The Statutory Implications of the Public's Right to View Executions: A State by State Analysis

Kate Esther Rapp
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“If executions were to exist at all, [let] them be public so that their consequences and enormity might be more vividly impressed on the public mind.”

-Assemblyman Samuel Bowne

I. INTRODUCTION

A democratic society is transparent. The Supreme Court has clearly stated that in order “to work effectively, it is important that society’s criminal process satisfy the appearance of justice, and the appearance of justice can best be provided by allowing people to observe it.” Specifically, this Article will analyze state private execution statutes and will argue that the public’s right to view executions of the condemned is the best and most efficient means of maintaining whatever fibers of transparency still remain within the criminal justice system. This Article is merely focusing on state statutes relating to the right to view executions and is not meant to take a stance on whether the death

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penalty should be upheld in any jurisdiction.

Part I of this Article will provide a brief history of capital punishment with an attempt to expose the statutory trend from publicizing to privatizing who may witness executions. With state executions on the rise in the United States, it is important that this particular area of jurisprudence be illuminated and examined. Interestingly, the vast majority of scholars have argued for the public’s right to view executions by utilizing a constitutional lens. But the strongest arguments can be made best by merely studying each state’s statutory language. A close reading of the statutory language is the purest way to extrapolate legislative intent. Not only will this Article discuss the statutory shift towards the privatization of executions, but also, it will attempt to demonstrate that this shift is one of many ailments plaguing the remains of the pellucidity within our criminal justice system. Thus, this Article urges legislators to amend their state execution statutes to remove ambiguity and allow citizens the same rights that are afforded to members of the media, surviving victims, victim’s families, members of the clergy, prison personnel, and others during the execution process.

In Part II, each method of execution currently being used by the states will be discussed. Part III of this Article will attempt to demonstrate the prior federal and state challenges to execution statutes, and why they have been unsuccessful in upholding a right to public viewing. Part IV will consist of two tables that will separate state private execution statutes into three distinct categories. Each category will correlate to the state statute’s degree of restriction regarding the ability to view executions.3

Part V surveys the various objections—both federal and state—to the state execution statutes. Finally, Part VI will discuss the prevalent public policy arguments made both in favor and against the public’s right to view executions. This Article will, however, ultimately conclude that certain state statutes currently in place which seek to privatize executions, are unconstitutional, deliberate, and undoubtedly contribute to a hidden criminal justice system that leaves citizens uninformed and stripped of a voice for public debate.

II. HISTORY OF EXECUTIONS: AN INCREASING TREND TOWARDS PRIVATIZING EXECUTIONS IN AMERICA

Both American and international history has made it clear that society advocates and, in some cases, demands that executions be privatized. In an attempt to expose and explain why society has moved away from public executions, it is of utmost importance that we understand where the nation has stood on this issue in the past.

Public execution is a notion possessing a robust history and has been

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3. Table I represents data from a study conducted in 1983 entitled “The Executioner’s Song: Is There a Right to Listen?” published by Mark Mamantov. It is worth noting that Mamantov is seemingly the first individual to categorize state execution statutes by their restrictive nature. Additionally, Table 1 compares 1983 data with 2015 data. Table 2 is original and re-categorizes state execution statutes based on different criteria in an attempt to demonstrate the increase in governmental privatization of state sanctioned executions.
thought to occur as early as the advent of the Biblical era. Interestingly, “death by public stoning and crucifixion were common methods of punishment employed against thieves, killers, and blasphemers.” In fact, the Romans engaged in this form of public execution during Nero’s reign, as did the French during the French Revolution. But in the United States, public executions had transpired up until the nineteenth century, “often in the public squares or commons,” drawing crowds with as many as 20,000 people. Amongst those in the crowd were religious affiliates who sought to deliver “spiritual messages” in the form of printed sermons and confessions. During public executions, these messages were meant to demonstrate the “consequences of crime and sin.” Yet presently, our courts have justified privatization to maintain order. This is a significant shift in theory arguably serving as the underbelly of the privatization trend and will be elaborated on later in this Article.

The movement towards privatizing executions commenced during the 1830s. Although one might think that the southern states led the way in privatizing executions in light of their overwhelming use of capital punishment, the New England states were “the first to enact private execution laws, and states in the South and Midwest soon followed.” Underscoring their opinions on privatization, some states went so far as to impose criminal sanctions for those that wrote about the specifics of an execution. Those state statutes required that the county sheriff be present in conjunction with any assistants deemed appropriate.

The states that statutorily required a sheriff to be present at executions seem to have camouflaged their purpose for privatization under the guise of maintaining order. But was that their true purpose? There is nothing to suggest that there was disorder (i.e. riots, brawls, burnings, etc.) when public viewing occurred. Further, the aforementioned criminalizing conduct was for merely writing about the execution rather than witnessing it. One could argue, however, that a higher probability of disorder is likely to occur after someone has physically witnessed an execution rather than having just read about it in their local newspaper. Thus, maintaining order simply cannot stand as the true statutory purpose behind privatizing executions. Putting an end to public executions as they once were, Missouri holds the title for the last public execution to take place in 1937 in the United States.

