MASUR, *supra* note 1,

tion of executions in America was not solely a new "strategy of social control." As Louis Masur has very convincingly argued, the movement to abolish public executions reflected as well the emergence and growing influence of new, distinctively "middle-class" attitudes about privacy, gender, and class.<sup>172</sup> In the first decades of the nineteenth century, Masur observes, the American middle and upper classes began to withdraw from the public sphere, turning inward "to the private realm of the sanctified home."<sup>173</sup> More and more, these classes insisted on a strict segregation of "masculine" and "feminine" realms, on the undesirability of social class mixing, and on the importance of emotional and physical self-control. The "ascendence of these sensibilities," he argues, "altered attitudes toward public rituals and gatherings and made certain events in the public realm, such as executions, intolerable."<sup>174</sup> Whereas once the entire community had gathered for public hangings, it now became "a class imperative not to be associated with such disturbing scenes."<sup>175</sup> Revolted by public executions, but unwilling to abolish capital punishment altogether, the elites of the northeastern states, Masur contends, solved the problem by moving hangings "indoors," where they could be conducted with proper solemnity and decorum, and without risking the moral corruption of women, children, or the "dangerous classes."

While Masur may overstate somewhat the extent to which the antebellum middle and upper classes deserted the public sphere,<sup>176</sup> he is right, I think, to link the movement against public executions to broader changes in culture and sensibility. One reason middle-class moralists and editorialists in this period railed against Hanging Day was that it threatened key elements of their world-view. For example, a public hanging in Lenox, Massachusetts in 1826 drew this censorious comment from the *Berkshire American*, which was reprinted in a New York magazine:

---

at 96-100; see also MACKAY, *supra* note 52, at 106-11.

172. Masur is not the only contemporary American historian to attribute changes in 18th and 19th century punitive practices to the changing "sensibilities" of middle and upper class reformers. Myra Glenn, for example, has argued that the efforts of antebellum reformers in New England and New York to abolish corporal punishment reflected "a profound change in attitudes toward discipline, pain, violence, and ultimately human nature." See MYRA C. GLENN, *supra* note 96, at 40. While acknowledging the desire of these reformers to strengthen discipline and social order, Glenn argues that they were motivated as well by a new "revulsion against the infliction of painful punishment." *Id.* at 54.

173. MASUR, *supra* note 1, at 103.

174. *Id.* at 102.

175. *Id.* at 96.

176. For example, the urban street "parade" was an invention of the antebellum period. See RYAN, *supra* note 66.

What a group appeared at Lenox! There were high (not high-minded) and low, rich and poor, old men and young, black and white, and all the intervening shades of colour; the farmer, the mechanic, the merchant, the laborer, the gentleman idler and the student, men of all professions and employment, and to crown the whole, *women!* yes, gracious heaven! soft, delicate, tender-hearted females who would faint at the killing of a chicken, went fifteen miles to see a fellow creature put to death! Wives with their husbands and sweethearts with their lovers! . . . Males and females jumbled together in one common mass, the former loud and boisterous, rude and disorderly, through intoxication, the latter full of affectation and false pretensions to sensibility . . . .

An hundred persons are made worse, where one is made better by a public execution. Rioting, drunkenness, and every species of disorderly conduct, prevail on such occasion to an extent never witnessed from any other cause in this land of steady habits.<sup>177</sup>

This editorial nicely illustrates Masur's thesis that Hanging Day violated emergent norms of gender and social class segregation and undermined culturally preferred notions of feminine "delicacy." Moreover, the intemperance, levity, and prodigality of Hanging Day crowds ran directly counter to such central bourgeois values as humanitarianism, self-control, and sobriety. The revelry of Hanging Day had no rightful place in a "land of steady habits." It is interesting to note in this connection that in the very same year that New York and New Jersey abolished public executions, the latter state enacted the first criminal statute prohibiting prize-fighting.<sup>178</sup> This, I think, is no mere coincidence. As the historian Elliott Gorn has observed, the antebellum middle class detested prize-fights because these events mocked its faith in progress and human perfectibility.<sup>179</sup> Public executions inspired loathing in the antebellum middle class for much the same reason. Exhibitions of both sorts deeply offended a rising, ideologically self-confident middle class that was seeking to reshape the national culture in its own self-image.<sup>180</sup>

### C. *The Resilience of Hanging Day: Popular Resistance to Legislative Reform*

In 1828, on the recommendation of New York's Law Revisors, county sheriffs were given the *discretion* to conduct executions within the confines of prisons or prison yards before a small num-

---

177. Reprinted in *The ESCRITOR* (Albany), Dec. 2, 1826, at 359 (emphasis in original).

178. New York, however, did not enact such a ban until the late 1850s. See GORN, *supra* note 93, at 66, 104.

179. See *id.* at 59-67.

180. Gorn makes this point about boxing. See *id.*

ber of official witnesses.<sup>181</sup> Not a single county sheriff anywhere in New York State took the hint, however.<sup>182</sup> Until 1835, when the legislature went further and *mandated* that executions be conducted inside prison walls, county sheriffs continued to conduct hangings in public places readily accessible to any and all who wished to attend.

The reluctance of sheriffs to depart from past practice is hardly surprising. After all, as elected officials,<sup>183</sup> county sheriffs were likely to be more responsive to the interests and desires of their local constituents than to the mere exhortations of distant legislators. And in the early 1830s public executions had a broad base of popular support. For one thing, public hangings meant crowds, and crowds meant money:

Merchants could look forward to unusual profits as hoards [sic] of viewers bought food, drink or supplies while awaiting the climactic moment. Enterprising homeowners and shopkeepers often sold admission to perches in upper floors and on roofs. Peddlers hawked food and trinkets to the milling crowds. Boys sold broadsides which described the lives and crimes of the victim in lurid detail and sometimes appended his confession.<sup>184</sup>

County sheriffs no doubt were mindful of these commercial realities. When a New York legislator attempted to persuade the sheriff of Saratoga County to conduct a private execution, the sheriff told him that such an action "would draw down upon him the ill will of the multitude of grocers and tavern keepers and merchants who always anticipate great profits from these executions. Those classes know that large crowds always attend them, and they calculate upon a fine speculation."<sup>185</sup>

Public hangings probably served the interests of certain members of the clergy as well. True, clergymen, especially Unitarians, were among the sharpest critics of public executions.<sup>186</sup> But at a time when the prestige and authority of American clergymen were

181. 2 N.Y. Rev. Stats., part IV, title 1, §§ 26-27 (1829), which read as follows:

[The death penalty] shall be inflicted, either in the prison where the convict shall be confined, or within an inclosed yard of such prison, if there be one, or in the manner heretofore accustomed, at the discretion of the sheriff whose duty it shall be to inflict such punishment.

The judges of the county courts of the county, the justices of the peace, and the marshals and constables of the city or town in which any execution is to be had, shall be notified thereof by the sheriff, at least three days previously, and shall be entitled to witness such [punishment]. . . .

182. See S. REP. NO. 79, N.Y. 58th Sess., 4 (1835).

183. See NY Rev. Stats., Part I, Chap. V, § 47 (1827).

184. MACKAY, *supra* note 52, at 109.

185. See ALB. EVENING J., Mar. 28, 1835 (quoting statement of State Senator Young).

186. See MASUR, *supra* note 1, at 108-09.

apparently waning, Hanging Day offered some local ministers a captive audience for their sermons,<sup>187</sup> a much larger audience than they typically enjoyed. It thus afforded them an opportunity to bolster their influence, burnish their personal reputations, and demonstrate, through the condemned man's repentance, God's (and their own) power to save souls.<sup>188</sup> Local storeowners, innkeepers, and clergymen, therefore, all had strong interests in the continuation of Hanging Day. Any move by a county sheriff to exercise his newly conferred discretion to conduct a hanging "indoors" would probably have incurred some resistance from these quarters. It would also have aroused the ire of many in the general community. For Hanging Day, especially outside New York City, was a festive occasion, a sort of "high holiday,"<sup>189</sup> which brought work and routine to a stop.<sup>190</sup> Even in nineteenth century America, the occasion probably still bore some resemblance to the Carnival of early modern Europe. Like Carnival, and other festival days, Hanging Day was a day for conviviality and consumption, for eating and drinking and fighting, for dressing up and singing and telling jokes, "a privileged time when what oft was thought could for once be expressed with relative impunity."<sup>191</sup> Like Carnival, too, it was a day apart when the usual hierarchies of class and gender

---

187. Although execution sermons originated in 17th century England, "the execution sermon as an autonomous literary genre seems to have been an invention of the New England Puritans." Daniel Cohen, *In Defense of the Gallows: Justifications of Capital Punishment in New England Execution Sermons, 1674-1825*, 40 AMERICAN QUARTERLY 147, 148 (1988). The form survived the decline of Puritanism, however, and was used by Presbyterian, Episcopalian, Baptist, and evangelical preachers, both in New England and elsewhere in the northeast, throughout the 18th and into the early 19th century. See Ronald A. Bosco, *Lectures at the Pillory: The Early American Execution Sermon*, 30 AM. Q. 156, 175-76 (1978). Although there were some variations in elements and style among execution sermons, the "range of concerns treated remained remarkably stable": "Ministers berated condemned criminals for their misconduct, explained how they had arrived at so terrible a fate, warned others against similar wickedness, and sought to turn the awful spectacle at the gallows into an occasion for saving souls." Cohen, *supra*, at 148.

188. See MASUR, *supra* note 1, at 42-43.

189. It is crucial in this regard to remember that hangings in New York (and elsewhere in the northeast) were quite infrequent events during the early nineteenth century. Some counties might go ten or twenty years, or occasionally even longer, between hangings.

190. Obvious differences aside, there is an intriguing resemblance here between public hangings and what Elihu Katz and Daniel Dayan have recently christened "media events," such events as the Olympic Games, the Super Bowl, John F. Kennedy's funeral, or the wedding of Charles and Diana. On their analysis, the distinguishing characteristic of these events is that they bring the flow of normal everyday life to a halt and offer viewers a chance for communal and "liminal" experience. They characterize these events as the "high holidays of mass communication." See DANIAL DAYAN & ELIHU KATZ, *MEDIA EVENTS: THE LIVE BROADCASTING OF HISTORY* (1992).

191. BURKE, *supra* note 62, at 182.

were suspended, and social classes mingled on easy and familiar terms.<sup>192</sup> And like Carnival, public hangings may have offered "opportunities for sadism": Onlookers could hurl epithets or objects at the condemned and thus "participate, if only for the moment, in the 'right of the masters.'"<sup>193</sup>

The carnivalesque quality of execution crowds was often noted by eighteenth and nineteenth century English and American writers, almost always with chagrin and disgust.<sup>194</sup> Indeed, as already noted, "[t]he growing disparity between the official meaning of the public execution and its carnival inversion at the hands of the crowd"<sup>195</sup> figured prominently in the arguments made for the abolition of public hangings in the 1820s and 1830s. The point to be seen here, though, is that however much middle-class moralists and editorialists might rail against its wastefulness and levity, Hanging Day was deeply rooted in popular life and culture. Any county sheriff in New York who exercised his newly granted discretion to conduct a hanging "privately" would thus have risked the great displeasure of many of his local constituents.

#### D. *The End of Hanging Day?: The Act of 1835*

It did not take very long for state legislators to realize that they had been politically naive in expecting elected county sheriffs to choose to conduct executions in private. In 1834, Carlos Emmons introduced a bill into the New York State Assembly "the great object of which was to prevent the vicious assemblages and demoralizing tendencies of public executions."<sup>196</sup> A county sheriff could not be relied on to act in accord with "the public interest," Emmons argued, because he would inevitably be swayed by the commercial interests of the particular town where the hanging was to take place. The only solution was to take the matter out of the sheriff's hands altogether, and make it *mandatory* that he conduct hangings in private.<sup>197</sup>

192. *Id.*

193. Laqueur, *supra* note 72, at 340 (quoting Nietzsche).

194. See, e.g., MANDEVILLE, *supra* note 136; HENRY FIELDING, AN ENQUIRY INTO THE CAUSES OF THE LATE INCREASE OF ROBBERS AND RELATED WRITINGS (1751); Edward Livingston, *Introductory Report to the Code of Crimes and Punishments*, in 1 THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE (Salmon Chase ed., 1873). For a discussion of English critics, see Barry Faulk, *The Public Execution: Urban Rhetoric and Victorian Crowds*, in EXECUTIONS AND THE BRITISH EXPERIENCE FROM THE 17TH TO THE 20TH CENTURY 77-91 (William B. Thesing ed., 1990).

195. Faulk, *supra* note 194, at 80.

196. *New-York Legislature*, ALB. EVENING J., Mar. 10, 1834, at 2.

197. *Legislature of New York*, DAILY ALB. ARGUS, Mar. 11, 1834, at 2.

Emmons's bill was attacked from several directions. Some legislators defended public executions on the traditional deterrence rationale. Others opposed "private" executions because they would leave the general public uncertain whether justice had been done properly, or at all.<sup>198</sup> Finally, some abolitionist legislators voiced opposition to Emmons' proposal. Samuel Bowne, for example, declared that if there were to be any executions, they should be public, in order "that their consequences and enormity might be more vividly impressed on the public mind." The "disgust" produced by public executions, he predicted, "would soon lead to the entire abolition of capital punishment."<sup>199</sup> Bowne's abolitionist colleague, Amasa Parker, concurred: Public executions, he said, "would be ultimately instrumental in abolishing capital punishments."<sup>200</sup> Assailed from all sides, Emmons' bill failed to reach a final reading.

The legislature returned to the issue in the following session, however. A select committee of the state Senate, established at the urging and under the leadership of Senator Ebenezer Mack,<sup>201</sup> filed a report in April, 1835, recommending that New York finally "cast off the shackles of custom": All executions should be conducted within prison walls before a small number of officials and "respectable citizens."<sup>202</sup> The Report considered two arguments against privatization. One was that public executions "are the only means of impressing upon the mass of the people a salutary dread and warning, and serve as a public admonition of the certainty of punishment following upon crimes;" and the other was that "punishments ought to be subjected to the public scrutiny, so that it may be certainly known that the requirements of the law, and no more, have been fulfilled."<sup>203</sup> The Report found both unpersuasive. In rejecting the deterrence argument, the Report quoted at length from a number of English and continental authorities, including Bentham, Romilly, Beccaria, and Dagge, to establish the proposition that public executions tend to "harden and brutalize the feelings of the populace, to familiarize them with scenes of blood, to incite disgust instead of terror or respect for the laws, and to increase

198. See, e.g., *id.* at 2 (statement of Mr. Gordon); *New-York Legislature*, ALB. EVENING J., Mar. 10, 1834 (statement of Mr. Myers).

199. *Legislature of New York*, DAILY ALB. ARGUS, Mar. 11, 1834.

200. *New-York Legislature*, ALB. EVENING J., Mar. 10, 1834.

201. *Legislature of New York*, ALB. EVENING J., Mar. 28, 1835, at 2.

202. S. REP. NO. 79, N.Y. 58th Sess. (1835). The Mack committee candidly acknowledged that it had been a mistake to leave matters to the discretion of county sheriffs: "As might have been foreseen," their Report stated, no sheriff was able and willing to resist "the solicitations of depraved curiosity, and the importunities of self-interest." *Id.* at 4.

203. *Id.* at 4.



offenses both in number and enormity."<sup>204</sup> In answer to the objection that private executions would open the door to official abuse and evasion, and would shake public confidence in the just execution of the laws,<sup>205</sup> the Report observed that even when hangings were conducted in public, only a very small proportion of the State's population had "ocular evidence of the execution." Although hangings drew large crowds, most people were informed (and satisfied) by word-of-mouth reports and newspaper accounts. Given this, the Report concluded, it would be "sufficient to guard against any evasion, perversion or abuse, that a specified number of officers and respectable citizens shall be present at each execution, as public witnesses, not as private spectators thereof." An official account from these officers and witnesses, "duly attested and published," would "convey to the public a full knowledge of the event, with all its solemn and salutary influences, unaccompanied by any of its contaminating and counteracting effects."<sup>206</sup>

Having disposed of what it believed to be the two chief objec-

204. *Id.* at 2-5.

205. This objection to privatization figured much more prominently in the English debate on public executions than it did in this country. In mid-19th century England, both radical abolitionists and conservative retentionists resisted the privatization of executions on the ground that publicity was necessary to maintain public confidence in the system of justice: If "the people" did not see an execution, it was frequently argued, they would not believe that it had taken place, especially if the culprit were rich, noble or well-connected. Time and again, the opponents of privatization reminded their audience that there was still a widespread popular belief that rich or well-connected convicts, like the minister Dr. Dodd and the banker Fauntleroy, had managed to cheat the gallows. For representative *Times* editorials opposing privatization on this ground, see *THE TIMES* (London), Nov. 14, 1849, at 3 (stating that unless executions were public, "the mass of people would never be sure"); *THE TIMES* (London), July 17, 1856, at 8 ("We will venture to say that the common people will never believe a man to be really hanged who had friends to get him off or money to bribe his gaolers.").

A related objection to privatization, also commonly made by both traditionalists (like *The Times*) and radicals (like Mayhew, Cobden, Ewart, Gilpin, and Bright) was that "privacy" would open the door to abuse and tyranny. Entrusting government with the power to put men to death in secret would subvert English "liberties." See generally COOPER, *supra* note 113.

It is interesting to speculate why these two "political" objections to privatization were so much more influential in England than they were in this country. A number of possibilities come to mind. One is that mid-19th century America was a much more egalitarian society than was England. Thus, it was much less likely that privatization would be construed as "class legislation," or that the general public would have serious doubts about even-handed justice. A second possible explanation is that England's history of "Star Chamber" punishment supplied both a rhetoric and a precedent for anxiety about "private assassination." In any event, the power of these two political objections to the privatization of executions may help explain why public executions survived considerably longer in England than they did in the American northeast.

206. S. REP. No. 79, N.Y. 58th Sess. 10 (1835).

tions to privatization, the Mack Committee went on to claim that public executions were very harmful to the spiritual interests of the condemned man himself. During his confinement, the prisoner was an object of great curiosity and solicitude, and "receive[d] numerous and indiscriminate visits and protestations of kindness and deep regard for his present comfort and eternal happiness." On Hanging Day, he was led forth "amidst military array, to the sound of solemn music, and followed by a long procession, [was] escorted with 'pomp and circumstance' to the gallows." There he was "surrounded by professed friends, public functionaries and spiritual advisers, and [saw] before him an immense mass of his fellow-beings, whose sympathies and good will . . . he still [sought] and hope[d] to conciliate." Was it any wonder, the Mack Committee asked, that at this moment the condemned man "[felt] himself of greater consequence than he ever was before"? Was it any wonder that he felt obliged to put on a false show of repentance and religious frenzy? Was it any wonder that he regarded himself, and was regarded by many others, "as a martyr, rather than a malefactor, expiating his offence upon the altar of justice"?<sup>207</sup>

In the view of the Mack Committee, the condemned man would be much more likely to come to a just appreciation of his fate, and hence a sincere, rather than sham, repentance, if he were to approach execution day in solitude and solemn silence. For it "[was] in solitude, and not in crowds, that the human mind receive[d] its deepest and most thorough convictions."<sup>208</sup> Thus, it would be better *for him*, as well as for society, if he were to die *privately*, away "from the glare and the murmurs of the multitude." In such a setting, "attended only by the officers and appointed witnesses of the law, whose duty he appreciate[d], and whose character he respect[ed]," he would be "most likely to realize the justice of his sentence, and to meet the solemn crisis with a 'broken and contrite heart,' with true contrition and sincere repentance."<sup>209</sup>

In May, 1835, the Senate and the Assembly, in a pair of lopsided votes, accepted the recommendations of the Mack Committee and formally abolished public executions.<sup>210</sup> Section one of "An Act to Abolish Public Executions" mandated that executions would henceforth be conducted "within the walls of the prison of the county in which such conviction shall have taken place, or within a yard or enclosure adjoining said prison." Section two of

207. *Id.* at 9-10.

