Death Duty

A Somewhat Modest Proposal To Bring Executions To The People

Joshua Dressler

Capital punishment is a strange thing. Consider the recent call by some members of the media to televise an execution. One would think that death penalty opponents would condemn the idea as barbaric, and advocates of capital punishment should jump at the opportunity. After all, what better way is there to deter murders? Imagine some young, teenage gang member watching a Louisiana electrocution on CBS or, more suitably, MTV. Viewers would see the usual jerking of the body of the executed party and the ordinary smoke emanating from the body; they might even see why the electric chair is known as "Ol' Sparky." And with just a little luck, the electric chair might malfunction again, permitting an even more gruesome picture that might deter even the most hardened criminal from committing a capital offense. In any case, why would a death penalty advocate want to hide the process he[1] advocates? Since we cannot *all* observe today's executions live, why not take advantage of technology to bring the process into our living rooms?[2]

But, the debate over televising executions has not followed predictable paths. Although there doubtlessly are proponents and opponents of the proposal on both sides of the death penalty debate, much of the opposition to televising executions comes from death penalty *advocates*. They don't want us to see the executions conducted in the public's – our – name. Instead, it is the opponents of capital punishment – the very people who probably cover their eyes when watching the movie *Fargo* – who want to open executions to

Joshua Dressler is a Professor of Law at McGeorge School of Law. *He would like to thank those academics who have assisted him in this paper, but for some reason they do not want to be thanked by name. But, there are persons in the body politic who deserve to be credited for making this paper possible. Unfortunately, there are too many of them to name here.*

1 I use "he" throughout this essay because, well, the topic *seems so macho*. Many feminists will probably thank me for the gender-biased language when they finish reading my proposal.

2 Indeed, why not bring it to our computers too, and show it at <www.olsparky.gov>?

the public.

Who would have figured this? But, as I observed, capital punishment is a strange thing. Consider the debates in the 1980s regarding the then-new mode of execution, lethal injection. Legislative *proponents* of the death penalty were often at the forefront of efforts to adopt this form of execution, on the ground that it is a more humane way to kill people. Since there does not seem to be an ideal way to test out the accuracy of this hypothesis, I am prepared to believe that the death penalty advocates are right (or, at least, are sincere) in this regard. And if so, one might naïvely assume that death penalty opponents would favor the change on a lesser-evil basis. But, lo and behold, capital punishment abolitionists have often opposed the change or conscientiously stood aside during the debate. I suspect that some of them feared that if executions seemed unmessy, even painless, juries might sentence *more* persons to death and sleep better at night at the same time. Death penalty opponents don't want us to sleep well at night as we execute people. That is why some of them want us to watch Ol' Sparky in action.

One more story needs to be set out here. In 1981, while the legislature of the State of Oklahoma debated whether to amend its death penalty statute to permit executions by lethal injection, a state lawmaker responded by introducing a bill that might be characterized as the Ultimate Lex Talionis Law. He argued that a murderer should have the choice of dying in the same manner as his victim. "If an inmate wants to be clubbed to death or stabbed to death, let's give them [sic] a chance."[3] The good senator's bill died (or was executed) in committee.

All of this leads me to my two very modest proposals. My More Modest (and, I believe, less persuasive) Proposal stems from my belief that televising executions makes good sense but does not go far enough. At a minimum, the recent movie *The Truman Show* should convince us of the wisdom of televising more than the execution itself. Why not permit television producers to select one of the four thousand or so persons currently sitting on Death Row and begin televising that inmate's experiences for, say, the last month of his life? The programming could be put on a C-SPAN3, a new subject-specific cable station (DEATH-TV), or perhaps added to the fare of COURT-TV (which seems to be having trouble filling its hours with interesting trials in this post-O.J. "not-in-*my*-courtroom" era). Once the Inmate-of-the-Month is selected, the process should be easy and relatively inexpensive to produce. We would have the predictable background stories, including a description of the murder to justify the execution, and live interviews with the family members of the victim (or, at least, tapes of their victim impact testimony at the trial). The public could then watch the inmate on a 24-hour-a-day, seven-day-a-week basis. Admittedly, some of the programming would be dull, but the compensation would be the climactic moment when the inmate is gassed, electrocuted, hanged, or drugged. Once the inmate is dead and family members are interviewed again ("What was going through your mind as you watched the body of the victim smoking?" and "Do you have closure now?"), the station could move seamlessly to the next Inmate-of-the-Month.