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5. Id.
6. Id. at 259-60.
7. Bessler, supra note 1 at 359.
8. Id. at 359-60.
9. Id. at 360.
10. Id. at 359.
11. Id. at 360.
12. Id. at 362-63.
13. Id. at 363.
14. Id.
15. Id. at 365.
With the New England states forging the path for private executions, thirty-one states still uphold the death penalty as a possible sentence. Of those thirty-one states, every jurisdiction has a private execution statute.

III. METHODS OF EXECUTION

There are five methods of execution currently being exercised in the United States: lethal injection, electrocution, gas chamber, hanging, and firing squad. Since 1976, 1,202 inmates have been executed by lethal injection, 158 inmates have been executed by electrocution, eleven have been executed by the gas chamber, three have been hanged, and three have been executed by a firing squad. How each method of execution is carried out serves as fertile ground for debate. The execution method raise serious concerns pursuant to the Eighth Amendment and equally to the First Amendment. The constitutional challenges concerning capital sentencing will be addressed in further detail in Part V.

Lethal injection is the leading mode of execution in states that enforce the death penalty. “Most executions by lethal injection involve a chemical that causes loss of consciousness, a chemical that arrests the breathing of the inmate, and a chemical which causes cardiac arrest.”

Electrocution (for whatever reason) seems to be a substantially less popular mode of execution as opposed to lethal injection. This method “involves strapping the inmate to a chair.” Metal electrodes are placed on the inmate’s scalp, forehead, and leg, and he or she is usually blindfolded. Electrical current is then run throughout the inmate’s body.

Next, there is the lethal gas method. Some might argue that the lethal gas method resembles the means that Adolf Hitler used during World War II to annihilate the Jews. Perhaps this means serves a historical context. With this method, “inmates [are] strapped to a chair in a special sealed room and sodium cyanide is released beneath the chair. Death follows from inhaling gas.”

Also, there is hanging. Delaware, New Hampshire, and Washington ascribe to hanging as a permissible means of execution should lethal injection be unavailable. Some have argued that this state sanctioned form of hanging is


17. See infra Table 1 (comparing the statutory changes that have occurred amongst the private execution statutes from 1983 to 2015 by state).


19. Id.

20. LINDA E. CARTER, UNDERSTANDING CAPITAL PUNISHMENT LAW, 39 (2d. ed. 2008).

21. Authorized Methods, supra note 18.

22. Carter, supra note 20 at 37.

23. Id. at 38.

24. Id. at 37.

25. Id.

akin to the public lynching that took place prior to the American Revolution. Hangings in Delaware, New Hampshire, and Washington are carried out by tying "a rope around the inmate's neck [and] death is caused by the fracture of the neck."  

Lastly, there is execution by a firing squad. This is the least adopted means of execution and "involves multiple shooters aiming at the inmate’s heart, usually marked with a white cloth." A typical procedure is to "give one of the shooters a blank round, but not to tell the shooters which one of them has the blank."  

IV. STATUTORY CONSTRUCTION AND INTERPRETATION  

Although numerous constitutional arguments have been made, there is no constitutional right afforded to the public to witness state sanctioned executions. As such, state statutes govern the execution process as well as who may be present to witness the execution. But whether deliberate or inadvertent, the statutory language of virtually every state execution statute is subject to various interpretations as to who may witness the execution. Notably, it currently appears that no state execution statute has been challenged based purely on its language; but rather it has been attacked using a First Amendment analysis. Thus, a discussion of statutory construction and interpretation becomes all the more relevant.

Statutes are written either in a mandatory or permissive (i.e. directory) way. In order to determine whether a statute is in effect “mandatory” or “permissive,” “effect must be given [to] the entire statute, its nature and object, and the consequences that would follow from each construction.” Statutory language including the word “shall” typically indicates that the statute is mandatory in nature.

As noted in the leading treatise on statutory construction, “Shall is considered presumptively mandatory unless there is something in the context or the character of the legislation which requires it to be looked at differently.” Numerous courts look to “whether the prescribed mode of action is of the essence of the thing to be accomplished” in order to determine whether the statute’s use of the word “shall” is mandatory or merely permissive.

Moreover, “[a] statutory provision would generally be regarded as mandatory where the power or duty to which it relates is for the public benefit,
good, interest or protection; it can also be for the security of public rights or for the advancement of public justice.” 35 Further, courts consistently look to other state statutes on an issue where its own jurisdictional statute is unclear. In fact, in addition to looking to other states, courts “use maxims such as expressio unius, [which] refer to common and technical meaning of words and to committee reports, employ rules relating to the derogation of common law, and do not presume the implied repeal of existing statutes.” 36

Perhaps most applicable to this Article is the notion that legislative intent is often looked at in making the determination of whether a statute is mandatory or permissive. 37 Here, the absence of words may prove to be just as useful in determining the legislature’s intent as those words, which are expressly written. For example, state execution statutes such as those of Louisiana, Kansas, and Montana include either “other witnesses” or a set number of witnesses without expressly providing whom these witness may be. 38 In contrast, state execution statutes such as those of Ohio and Tennessee remove the ambiguity to provide for the class of witness that is permitted to view an execution. 39

Thus, it begs the question of what the intent is of those state legislatures who failed to provide which witnesses may be present during the execution. For example, if Louisiana truly intended to include the public in viewing an execution, why is the statute written to include “other witnesses” rather than expressly stating who those witnesses are? And if Louisiana’s legislature intended to create statutory ambiguity—why? This Article suggests that the abstruseness of these statutes is intentional to mask the legislature’s true intentions of privatizing the highly debated process.