208. *Id.* at 10.

209. *Id.*

210. See Act of May 9, 1835, ch. 258, 1835 N.Y. Laws 299 [hereinafter Act of 1835].

the Act imposed on the county sheriff the duty to "invite the presence" of the following persons: the judges, district attorney, clerk, and surrogate of the county; two physicians; and "twelve reputable citizens" to be selected by him. The same section also required the sheriff to permit the presence, if requested, of two ministers (chosen by the condemned) and of the condemned's immediate relatives, and also of "such officers of the prison, deputies and constables as [the] sheriff . . . shall deem expedient to have present." However, "no other persons than those herein mentioned shall be permitted to be present at such execution, nor shall any person under age be allowed to witness the same." Finally, Section three of the Act set forth procedures for the preparation, signing, and filing of an official certificate of execution, and for its publication in "the state newspaper," and in one newspaper, if any, printed in the county in which the execution was held.<sup>211</sup> With the enactment of this statute, New York became the fourth state, after Connecticut (1830),<sup>212</sup> Pennsylvania (1834),<sup>213</sup> and New Jersey (1835),<sup>214</sup> to ring down the curtain on Hanging Day.<sup>215</sup>

---

211. This Section provided that the sheriff and judges attending the execution were to prepare and sign a certificate "setting forth the time and place thereof, and that such criminal was then and there executed in conformity to the sentence of the court;" that they were then to procure the signatures of the other "public officers and persons, not relatives of the criminal, who witnessed such execution;" that the sheriff was to file the certificate in the county clerk's office, and arrange for a copy thereof to be published "in the state newspaper, and in one newspaper, if any, printed in said county." Act of 1835, *supra* note 210.

212. See Act of June 5, 1830, ch. 1, § 147, 1830 Conn. Pub. Acts 284. ("The punishment of death, when by law required, shall, in all cases, be inflicted . . . within the jail, or within an enclosed yard, so as to prevent public observation . . .").

213. See Act of Apr. 10, 1834, Pub. Act No. 127, 1833-34 Pa. Laws 234. This statute probably provided the model for New York's law.

214. See Act of Mar. 5, 1835, 1834-35 N.J. Laws 170.

215. Even after 1835, however, *federal* executions in New York (as elsewhere in America) remained public events. As late as 1860, for example, a federal hanging was conducted on Bedloe's Island in New York harbor, on a spot that was visible from both lower Manhattan and Brooklyn. The site was selected, according to the *New York Times*, "for the purpose of giving as many persons as possible an opportunity to witness the spectacle." N.Y. TIMES, July 14, 1860, at 1. On a balmy summer day, tens of thousands of New Yorkers lined the piers and crammed into boats to watch the celebrated hangman, "Monsieur New York," do his work. See EDWARD VAN EVERY, SINS OF NEW YORK: AS "EXPOSED" BY THE POLICE GAZETTE 245-53 (1930); see also N.Y. TIMES, July 14, 1860, at 1 ("Steamboats, barges, oyster sloops, yachts and rowboats swarmed everywhere in view of the gallows . . . There were barges there with awnings spread, under which those who were thirsty imbibed beer.").

## III. "PRIVATE" EXECUTIONS IN NEW YORK: 1835-1888

And now that executions must be private, we are not to come in contact with them, any more than with Asiatic cholera.<sup>216</sup>

In Part I, I suggested that the "modernization" of execution practice in nineteenth century New York had three interrelated, but analytically distinguishable, dimensions: Capital punishment was 1) withdrawn from the presence and sight of the general public; 2) stripped of its ceremonial and dramatic elements; and 3) rendered (at least purportedly) painless by a new technology conceived and designed in part by medical professionals. In Part II, I examined the first step in this modernization process: the formal abolition of public executions by the New York legislature. The business of this Part is to examine what happened *after* public executions were formally abolished in 1835. To what extent was the privatization of capital punishment in New York slowed or compromised by popular or official resistance? Did the change in the site and visibility of executions, the relocation of executions from the public square to the prison yard, engender any changes in the way in which the death penalty was imposed? Did any of the traditional forms and rituals of Hanging Day survive the abolition of public executions in New York, and if so, why and how and for how long? What role, if any, did the press play in this process?

Briefly stated, what we shall see is that the state legislature's attempt to modernize execution practice was largely thwarted at the local level in the decades before the Civil War. Officially, executions became "private" affairs in 1835. But, in fact, they remained semi-public theatrical events. Even in the decades after the Civil War, hangings in non-metropolitan parts of New York continued to look very much like the "carnavalesque" public hangings of the early nineteenth century.<sup>217</sup> In the larger cities, however, a recognizably "modern" style of execution practice began to take definite shape in the 1870s and 1880s. The pacesetter in this process was New York City, and it is on developments there that I

216. William Lloyd Garrison, *Editor's Journey to New Hampshire*, HANGMAN, January 15, 1854, at 1.

217. For example, in January 1875, large numbers of "country folks," undeterred by icy roads and bitter cold, came from miles around to attend a hanging on Long Island. According to an account in the *New York Times*, "the occasion was regarded in the light of a 'circus day' . . . laborers trudged on foot and the farmers came in sleighs and wagons to see the show." *Two Murderers Hanged*, N.Y. TIMES, Jan. 16, 1875, at 2. Some of the people who were unable to gain entry to the yard where the gallows were erected used jackknives to cut holes in the wood fence surrounding the yard in order to get a glimpse of the proceedings. Others found viewing perches in the branches of nearby trees. *Id.*

will primarily focus.

### A. *Reconstituting the Execution Audience*

The declared purpose of the 1835 Act was to put an end to the "vicious assemblages and demoralizing tendencies of public executions."<sup>218</sup> The sponsors of the Act wanted executions to be simple, solemn, dignified events, free of pomp and display. The execution audience, now purged of spectators drawn to the event out of "morbid curiosity" or blood lust or the desire for entertainment, would be comprised *exclusively* of persons whose presence was compelled by official or civic "duty." The condemned man, unfussed over, would die quietly and sincerely penitent. And the general public would be satisfied to read in their newspapers the official certificate of execution. That was the legislative design. It promptly foundered, however, on the rocks of popular resistance, official connivance, and journalistic opportunism.

1. *Public Access to Executions After 1835.* If the legislators who abolished public executions in 1835 expected ordinary New Yorkers to acquiesce meekly in the elimination of Hanging Day, events must have quickly disillusioned them. Just six months after the 1835 Act took effect, Richard Jackson was hanged at 7 a.m. in the yard of Bellevue Prison in New York City. "No less than five hundred persons" were on hand, "some of whom climbed over the walls in despite of all the exertion used for their exclusion."<sup>219</sup> In 1838, New York City hangings were moved to a courtyard of the newly opened prison in the Halls of Justice, popularly known as the "Tombs,"<sup>220</sup> whose massive granite walls could not be so easily scaled. Nevertheless, large crowds continued to gather in the adjacent streets or on nearby rooftops in the hope of catching a glimpse or a sound of the proceedings inside.

For example, in the early morning of a scheduled hanging in 1842, "the Tombs were literally besieged by a mob, blocking up every street around it, all assembled not with the hope of getting

---

218. See *supra* note 196.

219. See *Execution of Richard C. Jackson*, N.Y. HERALD, Nov. 20, 1835, at 2.

220. After 1838, every hanging in New York City was conducted at this location. The Halls of Justice was a massive granite structure in the "Egyptian style," occupying a square bounded by Centre, Franklin, Elm, and Leonard Streets in southern Manhattan. The Tombs was a prison of detention only, where persons charged with crimes were confined before and during their trials. Prisoners sentenced to death were held there until their execution. See JAMES D. McCABE, *NEW YORK BY SUNLIGHT AND GASLIGHT* 414 (1881). For descriptions of the Tombs in the mid-nineteenth century, see McCABE, *supra*, at 409-15; CHARLES SUTTON, *supra* note 44, at 48-52.

admission, but to gaze eagerly at the walls that contained the miserable prisoner and to catch what rumors they could of what was going on within them."<sup>221</sup> Prior to a double hanging in 1851, "the avenues and entrances leading to the City Prison were densely crowded by anxious persons, some with tickets of admission, but a much larger number without, awaiting with anxious expectation to push their way in, if possible."<sup>222</sup> Two years later, more than five thousand persons collected in the general vicinity of the Tombs for another double hanging, many of them taking up available viewing positions on the rooftops and in the windows of nearby buildings.<sup>223</sup> At James Rodgers' hanging in 1858, the roofs of buildings overlooking the prison yard "were literally jammed with human beings, some of whom, clinging to the chimneys and railings, appeared to be in great danger of falling."<sup>224</sup> The best positions, from which a "tolerable view" of the gallows could be commanded, fetched from ten to fifty cents.<sup>225</sup>

It was not until after the Civil War<sup>226</sup> that New York City's sheriffs developed both the political will and the technical ability to do what the legislature in 1835 had clearly commanded them to do, namely, withdraw executions completely from the sight of the general public.<sup>227</sup> At the execution of George Wagner in 1867,<sup>228</sup> and on several subsequent occasions,<sup>229</sup> a "canvas awning" was

221. 1 THE DIARY OF GEORGE TEMPLETON STRONG: YOUNG MAN IN NEW YORK 190-91 (Allan Nevins & Milton Halsey Thomas eds., 1952). The scheduled hanging did not come off because the prisoner committed suicide in his cell.

222. *The Double Execution*, N.Y. HERALD, July 26, 1851, at 1.

223. See *Double Execution at the Tombs*, N.Y. HERALD, Jan. 29, 1853, at 1.

224. *Execution of Rodgers, The Boy-Murderer*, EVENING POST (New York), Nov. 12, 1858, at 1.

225. See *Execution of James Rodgers*, N.Y. TIMES, Nov. 13, 1858. Even more resourceful were the inmates of the Tombs, who sometimes used mirrors to obtain oblique views of the proceedings from their cells. See, e.g., *The Execution of the Negro Dorsey*, N.Y. HERALD, July 18, 1857, at 4.

226. I do not mean to suggest that the Civil War itself had anything to do with this change in official practice. Here, and throughout the remainder of this Article, I use the Civil War, and the terms "antebellum" and "postbellum," for periodization purposes only. It would be interesting, however, to think about how the Civil War experience, particularly the mass carnage and the journalistic coverage of the fighting, affected attitudes and practices in the capital punishment area. Certainly, the war took the wind out of the sails of the movement to abolish capital punishment. What is less clear is whether and how the war experience altered views about the manner in which the death penalty should be imposed.

227. On occasion, Sheriffs even adopted measures designed to "broadcast" the proceedings to people outside the prison yard. For example, it was apparently the custom in the early 1840s in New York City to toll a bell when the prisoner was launched into eternity. See LYDIA MARIA CHILD, LETTERS FROM NEW YORK 209 (1844).

228. See *Execution of Wagner*, N.Y. TIMES, Mar. 2, 1867, at 3.

229. See, e.g., *The Death Penalty*, N.Y. TIMES, May 17, 1873, at 5 (reporting execution

stretched above and in front of the gallows to conceal the hanging both from prisoners inside the Tombs<sup>230</sup> and persons atop nearby buildings.<sup>231</sup> Later the same year, another measure was implemented: Police officers were stationed on the roofs of the adjoining buildings, with instructions to keep them clear of would-be spectators.<sup>232</sup> Sometimes, as in the 1882 hanging of William Sindrim, these two methods were employed together in order to “shut out the gaze” of persons drawn to the vicinity by “morbid curiosity.”<sup>233</sup>

The upshot is that it took nearly a half-century for New York City authorities to arrange matters so that there was no longer any “spot outside the yard from which [hangings] could be witnessed.”<sup>234</sup> The execution audience was thereafter comprised *solely* of persons expressly admitted to the prison yard. Who were these privileged spectators, and how did they gain admission?

## 2. *Size and Composition of the Official Execution Audience.*

Section 2 of the 1835 Act expressly authorized Sheriffs to have present at an execution — in addition to several enumerated officials and “twelve respectable citizens” — such “deputies . . . as [they] shall deem expedient.” What the legislature probably had in mind here was the need to provide Sheriffs with some flexibility in meeting security and related needs. New York’s Sheriffs, however, immediately recognized that this provision could be put to a very different use. From the outset, their standard practice on Hanging

of Michael Nixon; stating that “[l]arge awnings hung overhead and in front [of the gallows], so as to screen the criminal’s last agony from searching eyes”) [hereinafter *Death Penalty*]; *His Last Day on Earth*, N.Y. TIMES, July 16, 1880, at 2 (reporting execution of Chastine Cox; stating that “[a] high canvas has been stretched above the Bridge of Sighs, so that persons on the buildings on the opposite side of Franklin Street will be cut off from seeing the execution”) [hereinafter *His Last Day on Earth*].

230. In 1880, a more effective method was adopted to deny prisoners a view of the execution: “[E]very prisoner from whose window the gallows could be seen was put in a different cell.” See *Balbo Expiates His Crime*, N.Y. TIMES, Aug. 7, 1880, at 2 (reporting execution of Pietro Balbo) [hereinafter *Balbo*]. I have been unable to determine whether this procedure was followed on subsequent occasions.

231. A similar technique was put into use a few years later in Buffalo. See *The Extreme Penalty*, N.Y. TIMES, Sept. 7, 1872, at 4 (“The execution was conducted with the utmost decorum and privacy . . . . The scaffold was erected in the east wing of the inclosure, and covered with an awning to prevent persons from witnessing the execution from the surrounding housetops.”).

232. See *Execution of Jerry O’Brien*, N.Y. TIMES, Aug. 10, 1867, at 8 [hereinafter *O’Brien*]. This procedure was employed with some frequency over the next twenty years. See, e.g., *Balbo*, *supra* note 230, at 2 (reporting that police officers cleared roofs of spectators and took possession of roofs until after execution).

233. See *William Sindrim Hanged*, N.Y. TRIB., Apr. 22, 1882, at 2 [hereinafter *Sindrim*].

234. *Id.*

Day was to appoint *hundreds* of "special deputies" from among their friends, cronies, and favored constituents. These "special deputies" were not given any responsibilities at executions; they were nothing more than curious onlookers.

Thus, at the Tombs hanging of James Eager in 1845, "between one and two hundred persons" were admitted "by special permission" to the prison yard. Many of them "lounged around, cracking jokes, smoking segars, and indulging in other frivolities."<sup>235</sup> Four years later, one hundred and fifty "special deputies" were admitted to the yard of the Tombs to watch the hanging of Matthew Wood.<sup>236</sup> In 1851, between five and six hundred people occupied the yard for Aaron Stookey's hanging.<sup>237</sup> And in 1853, New York City Sheriff Orser issued "tickets" for the double hanging of Howlett and Saul to several hundred persons, some of whom then sold their tickets for very tidy sums.<sup>238</sup>

The large crowd of "special deputies" at the Howlett-Saul hanging somehow came to the attention of then Governor Seymour. In a firmly worded letter, the Governor admonished Sheriff Orser to adhere both to the letter and the spirit of the 1835 Act:

You have no right or power to admit any other persons than those . . . mentioned [in the statute] . . . The admission of any one not designated is a grave offence. . . . The sheriff is authorized to allow the attendance of deputies; but this will not justify any evasion of the purpose of the law, by making special deputies with a view of admitting persons to witness executions. It is proper to have a sufficient force in attendance to prevent any interference with the ministers of justice; but it is not necessary nor proper that special deputies should witness the execution. As the only object of their employment is to restrain any crowd that may collect on such occasions, they should be stationed in and about the prison, and not in the yard where the criminals are executed.<sup>239</sup>

Chastened perhaps by this stern rebuke, Sheriff Orser mended his ways, at least for awhile. At the hanging of Joseph Clark two days later, only fifty persons — "only such persons as were required by law to be in attendance" — were admitted to the prison yard.<sup>240</sup>

235. See *Execution of James Eager*, EVENING POST (New York), May 10, 1845, at 2.

236. See *Execution of Matthew Wood*, N.Y. HERALD, July 21, 1849, at 3 [hereinafter *Matthew Wood*].

237. See *Murders of Carnel & Stookey*, N.Y. HERALD, Sept. 20, 1851, at 1 [hereinafter *Carnel & Stookey*].

238. According to one newspaper report, tickets for admission were "at a high premium" as the time for the execution approached, fetching up to twenty-five dollars apiece. See *The Hanging of Howlett and Saul*, N.Y. HERALD, Jan. 29, 1853, at 1.

239. See *Execution of Joseph Clark*, N.Y. HERALD, Feb. 12, 1853, at 4.

240. *Id.*



But by the next year, the number of persons present at the hanging of one James Hoare had climbed back to one hundred.<sup>241</sup> There were a like number of spectators in the yard of the Tombs at the hanging of Rodgers in 1858, and upwards of two hundred spectators at Tombs hangings throughout the 1860s and into the early 1870s.<sup>242</sup>

What sorts of people were favored with "special deputy" status? While it is difficult to answer this question with precision or confidence, two things are reasonably clear. The first is that "special deputies" were almost exclusively *adult men*. Minors were expressly barred by statute from attending hangings, and this prohibition seems to have been strictly enforced, even against reporters.<sup>243</sup> While the statute did not bar women from attending executions, Sheriffs consistently excluded them in the interests of "propriety."<sup>244</sup> On the very rare occasions when a woman either sought or somehow obtained access to a hanging, the fact was usually reported in the press with surprise and chagrin. In 1858, for example, the *New York Times* reported with evident disapproval that a woman — a middle-class woman no less — had "made strenuous efforts" to obtain a ticket of admission to see her husband's murderer hanged in the Tombs. According to the *Times* report, "she importuned the Sheriff, and for a long time would take no denial. It was not till the Sheriff told her that her request was highly improper that she withdrew from his office, evidently disappointed at the result of her interview."<sup>245</sup> That the "impropriety" turned chiefly on her gender, rather than her familial relationship to the victim, is clear from the fact that no eyebrow was raised when it emerged that the victim's brother had also sought an admission ticket.<sup>246</sup>

241. The jurors and members of the press, however, were admitted inside the inclosure. See *Execution at the Tombs*, N.Y. HERALD, Jan. 28, 1854, at 1.

242. See, e.g., *The Death Penalty*, N.Y. TIMES, May 17, 1873, at 5 (three hundred); *Execution of Jack Reynolds at the Tombs*, N.Y. TIMES, Mar. 10, 1870, at 1 (two hundred); *Execution of Real*, N.Y. TIMES, Aug. 6, 1870, at 2 (between two and three hundred) [hereinafter *Real*]; *O'Brien*, *supra* note 230, at 8 (over two hundred); *Thomas Hanged*, N.Y. TIMES, March 11, 1871, at 2 (three hundred).

243. See *Clark*, *supra* note 239, at 4 (stating that a reporter a few months under age 21 was required to leave the Tombs yard prior to an execution).

244. Many of the newspaper accounts of Tombs hangings in this period contain the names of some or all of the persons present in the yard. A woman's name does not once appear.

245. The woman in question promptly wrote a letter to the *Times*, indignantly denouncing this "rumor" as "entirely false." The *Times* accepted her denial, albeit not very graciously, and demanded to know who had been impersonating her. *The Rodgers Murder*, N.Y. TIMES, Nov. 17, 1858, at 2.