I concede that this proposal is flawed. An occasional inmate might have his execution stayed by a stubborn appellate court[4] at the last moment, but what better way to demonstrate the slowness of our judicial processes? And, of course, in view of the Missouri experi-

3 Laurence H. Gross, *Lawmaker Urges Death Row Inmates Given Choice to Die Like Their Victims*, UNITED PRESS INTERNATIONAL, Feb. 10, 1981.

4 The Ninth Circuit comes readily to mind.

ence, the producers would want to make sure that they don't select an inmate scheduled for execution in a state during the period a Pope is scheduled to visit, since the governor of the state might choose to commute that person's sentence. (On the other hand, it might make good sense to choose to televise the execution of the poor inmate scheduled for execution immediately *following* the Pope's visit. A governor is unlikely to commute a second sentence in a row, even if *that* inmate's innocence were incontrovertibly proven.) But, perhaps the greatest flaw in this proposal is that people would quickly become bored by the execution process and tune out. The only people who would likely watch regularly would be academics, people who watch C-SPAN around the clock, sadists, and, perhaps, Public Television viewers. These people do not compose the most important audience, though. It is more important that the general public – those who watch the Fox Channel or read *USA Today* – tune in, but their attention span is too short. And, of course, the would-be murderers we want to deter hardly have time to watch the full month of coverage, since they are too busy committing their criminal acts.[5]

That is why I have an alternative proposal. I suggest, gentle readers, that we extend the concept of citizen jury duty to death duty. That is, just as we are all required to serve on juries, all adults (with limited exceptions discussed below) should be required to participate, at least indirectly, in the execution of our capital offenders. After all, if these killings are done in our name, I don't know why we should deny persons the opportunity to participate more intimately in the process. The blood should *really* be on our hands.

This Less Modest Proposal is not based on the dubious claim that the process would deter murders. Ironically, the people we would most want to deter – felons – would not be allowed to participate. Just as felons are disqualified from serving on juries, they should be denied the opportunity to serve their country in this manner. They would enjoy the work too much, and they might find it a trifle inconsistent that we are letting them kill people while telling them that they shouldn't kill in other circumstances. Most of the felons would not understand the subtle distinctions.[6]

Instead, my proposal is founded on a simple idea. Support for the death penalty is largely based on James Stephen's "hate the criminal"[7] rub-out-the-vermin-because-they-deserve-it philosophy, not on the basis of cold, calculating cost-benefit deterrence analysis – which hardly justifies capital punishment. Death duty will permit the three-quarters of our population who favor capital punishment to channel their hatred in a constructive, patriotic manner. And, after all, if the Sovereign has the right to draft young men and women to go to war and *die* for the country, it certainly has the right to demand that we stay right here at home and *kill* for our country. Jury duty is our patriotic responsibility; so would be death duty.

Now, I must concede that I haven't worked out all of the specifics. My proposal is too important to wait for the details to be ironed out, so I look to the good readers of the *Green Bag* to help develop the best approach. One problem with my proposal is that, at least at current rates, there are not enough Death Row inmates to go around. Although the juries in a few states – Texas and Florida come to mind – are doing their best, not every qualified citizen is likely to have an opportunity to inject the

5 Perhaps, however, the crime rate would be reduced during the hour or so immediately preceding and during the execution, when we might expect the average criminal to tune in.

6 Neither do I.

7 2 James Fitzjames Stephen, A HISTORY OF THE CRIMINAL LAW IN ENGLAND 80 (1883) ("The criminal law thus proceeds upon the principle that it is morally right to hate criminals.").

drugs, pull the switch, fire the gun, or place the noose around the neck of a murderer. But, we might be able to resolve this with a little good-old American ingenuity.