V. PRIOR CHALLENGES TO EXECUTION STATUTES

Capital punishment jurisprudence implicates constitutional, statutory, and administrative sources of law and is “authorized in laws passed by state legislatures and Congress.” 40 Although some states may have death penalty provisions included within their constitution, the primary source of state guidance regarding this facet of the law rests within each state’s statute. State statutes governing the sentencing phase of a death penalty conviction should be viewed as constituting a spectrum from most privatized to least privatized. This Article will place the states currently enforcing the death penalty into three categories: (1) the most privatized, allowing for neither media nor citizens; (2) the moderately privatized, allowing for selected citizens or a set number of media members; and (3) the least privatized, allowing for both citizens and media members.

35. Id.
37. Singer & Singer, supra note 30 at 3 §57:2.
40. Carter, supra note 20 at 17.
A. Federal Challenges

The year 1972 marks a monumental year for capital punishment jurisprudence. In the landmark case, *Furman v. Georgia*, the Supreme Court rendered Georgia's death penalty statute unconstitutional, reasoning that enforcing the death penalty constituted cruel and unusual punishment pursuant to the Eighth and Fourteenth Amendments. Although the case resulted in a 5:4 decision, there was no majority opinion. Each member of the Court wrote a separate opinion, resulting in the "longest single collection of opinions in any one case to date." Despite the lengthy analysis by the Court to determine that Georgia's statute was unconstitutional, it failed to address what made a death penalty statute constitutional and it left that determination up to the state legislatures.

Further, the *Furman* ruling implied that all other state statutes providing for death sentencing were also unconstitutional. As a result of the ruling, "35 state legislatures passed new death penalty statutes." In fact, five states (Florida, Georgia, Louisiana, North Carolina, and Texas) had created new statutory schemes that were reviewed by the Supreme Court. Georgia, Florida, and Texas' new statutory schemes were upheld, while both North Carolina's and Louisiana's schemes were struck down. Interestingly, the judicial focus has overwhelmingly been on how a death sentence should be reached during the sentencing phase. This is to say that much of the procedure indicating how a death sentence should be carried out has been avoided and left up to statutory determination. In fact, conservative justices have written that "the states should be left to exercise their own judgment, and that the federal government and the Court itself need not have a role."

In addition, although *Pell v. Procunier* and *Saxbe v. Washington Post Co.* have not squarely addressed the prevailing concerns regarding who may witness an execution, both cases "upheld regulations precluding the press from prearranged interviews with individually selected prisoners." Both *Pell* and *Saxbe* are significant because they became the basis on which other states courts have relied in determining who may be present during an execution.

In the Fifth Circuit opinion *Garrett v. Estelle*, members of the media

41. *Id.* at 43-44.
42. *Id.* at 44.
43. *Id.*
44. *Id.*
45. *Id.* at 43.
46. *Id.*
47. *Id.*
48. *Id.*
challenged a Texas statute that barred the media from broadcasting executions. A member of the news media brought the claim before the United States District Court for the Northern District of Texas, in which the member of the news media won. The District Court reasoned that members of the press serve as surrogates for the public and noted that broadcasting would help fuel "informed debate on capital punishment." On appeal, the Fifth Circuit reversed the lower court relying primarily on the rationale expressed in *Pell* and *Saxbe*.

**B. State Challenges**

As one might imagine, there have been far more challenges to the right to view executions at the state level rather than at the federal level. This is likely because the Supreme Court views the issue too controversial to directly address and as stated earlier, punts the legal question for the states to address. Nevertheless, challenges to publicizing the events occurring within prison walls have also been addressed at the state level. For example, in *Houchins v. KQED*, the court held that neither the media nor the public possess a "right to government information regarding the conditions of jails and their inmates." KQED stands for the proposition that the "press should have no greater right of access than the general public." Both state courts and state legislatures will often cite this rule as justification for arguing in favor of privatizing executions.

As a result of state challenges and the growing trend towards privatization, whether masked by media concerns or judicially created loopholes, states legislatures eventually began to enact what have been referred to as "gag laws." Examples of gag laws include provisions embedded within the state’s private execution statutes that require private “nighttime executions that [can] only be witnessed by few people” as seen in Minnesota or laws that “generally [limit] attendance to six or twelve ‘reputable’ or ‘respectable’ citizens while [barring] newspaper reporters from attending executions or otherwise [restrict] media access.” As mentioned earlier, the statutes that make it a crime to publish the details of the executions can also be considered gag laws. Further, these gag laws have even been known to implicate Equal Protection violations.