246. See *The Execution of Rodgers*, N.Y. HERALD, Nov. 13, 1858, at 1; *Execution of*

The exclusion of women from prison yard hangings drew caustic comment from contemporary feminists. In 1858, over one hundred persons were invited to witness the hanging of Ira Stout in Rochester. Lucy Colman, an anti-slavery activist and feminist, in a letter to the *Liberator*, noted sardonically that while ministers, doctors, officers of the law, editors, and sheriffs from neighboring counties were all present for the Stout hanging, "not one of my own sex was honored with an invitation. Man has come to know that a woman's presence is objectionable at such a place."<sup>247</sup>

Even after the Civil War, the presence of women at hangings was deemed "objectionable" by such arbiters of propriety and gentility as the *New York Times*. In 1871, for example, one John Ware was hanged in Camden, New Jersey, in a yard behind the county courthouse that was inclosed by "a high wooden fence." The *Times* reported that 150 people assembled in the yard, and that "the only unseemly portion of the proceedings" was "the appearance of several women at one of the windows."<sup>248</sup> In 1878, thousands of people poured into the small upstate town of Fonda, New York for the hanging of a black man named Sam Steenburgh. The Sheriff had been "literally besieged for weeks" by requests for admission to the yard where the hanging would take place. With evident astonishment and disapproval, the *Times* reported that two men "actually asked for admittance for their wives as well as themselves, and one man wanted a ticket for a female friend."<sup>249</sup> "Of course," the Sheriff refused these entirely improper requests.<sup>250</sup>

The second point to make is that the men who were favored with "invitations" to hangings, both before and after the Civil War, were not a socially heterogeneous group. On the contrary, in-

*Rodgers, The Boy-Murderer, supra* note 224. Two years later, when the federal government publicly executed the pirate Hicks on Bedloe's Island, the reporter for the *New York Times* observed: "There were rowboats with ladies—no, with females of some sort—in them, shielding their complexions from the sun with their parasols, while from beneath the fringe and tassels they viewed the dying agonies of the choking murderer." *Execution of Hicks, the Pirate*, N.Y. TIMES, July 14, 1860, at 1.

247. See *Execution of Ira Stout*, LIBERATOR, Dec. 3, 1858 [hereinafter *Stout*]; see also CHILD, *supra* note 227, at 208-09:

Women deemed themselves not treated with becoming gallantry, because tickets of admittance were denied *them*; and I think it showed injudicious partiality; for many of them can be taught murder by as short a lesson as any man, and sustain it by arguments from Scripture, as ably as any theologian.

*Id.* (emphasis in original).

248. See *Ware's Execution Yesterday*, N.Y. TIMES, Dec. 16, 1871, at 2.

249. See *Sam Steenburgh Murders*, N.Y. TIMES, April 19, 1878, at 1.

250. See *id.* For a full account of the Steenburgh hanging, which closely resembled the "carnavalesque" public hangings of the early nineteenth century, see FRIEDMAN, *supra* note 118, at 168-70.

vitations went largely to "professional and public men"<sup>251</sup> — judicial and law enforcement officials, local aldermen and political cronies, physicians,<sup>252</sup> attorneys, merchants, and clergymen. The 1858 execution of James Rodgers in the yard of the Tombs is typical. Prior to the hanging, the Sheriff was "persecuted by applications for admission by many of our most respectable citizens."<sup>253</sup> The one hundred or so persons admitted to the yard included several judges, an Assistant District Attorney, a Governor of the Almshouse, the Sheriff-elect, and "many other public men."<sup>254</sup> Present as well were "sundry respectable, but private persons,"<sup>255</sup> including at least five physicians, who marched in the execution procession.<sup>256</sup> At a double hanging in Brooklyn in 1866, the crowd of 400 "special deputies" was "composed of sheriffs and policemen, lawyers and doctors, reporters and clergymen, politicians and pugilists."<sup>257</sup> One thousand people were admitted to the Raymond Street Jail in Brooklyn to witness the hanging of one Alexander Jefferson in 1884. "Nearly all" of them, according to the *New York World*, were "professional men and merchants well known in New York and Brooklyn."<sup>258</sup> Included were "scores of lawyers, doctors, politicians, officeholders, [and] hangers-on of the municipal departments and offices."<sup>259</sup>

After the Civil War, the composition of the execution audience may have altered somewhat. While substantial numbers of socially "respectable" and politically prominent men continued to attend, more Runyonesque elements began to wheedle or bull their way in as well. In 1876, for example, "several hundred rowdy politicians and saloon-keepers" pushed their way into the yard of the Tombs for a triple hanging, apparently without invitations. In 1880 the 200 "privileged persons" who were admitted to the Tombs were described by the *Times* reporter as "a motley crowd, composed in

251. This is how Lucy Colman described the majority of invited guests at the Stout hanging in Rochester in 1858. See *Stout*, *supra* note 247, at 209.

252. For example, there were 23 physicians at Nix's hanging in 1873 and 18 at Chastine Cox's hanging in 1880. See *Death Penalty*, *supra* note 229, at 5; *His Last Day on Earth*, *supra* note 229, at 2.

253. *The Execution of James Rodgers for the Murder of Mr. Swanston*, N.Y. TIMES, Nov. 12, 1858, at 4.

254. *Execution of James Rodgers*, *supra* note 246, at 1.

255. *Id.* at 4.

256. Similarly, in 1860, the official execution certificate of James Stevens bore the signatures of six police justices, two county clerks, one civil justice, three physicians, five almshouse governors, two aldermen, a coroner, and fourteen unidentified men. See *EVENING POST* (New York), Feb. 3, 1860, at 1.

257. See N.Y. HERALD, Oct. 13, 1866.

258. See *Bungled by the Hangman*, N.Y. WORLD, Aug. 4, 1884.

259. *A Horrible Death Scene*, N.Y. TIMES, Aug. 2, 1884, at 3.

large part of politicians of the lower grades, who had no earthly business there but the gratification of a morbid curiosity." Many of them were "rough-looking persons," who were admitted without tickets because they were friends of the deputy sheriffs.<sup>260</sup> The *New York Times* was indignant: An editorial the following day complained that the hanging "was regarded by the Sheriff's deputies as a species of show, to which the admissions were their perquisites." Worse still, "pot-house politicians and their hangers-on" were given preference over the "few respectable men whose duty compelled their presence."<sup>261</sup>

3. *Press Access to "Private" Executions.* As should already be apparent, members of the press were regularly among those admitted to the Tombs (and other New York prisons) for hangings after 1835. A number of reporters "were present by permission of the Sheriff" at the very first indoor execution in New York City.<sup>262</sup> In the following years, the New York press succeeded in establishing for itself what might fairly be called a *de facto* right of access to executions.<sup>263</sup> Even on the rare occasions when Sheriffs — reacting to editorial criticism or a gubernatorial rebuke — were stingy with invitations for "special deputies," members of the press were admitted as a matter of course.<sup>264</sup>

The fact that reporters were able to gain prompt and easy access to what were now supposedly "private" executions requires explanation. After all, the 1835 Act nowhere stated or implied that newspaper reporters would be permitted to attend executions. Indeed, the Act did not include reporters in its list of the various

260. See *Cox Expiates His Crime*, N.Y. TIMES, July 17, 1880, at 3.

261. *Id.* at 4 (emphasis added).

262. For some reason, the reporter for the *Herald* was excluded, eliciting a howl of protest from that newspaper. See *Execution of Richard Jackson*, N.Y. HERALD, Nov. 20, 1835, at 2. This is the only complaint of discriminatory access that I have come across during this period.

263. In April, 1878, a physician addressing the New York Medico-Legal Society complained that "at every [hanging] the reporters of the daily press are present in force, as if by right, to vie with each other in giving graphic and—to use the detestable word of the day—'sensationalistic' accounts . . ." See John H. Packard, *The Mode of Inflicting the Death Penalty*, in PAPERS READ BEFORE THE NEW YORK MEDICO-LEGAL SOCIETY 517, 521 (1886) (emphasis added).

264. See, e.g., *Matthew Wood*, *supra* note 236, at 3:

No person was admitted without a sheriff's deputation—not even the reporters. So stringent were the orders given that it was difficult to obtain admission even with a deputation. Mr. Dunlap, deputy sheriff, called at the *Herald* office, in the morning, to say that the execution would certainly take place, and that a reporter would, of course, be admitted.

*Id.* (emphasis added).

persons whose presence was permitted, and it expressly provided that "no other persons" than those mentioned were to be admitted. Moreover, *pace* Masur,<sup>265</sup> there is nothing in the legislative history to suggest that the legislature contemplated that members of the press, much less representatives of the newly emergent "penny press,"<sup>266</sup> would be admitted.<sup>267</sup> On the contrary, what the Act and its history seemed to contemplate was simply the publication, in one or more newspapers, of the *official certificate* of execution — stating the *bare fact* that the death sentence had been carried out in accordance with the law.

Moreover, the presence of reporters at "private" executions could not but frustrate certain of the 1835 Act's central purposes. One such purpose was to ensure that the prisoner died without fanfare, without a large and eager audience for his "last words," without the comfort or distraction of the public gaze. Such an unheralded and obscure death, the enacting legislators believed, would be best both for society and for the condemned man himself: It would increase the salutary terror of the event, thereby enhancing its deterrent effect; and it would enable the prisoner to arrive at a true understanding of his condition and a sincere repentance. Quite obviously, both these ends would be compromised if reporters were permitted to attend hangings and then relay to the world the prisoner's last moments and final words.<sup>268</sup>

Why, then, were reporters permitted to attend "private" executions after 1835? Louis Masur suggests that reporters were welcome because newspaper accounts of hangings served to "deflect" popular opposition to the privatization of executions. The presence

---

265. See MASUR, *supra* note 1, at 115-16.

266. On the emergence and success of the "penny press," see generally DAN SCHILLER, *OBJECTIVITY AND THE NEWS: THE PUBLIC AND THE RISE OF COMMERCIAL JOURNALISM* (1981) (arguing that the great success of the penny press derived largely from its fluent use of the "republican" idiom and ideology prevalent among its public of tradesmen); SCHUDSON, *supra* note 18, at 31-60 (arguing that the penny press "expressed and built the culture of a democratic market society").

267. It is of course possible that the reason the legislature said nothing about press access to executions was simply that it thought it too obvious to require explicit mention. To evaluate this possibility, it would be useful to know more about the access privileges the press enjoyed at the time to other governmental proceedings and institutions.

268. On January 21, 1854, Warren Wood was hanged at Catskill, New York, before a crowd of invited spectators. When the time came for his final remarks, Wood inquired whether any representatives of the local press were present. A reporter identified himself, and Wood "expressed a desire that his remarks should be reported." He then launched into a long speech in which he took his defense counsel to task for incompetence. The speech was printed verbatim in several newspapers, giving rise to a libel suit by the defense attorney. See *Execution of Warren Wood at Catskill*, N.Y. HERALD, Jan. 25, 1854, at 8 (quoting the *Catskill Whig*) [hereinafter *Warren Wood*].

of reporters — especially reporters from the new “penny press,” which catered to the informational needs and interests of the laboring and artisanal classes — “permitted the appearance of openness, the illusion that the public had access to events that, in reality, had become shut off to them.”<sup>269</sup> There probably is something to this explanation, although Masur’s claim that the 1835 *legislature* implicitly relied on this rationale is not entirely persuasive. It is more plausible to suppose that it was the county sheriffs who quickly perceived that the presence of reporters at executions would go a long way toward mollifying the public. The sheriffs and their assistants probably had a surer grasp of what changes in execution practice would be tolerated than did legislators in Albany. Just as sheriffs winked at the spectators who scrambled for “cheap seats” on nearby rooftops, they may have permitted reporters to attend executions because they realized that the strong popular interest in hangings could not be legislated out of existence, but had to be accommodated in some fashion.<sup>270</sup>

In any event, the “right” of the press to attend executions seems never to have been seriously questioned or challenged in the decades after 1835. Indeed, reporters lost little time in claiming — and obtaining — *special treatment* within the prison yard. At the 1849 hanging of Matthew Wood in the Tombs, for example, the police and deputy sheriffs set up a wooden railing “about fifteen yards from the gallows,” and insisted that *all* of the spectators and witnesses stand behind it. When the reporter from the *Herald* vehemently protested the “impropriety of refusing the press the right to hear and make known the words of the dying man,” he (and two other reporters) were admitted inside the railing.<sup>271</sup> After a double hanging in 1853, the *Herald* complained that spectators had been allowed to break through a chain barricade and get much too close to the scaffold. “It would be well, on any future occasion of this kind,” the *Herald* opined, to erect “a strong wooden barricade in front of the scaffold” to keep back “the crowd.”<sup>272</sup> The *Herald*’s suggestion was quickly implemented: The following year an “iron railing” was erected in the yard of the Tombs to keep spectators at a respectful distance from the scaffold. Members of the press, however, were permitted to join the twelve official “jurors” inside the railing.<sup>273</sup>

---

269. MASUR, *supra* note 1, at 115-16.

270. Other factors also might have been at work here. Certainly, county sheriffs, as elected officials, had an understandable interest in currying favor with the press.

271. See *Matthew Wood*, *supra* note 236, at 3.

272. *Double Execution at the Tombs*, *supra* note 223, at 1.

273. See *Execution at the Tombs*, *supra* note 241, at 1.

The physical segregation of reporters from the "crowd" was accompanied by a kind of ideological separation. With increasing frequency and self-consciousness after 1865, New York City reporters began to distinguish themselves *morally* from other elements of the execution audience. A common refrain in news accounts in this period was that the reporters — like the policemen, official jurors, and physicians — were "compelled" by "duty" to attend hangings, whereas the remainder of "the crowd" was drawn there by some base motive, such as "morbid curiosity." Reporters and editorialists after the Civil War were sharply critical whenever "too many" special deputies were appointed, or (worse still) when people without admission tickets were allowed inside. And, conversely, they were unstinting in their praise on those occasions — increasingly frequent after 1865 — when the authorities limited entry to those (such as themselves) whom "business" or "duty" required to be present.

The hanging of John Dolan in the Tombs in 1876 is a good example. According to the *New York Times*, "the arrangements of Sheriff Conner and of the Police were more perfect than on any previous occasion."<sup>274</sup> What had the authorities done to earn such accolades? For one thing, they had kept the crowd outside the prison "within bounds and in perfect order." More important, "owing to the good sense of Sheriff Conner," no crowd had been permitted inside the yard either. Instead, the great majority of those admitted to the yard were "reporters and physicians, whom *business and not inclination impelled to be present.*" In light of these "admirable arrangements," it was "not surprising," the *Times* reporter observed smugly, that "the gathering was a most orderly one, and that the Police in the yard had a sinecure."<sup>275</sup>

One additional development is worth noting in this connection. On a number of occasions — precisely how often it is impossible to tell — members of the press went so far as to take an active part in the execution proceedings themselves. In 1860, for example, "gentlemen of the press" marched, albeit at the rear, of an official execution procession in the yard of the Tombs.<sup>276</sup> In 1886, fourteen reporters were sworn in as Deputy Sheriffs and acted as the official execution jury at the hanging of Miguel Chacon, affixing their names to the certificate filed with the County Clerk.<sup>277</sup> What is

---

274. See *The Death Penalty: Dolan's Execution*, N.Y. TIMES, Apr. 22, 1876, at 2.

275. For another example, see *Editorial*, N.Y. WORLD, July 10, 1886, at 6 (praising the sheriff for restricting admission to the Tombs to "the necessary deputies and legitimate reporters").

276. See *Execution of John Crummins*, N.Y. TIMES, Mar. 31, 1860, at 8.

277. See *Chacon Pays the Penalty*, N.Y. WORLD, July 10, 1886, at 8; *Editorial, supra*

most interesting about these incidents is that the reporters apparently experienced no "role confusion" or ethical conflict in being formally integrated into the execution process. Far from fearing that their journalistic independence would be—or would appear to be—compromised, the press seemed to exude pride in this official recognition,<sup>278</sup> and to relish the status or legitimacy it implied.<sup>279</sup>

### B. *The (Slow) Decline of Hanging Day Ritual*

The Act of 1835, which moved executions inside prison walls, did not mandate any change in the forms and procedures to be followed in the imposition of the death penalty. Nonetheless, the sponsors of the Act probably hoped (and expected) that once the execution audience had been shrunk down to a handful of official witnesses, the theatrical and ceremonial aspects of Hanging Day would simply disappear. Executions would become simple, sober affairs. No longer the leading player in a great public drama, no longer buoyed or distracted by friends and admirers, the condemned man would die quietly — away "from the glare and the murmurs of the multitude."<sup>280</sup>

Was this hope fulfilled? Did the "theater" of Hanging Day end when executions were privatized? Consider, for example, the January, 1853 hanging of two notorious "river thieves," Nicholas Howlett and William Saul,<sup>281</sup> in the yard of the Tombs prison in New York City. According to a detailed news report in the *Herald*, a large number of "citizens of every class" assembled outside the prison in the early morning hours in the hope of obtaining access to the prison to witness the execution. Most of them were to be disappointed, however, because only the three or four hundred

note 275, at 6. Apparently, the practice of reporters serving as jurors was quite common. A State Senate Report in 1888 stated that "the jury" at executions was "often composed of representatives of the press." See N.Y. SEN. REP. No. 17, at 90 (1888).

278. After the hanging of Chacon, at which reporters served as official jurors, the *New York World* ran an editorial effusively praising the Sheriff for restricting admission to "the necessary deputies and legitimate reporters, the latter serving as a post-mortem jury." N.Y. WORLD, July 10, 1886, at 6. The *World* was evidently pleased to make it possible for the Sheriff to conduct the proceedings without having to admit "a drove of morbid and brutalized men." *Id.*

279. This is not to say that reporters in this period in fact pulled any punches in their coverage of executions. On the contrary, the New York press in the decades after the Civil War often took the authorities severely to task when a hanging was bungled or proper decorum was not maintained. The press did not seem to have any qualms about combining "journalistic" and "civic" duties in the manner described.

280. N.Y. SEN. REP. No. 79, at 10 (1835).

281. For an account of their crime and apprehension, see GEORGE W. WALLING, RECOLLECTIONS OF A NEW YORK CHIEF OF POLICE 138-39 (1887).



persons who held a ticket of admission issued by Sheriff Orser were permitted to enter. These tickets, which had been issued primarily to political and judicial officeholders, were "at a high premium as the time advanced," some exchanging hands at the extraordinary sum of twenty-five dollars apiece.

By eleven o'clock, more than five thousand persons were in the general vicinity of the Tombs, many of them taking up viewing positions on the rooftops and windows of nearby buildings. At a few minutes before noon, an execution procession formed at the prisoners' cell. Sheriff Orser, dressed in black, with a chapeau and sword, and his first deputy, similarly attired, were at the procession's head. Next came the prisoners, "in their usual dress, with the ropes around their necks and black caps on their heads." Saul was accompanied by Reverends Evans and Camp, and Howlett by two unidentified priests. Bringing up the rear were the "execution jury" and a "posse of deputies." The procession marched from the east door of the prison, around the south end of the yard to the gallows. When Saul and Howlett reached the gallows, the Deputy Sheriff attached the nooses on each of their necks to the ropes suspended from the beam. At that point, Saul said, "Don't be in such a hurry now to jerk a fellow up, for I wish to shake hands and bid some of my friends good bye." The Sheriff acceded to Saul's request, permitting a number of his friends and acquaintances to come forward for a final farewell. Howlett meanwhile engaged in "religious conversation" with the attending priests, breaking off now and then to shake hands with friends.

