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The "Midnight Assassination Law" and Minnesota's Anti-Death Penalty Movement, 1849-1911

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THE "MIDNIGHT ASSASSINATION LAW" AND MINNESOTA'S ANTI-DEATH PENALTY MOVEMENT, 1849-1911[†]

John D. Bessler^{††}

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A portion of this article will appear in the author's forthcoming book, tentatively entitled *Death in the Dark: Midnight Executions and Capital Punishment in America*, to be published by University Press.

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I. INTRODUCTION

In the United States, executions are hidden from public view. State laws, in fact, require that executions take place within prisons, and most states limit public attendance at executions to only six to twelve "reputable" or "respectable citizens."¹ Television coverage is not allowed.² The death

1. ARIZ. REV. STAT. ANN. § 13-705 (Supp. 1994) (asserting that a superintendent shall invite "at least twelve reputable citizens of his selection"); ARK. CODE ANN. § 16-90-502(d)(2) (Michie 1987) ("At the execution there shall be present . . . a number of respectable citizens numbering not fewer than six (6) nor more than twelve (12)."); MD. CODE ANN., art. 27, § 73 (1957) (stating that executions shall take place in the presence of "a number of respectable citizens numbering not less than six or more than twelve"); MO. ANN. STAT. § 546.740 (Vernon 1987 & Supp. 1992) (requiring that the chief administrative officer of the correctional facility invite "at least twelve reputable citizens, to be selected by him"); NEV. REV. STAT. § 176.355(2)(d) (1991) (allowing the director of the department of prisons to invite "not less than six nor more than nine reputable citizens"); N.H. REV. STAT. ANN. § 630:6 (1986) (stating that "the sheriff of the county in which the person was convicted . . . may admit other reputable citizens not exceeding 12. . . ."); N.M. STAT. ANN. § 31-14-15 (Michie 1984) (warden must invite "at least twelve reputable citizens, to be selected by him"); N.C. GEN. STAT. § 15-190 (1983) ("At such execution there shall be present . . . six respectable citizens. . . ."); PA. CONS. STAT. ANN. § 9711(k)(1) (Supp. 1995) ("No person except the following shall witness any execution . . . six reputable adult citizens selected by such superintendent. . . ."); S.C.

penalty is cloaked in added secrecy because executions usually occur at night. Many states even mandate, by statute, that executions take place after midnight and before dawn. For example, Delaware and Louisiana authorize executions only between midnight and 3:00 A.M., and South Dakota's executions must occur between 12:01 A.M. and 6:00 A.M.³ Other states, like Wyoming and Indiana, require executions "before the hour of sunrise."⁴ In fact, one of the most popular times to schedule an execution is one minute after midnight, with over eighty-two percent of all executions from 1977 to 1995 occurring between the hours of 11:00 P.M. and 7:30 A.M. Only rarely do executions occur during daylight hours.⁵

Minnesota no longer authorizes capital punishment, but the state once played a pivotal role in shaping the way in which states conduct executions in America. Indeed, while other states acted first in passing laws requiring private, nighttime execu-

CODE ANN. § 24-3-550 (Law. Co-op. Supp. 1995) ("At an execution . . . a group of not more than two respectable citizens of the State designated by the director . . . must be present."); *see also* COLO. REV. STAT. § 16-11-404 (1986) ("There shall . . . be present . . . such guards, attendants, and other persons as the executive director . . . deems desirable, not to exceed fifteen persons.").

2. MISS. CODE ANN. § 99-19-55(2) (1972) ("No person shall be allowed to take photographs or other recordings of any type during the execution."); TENN. CODE ANN. § 40-23-116(c)(1) (Supp. 1995) ("Photographic or recording equipment shall not be permitted at the execution site until the execution is completed, the body is removed, and the site has been restored to an orderly condition."); UTAH CODE ANN. § 77-19-11(5)(a) (1995) ("Photographic or recording equipment is not permitted at the execution site until the execution is completed, the body is removed, and the site has been restored to an orderly condition.").

3. DEL. CODE ANN. tit. 11, § 4209(f) (Supp. 1994); LA. REV. STAT. ANN. § 15:569.1 (West 1992); S.D. CODIFIED LAWS ANN. § 23A-27A-17 (1988).