54. Id. at 383.
55. Id.
56. Id.
57. Id.
58. Id. at 382.
59. Id. at 382-83.
61. Id.
62. A “respectable” or “reputable” citizen hereinafter means any individual who demonstrates good character. An execution statute providing for “respectable” or “reputable” citizens excludes such classes as victims’ families, friends of the defendant, members of the media, or prison personnel. Rather, the statute is likely referring to ordinary members of the community.
For instance, in 1893, Connecticut adopted a law that only allowed “adult males” to witness executions.64

The most obvious demonstration of gag laws attempting to maintain the secrecy of an execution are statutes that impose a specific time of day or night to carry out the death sentence. One such jurisdiction providing for a specific time is Mississippi. Mississippi’s statute detailing execution procedures provides that “such punishment shall be inflicted at 6:00 p.m. or as soon as possible thereafter within the next twenty-four hour (24) hours.”65

VI. CURRENT STATE STATUTORY SCHEMES

A. A comparative table using Mamantov’s 1983 study

Table 166: The following compares the statutory changes that have occurred amongst the private execution statutes from 1983 to 2015 by state. The 1983 analysis strictly uses Mamantov’s categorical criteria from his 1983 article.67 Specifically, the 1983 statistics located in Table 1 above and indicated in a polka dot pattern, specifically addresses G. Mark Mamantov’s categorization of the degree of restriction that state execution statutes had in 1983. The following is Mamantov’s classification: Category one indicates the “most restrictive type of statute [permitting] only persons acting in an official capacity or chosen by the condemned to be present at an execution.”68 Category two indicates those state statutes that “[required] a given number of witnesses at an execution, but [failed] to specify what types of persons the witness group may include.”69 Lastly, Mamantov’s third and least restrictive statutory category, “explicitly provides for the presence of media representatives at executions, either in the language of the statute itself or by means of implementing administrative guidelines.”70

The 2015 data indicated in a checkerboard pattern, represents where the state statutes would currently fall under their revised statutory scheme according to Mamantov’s 1983 categorical criteria.71 The data indicates that from 1983 to 2015, the number of private execution statutes has increased. Additionally, there has been a decrease in the number of states enforcing the death penalty. Note that thirty-two states currently uphold the death penalty as opposed to thirty-six in 1983.

In his article entitled The Executioner’s Song: Is There a Right to Listen, the esteemed G. Mark Mamantov is the first known author to have categorized

64. Id.
66. Please refer to Appendix A for Table 1.
68. Id. at 378 (citing Indiana, Tennessee, and Wyoming).
69. Id. at 379 (citing Arizona, Arkansas, Colorado, Maryland, Massachusetts, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, and Virginia).
70. Id. at 379 (citing Alabama, California, Connecticut, Florida, Georgia, Illinois, Kentucky, Louisiana, Mississippi, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, and Utah).
71. Mamantov, supra note 53 at 378-379.
private execution statutes. The key distinction between Mamantov's
categorical analysis and the one presently created is the lens used to create the
categories. Mamantov splits the states into three categories using a
Constitutional lens and focuses heavily on the media's right of access. Mamantov's first category comprises those statutes that are considered to be the
most restrictive and "permit only persons acting in an official capacity or chosen
by the condemned to be present at an execution." The second category "requires a given number of witnesses at an execution, but fails to specify what
types of persons the witness group may include." Mamantov's last category is
considered the least restrictive type of private execution statute because it
"explicitly provides for the presence of media representatives at executions,
either in the language of the statute itself or by means of implementing
administrative guidelines.

Although informative, Mamantov's work is based on data dating back thirty-one years when thirty-eight states upheld the death penalty. Capital
punishment jurisprudence has since changed. In contrast, this Article will focus
only on the statutory components of capital punishment law in an attempt to
further expose the movement from public to private executions. As mentioned
previously, states currently enforcing the death penalty will be re-categorized
pursuant to each jurisdiction's current statutory scheme.

B. A current analysis of states with the death penalty using strictly 2015 data

Table 2: The following table re-categorizes states upholding the death
penalty using entirely different or original criteria for each category. Category
one provides for state statutes that are the most privatized by expressly barring
media members and does not allow for reputable citizens during the execution
process. Category two indicates the state statutes that allow either select
citizens by prison officials or members of the media. Lastly, category three
represents the state statutes that are the least privatized by allowing for both
reputable citizens and media members. The category "N/A" provides for

72. Id.
73. Id. at 378.
74. Id. (citing Indiana, Tennessee, and Wyoming).
75. Id. at 379 (citing Arizona, Arkansas, Colorado, Maryland, Massachusetts, Missouri, Montana,
Nebraska, Nevada, New Hampshire, New Mexico, and Virginia).
76. Id. (citing Alabama, California, Connecticut, Florida, Georgia, Illinois, Kentucky, Louisiana,
Mississippi, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, and Utah).
77. Id. at 373.
78. See infra Table 2 (re-categorizing states upholding the death penalty using different criteria for each
category).
79. Please refer to Appendix B for Table 2.
Ann. § 17-10-41 (West 2015); Idaho, Idaho Code § 19-2705(3) (West 2015); Indiana, Ind. Code § 35-38-6-
those states that do not fit into any category.81

Because much has changed regarding capital punishment jurisprudence
since the early 1980s, this Article re-categorizes the states with enforceable
execution statutes using entirely different categories. Importantly, the analysis
of each statute is done through the lens of a citizen’s right to view executions
rather than the media’s right. Thus, this Article views the least privatized state
statute to be one that provides for both members of the media and respectable
citizens. A state statute favoring one class (either the public or media) over the
other is not only unconstitutional but suggests an attempt to shield information
from either class. In addition, the trend towards privatization can be seen in both
Table 1 and Table 2.