I am more familiar with California than other states, so let me focus on my home state. Why not have California executions conducted in Dodger Stadium? The stadium sits empty all winter long and during half of the baseball season.[8] We could use these dormant periods to hold executions. We would fill Dodger Stadium with 54,000 adults called for Death Duty. The execution could be held at second base, and observed on the scoreboard out at centerfield.

Now admittedly, this is not really exciting stuff (about on par with recent Dodger games). I am not sure how involved a person would feel, sitting in left field while a drug is injected in the veins of some miserable felon at second base. So, we might have to change our execution processes. At a minimum, we might require new formalities. A lottery would be conducted, and the winner would be permitted to inject the drug. Four runners-up would be permitted to join the executioner at second base, perhaps to help strap the inmate to the gurney. The remaining 53,995 Death Duty participants might be required by law to yell, "Kill him," "We hate you, you son-of-a-bitch," "We are rubbing you out, you piece of vermin," or other statutorily-devised epithets. Such indirect participation, although imperfect, would at least make the executions more up-close-and-personal than they are today, or than they would be were they only televised. And, in progressive states in which the inmate is electrocuted, those in the seats would be able to see the sparks fly, smell the flesh burning if the wind is blowing right, and perhaps hear a momentary gasp from the inmate through microphones set up for the spectacle. And, in all of the states that have the death penalty, we could require the Death Duty participants to come down on the field after the execution to spit on the corpse. What better way to vindicate the worth of the murderer's victim?

Utilitarian skeptics should notice that although there is no serious evidence that the death penalty deters homicides now, my proposal at least has the potential of producing some economic benefits to include in the cost benefit equation. For example, most Californians do not live in Los Angeles (although it seems that way during rush hour), so it would be necessary to transport Death Duty citizens from Eureka, San Francisco, Sacramento and other distant spots. How would we do that? This is where we help Amtrak balance its budget. Or, imagine the opportunities for Southwest Airlines if it were to receive the contract to bring people to Burbank Airport, just a few short miles from Dodger Stadium? And, the 54,000 executioners would be starved from their flight (just one bag of peanuts when Southwest is generous) and would need to eat when they arrive. The restaurant business in the region would flourish. Most of the travelers would have to stay overnight, too, bringing millions of dollars into the hotel coffers. The tourist industry (or Dodger owner Rupert Murdoch) could even set up special discounted Death Tours that would include Disneyland, the beach, and a choice of either staying in town for a three-game Dodger series or taking a tour of the Los Angeles County morgue.

Now, of course, there are other ways to handle the matter. The legislature in Oklahoma might want to revive the Ultimate Lex Talionis bill and permit the Death Duty citizens of that great State to participate directly in the executions. If the convicted murderer killed his vic-

8 As I write this, I am forced to suggest that it seems lifeless even when the Dodgers are playing at home. But, that is another story for another venue.

tim, say, with a bat, then Oklahomans would have Bat Day at the University of Oklahoma stadium, and each person could be provided with a bat (another economic benefit), and invited down on the field (reminiscent of *Murder on the Orient Express*) to beat the murderer to death, and beyond.

Some critics will maintain that my proposal is barbaric. But, I am not really suggesting any qualitative changes in our system,[9] only that more persons should participate directly in the process. If the claim is that my proposal will result in a devaluation of human life, I am not sure how one could say this is so, at least without calling into question capital punishment itself. And, as a former Conscientious Objector during the Vietnam War, I would honor the rights of those persons morally opposed to the death penalty to opt out. It is the least we can do for *Witherspoon*-excludables,[10] who are denied the right to serve on juries, even during the guilt phase, of capital offenses.

Let's save the experience for those who stand up and vote for the death penalty, and those who nod their heads in agreement.

9 Well, maybe my Bat Day crosses current lines just a bit.

10 *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Wainwright v. Witt*, 469 U.S. 412 (1985) (providing for the exclusion of death penalty opponents from juries if their opposition would prevent or substantially impair performance of their duties as jurors to apply the law as required by their oath).