Saul next asked to bid farewell to the jailkeeper who had seen to his needs during his confinement. After this request too had been granted, the Reverend Evans read the burial service to Saul, and the priests read the Litany of the Dead to Howlett. When this ceremony concluded, Saul delivered a short speech, repenting his misdeeds and asking for divine forgiveness. He then asked for a drink of water, which was promptly provided by the Deputy Sheriff. Again, Saul urged that the officials not be "in such a hurry," saying there were still more friends he wanted to take leave of. Several persons came forward, among them "Mr. Clarke, the well-known tragedian." Saul told Clarke that he deeply regretted that he had not taken to heart the moral of the play *Six Degrees of Crime*, in which Clarke had lately appeared. "If I had done so, I should not have been here now. It is now too late."

At that point, the Deputy Sheriff, his patience perhaps at last exhausted, came forward, and — over Saul's objection — began to tighten the noose and adjust the knot around Saul's neck. Sheriff Orser was "much affected," and "embraced and kissed both of the unhappy men." Several of the onlookers began to weep. The Dep-

uty Sheriff drew the black caps over the prisoners' faces, and the Sheriff gave the signal for the cutting of the rope by drawing his sword. Saul "struggled violently, but Howlett appeared to suffer little." After hanging "the usual time," the two bodies were lowered, and a quintet of doctors examined them and declared them dead.

This double hanging is, in most respects, representative of the so-called "private" executions in New York during the antebellum period. What is most striking, I think, is how *little* it differs from the public hanging of Reynolds in 1825. True, the venue and seating arrangements have been altered. But the "drama" itself is largely unchanged. While the clergymen now play a noticeably less prominent role in the proceedings than they did in 1825 — there is no execution sermon; all the clergymen do at the scaffold is read the Liturgy<sup>282</sup> — most of the ritual and formal elements of the traditional Hanging Day ceremony have either been transplanted intact, or have been adapted to their new surroundings.

Take, for example, the "execution procession." At Reynolds' hanging in 1825, the procession traveled from the Bridewell through the City's busiest streets to the scaffold site over two miles away. Now, the distance traversed is only the few hundred feet from the condemned men's cell across the "Bridge of Sighs"<sup>283</sup> to the gallows in the courtyard. But the key point to see is that the walk from the cell to the gallows retained its "processional" quality: The Sheriff, dressed in black and bearing a sword, still led the way. The prisoners, still accompanied by clergymen, walked with halter and black cap already in place. And, most interestingly, the route taken to the gallows was *not* the shortest one available: The Sheriff followed a circuitous course around the periphery of the prison yard, thus underscoring the symbolic character of the march.

The essential dramatic structure and discursive character of the event were also preserved. Like the Reynolds' hanging in 1825, the hanging here was a leisurely, fluid, and dramatically "open" affair. No one, least of all Saul, was in much of a hurry, and although there was clearly an official script of sorts, it was a very loose one. Indeed, the authorities essentially permitted the con-

---

282. The execution sermon does not appear to have survived the privatization of capital punishment, at least in New York City. While clergymen continued to offer prayers (and sometimes hymns) at the scaffold, they no longer delivered full-fledged sermons on such occasions. It would be wrong, however, to conclude that the execution sermon was a casualty of privatization. Other factors may have been at work here as well, including the declining prestige of clergymen generally and the declining public interest in this genre in particular.

283. See McCABE, *supra* note 220, at 411, for this term's origin.

demned men to dictate not only the pace of the proceedings, but much of its content as well. Saul was permitted to give a final speech,<sup>284</sup> to take his leave of friends and acquaintances, and to speak to and with members of the execution audience. In all these respects—and its unashamed emotionalism as well<sup>285</sup>—the Saul-Howlett hanging was fairly typical of the “private” executions of the 1840s and 1850s,<sup>286</sup> which showed a remarkable continuity with the public hangings of preceding decades.

The forms and rituals of Hanging Day did start to erode markedly, however, in the decades after the Civil War. Perhaps the most noticeable change was that *celerity* became a conscious ideal, even a fetish. The idea was now expressed — by prison authorities as well as the press — that a brief execution ceremony was more “humane” than a prolonged one. An early example is the Tombs hanging of Jack Reynolds in 1870. According to the *Times* reporter, the “closing ceremonies were very brief” — “by previous and humane arrangement” on the part of the Under-Sheriff.<sup>287</sup> As soon as the prisoner reached the scaffold, a “short prayer” was offered up by him and his attending priests. Then the cap was drawn down, and the rope cut.

A careful reading of news accounts after 1870 suggests that the authorities in the Tombs were now making systematic efforts to accelerate the pace of the execution ceremony. One noticeable change was that prisoners seldom delivered full-fledged final speeches anymore. Sometimes, the condemned man himself, eager to have his execution take place as soon as possible after his arrival at the scaffold, expressly declined an invitation to make a final ad-

---

284. The scaffold speech remained a central part of the execution ceremony throughout the antebellum period. While prisoners sometimes declined the invitation to make an address, the great majority seized the opportunity. The content of these speeches varied. Some followed the classic pattern, repenting misdeeds and warning against the dangers of rum, etc. See, e.g., *The Murders of Carnel & Stookey*, *supra* note 237, at 1. A surprisingly large number, however, were protestations of innocence, sometimes including accusations of perjury against state witnesses or sharp criticism of defense counsel. See *Execution of Otto Grunzig*, N.Y. DAILY TRIB., Feb. 2, 1852, at 4 [hereinafter *Grunzig*]; *Execution of James Stephens*, N.Y. DAILY TRIB., Feb. 4, 1860, at 8 [hereinafter *Stephens*]; *Warren Wood*, *supra* note 268, at 8.

285. Perhaps no part of this execution seems less “modern” than its emotionalism—the teary farewells, the sheriff’s final embrace and kiss, the weeping of spectators. But such emotional display was apparently not unusual in antebellum executions. For another example, see *Grunzig*, *supra* note 284, at 4.

286. For example, at an 1849 hanging in the Tombs, the condemned man asked to speak a second time *after* the cap had already been drawn down over his face. The request was granted. See *The Execution of Matthew Wood*, EVENING POST (New York), July 20, 1849.

287. See *Hanging for Murder*, N.Y. TIMES, Mar. 10, 1870, at 1 (emphasis added).

dress to the spectators.<sup>288</sup> On other occasions, however, the decision to dispense with the scaffold speech was made by the authorities, over the objection of the condemned. In 1875, for example, at a triple hanging in the Tombs, one of the prisoners "begged" to be allowed to "say a few words before he died."<sup>289</sup> The Deputy Sheriff, however, "denied the request, saying that if he allowed him to say anything the others would desire to be allowed the same privilege, and would thus *delay* the execution."<sup>290</sup> Why such "delay" would be undesirable — when it was expressly requested by the prisoner himself — was not made clear. Incidents like this one give purchase to the suspicion that the speeding up of executions was motivated less by considerations of "humanity" than by the desire to spare the feelings of the executioners and the spectators. I do not mean to suggest that the new emphasis on speed accounts by itself for the decline of final speeches in this period. There were probably other factors at work here as well. Most importantly, the composition of the convict population changed in several respects after the Civil War. First, a larger proportion of the individuals executed in New York City were immigrants from non-English-speaking countries. Often, these prisoners simply did not speak English well enough to hold forth before a crowd of spectators. Second, a larger proportion of those executed in New York City after the Civil War were Catholics. Whereas Protestantism encouraged condemned men to bare their hearts and souls in public before meeting their Maker, Catholicism placed greater emphasis on sacrament and private confession than on public displays of repentance.<sup>291</sup> On occasion, Catholic clergymen seem even to have actively dissuaded prisoners from delivering a planned final speech.<sup>292</sup> Third, African-Americans also appear at the scaffold with greater frequency after the Civil War. At the 1875 triple hanging mentioned above, the prisoner who "begged" for a chance to speak was an African-American. One wonders whether the Dep-

---

288. For instance, in 1860, James Stephens, when asked by the Sheriff whether he had anything to say, replied: "[n]o; only do it quick and don't keep me standing here two hours," after which he uttered a short prayer and said "I die an innocent man." See *Stephens*, *supra* note 284, at 16. Similarly, in 1870, John Real declined "the usual privilege" to address the crowd gathered in the yard at the Tombs, contenting himself instead with a statement "to the public" that had been published in the previous morning's newspapers. See *Real*, *supra* note 242, at 2.

289. See *A Triple Execution*, N.Y. TIMES, Dec. 18, 1875, at 2.

290. *Id.* (emphasis added).

291. Indeed, such displays had fallen into disrepute in certain Protestant circles as well by the 1830s. See *MASUR*, *supra* note 1, at 108-10.

292. See, e.g., *The Death Penalty: Execution of Franz Ferris, the Wife Murderer*, N.Y. HERALD, Oct. 20, 1866, at 8.

uty Sheriff would have silenced a white man quite so peremptorily. Suspicions on this score are raised by the fact that within the next several years two other black men — Chastine Cox in 1880, and Augustus Leighton in 1882 — were hanged in the Tombs without being given an opportunity to address the crowd.<sup>293</sup> Notwithstanding these other factors, however, the new emphasis on speed was undoubtedly an important reason for the postbellum decline of the final address.<sup>294</sup>

Another way in which temporal economies were made in this period was by moving certain components of the traditional scaffold ceremony to other sites. For example, the traditional practice had long been for the clergymen to offer prayers, and sometimes hymns, at the scaffold, while the condemned man stood under the gallows with a rope around his neck. In the early 1880s, however, this way of doing things came to be seen as needlessly "cruel." As a result, clergymen — on whose suggestion is not clear — began to recite the prayers *during* the execution procession. For example, at the hanging of William Sindrim in 1882, a clergyman recited the Christian burial service as the procession made its way through the prison corridors to the yard, pronouncing "Amen" just as the procession reached the gallows. This method of conducting the religious services, the *Tribune* reporter observed, "was felt by all present to be most merciful." The traditional scaffold prayer, the reporter opined, is "often the cruelest part of the execution" because it keeps the prisoner (and the spectators) in "dreadful suspense."<sup>295</sup> Similarly, at the Tombs hanging of Augustus Leighton

293. One additional factor may help explain why the authorities in this period sought to eliminate or curtail scaffold speeches. In the early decades of the 19th century, very few prisoners protested their innocence on the scaffold. The majority, as already noted, repented their sins, warned others to learn from their example, and plead for divine mercy. Around mid-century, however, for reasons that need to be explored, protestations of innocence became more frequent. Final speeches of this latter sort—which often contained stinging criticisms of judges, witnesses, and attorneys—made very good copy and were regularly reported by the press. See, e.g., *A Murderer Hanged—Execution of Joseph Brown at Hudson, N.Y.* *Times*, May 31, 1868, at 5 [hereinafter *Brown*]; *Execution of Lowenstein, N.Y.* *Times*, Apr. 11, 1874, at 7; *The Gallows, Execution of Henry Fralich at Syracuse—His Last Hours, N.Y.* *Times*, Apr. 19, 1873, [hereinafter *Fralich*]; *Grunzig, supra* note 284; *Stephens, supra* note 284, at 8; *Warren Wood, supra* note 268, at 8.

294. Here, too, traditional forms survived longer outside New York City. Even in the 1870s and 1880s, long scaffold speeches were still common at upstate hangings. See, e.g., *Brown, supra* note 293; *Fralich, supra* note 293; *A Negro Murderer Hanged, N.Y. Times*, Jan. 22, 1880. Indeed, on a number of occasions, the authorities exhibited annoyance or disappointment when the condemned man declined the invitation to make a final address. See, e.g., *Ruloff: The Sentence of the Law Executed Upon the Murderer, N.Y. Times*, May 19, 1871, at 5.

295. *William Sindrim Hanged, N.Y. Daily Trib.*, Mar. 22, 1882, at 2.

later the same year, the service for the dead was read while the procession was passing from the prisoner's cell to the scaffold, "and only a single sentence remained when Leighton stood under the fatal crossbar."<sup>296</sup>

The efforts of the authorities to accelerate the pace of the ceremony were now closely monitored by the press. Reporters began carefully to count the number of minutes, sometimes seconds, that elapsed from the time the prisoner was removed from the cell to the time of the drop — lauding the authorities when the pace was especially swift, and complaining when events moved slowly. For example, in 1870, the *Times* reported, with evident approval, that less than five minutes passed between the time the prisoner was "led out of his cell" and the time he was "suspended in the air."<sup>297</sup> The 1879 hanging of Myron Buell in Cooperstown was reported as "the quickest legal hanging [note the qualification] on record": "The procession . . . entered the jailyard at 10:36 A.M. The prisoner took his stand on the scaffold at 10:39, and, answering no, when asked if he had anything to say . . ., the trap was sprung at 10:39:30."<sup>298</sup> Records, of course, are made to be broken. And in 1888, the prison authorities at the Tombs managed to get Daniel Lyons out of his cell and hanged in just three minutes: "The forty paces from prison to gallows, the benisons of the priests, the adjustment of the noose, the signal to the agent of death within the box, the leap into the air and the awful fall occupied just this brief space," the *New York World* gushed.

When, on the other hand, there was a snag in the proceedings, the New York press was blunt in its criticism. Take, for example, the execution of William Sindrim in 1882. When the procession reached the gallows, Sindrim stationed himself under the dangling rope. The executioner's assistant promptly adjusted the noose on Sindrim's neck, and attached it to the larger rope above. Sindrim impatiently whispered to him to "hurry up; get the thing over." The black cap was pulled down over Sindrim's face, and the Under-Sheriff gave the signal with his handkerchief. Nothing happened. "Seconds of dreadful suspense followed and the drop did not fall," an outraged *Tribune* reported. Again the signal was given, and "there followed the same *cruel delay*." (It emerged afterward that the hangman, peering through the "peephole" in his "box,"<sup>299</sup> had not seen the signal because his view was obstructed

---

296. See *Strangled to Death*, N.Y. DAILY TRIB., May 20, 1882, at 1.

297. *Real*, *supra* note 242, at 2.

298. *Myron A. Buell Hanged*, N.Y. TIMES, Nov. 15, 1879, at 2.

299. This "box," which concealed the executioner from the view of both the condemned man and the spectators, was apparently a post-Civil War innovation. The first mention of it

by one of the physicians in attendance.) Finally, someone hurried into the executioner's "box" to deliver the order directly. At exactly "8:33:30" — note that reporters are now counting in seconds — the sound of the hangman's axe was finally heard, and Sindrim was lifted into the air.

Reporters did not put their watches away at the sound of the drop, however. Their newfound sensitivity to the psychological pain of the prisoner was accompanied by a new, or at least much heightened, sensitivity to his physical pain as well. The origins and implications of this development are the subject of the next section.

### C. *The End of the Rope: The Electrical Execution Act of 1888*

As already noted,<sup>300</sup> the nineteenth century was an era of heightened sensitivity to physical pain. For the first time, people developed a "dread of pain" — an "'instinctive' revulsion" from the sight or even the report of physical pain.<sup>301</sup> The influence of this "revolution in feeling," which made itself felt in nineteenth century politics, philanthropy, and medicine, can be seen in changing public and press reactions to hanging. In the first decades of the nineteenth century, the press paid scant attention to the prisoner's dying struggles. News accounts, even in the penny press, generally concluded as the account of Reynolds' hanging had — with either a stock euphemism (the prisoner "was launched into eternity" or "paid the penalty of his crime"), or a brief, boilerplate description (the prisoner "died hard" or "scarcely struggled"). Around mid-century, however, reporters began to focus on the duration and intensity of the prisoner's dying struggle,<sup>302</sup> as well as the spectators' reaction to it. High marks were now accorded to executioners when, as too rarely happened, the prisoner's neck appeared to snap immediately, bringing about a swift and painless death. When there appeared to be prolonged physical suffering, however, the press was graphic in its descriptions and harsh in its criticism, often venturing its own expert opinion as to the cause of the mishap.

In 1858, for example, James Rodgers' dying struggles were de-

---

that I have found occurs in a news account of an 1880 hanging in the Tombs. *Cox Expiates His Crime*, N.Y. TIMES, July 17, 1880, at 3 [hereinafter *Cox*].

300. See *supra* text accompanying notes 85-96.

301. Turner, *supra* note 90, at xi-xii.

302. One early example is Aaron Stookey's hanging in 1851. According to a report in the *New York Herald*, the "noose unfortunately slipped from its intended position, and the poor sufferer struggled convulsively for a space of two minutes," eventually dying of strangulation. See *Carnel & Stookey*, *supra* note 237, at 1.

scribed by the *Times* as "sickening to behold," even though the physicians on the scene offered their customary reassurance that the struggles were just involuntary muscular contractions and that the prisoner had immediately lost consciousness.<sup>303</sup> That same year, Ira Stout's eight-minute-long struggle reportedly "caused the spectators to turn away in disgust."<sup>304</sup> In 1860, James Stephens' executioner did not sever the rope "in the usual way with a blow of the hatchet," but instead — "through ignorance or design" — let it run off slowly. As a result, "the poor culprit was raised gradually" and his neck was not broken: "For about three minutes after his suspension the struggles and contortions were fearful. They were accompanied by a gurgling in the throat, and his sufferings must have been dreadful."<sup>305</sup>

In the decades after the Civil War, press reports of bungled hangings became more frequent, more detailed, and more lurid. News stories from these years offer a parade of "writhing" bodies, "contorted" faces, "horrible" groaning, and "mortal agonies."<sup>306</sup>

303. See *Rodgers, supra* note 225, at 4. On frequent occasions over the next thirty years, the physicians present at hangings in the Tombs engaged in similar apologetics, assuring reporters and spectators that despite the appearance of struggle and pain, the prisoner had not in fact suffered much, if at all. See *Cox, supra* note 299, at 3; *The Death Penalty*, N.Y. TIMES, Apr. 22, 1876, at 2; *Stephens, supra* note 284, at 2.

304. *The Last Chapter of the Little's Tragedy*, N.Y. TIMES, Oct. 25, 1858, at 2.

305. See *Stephens, supra* note 284, at 2. However, the physicians on the scene insisted that appearances were deceiving: although the prisoner's neck had not been broken, death nevertheless resulted "very quickly." *Id.*

306. The following newspaper account of a bungled 1884 hanging in Brooklyn is representative:

Owing to the carelessness of the executioner, the noose had not been properly adjusted about the neck, and it had caught under the miserable wretch's chin, which prevented it from drawing sufficiently close about the throat. His head was thrown back and he struggled frantically, while horrible choked cries issued from his partly opened mouth. Every one realized that the man was conscious and that his death struggle would be a fearful one, and all gazed fascinated by the horror of the sight, as the unfortunate wretch threw up his pinioned arms and clutched, gasping, at the pitiless rope that was cutting into his neck, and finally tore the black cap from his face and revealed his features distorted in mortal agony . . . The dying man drew up his legs to his stomach, and spasmodically threw them out and forward, until he began to sway back and forth like a boy in a swing, and his face was a ghastly and pitiful sight as he writhed and struggled in the prolonged torture of one of the most cruel forms of death. The struggle seemed endless to the horrified spectators, and when the arms finally dropped and the limbs hung limp they could hardly believe that the horrible scene had been enacted in less than two minutes. Several were made sick at the stomach by the sight, and one or two men fainted after it was all over.