Below is a listing of the states with enforceable execution statutes broken
down by the three new categories created:

1. Statutes that are the most privatized by expressly barring both media members
and reputable citizens during the execution process.

<table>
<thead>
<tr>
<th>State</th>
<th>Citation</th>
<th>1983 Statutory Language</th>
<th>2015 Statutory Language</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Allowing for “reputable citizens”</td>
<td>Allowing for “members of the media”</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Allowing for “reputable citizens”</td>
<td>Allowing for “members of the media”</td>
</tr>
<tr>
<td>1. Colorado</td>
<td>§18-1.3-1206 (2015)</td>
<td>Maybe82 No83</td>
<td>No No</td>
</tr>
<tr>
<td>2. Georgia</td>
<td>§17-10-41 (2015)</td>
<td>Maybe84 Yes85</td>
<td>No No</td>
</tr>
<tr>
<td>3. Indiana</td>
<td>§35-38-6-6(a)(1)-(8) (2015)</td>
<td>No86 No87</td>
<td>No No</td>
</tr>
</tbody>
</table>

82. See Mamontov, supra note 53 at 378 (noting that the type of witness is not specified).
83. See id. at 379 (listing the jurisdictions that allow for media).
84. Id. at 378 (indicating that Georgia is silent on this issue).
85. Id. at 379 (stating that media is “explicitly” permitted).
86. Id. at 378 (“[O]nly persons acting in an official capacity or chosen by the condemned [may] be present at any execution.”).
87. Id. (“[O]nly persons acting in an official capacity or chosen by the condemned [may] be present at any execution.”).
### 4. Texas

<table>
<thead>
<tr>
<th></th>
<th></th>
<th>Mayb88 Yes99</th>
<th>No</th>
<th>No</th>
</tr>
</thead>
</table>

### 5. Wyoming

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th>No90</th>
<th>No91</th>
</tr>
</thead>
</table>

Note: Idaho fails to fit into any category regardless of whether the 1983 or 2015 statutory language is applied.

2. Statutes that allow select citizens, prison officials, or members of the media to witness the execution.

<table>
<thead>
<tr>
<th>State</th>
<th>Citation</th>
<th>1983 Statutory Language</th>
<th>2015 Statutory Language</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Allow for “reputable citizens”</td>
<td>Allow for “members of the media”</td>
<td>Allow for “reputable citizens”</td>
</tr>
<tr>
<td>2. Arizona</td>
<td>§13-758 (2015)</td>
<td>Maybe95 No96</td>
<td>Yes</td>
</tr>
<tr>
<td>4. California</td>
<td>§3605(a) (2015)</td>
<td>Maybe99 Yes100</td>
<td>Yes</td>
</tr>
<tr>
<td>5. Kansas</td>
<td>§22-4003(a) (2015)</td>
<td>N/A101 N/A</td>
<td>Maybe102</td>
</tr>
</tbody>
</table>

88. See Mamantov, *supra* note 53 at 378 (indicating silence as to whether reputable citizens are allowed to view executions in Texas).

89. *Id.* at 379 (indicating that media is “explicitly” permitted).

90. *Id.* at 378 (“Only persons acting in an official capacity or chosen by the condemned [may] be present at any execution.”).

91. *Id.* (“Only persons acting in an official capacity or chosen by the condemned [may] be present at any execution.”).

92. *Id.* at 378.

93. *Id.* at 379 (indicating that Alabama is silent on this issue).

94. *Id.* (indicating that media is “explicitly” permitted).

95. *Id.* at 378 (noting that the type of witness is not specified).

96. *Id.* at 379 (listing the jurisdictions that allow for media).

97. *Id.* at 378 (noting that the type of witness is not specified).

98. *Id.* at 379 (listing the jurisdictions that allow for media).

99. *Id.* (indicating that California is silent on this issue).

100. *Id.* (indicating that media is “explicitly” permitted).

101. *States With and Without the Death Penalty, supra* note 16.

102. See KAN. STAT. ANN. § 22-4003(a) which does not specify which of the ten persons, designated by the secretary of correction may serve as “official witness.” This could include reputable citizens, members of the media, or both.

103. See KY. REV. STAT. § 431.250.

104. See Mamantov, *supra* note 53 at 379 (indicating that Kentucky is silent on this issue).

105. *Id.* (stating that media is “explicitly” permitted).
<table>
<thead>
<tr>
<th>State</th>
<th>Section/Note</th>
<th>Allowed Witnesses</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>7. Louisiana</td>
<td>§15:570(6) (2015)</td>
<td>Maybe⁴⁶</td>
<td>Likely to include reputable citizens, members of the media, or both.</td>
</tr>
<tr>
<td>11. New Hampshire</td>
<td>§630.6 (2015)</td>
<td>Maybe⁵⁰</td>
<td>Yes No</td>
</tr>
<tr>
<td>14. Oklahoma</td>
<td>§1015(B) (2015)</td>
<td>Maybe⁵³</td>
<td>Yes No</td>
</tr>
<tr>
<td>15. Oregon</td>
<td>§137.473(1) (2015)</td>
<td>N/A⁵⁴</td>
<td>No Yes</td>
</tr>
<tr>
<td>16. South Carolina</td>
<td>§24-3-550 (2015)</td>
<td>Maybe⁵⁵</td>
<td>No Yes</td>
</tr>
<tr>
<td>17. Tennessee</td>
<td>§40-23-116(a) (2015)</td>
<td>Maybe⁵⁶</td>
<td>No Yes</td>
</tr>
</tbody>
</table>

106. *Id.* (indicating that Louisiana is silent on this issue).
107. *Id.* (noting that media is "explicitly" permitted).
108. *See* LA. STAT. ANN. § 15:570(A)(6) which allows for a maximum of seven other witnesses. Like Kansas, this could include reputable citizens, members of the media, or both.
110. *See* Mamontov, *supra* note 53, at 378 (noting that the type of witness is not specified).
111. *Id.* at 379 (listing the jurisdictions that allow for media).
112. *Id.* (noting that the type of witness is not specified).
113. *Id.* (listing the jurisdictions that allow for media).
114. *See* Mont. Code Ann. §46-19-103(6)(b) allowing for "three persons chosen by the department of corrections." This may include reputable citizens or may not.
115. *See* Mamontov, *supra* note 53, at 379 (noting that the type of witness is not specified).
116. *Id.* (listing the jurisdictions that allow for media).
117. *Id.* (noting that the type of witness is not specified).
118. *Id.* (listing the jurisdictions that allow for media).
119. *Id.* (North Carolina is silent on this issue).
120. *Id.* (indicating that media is "explicitly" permitted in North Carolina).
121. *Id.* (Ohio is silent on this issue).
122. *Id.* (indicating that media is "explicitly" permitted in Ohio).
123. *Id.* (Oklahoma is silent on this issue).
124. *Id.* (noting that media is "explicitly" permitted).
125. *Death Penalty Information Center, supra* note 16.
126. *Mamontov, supra* note 53, at 379 (South Carolina is silent on this issue).
127. *Id.* (noting that media is "explicitly" permitted).
128. *Id.* (allowing for "only persons acting in an official capacity or chosen by the condemned to be present at an execution").
129. *Id.* (allowing for "only persons acting in an official capacity or chosen by the condemned to be present at an execution").
130. *Id.* (Utah is silent on this issue).
20. Washington §10.95.185(2)(a) (2015) | N/A¹³⁴ | N/A¹³⁵ | No | Yes

Note: Delaware fails to fit into any category regardless of whether the 1983 or 2015 statutory language is applied.¹³⁶

3. Statutes that are the least privatized by allowing for both reputable citizens and media members during the execution process.

<table>
<thead>
<tr>
<th>State</th>
<th>Citation</th>
<th>1983 Statutory Language</th>
<th>2015 Statutory Language</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Allowing for &quot;reputable citizens&quot;</td>
<td>Allowing for &quot;members of the media&quot;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
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<td>Yes</td>
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<td></td>
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<td>Yes</td>
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<tr>
<td></td>
<td></td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

Although a split exists between the most and least restrictive categories, it is important to note two findings. First, in comparing Mamantov’s data from *Table 1*, we find that the number of state statutes privatizing executions has increased and likewise, the number of state statutes allowing for a broader audience has decreased as between 1983 and 2015. Second, although the current study indicated as *Table 2* centers on the citizen’s right to view as the determinant for

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¹³¹ *Id.* (stating that media is “explicitly” permitted).
¹³² *Id.* (demonstrating that the type of witness is not specified).
¹³³ *Id.* (listing the jurisdictions that allow for media).
¹³⁴ *Id.* (noting that Washington does not fit into any category).
¹³⁵ *Id.*
¹³⁶ *Id.* (noting that Delaware does not fit into any category).
¹³⁷ F.L.A. STAT. ANN. § 922.11 (West 1982) (Florida is silent on this issue).
¹³⁸ *Id.* (indicating that media is “explicitly” permitted).
¹⁴⁰ *Id.* (stating that media is “explicitly” permitted).
¹⁴² *Id.* (stating that media is “explicitly” permitted).
¹⁴⁴ *Id.* (stating that media is “explicitly” permitted).
privatization, the results from Table 1 and Table 2 indicate the same trend; an increasing shift towards privatization. For example, Table 1 indicates that there were three states in 1983 that fell into the “most restrictive” category. Table 2 shows that in 2015, there is now double that amount in the “most privatized” category. This shift seems to demonstrate that there are increasingly more states adopting a private approach towards carrying out death sentences.