*A Horrible Death Scene*, N.Y. TIMES, Aug. 2, 1884, at 3; *Two Murderers Hanged*, N.Y. TIMES, Jan. 16, 1875, at 2 (reporting that prisoner "slowly strangled to death" in a "horrible scene"); *Wagner, supra* note 228, at 3 (reporting that "many of the spectators" turned away



And with every bungled hanging, editorial comment grew more caustic and impatient. As early as 1867, a *New York Times* editorial lamented that "scarcely a week passes that the public heart is not shocked by the tale of some poor wretch being strangled by slow torture and with the most horrible evidences of suffering, in consequence of the slipping of the rope or some awkwardness of the hangman. . . . Why cannot the guillotine be substituted for the gallows? It is infinitely preferable in every way."<sup>307</sup> Two years later, Edmund Clarence Stedman, a poet, literary critic, and editor, writing in *Putnam's Magazine*, contended that "death by the gallows is in many, if not most, instances, as slow and cruel a torment as that by fire or the wheel."<sup>308</sup> Stedman expressed the hope that "with new scientific knowledge, a painless mode of killing may be discovered — as by an electric shock, or by the use of some deadly anaesthetic."<sup>309</sup>

In the 1870s, some American physicians began seeking ways to improve the efficacy and speed of hanging.<sup>310</sup> Others began to seek a less painful and more certain substitute. In 1873, for example, a Dr. Alonzo Calkins read a paper before the Medico-Legal Society of New York,<sup>311</sup> in which he advocated the abolition of hanging and canvassed various alternative methods.<sup>312</sup> Five years later, a Dr. John Packard, addressing the same body, urged that convicts be put to death by administering carbonic oxide gas in a sealed

when, "owing to some wrong adjustment of the weights and pullies, [the prisoner's] neck was not broken, and for nearly five minutes the body writhed in agony"; see also *Meeting Death Firmly*, N.Y. TIMES, May 20, 1882, at 3; *A Triple Execution*, *supra* note 289, at 2.

307. See *Editorial*, N.Y. TIMES, Nov. 15, 1867, at 4.

308. Edmund Clarence Stedman, *The Gallows in America*, PUTNAM'S MAG., Feb. 1869, at 225-35; see also VOICES AGAINST DEATH 132 (Philip English Mackey ed. 1976). Based on an examination of reported cases, Stedman claimed that at least sixty per cent of the time the neck vertebrae were not broken, and "death [took] place either from slow and painful suffocation—the victim getting just air enough through the half-closed windpipe to prolong his struggles—or from apoplexy following the sudden cerebral congestion which [was] caused both by the suffocation and by the pressure of the rope upon the great veins of the neck." Stedman observed that in these cases, the condemned died "slowly and in torment," often "with such hard breathing, groans, and contortions, as to drive the witnesses from the dreadful scene." Stedman, *supra*, at 230.

309. *Id.*

310. See, e.g., Wooster Beach, *The Death Penalty: Proper Mode of Its Infliction*, 30 MED. REC. 89 (1886); Graeme M. Hammond, *On the Proper Method of Executing the Sentence of Death By Hanging*, 22 MED. REC. 426 (1882).

311. Founded in 1886, this society had a membership consisting of "regular practitioners of the medical and legal professions." See 3 JAMES J. WALSH, *HISTORY OF MEDICINE IN NEW YORK* 692 (1919).

312. See Alonzo Calkins, *Felonious Homicide; its Penalty, and the Execution Thereof Judicially*, in PAPERS READ BEFORE THE MEDICO-LEGAL SOCIETY OF NEW YORK 250 (3d ser. 1873).

room. Packard pointed out that the method was already used for the humane killing of stray dogs, and that it was favored by French suicides. Its virtues were that it was entirely "private," involved no struggle, and caused scarcely any suffering.<sup>313</sup>

Among the medical men most critical of "the rope" was a prominent and well-connected Buffalo dentist by the name of Alfred Porter Southwick, formerly the chief engineer of a Great Lakes steamboat company and later professor of Operative Technics at the University of Buffalo Dental School.<sup>314</sup> In 1881, Dr. Southwick happened to see a drunken man step on a live electric wire and instantly fall dead.<sup>315</sup> Convinced that electricity could take the pain and agony out of capital punishment, Southwick spent several years performing lethal electrical experiments on animals, and lobbying in Albany in favor of electrocution. In 1885, his efforts bore fruit: the Governor of New York, David Hill, included the following recommendation in his annual message to the legislature:

The present mode of executing criminals by hanging has come down to us from the dark ages and it may well be questioned whether the science of the present day cannot provide a means for taking the life of such as are condemned to die in a less barbarous manner. I commend this suggestion to the consideration of the Legislature.<sup>316</sup>

Shortly thereafter, the New York legislature adopted a resolution for the appointment of a special commission to "investigate and report at an early date the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases."<sup>317</sup> The commission appointed by Governor Hill had three members. Its chairman was Elbridge T. Gerry, a socially prominent and philanthropically-minded New York City lawyer. A grandson of one of the signers of the Declaration of Independence, Gerry was a former "Commodore" of the New York City Yacht Club, a co-founder of the Society for the Prevention of Cruelty to Children, and counsel to the American Society for the Prevention of Cruelty to Animals.<sup>318</sup> The other members of the com-

313. See John H. Packard, *Mode of Inflicting the Death Penalty*, in PAPERS READ BEFORE THE MEDICO-LEGAL SOCIETY OF NEW YORK 517 (3d ser. 1873). Dr. Packard's proposal drew unfavorable notice from the *New York Daily Tribune*. See Editorial, *Methods of Execution*, N.Y. DAILY TRIB., Apr. 6, 1878, at 4.

314. See *Obituary*, 40 DENTAL COSMOS 597, 597 (1898).

315. See Arnold Beichman, *The First Electrocution*, 35 COMMENTARY 410, 410 (1963).

316. *Annual Message of the Governor of the State of New York* (1885), reprinted in 8 MESSAGES FROM THE GOVERNORS 1, 37 (Charles Z. Lincoln ed., 1909).

317. See 1886 N.Y. LAWS 352.

318. See *Elbridge T. Gerry Dies in 90th Year*, N.Y. TIMES, Feb. 19, 1927, at 15.

mission were Matthew Hall, an Albany attorney who had served a short stint in the State Senate,<sup>319</sup> and Dr. Southwick.

Over the next two years, the "Gerry Commission," as it quickly came to be known, took extensive testimony from physicians, hangmen, reporters, and others, and sent questionnaires to some two hundred judges, doctors, sheriffs, and prosecutors, seeking guidance on the best method of execution.<sup>320</sup> At the same time, working behind the scenes, Dr. Southwick managed to persuade an initially reluctant Thomas Edison to declare himself in favor of the substitution of electrocution for hanging.<sup>321</sup> In January, 1888, the Commission transmitted to the legislature a 95-page report, urging a comprehensive overhaul of the state's capital punishment procedures.<sup>322</sup> Its principal recommendation was that electrocution should be the sole method of imposing the death penalty.<sup>323</sup>

Primitive forms of capital punishment, the Report contended, were characterized by unacceptable "cruelty" — by "a passionate desire to inflict pain and suffering, even the utmost agony possible, upon the criminal."<sup>324</sup> The "modern idea" of capital punishment, in contrast, insisted on "dealing humanely with the individual, and refraining from superadding to the single, solemn act of death, features . . . which merely intensify the suffering and heighten the shame of the culprit."<sup>325</sup> With this criterion in mind, the Report

319. See *Death List of a Day*, N.Y. TIMES, Mar. 26, 1899, at 7.

320. See REPORT OF THE COMMISSION TO INVESTIGATE AND REPORT THE MOST HUMANE AND PRACTICAL METHOD OF CARRYING INTO EFFECT THE SENTENCE OF DEATH IN CAPITAL CASES, N.Y. SEN. REP. NO. 17, at 81 (1888) [hereinafter COMM'N REPORT]. The respondents were divided as follows: 80 favored the retention of hanging; 87 urged the adoption of electrocution. There was also scattered support for a variety of other methods. Poison attracted 8 votes, the guillotine 5, the garotte 4, etc. A handful of respondents were noncommittal. *Id.* at 81-82. One recommended that hanging be retained for men, but that women be electrocuted. *Id.* at 82.

321. For a discussion of Southwick's courtship of Edison, and the latter's reasons for ultimately declaring himself in favor of electrocution, see Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century*, 35 WM. & MARY L. REV. 551, 570-71 (1994). According to Denno, Edison's ultimate support of electrocution "significantly influenced Gerry." *Id.* at 571.

322. See COMM'N REPORT, *supra* note 320.

323. *Id.* at 90. The Commission Report recommended that (1) every execution be conducted in a State prison; (2) the Warden in charge be permitted to have present no more than seven "special deputies"; (3) after a post-mortem examination of the prisoner's body, the remains should be handed over to the medical profession for dissection, or buried without ceremony in the prison cemetery or grave-yard; and (4) newspaper and other public accounts of the details of the execution should be prohibited. *Id.* at 90. These recommendations are discussed *infra* Part IV.

324. *Id.* at 13.

325. *Id.* at 13-14; see also Elbridge T. Gerry, *Capital Punishment By Electricity*, 149 N. AM. REV. 21, 22 (1889) ("The spirit of humanity which everywhere asserts itself as civili-

first considered — and found wanting in one respect or another — the four execution methods then used in “the civilized world”: the guillotine; the garrote; shooting; and hanging.<sup>326</sup> It also rejected a novel proposal, lethal injection, on the ground that the hypodermic needle was too closely “associated with the practice of medicine, and as a legitimate means of alleviating human suffering.”<sup>327</sup>

Finally, the Report turned to the merits of electricity — “perhaps the most potent agent known for the destruction of human life.”<sup>328</sup> The death produced by electricity, the Report found, “is instantaneous upon its application.” In addition, the “place for its infliction may be strictly private, and . . . its certainty is beyond doubt.” The Commission acknowledged that to “the lay mind” electrocution may *seem* to be very painful. But relying on such sci-

zation advances has . . . decreed that some mercy shall be shown even the vilest convict in depriving him of life, and that the means employed shall be as rapid and painless as possible.”)

326. See COMM’N REPORT, *supra* note 320, at 47-73. The substantial merits of the *guillotine* were readily conceded: “[I]t is instantaneous, and, therefore, painless, and it is certain, that is, beyond all possibility of resuscitation.” *Id.* at 49. However, its bloodiness was found to be “needlessly shocking” to the witnesses’ feelings. *Id.* Although its “evil effects” could be “greatly diminished by insuring a strict privacy,” even the “idea” of such a sanguinary and disfiguring execution—“associated as it is with the bloody scenes of the French Revolution”—would be “totally repugnant” to Americans. *Id.* at 49-50.

The *garrote* involved no profusion of blood, and was more swift and certain than hanging. But it is “scarcely less distressing when presented distinctly to the imagination, than is the guillotine.” *Id.* at 50. Moreover, “medical men say that the fatal screw cannot be depended upon to be so quick and certain in operation that there may not be great agony on the part of the subject.” *Id.*

*Shooting*, while “perfectly well adapted” for military executions, was too bloody, lacked celerity and certainty, and was historically associated with military despotisms. *Id.* at 50-51.

That left *hanging*, which the Report criticized at great length, citing numerous recorded instances in which the executioner’s ineptness or indifference, latent defects in the rope or machinery, or fierce resistance on the part of the condemned had resulted in “horrible” scenes of suffering or decapitation. *Id.* at 51-63. Hanging was also criticized on two other grounds. First, it was a particularly “shocking” mode of executing women. *Id.* at 68. Second, many among the “unlearned” believed that “resuscitations are possible by gross collusion between the officers of the law and the condemned man, and have in some cases occurred.” *Id.* at 64. While taking no position on whether such resuscitation was possible, or had ever actually occurred, the Report concluded that such a popular belief “casts a doubt over the administration of the penal law which it would be well to dispel.” *Id.*

327. *Id.* at 75. Gerry later gave a somewhat fuller explanation for the Commission’s decision to reject lethal injection of morphine. Medical men, he said, strongly opposed the use of morphine in executions for the same reason the Westinghouse interests opposed the use of alternating current in electrical executions: Killing criminals with morphine, physicians feared, “would create a public prejudice against the drug which would be impossible for [them] to overcome in their practice.” See *Mr. Gerry on the Stand*, N.Y. TIMES, July 19, 1889, at 8.

328. COMM’N REPORT, *supra* note 320, at 75.

entific authorities as Helmholtz and Tyndal,<sup>329</sup> on the results of electrical experiments performed on stray dogs by a Buffalo physician named George Fell,<sup>330</sup> and perhaps above all,<sup>331</sup> on the judgment of Thomas Edison, the Commission expressed confidence that an "electric shock of sufficient force to produce death cannot, in fact, produce a sensation which can be recognized."<sup>332</sup> Accordingly, the Gerry Commission concluded that electrocution should be substituted for hanging as the sole mode of capital punishment in New York.<sup>333</sup>

This recommendation was enthusiastically endorsed by the New York City Medico-Legal Society<sup>334</sup> and by the New York press.<sup>335</sup> There were, however, a few dissenting voices: The *Spectator* (London) wondered why murderers should die *less* painful deaths than "the majority of innocent mankind," and worried that eliminating the painfulness of the death penalty might make society too casual in its use.<sup>336</sup> A prominent electrical engineer also questioned the excessive "solicitude" for convicts, and asserted that "electricity is too noble a science to be thus lowered to the most ignoble of uses."<sup>337</sup> The Society of Medical Jurisprudence

329. *Id.*

330. *Id.* at 77.

331. See Denno, *supra* note 321, at 571.

332. COMM'N REPORT, *supra* note 320, at 75.

333. However, the Gerry Commission did not make any recommendation about whether alternating or direct current should be employed. Thomas Edison and his business allies, who were heavily invested in direct current technology and were rapidly losing ground to Westinghouse's more efficient alternating current systems, lobbied aggressively to have alternating current adopted for electrocution. Their hope was that if alternating current were used to execute criminals, the public would come to associate it with death and resist its use in commercial and residential settings. Despite Westinghouse's strenuous opposition, alternating current was selected for use in the first electrocutions. For a fascinating account of the contest over which current would be used in the first electrocutions, see Thomas P. Hughes, *Harold P. Brown and the Executioner's Current: An Incident in the AC-DC Controversy*, 32 BUS. HIST. REV. 143 (1958); see also FRANCIS LEUPP, *GEORGE WESTINGHOUSE: HIS LIFE AND ACHIEVEMENTS* 143-55 (1918); HAROLD C. PASSER, *THE ELECTRICAL MANUFACTURERS, 1875-1900: A STUDY IN COMPETITION, ENTREPRENEURSHIP, TECHNICAL CHANGE, AND ECONOMIC GROWTH* 164-75 (1953); Terry S. Reynolds & Theodore Bernstein, *The Damnable Alternating Current*, 66 PROC. INST. ELECT. & ELECTRONICS ENG'RS 1339 (1976).

334. *Report of Committee on Best Methods of Executing Criminals* (Mar. 1888), reprinted in Clark Bell, *Electricity and the Death Penalty*, 7 MEDICO-LEGAL J. 200, 205 (1889) [hereinafter *Best Methods*].

335. See, e.g., *Capital Punishment*, N.Y. TIMES, Dec. 17, 1887, at 4 ("It will be creditable to the State of New York to be the first community to substitute a civilized for a barbarous method of inflicting capital punishment, and to set an example which is sure of being followed throughout the world.")

336. See *Execution By Electricity*, 61 SPECTATOR 540 (1888).

337. See Thomas D. Lockwood, 7 ELECTRICAL ENG'R 89 (1888).

adopted a resolution against electrocution.<sup>338</sup> And the novelist William Dean Howells caustically observed that “there is a sort of poetical fitness” in the use of electricity for executions “in an age and a country ambitious of amenity as well as humanity.”<sup>339</sup> Howells sarcastically “fancied” state executions “taking place from the Governor’s office, where his private secretary, or the Governor himself might touch a little annunciation button and dismiss a murderer to the presence of his Maker with the lightest pressure of the finger.” In cases of “unusual interest,” the Governor might even “invite a company of distinguished persons to be present and might ask some lady of the party to touch the button.”<sup>340</sup>

But these dissenters and skeptics were spitting into the wind. The Gerry Commission’s proposal tapped into two of the strongest ideological currents in late nineteenth century America: a faith in the “civilizing” power of science and technology, and a deep horror of inflicting physical pain. In April, 1888, the State Assembly passed a bill substituting electricity for hanging in all capital cases by the lopsided vote of 87 to 8. The Senate soon followed suit, and on June 4, 1888, Governor Hill signed the Electrical Execution Act.<sup>341</sup> On August 6, 1890, after protracted litigation<sup>342</sup> challenging the constitutionality of this new method of execution — litigation that was in all probability secretly financed by George Westinghouse<sup>343</sup> — William Kemmler became the first person to die in New York’s electric chair. A year and a half later, Charles McElvaine, whose execution was described in detail in Part I of this Article, became the seventh. As we will see next, however, McElvaine’s execution was the very first electrocution whose details it was lawful for the New York press to report.

338. See *Still Prefer Hanging*, N.Y. TIMES, Mar. 9, 1888, at 5.

339. William Dean Howells, *Execution By Electricity*, HARPER’S WKLY., Jan. 14, 1888, at 23.

340. *Id.*

341. 1888 N.Y. Laws 489. Section 5 of the Act provided that “the punishment of death must, in every case, be inflicted by passing through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict is dead.” *Id.* § 5. The Act took effect on January 1, 1889, and applied to anyone convicted of a capital crime after that date. See *id.* § 12.

342. For a comprehensive account of the *Kemmler* litigation, see Denno, *supra* note 321, at 556-98.

343. Kemmler’s state court challenge to the constitutionality of electrocution was handled by W. Bourke Cockran, a leading New York City lawyer. Westinghouse repeatedly denied that he was paying Cockran’s fee. See, e.g., *A Denial From Mr. Westinghouse*, N.Y. TIMES, May 4, 1890, at 4. However, most contemporary observers were openly skeptical of these disclaimers.

## IV. ELECTROCUTION, THE PUBLIC AND THE PRESS

In this country the people have as much right to know how their laws are enforced within prison walls as they have to know how they are made in legislative halls or administered in courts. A star chamber execution is repugnant to the American idea of government.<sup>344</sup>

The Electrical Execution Act of 1888 changed more than the mode of execution in New York. It also centralized executions in specially designated state prisons, strictly limited the number of authorized witnesses, and made it a criminal offense for the press to publish the details of any execution "beyond the statement of the fact that [the] convict was on the day in question duly executed according to law."<sup>345</sup> These measures were designed to sever the entire execution process from civil society, to relocate it to the sphere of "abstract consciousness." After final sentence was pronounced, the condemned man would simply "drop absolutely out of public sight and consciousness."<sup>346</sup> Prisoners would die in near-total obscurity — unlionized, unheralded, and unmourned — and the general public would no longer be "demoralized" by "lurid" and "sensational" press reports of their last words, acts, and struggles. That was the legislative design. As we will see, however, it was strenuously resisted by a politically powerful and ideologically self-confident press. When the dust settled four years later, the ban on press reports had been repealed, and the former uneasy compromise between concealment and publicity — a compromise that still prevails today — had been reinstated.

A. *The Anti-Publicity Provisions of the Electrical Execution Act*

The Report filed by the Gerry Commission is the founding document of modern execution practice. The substitution of electricity for hanging was certainly its most discussed proposal, but its recommendations went well beyond a change in execution technology. The Commission also recommended a set of anti-publicity measures aimed at making good the failed promise of the Act of 1835 to end the "demoralizing tendencies" of state executions. Its five principal recommendations were as follows:

---

344. *Freedom of the Press*, N.Y. HERALD, July 29, 1891, at 6.

345. 1888 N.Y. Laws 489.