VII. PUBLIC POLICY ARGUMENTS

A. Arguments in favor of the public’s right to view

Public executions should be statutorily permissible because (1) human history dictates so, (2) it would encourage an informed debate, and (3) it would invariably lead to the abolition of the death penalty. As mentioned earlier, the notion of carrying out a death sentence in public has long been part of our nation’s history. In fact, that last public execution occurred just seventy-nine years ago. It simply cannot be overlooked that defendants are still being executed pursuant to “ritualized standards provided by law.” Ironically, “[t]he condemned prisoner dies in a surgical environment out of view, although it is the public who ultimately sanctions his death.” Historically, those convicted and sentenced to death carried out their sentences publicly as a result of society’s efforts to demean and shame. Although reviving public executions might invoke a similar effect, society has a new purpose and an established right.

One must also understand that the notion of public execution is not merely a domestic concern. Public execution is a practice that spans cross-culturally. For example, “Asian offenders were skinned alive or tied to stakes, smeared with honey, and left for wild animals to eat, while Persian offenders were crucified, trampled by elephants, smothered with hot ashes or heavy stones, or buried alive.” Just to the west, “the pharaohs embalmed criminals alive for giving false testimony, and mass drownings took place during the French Revolution.” Consequently, it is no surprise that numerous nations have shared in the trend towards abolishing the death penalty in light of the way the punishment was carried out.

As of 2013, there were twenty-two countries that still enforce the death penalty.

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148. Patrick, supra note 144 at 118.
149. Id.
150. Id.
151. Bessler, supra note 60 at 216.
152. Id. at 216.
153. Id.
penalty.\textsuperscript{154} The overwhelmingly majority of those twenty-two countries that still enforce capital punishment are made up of totalitarian regimes.\textsuperscript{155} Although the number of international executions seems to be decreasing, the United States ranks fifth out of twenty-two in the amount of executions being conducted.\textsuperscript{156} As previously mentioned, within the United States, the majority of states have upheld the death penalty. One explanation as to why the majority of states have chosen to uphold capital punishment lies firmly within the state’s well-crafted private execution statutes. If state statutes allowed for public executions, perhaps the majority would soon become the minority in terms of states that would continue to uphold the death penalty as a valid form of punishment.

Moreover, it has been heavily argued that allowing for public executions would catapult debate concerning capital punishment jurisprudence. At the very least, it would allow for citizens to visualize the consequences of their decision to sentence someone to death. Although this Article focuses primarily on the statutory rather than constitutional implications of the public’s right to view, it is imperative to note that both First and Eighth Amendment arguments have been raised which often add credence to the debate argument.

Arguably, statutory and constitutional arguments go hand in hand. It has been written that “[t]he prohibition against filmed public executions not only restricts the marketplace of ideas, [but] it also cuts fundamentally to the core of the Eighth Amendment.”\textsuperscript{157} By denying the public’s right to view executions, citizens are no longer able to serve as a “checks and balances” in determining whether a particular method of execution is humane or whether a particular execution was carried out properly. Justice Marshall essentially argued for a checks and balances system and has said, “whether or not a punishment is cruel and unusual depends, not on whether its mere mention ‘shocks the conscience and sense of justice of the people,’ but on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable.”\textsuperscript{158}

One author argues that “the free evolution of the ‘evolving standards of decency that mark a maturing society’ is being constricted by prison officials who do not want the details of executions widely known and certainly not watched by a gathered nation on television.”\textsuperscript{159} Hidden knowledge inevitably leads to stagnate growth. Query, how can society educate itself and construct informed decisions on ending an individual’s life if the very pieces of information needed are hidden from it? Particularly in an era where knowledge disseminates in milliseconds with the advent of an emerging Internet, it is now more than ever that a debate on executions would have the most profound impact on capital punishment jurisprudence.

\textsuperscript{154} Amnesty International (Nov. 20, 2015, 10:22 PM), http://www.amnestyusa.org/images/dpreport2013_map.jpg [hereinafter Amnesty International].
\textsuperscript{155} Bessler, supra note 60 at 201.
\textsuperscript{156} See Amnesty International, supra note 155.
\textsuperscript{157} Patrick, supra note 147 at 138.
\textsuperscript{158} Bessler, supra note 60 at 238 (emphasis added).
\textsuperscript{159} Patrick, supra note 147 at 139.
Last, one could only conclude that state legislatures know what researchers have been arguing all along. If executions were made public pursuant to state statute allowing for anyone to view them, and public debate was fostered, the United States would join the majority of nations who have since abolished capital punishment. Justice Marshall agreed with this theory and noted, "accurate information about capital punishment, would convince Americans that the death penalty was "unwise and immoral." Many Supreme Court Justices have underscored that it is the legislature (rather than the judiciary) that is best suited to make such determinations concerning the application of capital punishment. It naturally follows that if the Justices felt that the legislature was the appropriate branch to determine execution application, then the legislature is surely the proper means to determine such concerns as who may view an execution. But the state private execution statutes still remain unconstitutional and narrow, providing for some members of society and not others. Thus, the state legislature should utilize its power in amending the statutes to provide that all citizens may view an execution being performed.

Additional Justices who believed that the power of enforcing the death penalty should be removed from the judiciary and into the hands of the legislative branch were Justice Powell, Justice Rehnquist, Justice Burger, and Justice Blackmun. In *Furman v. Georgia*, Justice Powell, dissenting from the decision, noted the majority’s holding was "the very sort of judgment that the legislative branch is competent to make and for which the judiciary is ill-equipped." In addition, Justice Rehnquist noted that making such decisions of life or death "must surely be approached with the deepest humility and genuine deference to legislative judgment." Justice Blackmun also thought it appropriate to place the power within the legislative branch when he said, "[w]ere I a legislator, I would vote against the death penalty for the policy reasons . . . ." If it is within the legislature’s purview to uphold capital sentencing, then it is certainly within its authority to draft statutes that allow for total public viewing.

B. Arguments against the public’s right to view

In their article entitled *Televising Executions: The High-Tech Alternative to Public Hangings*, Richards and Easter classify the arguments against public executions into three categories: (1) effects on the prison system; (2) effects on viewers; and (3) the effect on the condemned, and their privacy interest. This Article will briefly discuss each category and their relation to current execution statutes.

161. Id. at 239.
162. Id.
163. Id.
164. Id. (quoting *Furman v. Georgia*, 408 U.S. at 468) (Rehnquist, J., dissenting).
165. Id. at 240 (quoting *Furman v. Georgia*, 408 U.S. at 406) (Blackmun, J. dissenting).
166. Richards & Easter, *supra* note 52 at 408.
Those opposed to the right to view executions often argue that the ability to watch public executions will inevitably lead to a prison uproar and leave the safety of those present in question. But "[t]here is no evidence that dangers would result to witnesses, that the sight of fellow prisoners dying would cause inmates to riot, or that a camera would ever be thrown at a gas chamber." Further, private execution statutes have already addressed this problem by providing for a set number of witnesses to attend the execution, the method in which each witness signs in on the day of the execution, the time of day that each execution must occur, the anonymity of the executioner, and what is allowed within the execution chamber. However, one must wonder if these rigid statutory restrictions concerning the execution process are an attempt to preserve prison safety of which there is no evidence to suggest, or are merely an attempt to conceal the gruesome details and botched procedures.

Evidence that seems to further underscore the state's attempt to maintain secrecy during the process lies in the procedure. California dims the light in the execution chamber to maintain the "executioner's anonymity" and in Missouri, drugs are administered in the prisoner's body using a flashlight. Those that have attacked the restrictions of private state execution statutes (which mandate executioner anonymity) have argued that revealing the executioner's identity and credentials would lead to less botched jobs because qualified executioners would be completing the task.

Second, those opposed to public executions argue that because of the gory and graphic nature of executions, the public should not be permitted to witness them. However, the same argument could be made for crime shows that air actual footage from violent crimes, and Halloween movies that often plaster the television screen with blood and guts. What distinguishes public executions from the other examples mentioned is that there is an added educational component.

If the public were able to witness executions, it could potentially serve as a deterrent. Cesare Beccaria is responsible for shedding light on what we as a society know about capital sentencing. Beccaria is most famous for his treatise, On Crimes and Punishments. Beccaria himself has noted, "For a punishment to be just, it must have only that degree of intensity that suffices to deter men from crime." Interestingly, statistics have shown that homicide rates are higher in states that uphold the death penalty than those that do not. These statistics are likely the result of statutory privatization of each jurisdiction's execution statute. If executions were to become public, perhaps the statistics would demonstrate a vastly different result.

167. Id. at 410.
169. Id. at 2826.
170. Bessler, supra note 60 at 196.
171. Id.
172. Id. at 223.
173. Id. at 283.
The last core argument against public viewing is the notion of maintaining the condemned's right to privacy.\textsuperscript{174} Although the individual rights of a prisoner are significantly diminished while incarcerated, many have argued that death is too intimate to be publicized. Nonetheless, many death row inmates have advocated for their executions to be made public. The results of one survey conducted using Florida death row inmates indicated “of twenty-nine responses, twenty-one of [those] inmates favored televising executions.”\textsuperscript{175} Most would argue that the choice of publicizing one's death should rest with the individual, and indeed, the individual has spoken.

VIII. CONCLUSION

Public executions have been apart of our nation's history for centuries and should therefore be restored. What was once an attempt to shame and humiliate, the purpose for public executions in this country has since changed. Because American citizens have constitutionally been empowered with the right to sentence individuals to death, and both the victims of crimes and the citizens of the state in which the crime has occurred have been wronged, it follows that all citizens should have the right to view a death sentence carried out.

As evident in Table 1 and Table 2, there is a trend towards privatizing execution statutes amongst states that currently enforce the death penalty. Accordingly, by deliberately masking the execution process through state statutes, it leaves citizens uninformed about a process they actively play a role in, while serving to ensure that death sentences will continue to be carried out for centuries to come.

\textsuperscript{174} Richards & Easter, supra note 52 at 407.

\textsuperscript{175} Id. at 419.
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<thead>
<tr>
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<td>Most Privatized</td>
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<td>Least Privatized</td>
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Table 1

- 2015
- 1983
Table 2

<table>
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