346. COMM'N REPORT, *supra* note 320, at 86 (quoting Hon. Lucius N. Bangs).

1. *Execution Site.* Under the provisions of the 1835 Act, executions had been conducted by county sheriffs in the jail or prison of the particular county in which the capital offense had been committed. The Gerry Commission proposed instead that a State prison be designated as the place for the imposition of all capital sentences, and that "immediately after sentence the criminal should be there conveyed without delay and kept until the sentence be carried into effect."<sup>347</sup> Among the advantages claimed for this arrangement were that friends of the condemned man would then be unable to gather outside the prison on execution day to "evince their sympathy for the condemned in a manner alike discreditable to public decency and dangerous to the public peace," and also that members of the press could be more effectively excluded.<sup>348</sup>

2. *Visitation.* The 1835 Act had imposed no limitations on visits by reporters or members of the public to a prisoner awaiting execution. Throughout the postbellum period, it was common practice for reporters to interview prisoners during their final days, and to report, often in considerable detail, their thoughts, words, and acts. It was also common for the condemned to receive visits from curious or solicitous members of the general public. The Gerry Commission proposed to put an end to all such pre-execution visitation, on the ground that it contributed to the "glorification" of murderers. The Report therefore recommended that the condemned man be kept in solitary confinement from the time he was delivered to the warden of the State prison until the death sentence was carried out. No person would be allowed access to him during this period without an order of the court, except prison officers, his counsel, his physician, a clergyman, and family members.

3. *Execution Audience.* The 1835 Act, it will be recalled, had permitted county sheriffs to have present at executions such "special deputies" as they deemed appropriate. As we have seen, sheriffs seized on this loophole to admit hundreds of cronies, friends, and favored constituents to supposedly "private" executions. The Gerry Commission proposed that this loophole be plugged, by limiting the number of special deputies that the warden could have present to seven.

---

347. *Id.* at 89.

348. *Id.*



4. *Disposition of the Corpse.* The members of the Gerry Commission were concerned that the proposed changes in the mode and site of executions might have the unwelcome effect of reducing the deterrent effect of capital punishment. Making executions simultaneously less *painful* and less *visible*, they feared, might reduce not only their "horror" but their salutary "terror" as well. To offset this effect, the Commission proposed that the bodies of executed criminals not be surrendered to their relatives or friends for public burial. Instead, after a post-mortem examination, the body would be turned over to a hospital or doctor for dissection,<sup>349</sup> or buried without any funeral in the prison cemetery. These measures, the Commission believed, would strike terror into the hearts of would-be offenders. The "criminal classes," the Report reasoned, were "devoid of religious sentiment," but were nonetheless quite "superstitious": "Strange as it may seem, [they were] often more concerned as to what will happen to the body after death than as to their future spiritual existence." Many "bravos" who were indifferent to the infliction of death itself would "hesitate long to commit" a capital crime "if they were certain that after execution their bodies would be cut up in the interest of medical science."<sup>350</sup> Indeed, the Report went on, one of the main reasons why hangings currently had so little deterrent effect was that "too often the body of the criminal . . . [was] handed over to his relatives and friends and treated by them as a martyr":

The most disgusting scenes of this character have occurred, especially in the city of New York. After an execution has been duly performed with all the solemnity of the law, the friends of the deceased, his companions in crime and his sympathizers in its commission, having procured the body from the sheriff, indulge in the most drunken and beastly orgies. Eulogies of the deceased are pronounced as if he were a martyr instead of an executed criminal. His evil deeds are glorified into acts of heroism.<sup>351</sup>

---

349. *Id.* at 90. One century earlier, the New York legislature had enacted a statute providing for the postmortem dissection of executed felons. The statute's implementation generated so much popular protest that the practice was quickly discontinued. See Steven Robert Wilf, *Anatomy and Punishment in Late Eighteenth-Century New York*, 22 J. Soc. Hist. 507 (1989).

350. COMM'N REPORT, *supra* note 320, at 88.

351. *Id.* The Report did not identify the particular "disgusting scenes" it had in mind. Among the likely candidates were the funeral processions and ceremonies that followed the executions of Chastine Cox and Pietro Balbo in New York City's Tombs in 1880. For vivid descriptions, see *Balbo*, *supra* note 230, at 2 (reporting that several thousand people visited funeral parlor; describing plans for long funeral procession that Balbo's friends announced); *Burial of Balbo's Body*, N.Y. TIMES, Aug. 8, 1880, at 12 (reporting that even though authorities (1) refused to permit funeral procession to take circuitous route to cemetery that had been announced, and (2) prohibited music and banners, thousands of people marched in or

To prevent a repetition of these "scandals" in the future, the Report recommended that the body of the executed man should be deemed "forfeited to the State," and should be either handed over to a medical institution for dissection, or quickly and unceremoniously buried in the prison cemetery, "with sufficient quicklime to ensure [its] immediate consumption."<sup>352</sup>

5. *Restrictions on the Press.* Finally, and perhaps most remarkably, the Gerry Commission recommended that it should be made a crime for any newspaper to publish "the details" of an execution. Under present arrangements, the Commission lamented, "sensational" newspaper reports "always appear on the same day or the day following [an execution], giving a detail of the agonies and struggles of the dying wretch." The "result is that the execution, instead of operating as a deterrent, creates with many a vicious and morbid appetite for the disgusting description, and has been known even to stimulate others to the commission of crime." Newspapers should thus be restricted to "a simple statement . . . to the effect that the sentence of the law had been duly carried into effect."<sup>353</sup>

The Commission acknowledged, albeit somewhat grudgingly, that "great credit" was due the press for its "fearless exposure" of the evils of hanging. Moreover, it insisted that it "was far from recommending" any legislation that would "even indirectly" tend to curtail "the liberty of the press." But it expressed confidence that a restriction on the reporting of the "details" of executions — along the lines of then-existing restrictions on the publication of evidence in divorce proceedings — would not only meet with the "hearty approval" of the press itself, but also contribute greatly to the "moral and deterrent effect" of executions.<sup>354</sup>

The Electrical Execution Act of 1888 adopted all of these recommendations, except for the one on dissection and burial.<sup>355</sup>

watched funeral procession); *The Burial of Chastine Cox*, N.Y. TIMES, July 18, 1880, at 12 (reporting that large numbers of people, including women and children, visited funeral parlor). It is possible that the Commission also had in mind the funeral ceremonies that followed the execution of the Haymarket anarchists in November 1887, just two months before the Commission filed its report.

352. COMM'N REPORT, *supra* note 320, at 89-90. It was believed that this latter precaution would thwart any friends' or relatives' attempts to dig the body up for burial elsewhere.

353. *Id.* Specifically, the Commission proposed that it should be a misdemeanor for anyone to publish the "details" of any execution "beyond the statement of the fact that [the convict] was, on the day in question, duly executed according to law at the prison." *Id.* at 94.

354. *Id.* at 90.

355. See 1888 N.Y. Laws 489. The Medico-Legal Society had voiced strong support for

Taken together, these measures constituted an ambitious attempt by the State to carry the logic of privatization through to its apparent end. However, as we shall see next, the ban on press reports of the details of executions was to be short-lived. Within the space of four years, this ban was repealed, and the press was readmitted to the execution audience.

### B. *The "Gag Law": Defiance, Debate, and Repeal*

Contrary to the hope expressed by the Gerry Commission, the ban on publication of the details of executions was not met with the "hearty approval" of the press. The *New York Times* took the lead oar against the provision. Its editorials had no quarrel with the general objective of the ban: "The details of an ordinary execution," the *Times* acknowledged, were "revolting to right-minded persons, and more or less corrupting to such minds as are not revolted by them." Moreover, convicts should not be permitted to attain the "celebrity" too many of them seemed to crave. For both these reasons, the *Times* opined, "self-respecting newspapers should not publish and self-respecting readers should not read extended accounts" of garden-variety executions.

But it did not follow, the *Times* insisted, that the law ought to enforce this journalistic norm. On the contrary, the *Times* cited several reasons — reasons that have since become staples of press argument against governmental content-regulation — why a legal prohibition on reports of executions was altogether inappropriate. First, a flat ban on all reports on executions, the *Times* said, was too "indiscriminate." While it would "probably be better for everyone if newspapers gave but a bare announcement of the execution of ordinary murderers," certain executions — like that of President Garfield's assassin Guiteau, or of the Chicago (Haymarket) Anarchists — were themselves "important historical events," the final scenes in dramas of national importance. To limit reports of this latter category of executions to a mere announcement that the sentence had been carried out would be "despotic" and "absurd." In addition, a "hard-and-fast line" between these two categories of

---

postmortem dissection. See *Best Methods*, *supra* note 334. However, the *New York Times* took the position that the denial of decent burial would unfairly punish the criminal's "unoffending survivors." See *Editorial*, N.Y. TIMES, Jan. 17, 1888, at 4. This view ultimately carried the day in the legislature. The 1888 Act permitted an executed man's relatives to claim his body, but provided that funeral services had to be held inside the prison walls, and that only the deceased prisoner's immediate family and relatives could attend. In the event that the deceased prisoner's relatives did not claim his body, it would be buried in the prison graveyard. See 1888 N.Y. Laws 489. However, in no case would the prisoner's body be handed over to the medical schools for dissection.

executions was "impossible" to draw in advance, even for an editor — much less a legislative draftsman. It was necessary, therefore, to leave the choice of legitimately "newsworthy"<sup>356</sup> executions for case-by-case editorial determination.

Second, journalistic "decency" or "good taste," the *Times* declared, was not something the State should attempt to enforce with criminal sanctions. If a newspaper chose to cater to "depraved tastes" by publishing "vulgar and disgusting" reports of executions, its reputation would suffer in the court of public opinion: It would become known as a "flash" paper, and "people who [were] careful about the quality of their own reading or that of their families" would desert it. That market penalty was remedy enough for journalistic offense against good taste.

Third, a ban on press reporting of executions, the *Times* predicted, would be simply unenforceable. "When exceptional circumstances give exceptional interest to an execution, it will be reported, and juries will not convict a newspaper of a misdemeanor unless its report be manifestly indecent and outrageous."

The enforceability *vel non* of the new "gag law" was promptly put to a test in August, 1890, when William Kemmler became the first person to die in New York's electric chair. Although no reporter from a New York newspaper was permitted to witness the electrocution,<sup>357</sup> most New York newspapers ignored the publication ban and published lengthy and graphic accounts of the event. These reports were based on statements made by eyewitnesses, including an electrical engineer who may well have been a Westinghouse "mole."<sup>358</sup> With a few exceptions,<sup>359</sup> the newspaper accounts derided claims made by state physicians and official witnesses that Kemmler's death was swift and painless,<sup>360</sup> and reported instead that the first electrocution had been horribly "botched."<sup>361</sup> Under the headline "Far Worse Than Hanging," the *New York Times* declared "no murderer of modern times [had] been made to suffer as

356. The *New York Times* did not use this contemporary term, but it seems to capture well enough the distinction at which it was aiming.

357. *Editorial*, N.Y. TIMES, Aug. 7, 1880, at 4. By the warden's invitation, Frank W. Mack of the Associated Press witnessed the execution. See *Far Worse than Hanging*, N.Y. TIMES, Aug. 7, 1890, at 2 [hereinafter *Far Worse than Hanging*].

358. Westinghouse was eager to discredit the Kemmler execution in order to turn public opinion against electrocution. See *supra* note 333.

359. I have in mind here the *Evening Post* and the *Tribune*.

360. See, e.g., *Far Worse than Hanging*, *supra* note 357, at 2. Of the physicians in attendance, Dr. Southwick was the most extravagant in his praise. He declared that Kemmler's execution was "the grandest success of the age." *Id.*

361. This may have been the first time that the term "botch" was used to describe an execution mishap. See Denno, *supra* note 321, at 556 n.20.

Kemmler suffered." His execution was "a disgrace to civilisation."<sup>362</sup> News reports in the tabloids, which were accompanied by lively illustrations, were even more damning. The *New York World* reported that Kemmler was "slowly roasted to death." The *New York Sun* pronounced the execution a "miserable failure, . . . a spectacle more horrible than words can tell."<sup>363</sup>

The widespread defiance of the publication ban touched off a lively and interesting debate within the New York press itself. A day before Kemmler's execution, E. L. Godkin's *Evening Post*<sup>364</sup> ran an editorial describing the ban on press reports as "commendable," and urging state authorities to arrest and charge "every New York editor who prints a fuller account of [Kemmler's] execution than the law allows."<sup>365</sup> The *Post's* rivals were quick to respond. An editorial in the *Sun*, a tabloid with a large circulation, declared that "the publication by the New York newspapers of all the details concerning the awful death of Kemmler [was] one of the most valuable services which a free press ever rendered to the cause of civilization." If this "foolish and unconstitutional" prohibition had been obeyed, the *Sun* said, the public would never have learned "the horrible circumstances which are discussed today in every part of the civilized world." The newspapers' crime was "a misdemeanor of which every citizen may well be proud."<sup>366</sup>

The *New York Times's* response to the *Post's* criticism was more temperate, but no less confident. An editorial mocked the *Post's* pretensions to virtue, observing slyly that it too had violated the law by giving an account, albeit brief, of the "details" of the

362. *Editorial*, N.Y. TIMES, Aug. 7, 1890, at 2. However, an editorial published the following day was more cautious in its judgment. This editorial noted that while the Kemmler execution had been botched, electrocution was still in the "experimental" stage and deserved another opportunity to prove its merit. See *Editorial*, N.Y. TIMES, Aug. 8, 1890, at 4. Four days later, another editorial concluded that "when the facts are sifted down it appears pretty clear that execution by electricity is altogether feasible and every way [sic] preferable to hanging." See *The Capital Punishment Question*, N.Y. TIMES, Aug. 12, 1890, at 4 [hereinafter *Capital Punishment Question*].

363. For a sampling of editorial comment on the Kemmler execution drawn from newspapers in this country and abroad, see *Capital Punishment - Execution by Electricity - The Kemmler Case*, 9 PUB. OPINION 432 (1890).

364. Godkin, longtime editor of the *Nation*, became editor of the *Evening Post* in 1883. Throughout his career in journalism and letters, Godkin was a fierce and consistent critic of the commercialism, "sensationalism," and "gossip-mongering" of the popular press. See HAZEL DICKENSON-GARCIA, *JOURNALISTIC STANDARDS IN NINETEENTH-CENTURY AMERICA* 161-203 (1989); MARION TUTTLE MARZOLF, *CIVILIZING VOICES: AMERICAN PRESS CRITICISM, 1880-1950*, at 11 (1991). In fact, Godkin first used the term "sensational" in 1869 to describe journalism that catered to popular interest in crime, sex, and scandal. Thereafter the term became a staple of journalistic criticism. See DICKENSON-GARCIA, *supra*, at 203.

365. See *The Evening Post* (New York), Aug. 5, 1890.

366. See *The Misdemeanor of the Newspapers*, SUN (New York), Aug. 8, 1890.

## Kemmler execution:

It was a very bad account, we will say that for the *Post*, and sent every intelligent reader who had any curiosity about the execution to some other paper to get it assuaged. Nevertheless, it was more of an account than the law permits. For it said "the shock was given at 6:43 A.M." and was "continued for eighteen seconds," that "at the end of two minutes there was evidence of respiration," that "the current was again turned on," and that "this was repeated a few minutes later." If these are not "details" of the execution, what are they?<sup>367</sup>

The *Times* editorial pointed out that the *Post*'s article on Kemmler's execution was "double-ledged" — a breach of the "spirit", if not the letter, of the law. It ended by predicting that the *Post* would continue to print front-page stories on the Kemmler execution — stories which quoted the revolting "details" from the morning papers, and then tacked on "expressions of horror and derision."<sup>368</sup>

Over the following days, the *Times* continued to tweak the *Post*'s nose. When a *Post* editorial claimed that it had obeyed "the law forbidding the publication of *sensational* details of executions,"<sup>369</sup> the *Times* pounced: "The law says nothing about 'sensational details.' It forbids the publication of *any* details of an execution and limits the permissible report to a mere announcement that upon a certain date the sentence was carried into effect. Instead of obeying this law, the *Evening Post* distinctly disobeyed it, by giving prohibited details."<sup>370</sup> And in another editorial the same day, the *Times* defended the press against the charge that it had been irresponsible in printing what now appeared to have been false or at least overstated reports of mishaps at the Kemmler execution. The newspapers were hardly to blame for these erroneous reports, said the *Times*, inasmuch as reporters had been excluded from the death chamber and therefore had to piece together what had transpired there from "vague and excited utterances" of official witnesses, and from (mis-)statements by persons "interested in making the experiment a failure."<sup>371</sup>

While the *Post* stood virtually alone within the journalistic community,<sup>372</sup> the position it asserted had vocal supporters in the

367. *Editorial*, N.Y. TIMES, Aug. 7, 1890, at 4.

368. *Id.*

369. See *The Press and the Execution*, EVENING POST (New York), Aug. 11, 1890, at 4 (emphasis added).

370. *Editorial*, N.Y. TIMES, Aug. 12, 1890, at 4 (emphasis added).

371. See *The Capital Punishment Question*, *supra* note 362, at 4.

372. The *Nation* ran an editorial criticizing all the New York papers—except for the *Evening Post*, the *Commercial Advertiser*, and the *Tribune*—for running "purely imagina-

legal and medical professions. The Medico-Legal Society, for example, warmly supported the ban on press reports of executions, complaining that reporters simply lacked the medical knowledge necessary to interpret and recite the details of such affairs.<sup>373</sup> And an editorial in the *Albany Law Journal*, a leading organ of the New York bar, accused the newspapers of running "false and sensational accounts" of the Kemmler execution for two base purposes: to gain "revenge" for their exclusion from the event, and to "sell large quantities of their lying and lawless prints."<sup>374</sup> The political authorities, however, declined to initiate a prosecution against any of the newspapers whose accounts of Kemmler's execution had violated the "gag law."<sup>375</sup>

That is where matters remained until the summer of 1891, when four prisoners — the first since Kemmler — were electrocuted under very tight security in Sing Sing Prison. Acting apparently at Governor Hill's direction, the prison warden required all of the official witnesses to take an oath not to disclose anything that happened in the death chamber.<sup>376</sup> In addition, he positioned armed guards outside the prison and ordered them to shoot any reporter who attempted to cross a designated "dead line."<sup>377</sup> The lone concession the warden made to reporters was to have flags run up on the staff of the prison cupola when the executions actually occurred.<sup>378</sup> No press representative was permitted to witness the executions.

New York newspapers, however, encountered little difficulty in getting eyewitnesses to break their oaths and recount what had gone on in the death chamber. The very earliest news stories —

tive" accounts of the Kemmler execution. See *The Week*, NATION MAG., Aug. 14, 1890. At the time, the *Nation* was "the weekly edition of the *Evening Post*, duplicating editorial matter by selection." Both publications were under Godkin's direction. See 3 DICTIONARY OF AMERICAN BIOGRAPHY 348 (Allen Johnson & Dumas Malone eds., 1931).

373. See *Editorial*, 8 MEDICO-LEGAL J. 180 (1890). State physicians, as well as members of the Medico-Legal Society, complained that reporters consistently misinterpreted post-mortem muscular contractions as a sign that the prisoner was still alive and in pain.

374. *Current Topics*, 42 ALBANY L.J. 121 (1890); see also *Current Topics*, 44 ALBANY L.J. 493-94 (1891).

375. According to Arnold Beichman, "the representative of the State Attorney-General laughed when asked if he would seek indictments." See Beichman, *supra* note 315, at 418.

376. See *Death Shadowing Them*, N.Y. TIMES, July 6, 1891, at 1.

377. See *They Still Await Death*, N.Y. TIMES, July 7, 1891, at 1. The warden also used a brace of prison dogs to keep the reporters safely beyond the "dead line." *Id.*

378. By prior arrangement, each of the four prisoners was represented by a different color flag. Thus, when a flag of the designated color was hoisted, the reporters would know which prisoner had died. The warden assigned the black flag to the sole African-American prisoner, explaining that "it was good enough for a coon." See *Four Men Die by the Law*, N.Y. TIMES, July 8, 1891, at 1 [hereinafter *Four Men Die by the Law*].

based on reports fed to the Associated Press by an electrical engineer who was possibly in league with Westinghouse<sup>379</sup> — described the executions as “repetitions of the Kemmler horror.”<sup>380</sup> However, the subsequent statements of the various physicians, clergymen, and other official witnesses<sup>381</sup> present at the executions quickly satisfied the New York press that the executions had actually gone off “without a hitch.”<sup>382</sup> In an editorial, the *Times* observed that the dissemination of the initial false stories about the executions was the direct result of the state’s exclusion of reporters from the event. When reporters are denied access to executions, the *Times* pointed out, they can easily be misled or manipulated by self-interested or unreliable sources. If journalistic accuracy is what is wanted, then the way to get it is simple enough: let reporters see executions for themselves.<sup>383</sup>

Two weeks after the quadruple electrocution at Sing Sing, New York District Attorney DeLancey Nicoll announced that he would seek an indictment against one offending newspaper to “test” the constitutionality<sup>384</sup> of the anti-publicity provision of the Electrical Execution Act.<sup>385</sup> On July 23, 1891, a grand jury handed up an indictment against Charles Hennessey, the editor of the *Daily News*. Hennessey was arrested, posted bail of \$500, and promptly filed a demurrer.<sup>386</sup>

A week later, District Attorney Nicoll secured a second indictment, this one against James Gordon Bennett, the publisher of the

379. See *The Electrical Executions*, N.Y. TIMES, July 8, 1891, at 4.

380. See *Four Men Die by the Law*, *supra* note 378, at 1.

381. Once again, Dr. Southwick was on hand. After the executions, he told reporters that “the executions were a success in every way. There was not the slightest hitch.” *The Weapon Slocum Used*, N.Y. TIMES, July 10, 1891, at 2.

382. *Four Men Die By The Law*, *supra* note 378, at 1; see also *Electricity a Success*, N.Y. HERALD, July 8, 1891, at 6 (“Enough has been learned to show that the executions were a success.”). The *Herald* even arranged for its own autopsy of one of the four men who had been electrocuted, and declared that the autopsy proved “beyond peradventure that [his] death was instantaneous.” See *The Herald Causes an Autopsy To Be Made on Smiler’s Body*, N.Y. HERALD, July 9, 1891, at 6.

383. See *The Electrical Executions*, N.Y. TIMES, July 8, 1891, at 4.

384. District Attorney Nicoll made clear from the outset that he disapproved of the publication ban and hoped it would be repealed, but believed he was obligated to bring a “test case” to determine the ban’s constitutionality. See *The Herald Will Battle for the People’s Right*, N.Y. HERALD, July 31, 1891, at 1 [hereinafter *The Herald Will Battle for the People’s Right*].

385. See *Electrical Execution Act Again*, BROOKLYN EAGLE, July 17, 1891. The *Eagle* stated that the press had “nagged or ‘dared’” the district attorney into taking this action. Presumably, the “nagging” would have been done by the *Evening Post*. The “dares” would have come from the papers that had openly defied the ban.

386. See *City and Suburban News*, N.Y. TIMES, July 24, 1891, at 3; *Mr. Hennessy Files a Demurrer*, N.Y. TIMES, July 28, 1891, at 8.



*Herald*. The *Herald* could hardly conceal its delight. Under headlines reading "THE HERALD INDICTED FOR PRINTING NEWS"<sup>387</sup> and "THE HERALD WILL BATTLE FOR THE PEOPLE'S RIGHT,"<sup>388</sup> it trumpeted the indictment and declared it to be "an honor to have been chosen as the journal to vindicate the freedom of the press." "We have not been anxious for this distinction," an editorial insisted, "but since the honor has been thrust upon us we shall avail ourselves of the opportunity to defend . . . the liberty of the press."<sup>389</sup>

The *Herald* took pains to explain to its readers that what was really at stake in its indictment was not some special privilege of the press to attend executions and publish their details, but rather the *public's* "right to know" how its "servants" were discharging their official responsibilities:

The *Herald* has always been the foremost exponent of the doctrine that the people should have the news, all the news, and nothing but the news. . . . The taking of human life is the highest judicial act of the State. . . . *The people have a right to know* whether the ministers of the law put murderers to death in a humane and scientific manner, or whether they are horribly burned and tortured as Kemmler was.<sup>390</sup>

And again: .

An execution is an official act. It is the enforcement of a law of the State. *The people have a right to know* what is done and how it is done. It is of vital importance that they should know it.<sup>391</sup>

In addition to this democratic "right to know" rhetoric,<sup>392</sup> the *Herald* appealed to the prophylactic value of publicity: When the bright "light of publicity is thrown on the death chamber," the *Herald* asserted, no "bungling or brutality, no inhumanity or

387. *The Herald Indicted for Printing News*, N.Y. HERALD, July 30, 1891, at 3 [hereinafter *The Herald Indicted for Printing News*].

388. *The Herald Will Battle for the People's Right*, *supra* note 384, at 1.

389. *The Herald is Indicted*, N.Y. HERALD, July 30, 1891, at 6 [hereinafter *Herald is Indicted*].

390. *The Herald Indicted for Printing News*, *supra* note 387, at 3 (emphasis added).

391. *Voiced the Bar*, N.Y. HERALD, July 31, 1891, at 6 [hereinafter *Voiced the Bar*]; see also *The Herald is Indicted*, *supra* note 389, at 6 ("The people have a right to know what their servants do and how they do it . . .").

392. For modern versions of this now prevalent theory of press freedom, see LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION* 235-259 (1991). Powe states that the phrase "right to know" became popular after the Second World War, and was a "synonym for freedom of the press" in the 1960s. *Id.* at 242. However, the episode I have recounted makes clear that "right to know" already was a press "mantra" in 1892. It would be interesting to know whether the *Herald* coined this slogan for use in the execution debate or simply drew on established usage.

wrong, can pass there unknown to the world. This very fact must have a potent effect in *preventing* such abuses."<sup>393</sup>

How did the other New York City newspapers react to the *Herald's* indictment? Several of its competitors — especially other mass circulation “morning papers” like the *World*<sup>394</sup> and the *Sun* — were probably chagrined *not* to have been selected for indictment themselves. As one observer wryly put it, the *Herald's* rivals “would have been glad to pay liberally for the privilege of being indicted for this cause, and no doubt there are [ ] many envious editorial hearts in the great metropolis.”<sup>395</sup> Indeed, so galling was the spectacle of the *Herald* exploiting its indictment to increase its prestige and circulation, that other papers may even have agitated for additional indictments. In any event, the District Attorney — despite his expressed view that one indictment would suffice for the intended purpose of putting the constitutionality of the statutory prohibition to a “test”<sup>396</sup> — quickly secured indictments against the editors or publishers of eight more New York City newspapers who had published accounts of the quadruple electrocution at Sing Sing.<sup>397</sup>

Noticeably absent from this honor roll was Godkin's *Evening Post*, whose editorial page applauded the indictments, defended the wisdom and constitutionality of the publication ban, and took upon itself the task of puncturing the *Herald's* “liberty of the press”/ “public's right to know” rhetoric. A long *Post* editorial, probably penned by Godkin himself, recalled that when the press ban was enacted in 1888, there had been “universal acquiescence in it as a much-needed reform.” “Sober-minded people” had been “nauseated and shocked” by the press's lurid accounts of executions,<sup>398</sup> and the publication ban reflected a widespread and “well-founded” belief that the “parading” of execution details before “the young, the ignorant, the half-vicious, and the half-baked

393. *Voiced the Bar*, *supra* note 391, at 6.

394. In 1887, Pulitzer's *World* had a circulation of 250,000, surpassing both the *Herald* and the *Sun*, which were the original “penny press” papers. See MARZOLF, *supra* note 364, at 9.

395. *New Bedford Mercury*, quoted in *Past Understanding*, N.Y. HERALD, Aug. 2, 1891, at 15.

396. See *They Wanted It, Now They Have It*, N.Y. HERALD, Aug. 5, 1891, at 5.

397. See *The Newspapers Indicted*, N.Y. TIMES, Aug. 5, 1891, at 8. The eight papers were: the *Morning Journal*, the *Morning Advertiser*, the *Press*, the *Recorder*, the *Staats Zeitung*, the *Sun*, the *Times*, and the *World*. *Id.*

398. The *Post* did not provide the names of any of these “sober-minded” people. For some representative examples, see Packard, *supra* note 263, at 521; and George Rider, *The Pretensions of Journalism*, 135 N. AM. REV. 471, 477-78 (1882) (criticizing graphic press coverage of executions).

tended to the promotion of savagery among us." Were the "rights" of "the public" infringed by the publication ban, as the *Herald* contended? The *Post* scoffed at the notion. Indeed it scoffed at the very idea that there existed a "public" for whom the press could claim to speak: It is "very easy," the *Post* said, "for a newspaper to mistake itself for the public, and to say that the public wants this or that, when nobody wants it except the fiend in its own counting-room. The public — the only public that we can reckon with up to the present time — has given its opinion, in the State Legislature, in a contrary sense." It is "sheer impudence," the *Post* editorial continued, for a newspaper to "talk about a public which has passed this law as being now opposed to it, without any scrap of evidence except the ding-dong which itself creates."<sup>399</sup>

It is clear that for the *Post*, as for the *Herald*, the controversy over press coverage of executions raised fundamental questions about the press's proper role and mission in a democratic, market-oriented society. Bennett's *Herald*, one of the original "penny press" newspapers, proudly claimed to serve the informational and entertainment needs and desires of its mass audience. The *Herald*, like the *Sun* and the *World*, saw its role as providing "all the news," leaving the reader to select what she wanted to read.<sup>400</sup> And it viewed success in the marketplace (i.e. high circulation) as proof that it was fulfilling its role. Godkin's *Evening Post*, in contrast, clung to a higher and older "civilizing" ideal<sup>401</sup> — one which subordinated the "newsgathering function" to the "critical function,"<sup>402</sup> which refused to pander to "low" and "vulgar" tastes for "sensationalism," "scandal," and "gossip,"<sup>403</sup> and which rejected marketplace norms.<sup>404</sup> The *Post* ridiculed the idea that detailed and grie-

399. *Editorial*, *EVENING POST* (New York), Aug. 1, 1891.

400. Charles Dana, editor of the *Sun*, insisted that a newspaper "must correspond to the wants of people," and cannot succeed if it fails to provide the "sort of information which the people demand." Responding to the argument that, in the interests of taste and decency, "certain kinds of news ought not to be published," Dana said he was not "prepared to maintain any abstract proposition in that line." Indeed, he was "not too proud to report" whatever "the Divine providence permitted to occur." See CHARLES DANA, *THE ART OF NEWSPAPER MAKING* 11-12 (1895).

401. See MARZOLF, *supra* note 364, at 1-19.

402. E.L. Godkin used these terms in an article that appeared in the *North American Review* in 1890. In this article, Godkin lamented the shift in American journalism from "criticism and comment" to the gathering and selling of "news" as a commodity. See E.L. Godkin, *Newspapers Here and Abroad*, 150 N. AM. REV. 197 (1890).

403. In 1890, Godkin complained that the popular press had "converted curiosity into what economists call an effectual demand, and gossip into a marketable commodity." See E.L. Godkin, *The Rights of the Citizen, IV—To His Own Reputation*, *SCRIBNER'S MAG.*, July-Dec. 1890, at 58, 66.

404. While Godkin was perhaps the most forceful and prominent critic of the "new

some accounts of executions represented *editorial* judgments about what readers had a "right" or need to know. On the contrary, the articles for which the *Herald* had been indicted "represent[ed] nothing but the newspaper's money-box."<sup>405</sup> The *Herald's* self-chosen "mission" was only a rationalization for its commercial self-interest.

While these rather high-minded arguments were going on between the *Post* and the *Herald* — with lawyers,<sup>406</sup> clergymen,<sup>407</sup> and others lining up on one side or the other — another New York newspaper took the gloves off. On August 3, 1891, Charles Dana's *New York Sun* announced that it intended to make the publication ban issue a litmus test in the coming November elections, and urged other newspapers to do the same. The *Sun's* extraordinary, muscle-flexing call to arms is worth quoting at length:

We earnestly urge our esteemed contemporaries throughout the State to subject every candidate for executive or legislative office this fall to the test herein set forth: Is he in favor of the gag law which now disgraces the statutes, or is he for its immediate and unconditional repeal? Let no candidate for any office of importance, for Governor, for Lieutenant-Governor, for Senator, or for Assemblyman, go before his party asking for its nomination, or go before the citizens asking for their votes on election day, until his position with respect to the repeal of the law has been definitely ascertained and put upon record in a form so distinct as to leave not the slightest doubt as to what he will do if he gets into office.

Then let the press of New York move as a unit in defence of its priceless freedom, in vindication of its glorious traditions, and in proof of its immeasurable power.

This is the issue of 1891, so far as the newspapers of the Empire State are concerned. . . . It is high time that certain politicians . . . and certain volunteer reformers of society be taught that against the righteous protest

journalism," he was hardly the only one. Attacks on the popular press for its commercialism, sensationalism, and intrusiveness were quite common in the literary journals and "quality magazines" of the 1880s and 1890s. See, e.g., Joseph B. Bishop, *Newspaper Espionage*, F., Mar. 1886, at 529; Dion Boucicault, *The Decline and Fall of the Press*, 145 N. AM. REV. 32 (1887); Conde Benoist Pallen, *Newspaperism*, LIPPINCOTT'S MONTHLY MAG., July-Dec. 1886, at 470; George T. Rider, *The Pretensions of Journalism*, 135 N. AM. REV. 471 (1882); John Gilmer Speed, *Do Newspapers Now Give the News?*, F., Mar. 1893, at 710.

405. *Editorial*, EVENING POST (New York), Aug. 1, 1891.

406. See, e.g., Clark Bell, *Electrocution*, 9 MEDICO-LEGAL J. 48, 50 (1891) (arguing that convictions of some of the offending newspapers would be "healthy" and "for the public weal"); *Editorial*, *Electrical Executions*, 9 MEDICO-LEGAL J. 166, 166 (1891) (arguing that publication ban promotes public welfare) [hereinafter *Editorial*, *Electrical Executions*]; *The Herald Will Battle for the People's Right*, *supra* note 384, at 1 (canvassing views in legal community).

407. See, e.g., *Rev. A.C. Dixon on Electrical Execution*, BROOKLYN EAGLE, Aug. 3, 1891, at 2 (supporting ban on publication of execution accounts).

of the united newspaper press no law can stand; that no public servant can persist in attacking the constitutional liberties of the press and continue his public career. . . .

For any office from Governor down, THE SUN is prepared to support the man who comes out squarely for free speech and unshackled newspaper press, as against the man who believes in the gag law. . . . This is THE SUN's position, and it will be the position of every self-respecting New York newspaper worthy to wear the proud badge of freedom. . . .<sup>408</sup>

On the same day in which this editorial appeared, the *Sun* ran a front-page article reporting the responses of about a dozen prominent officeholders and candidates to the question whether they favored repeal of the law prohibiting newspaper publication of execution accounts.<sup>409</sup> While some hedged a bit, not a single one opposed repeal. Most importantly, the Democratic nominee for Governor, Roswell Flower, committed himself to the repeal of the gag law.<sup>410</sup> A similar pledge was subsequently extracted from his Republican rival, Jacob Fassett.<sup>411</sup>

The *Sun's* two-fisted tactics had no discernible effect, however, on the lameduck Governor Hill, or on Warden Brown of Sing Sing, who was Hill's political appointee. The electrocution of Martin Lopy in December, 1892, was conducted in exactly the same way as the four executions the previous July: Warden Brown refused to disclose the names of the invited witnesses, or to divulge any of the preparations.<sup>412</sup> He swore the official witnesses to secrecy,<sup>413</sup> and barred reporters from the execution. He established a "dead line" fifty feet from the prison, and directed guards to shoot down any newspaper reporter who attempted to cross it.<sup>414</sup> And, as before, the sole concession he made to reporters was to promise that he would give them a signal as soon as Lopy was dead.<sup>415</sup>

Once again, however, reporters succeeded in getting some eyewitnesses to talk, and once again New York City newspapers, including those already under indictment, published full accounts of the electrocution. The *Times*, for example, reported that the first current had failed to kill Lopy, that the second application of

408. *No Gag-Law Governor or Legislature Next Year?*, N.Y. SUN, Aug. 3, 1891, at 3.

409. *See The Electric Execution Law and the Liberty of the Press*, N.Y. SUN, Aug. 3, 1891, at 1.

410. *Id.*

411. *See* Editorial, *Electrical Executions*, *supra* note 406, at 167.

412. *See Lopy's Death Drawing Near*, N.Y. TIMES, Dec. 6, 1891, at 9.

413. *See Governor Hill's Sixth Victim*, N.Y. TIMES, Dec. 8, 1891, at 5.

414. *See Lopy Must Die This Week*, N.Y. TIMES, Dec. 7, 1891, at 1.

415. If the execution took place at night, the warden would hang a lantern in the tower over the prison office. If the execution occurred during the day, he would run up a flag as a signal. *Id.*

current had caused his eyeball to rupture and his hair to "scorch," and that the "overpowering stench" of "roasting flesh" had sent a guard and a witness rushing from the death chamber.

Within days of Lippy's execution, a Brooklyn Assemblyman named Meyer Stein announced that when the legislature reconvened in January, he would introduce a bill providing that at least six of the twelve "reputable citizens" required to witness executions be representatives of New York newspapers.<sup>416</sup> At the opening of the legislative session, the newly elected Governor, Roswell Flower, made good on the pledge extracted by the *Sun*. In his Annual Message, he told the Legislature that "the adoption of so novel a method of inflicting the death penalty as electricity naturally excited world-wide attention and aroused both popular and scientific curiosity." The public's eagerness to know "the actual results of the experiment," Flower said, "did not spring from morbidity, but from wholesome interest." The press ban should be quickly repealed so that public would have the opportunity of "securing the most unbiased information" about this new method of execution.<sup>417</sup>

A week after this gubernatorial address, the State Senate requested Elbridge T. Gerry and the other two members of the "Gerry Commission" (Dr. Southwick and Matthew Hale) to submit forthwith a supplemental report, explaining at greater length why they had originally recommended that newspaper publication of execution details be prohibited, and also assessing the constitutionality of the current ban. In their hastily written twenty-four page report,<sup>418</sup> Gerry and his colleagues somewhat petulantly reminded the Senate that the chief purpose of removing executions from public view had been to prevent the populace, especially the "criminal classes"<sup>419</sup> and "the young," from being demoralized or corrupted. That purpose would be defeated if newspapers could publish graphic accounts of the proceedings:

Your committee failed to see how it was possible to preserve the private

416. See *Must Have Reporters There*, BROOKLYN EAGLE, Dec. 10, 1891.

417. See *Annual Message of the Governor of the State of New York (1892)*, reprinted in 1 DOCUMENTS OF THE SENATE OF THE STATE OF NEW YORK, 115th Sess. 21-22 (1892).

418. ADDITIONAL REPORT OF THE COMMISSIONERS ON CAPITAL PUNISHMENT, N.Y. SEN. REP. No. 12, at 3 (1892) [hereinafter ADDITIONAL COMM'N REPORT]. The Gerry Commission submitted its Report just two days after the Senate resolution was adopted on January 13, 1892.

419. The Commission's Additional Report observed that newspapers are "extensively read by the criminal classes, who glory in the description of the courage shown by their colleagues undergoing the sentence of death, and whose minds are repeatedly stimulated to fresh acts of violence by reading of such disgusting details." *Id.* at 9.

character of executions if on the next day the newspapers were permitted to publish highly colored and sensational descriptions of the occurrence, bringing forcibly to the eye of the reader the scene as fully, or even more so, than if he were personally present. The execution might as well be public and the people at large have an opportunity of seeing the horrible details themselves.<sup>420</sup>

Of the constitutionality of the publication ban, the Gerry Commission also had no doubt. The law did not "restrain or abridge" the "liberty of the press," within the meaning of Art. 1, Sec. 8, of the New York State Constitution,<sup>421</sup> the Additional Report stated, because press liberty had never been understood to encompass the freedom to publish "dangerous or offensive writings of a pernicious tendency."<sup>422</sup> The ban on publication of execution details was no more unconstitutional than were prohibitions on publication of obscene matters, or lottery ticket advertisements, or the "disgusting details" of the evidence in divorce proceedings.<sup>423</sup>

On this occasion, however, it was the Gerry Commission that was spitting into the wind. The state legislature — either persuaded by the press's arguments or frightened of its power — shrugged off the Gerry Commission's lecture and moved quickly to repeal the "gag law." In the Assembly, the Stein bill — requiring

420. *Id.* at 8.

421. Article I, Section 8 of the New York State Constitution provided: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; no law shall be passed to restrain or abridge the liberty of speech or of the press." N.Y. CONST. art. I, § 8. All participants in this controversy agreed that the First Amendment of the Federal Constitution had no application to state legislation. For a comprehensive account of decisional law and scholarship on freedom of speech and the press in the decades preceding World War I, see David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1981).

422. ADDITIONAL COMM'N REPORT, *supra* note 418, at 20. Here the Commission's Additional Report was referring to the so-called "bad tendency" test, which turn-of-the-century courts in New York relied upon to uphold prohibitions on speech judged to be threatening to civic peace or harmful to "public morals." See, e.g., *People v. Most*, 171 N.Y. 423 (1902); *People v. Most*, 128 N.Y. 108 (1891); see also *State v. McKie*, 46 A. 409, 410, 412 (Conn. 1900) (upholding law prohibiting publications "principally made up of criminal news, police reports, or pictures and stories of deeds of bloodshed, lust, or crime," on the ground that legislature permissibly determined that such publications "tend to public demoralization"). For discussion of the "bad tendency" doctrine, see Rabban, *supra* note 421, at 543-49.

423. ADDITIONAL COMM'N REPORT, *supra* note 418, at 18-20. Fifteen years later, the Minnesota Supreme Court upheld, on very similar reasoning, the constitutionality of a statutory ban on the newspaper publication of the details of executions, a ban that was adopted shortly after New York's Electrical Execution Act and was probably patterned upon it. See *State v. Pioneer Press*, 110 N.W. 867 (Minn. 1907). For an interesting account of the circumstances prompting the enactment of the Minnesota gag law and the case in which its constitutionality was upheld, see WALTER N. TRENERRY, *MURDER IN MINNESOTA* 162-167 (1985).

that at least six reporters from New York newspapers be invited to witness every execution — was passed by the remarkably lopsided vote of one hundred and five to three.<sup>424</sup> In the Senate, members sounded as if they were reading their lines from recent newspaper editorial pages. One Senator wanted *all* the official witnesses to be reporters: “The papers must have the news, and if the reporters can’t get it one way, they must rely upon their imagination.” Another Senator was unsure whether publication of execution details was good for public morals, “but the people demanded this news and the press was forced to cater to the demand.” And the sponsor of the bill, Col. W.L. Brown, declared that “the people are entitled” to know about the conduct of their “public servants.”<sup>425</sup>

On February 4, 1892, Governor Flower signed into law a bill repealing the “gag law”<sup>426</sup> — just in time for eight reporters to attend the execution of Charles McElvaine. The *New York World*, one of whose reporters had been selected to attend the McElvaine execution, declared that the people of New York would now learn “for the first time” what electrocution was “really like.”<sup>427</sup> After the execution, the *Times* struck the same note: “The people of the State have, in the execution of McElvaine, for the first time, a fair criticism of the working of their new law, and of the impression it has produced, not upon scientific experts, but upon observers of the average sensibility.”<sup>428</sup> Shortly thereafter, the New York District Attorney had the indictments against the *Herald* and the other newspapers dismissed.

In fewer than four years, then, the New York press had decisively beaten back an attempt by the State to carry the privatization of capital punishment to the limits of its logic. The press regained its monopoly — cultural as well as economic — in the provision of eyewitness accounts of executions. And the uneasy compromise between concealment and publicity — a compromise that had been worked out informally between newspapers and prison officials in the half-century after executions were moved indoors — was ratified and strengthened.

424. See *The New York World*, Jan. 28, 1892; see also *In the Assembly*, N.Y. TIMES, Jan. 28, 1892, at 2.

425. See *Electric Executions and Reporters*, N.Y. TIMES, Jan. 29, 1892, at 1.

426. 1892 N.Y. Laws 16. The statute that was ultimately enacted did not require that any number of reporters be invited as witnesses. It simply repealed the provision making the publication of execution details a misdemeanor, and left it to the warden to include reporters among the twelve “reputable citizens” selected as witnesses.

427. See *Reporters At Execution*, N.Y. WORLD, Feb. 6, 1892.

428. *Execution by Electricity*, N.Y. TIMES, Feb. 9, 1892, at 4.



## V. CONCLUSION

Si vous voulez la peine de mort, montrez-la! (Gambetta)<sup>429</sup>

The compromise worked out in New York during the nineteenth century — and emphatically reaffirmed in 1892 — proved to be remarkably stable, primarily because it served the institutional interests of both the press and the State. The legitimacy of that compromise has recently been called into question, however, by proponents of televised executions. In this concluding section, I want briefly to consider whether the historical account provided above helps us in analyzing and evaluating the case for televised executions. I shall also offer some thoughts on the relation between the televised executions debate and the larger debate on the legitimacy and future of capital punishment.

Opponents and supporters of the death penalty do not line up neatly on opposite sides of the televised executions debate. Indeed, a clear majority of *both* camps is firmly opposed to the idea. While a few law enforcement officials and state legislators have expressed cautious support for the idea of televising executions, on the ground that it might enhance their deterrent value,<sup>430</sup> most retentionists worry that a televised execution is more likely to inspire pity than terror. Echoing early critics of public executions, they argue that televising executions will elevate criminals to “celebrity” status and give them “the last word.”<sup>431</sup> It will deflect public attention from the nature and consequences of the criminal’s act to the physical aspects of his punishment, thus arousing pity for him as “the victim of the state.”<sup>432</sup> The viewers of a televised execution will get the “wrong message” — that “the killer is the victim.”

---

429. Quoted in, *LE MONDE*, Jan. 5, 1973, at 24 (“If you want the death penalty, then show it!”).

430. See, e.g., *Top Official and Death Row Fear Texas Is Shrugging Off Executions*, *N.Y. TIMES*, July 2, 1987, at A21 (reporting that Texas Attorney General Jim Mattox favors televising executions to restore their deterrent impact). This view has received some empirical support from scholars. See Steven Stack, *Publicized Executions and Homicide, 1950-1980*, 52 *AM. SOC. REV.* 532 (1987) (finding that (1) a negative relationship exists between nationally publicized executions and the incidence of homicide; (2) a nationally publicized execution is associated, on average, with a decrease of thirty homicides nationwide in the month of the story; and (3) little-publicized executions have no impact on homicide rates). But see William C. Bailey, *Murder, Capital Punishment, and Television: Execution Publicity and Homicide Rates*, 55 *AM. SOC. REV.* 628 (1990) (finding no relationship between monthly homicide rates and television publicity from 1976 to 1987).

431. See, e.g., Harriet Salarno, *The Victim Will Not Get Equal Time*, *L.A. TIMES*, May 1, 1991, at B7.

432. See, e.g., Ernest van den Haag, *Death Is Not a Spectacle*, *N.J. L.J.*, Apr. 12, 1990, at 9.

Abolitionists are also badly split on the issue of televised executions, just as they were divided a century and a half ago on the issue of public executions. In Part II of this Article, we saw that some early nineteenth century abolitionists supported the privatization of executions in the belief that concealing executions from the public's view would undermine, both intellectually and politically, what they viewed as the only legitimate justification for capital punishment: deterrence. They were confident that the abolition of public executions would be a way-station to the elimination of the death penalty. Other abolitionists, however — like Samuel Bowne and Amasa Parker in New York, and William Lloyd Garrison in Massachusetts — insisted that if there were to be any executions, they should be conducted in public, so that their “consequences and enormity might be more vividly impressed on the public mind.” They opposed privatization because they feared that it would simply lull the public conscience to sleep.

Subsequent events seem to have borne out these fears. Shortly after executions were moved “indoors” in New York in 1835, the abolitionist movement gradually began to lose momentum. While abolitionist agitation did not peak until the 1840s, privatization may well have “saved” capital punishment in New York and elsewhere in the northeast. As Philip Mackey has observed, privatization “decreased the supply of new reformers by ending the recurrent scenes which had turned so many against the death penalty.” It also created “the impression” among reformers “that the government had met them halfway.”<sup>433</sup>

Some contemporary abolitionists claim to have absorbed this historical lesson. They favor televised executions because they believe that graphic pictures from San Quentin or Starke will “shock” the public into reconsidering their views on the death penalty. For example, the director of Death Penalty Focus, a California abolitionist group, has said that “if people see what executions are like, they will oppose them.”<sup>434</sup> Similarly, the author of a recent abolitionist book is confident that “if executions were public, the torture and violence would be unmasked, and we would be shamed into abolishing executions.”<sup>435</sup> Senator Mark Hatfield, a

433. See Mackey, *supra* note 52, at 119.

434. See David A. Kaplan, *Live from San Quentin: Should a TV Station Broadcast an Execution?*, NEWSWEEK, Apr. 1, 1991, at 35.

435. HELEN PREJEAN, *DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY* 214-15 (1993). Camus made the same claim, with unrivaled power and eloquence, in his *Reflections on the Guillotine*: “[I]f people are shown the machine, made to touch the wood and steel and to hear the sound of a head falling, then public imagination, suddenly awakened, will repudiate [the death penalty].” See CAMUS, *supra* note 84, at 177.

longtime opponent of the death penalty, has gone so far as to introduce legislation *requiring* that every federal execution be carried out at a place and time that is "convenient for members of the public to view [it] in person and for the communications media to broadcast [it]. . . ." <sup>436</sup> Television publicity, Hatfield and other abolitionists believe, would put the deterrence hypothesis to a test — a test they are quite confident it would fail.

These abolitionists, I think, are fighting the last war. For one thing, they probably overstate the extent to which public support of capital punishment rests on instrumental considerations like deterrence. Second, most pro-television abolitionists seem to have an inflated notion of the moralizing power of visual images. As Susan Sontag has observed, images by themselves — without "an appropriate context of attitude and feeling" — can awaken desire, but not conscience. <sup>437</sup> A news photo or film footage of a grisly execution may disgust or horrify us when we first see it. But "unless we associate [it] with some kind of narrative," its power to move us — much less change our attitudes and values — will not be lasting. <sup>438</sup> Moreover, it is doubtful that television images — even when suitably draped with commentary and analysis — could make capital punishment more disturbing than such purely "literary" accounts as Orwell's "A Hanging," or Thackeray's "Going To See a Man Hanged," or Turgenev's "The Execution of Tropmann," or Dickens' celebrated letters to the *London Times*.

Finally, and most importantly, the abolitionists who favor televised executions overlook the significance of the fact that the typical modern execution — hurried, cold, medicalized, "professional" — is a rather tame and tepid affair. It is not nearly as dra-

436. S. 1155, 102d Cong., 1st Sess. (1991). In his statement introducing the bill, Senator Hatfield, echoing nineteenth century abolitionists, asserted that hiding executions from public view undercuts the only possible moral justification for capital punishment: deterrence. If we really believed that capital punishment is a deterrent to murder and other crimes, then "we should do everything possible" to assure the maximum visibility—and hence deterrence value—of each and every execution.

Again, Camus made this same argument many years ago:

If [society] really believed what it says, it would exhibit the heads. Society would give executions the benefit of the publicity it generally uses for national bond issues or new brands of drinks . . . . If the penalty is intended to be exemplary, then, . . . the machine should be set on a platform in Place de la Concorde at two p.m., the entire population should be invited, and the ceremony should be put on television for those who couldn't attend. Either this must be done or else there must be no more talk of exemplary value. How can a furtive assassination committed at night in a prison courtyard be exemplary?

CAMUS, *supra* note 84, at 180-81.

437. See SUSAN SONTAG, *ON PHOTOGRAPHY* 17 (1973).

438. See WENDY LESSER, *PICTURES AT AN EXECUTION* 171 (1993).

matically or morally compelling — or as “shocking” — as its nineteenth century counterpart. Doubtless, the first televised execution would command a large audience. But after that “audience interest” is likely to fall off sharply — especially since television will accelerate the trend to “gentler” (and less exciting) modes of execution, like lethal injection.<sup>439</sup>

None of this is to deny that our contemporary practice of capital punishment is horrible. It is only to say that the true horrors of capital punishment — the capriciousness of its application, the slow dehumanization of years on death row, the final countdown of last days and hours — could not, or at least would not, be shown on television. As Michael Kroll has observed, “an execution is far more than the final extinguishing of life [broadcasters] want us to see. What TV cannot show is the process that defines an execution: the years of vegetating somewhere between life and death; the deliberate stripping away of every shred of the condemned’s identity. . . ; the humiliation of innocent family visitors subjected to body-cavity searches in the final days. . . .”<sup>440</sup> The real horror of capital punishment, then, is not in the final moment of wriggling or gagging or gurgling, but “in the time before, the time when a human being must brush his teeth, pull on his pants, watch TV, all the while knowing he is soon to die.”<sup>441</sup>

David Bruck, a defense lawyer who specializes in death penalty cases and who has witnessed a number of executions, goes even further. Not only would a televised execution be contextless — and hence “false.” But the most common reaction to a televised execution, Bruck predicts, would be “Well, that wasn’t so bad.” Death chamber pictures, Bruck thinks, would be more soothing than unsettling; they would work to reassure now troubled moral imaginations. The dominant “message” that viewers would actually get from a televised execution is that “people can be converted into junk in as long as it takes to shut a drawer or cut off an elec-

439. A number of shrewd observers suggested that had KQED been successful in gaining access to the San Quentin gas chamber, California would have promptly switched to lethal injection. This surmise received indirect support from developments in Maryland in 1994. The Maryland legislature hastily enacted a lethal injection law after a federal judge ordered that an upcoming gas chamber execution be videotaped for use as evidence in a lawsuit challenging that mode of execution on 8th Amendment grounds. See Sabra Chartrand, *Given a Push, Maryland Alters Its Death Penalty*, N.Y. TIMES, Mar. 25, 1994, at B18.

440. Michael Kroll, *This TV Picture Is a Distortion*, USA TODAY, June 10, 1991, at A10.

441. Bill McKibben, *After It’s Over, Will We Watch Seinfeld?*, NEWSDAY, May 18, 1994, at A28.

tric light . . .”<sup>442</sup> Televised executions would thus be little more than government-generated “snuff films” — and, like other, more familiar kinds of pornography, would have a “deadening” or “desensitizing” effect on the audience.<sup>443</sup>

I suspect Bruck is right about this. But I am by no means sure. Several things give me pause. First, as we have seen, nineteenth century Americans turned against public executions not so much because they could not bear to watch them, as because they could not bear to watch their fellow citizens watch them. The antebellum middle class rang down the curtain on Hanging Day for the same reason it objected to such plebeian pastimes as bare-knuckle prize-fighting and cock-fighting — not because it gave pain to the victims, but because it gave pleasure to the spectators. It was the levity and revelry of the scaffold crowd, the carnival atmosphere and crass commercialism of Hanging Day, that chiefly offended middle-class “sensibilities.” The sight (or report) of large, drunken crowds cheering televised executions at sports bars, or placing bets on how long the execution will last or whether it will be botched, would probably offend and mobilize these same “bourgeois sensibilities.” Even in the absence of hard empirical evidence that televised executions were criminogenic, some retentionists — concerned about further “coarsening” of our national life — might abandon their support of capital punishment.

Second, Bruck’s predictions about the “message” and “effect” of televised executions are deeply problematic. If anything at all is clear from an examination of the history of execution practice, it is that “meanings” do not reside in executions like water in bottles. Even contemporary executions — which are much less semiotically open than were their early nineteenth century counterparts — are unstable texts, interpretable in a number of ways. It is very difficult to know or predict with any confidence what meanings a televised execution will have, or be given. Indeed, it is that very unpredictability which primarily explains why a majority of both abolitionists and retentionists oppose televised executions. Each group has the same anxiety — that viewers will take (or make) the “wrong” message from what they see.

Most importantly, Bruck seems to assume that the introduction of television into the death chamber will have little or no impact on what goes on there. But is that a safe assumption? Isn’t it at least possible that the restoration of mass publicity would change the moral ecology of the death chamber and thus have sig-

---

442. Interview with David Bruck, *Nightline* (ABC television broadcast, May 24, 1991).

443. *Id.*; see also Uelman, *supra* note 8 (describing televised executions as state-made “snuff films”).

nificant impact on *how* the state “does death”? As already noted, one likely effect of television coverage would be to accelerate the “medicalization” of execution practice that began in the late nineteenth century and that continues apace today with the legislative stampede to lethal injection. Another likely effect would be to raise the political costs of botched executions, and so put added pressure on legislators and bureaucrats to take steps to reduce their incidence.<sup>444</sup>

Beyond this, however, it is also possible that the presence of television cameras would generate pressure to restore certain of the “pre-modern” features of executions. As we have seen, the “rationalization” of execution practice took place only after the general public was excluded from the execution audience. This was, I suspect, something more than an accident of history. It would have been politically difficult for the authorities to dismantle the forms and rituals of Hanging Day in plain view of the public. Indeed, even after executions were privatized, these forms and rituals proved remarkably resilient — in part because they still answered the moral and psychological needs of the various participants in the execution process, including the newspaper reading public.

The question that we need to think hardest about is whether the restoration of publicity might therefore generate pressure, from within the prison or without, for changes in our execution practice — changes that might to some extent reverse or undo the “modernization” of capital punishment. For example, might prison authorities, under the glare of television lights, be reluctant to hurry the condemned man along to a wordless, voiceless death? Might they feel obliged to cede him more control over the pace and content of the proceedings? Would full-scale final speeches return, and if they did, would the authorities engage in a counter-discourse of some kind? Would prison wardens (or Governors) deliver speeches, or ask clergymen to deliver prayers or sermons? Would executions be preceded or followed by dramatic reenactments or narrative accounts of the condemned man’s crime, designed to ensure that the television audience got the “right message”? And would television’s talking heads argue about what it all meant? In short, might a televised death chamber become what the gallows once were — a place where the normative boundaries of our community are declared, confronted, fought over; a place where people

---

444. See, e.g., Henry Lee, *Televising Executions Might Settle the Debate*, N.Y. DAILY NEWS, Aug. 11, 1991, at 29 (“If wardens knew that the whole country was watching, and not just a privileged few observers, they damn well would make sure that their equipment was in top working order.”).

struggle, with themselves and others, to make sense of and give meaning to crime and punishment?