4. IND. CODE ANN. § 35-38-6-1(b) (West 1986); KEN. REV. STAT. § 431.240(1) (Michie Supp. 1995) (requiring executions to take place "before sunrise"); WYO. STAT. § 7-13-905(a) (1995) (requiring executions "before the hour of sunrise"). Until 1995, Texas also required executions to take place "before sunrise." In 1995, the Texas Legislature passed a law requiring lethal injections to occur after 6:00 P.M. TEX. CRIM. PROC. CODE ANN. art. 43.14 (West 1996) (requiring that "the sentence shall be executed any time after the hour of 6 p.m. on the day set for the execution."). This change in the timing of executions was meant to accommodate the schedules of lawyers and judges, who are more accessible during the day. Bruce Tomaso, *100th Inmate Executed*, DALLAS MORNING NEWS, Oct. 5, 1995, at 27A; *Texas Murderer Dies by Lethal Injection*, BALTIMORE SUN, Oct. 5, 1995, at 6A. Some states allow correctional officials to set the hour of execution. UTAH CODE ANN. § 77-19-6(2) (1995) ("The Department of Corrections shall determine the hour, within the appointed day, at which the judgment is to be executed.").

5. *See infra* Appendix (listing the hour and minute that executions took place in the United States from 1977 to 1995).

tions,⁶ Minnesota's so-called "midnight assassination law" is the only American law requiring private, nighttime executions ever commented upon by the United States Supreme Court.⁷ That fact alone makes the study of Minnesota's "midnight assassination law" important. However, an examination of Minnesota history also provides a fascinating microcosm of the paternalistic sentiment that led to the rise of laws requiring private, nighttime executions in America. For example, in its quest to protect "the masses" from gruesome execution spectacles, Minnesota adopted the "midnight assassination law,"⁸ which, like laws enacted in New York and Colorado, went so far as to make it a crime for newspapers to print any execution details.⁹ By exposing the

6. Many states enacted laws requiring private executions before the Minnesota Legislature passed its private execution law in 1889. For example, Pennsylvania abolished public executions in 1834, as did Massachusetts, New Jersey and New York in 1835. LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776-1865 93-94 (1989); *see also id.* at 93-116 (tracing the origins of private execution laws). Neither was Minnesota the first state to pass a law requiring nighttime executions. Ohio passed legislation in 1885 requiring executions "before the hour of sunrise," and Indiana passed a similar law on March 6, 1889—more than a month before Minnesota's statute requiring nighttime executions was signed into law. 1889 Ind. Acts 192; 1885 Ohio Laws 169. *See infra* text accompanying note 364 (describing the passage of Minnesota's law requiring nighttime executions). The Ohio law required executions to take place "within the walls of the Ohio penitentiary." 1885 Ohio Laws 169. However, it allowed "a reporter for each one of the two leading [county] newspapers of opposite politics" to attend them. 1885 Ohio Laws 170. The Indiana law required executions to "take place inside the walls of the State Prison. . . ." 1889 Ind. Laws 193. That law, however, made no provision for the attendance of newspaper reporters. *Id.* at 192-95.

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

8. 1889 Minn. Laws, ch. 20.

9. This statement is taken from the Minnesota Supreme Court's decision upholding the constitutionality of Minnesota's "midnight assassination law." *State v. Pioneer Press Co.*, 100 Minn. 173, 175, 110 N.W. 867, 868 (1907) (holding that the "evident purpose" of Minnesota's law was "to surround the execution of criminals with as much secrecy as possible, in order to avoid exciting an unwholesome effect on the public mind," with the effect being that executions "must take place before dawn, while the masses are at rest, and within an inclosure, so as to debar the morbidly curious"). The New York law, enacted in 1888, provided:

No account of the details of any . . . execution, beyond the statement of the fact that such convict was on the day in question executed according to the law at the prison, shall be published in any newspaper. Any person who shall violate or omit to comply with any provision of this section shall be guilty of a misdemeanor.

1888 N.Y. Laws, ch. 489, § 507. The Colorado law, passed in 1889, similarly provided: "No account of the details of any such execution, beyond the statement of the fact that such convict was on the day in question duly executed according to law at the State Penitentiary, shall in any manner be published in this State." 1889 Colo. Sess. Laws 118.

dubious legislative rationales behind Minnesota's "midnight assassination law,"¹⁰ this Article calls into question the nationwide practice of excluding the public from viewing executions.

The Minnesota Legislature abolished capital punishment in 1911. Over twenty years earlier, however, the Legislature passed a law mandating that executions take place "before the hour of sunrise."¹¹ Dubbed the "midnight assassination law," the 1889 law required private, nighttime executions and restricted the number of execution spectators.¹² It also prohibited newspaper reporters from attending hangings, and forbade newspapers from printing any execution details.¹³ Only the fact that the execution occurred could be lawfully printed.¹⁴ Sheriffs or reporters who violated the law could be criminally prosecuted.¹⁵ Authored by Minneapolis legislator John Day Smith, the "midnight assassination law" was also commonly referred to as the "John Day Smith law."¹⁶

In Parts II, III, and IV, this Article traces the administration of capital punishment in Minnesota from 1849 to 1889. Part II describes early death penalty laws in Minnesota and recounts some infamous public executions in this frontier state. Part III discusses the passage and repeal of an 1868 law, which gave jurors the exclusive right to impose death sentences, effectively halting executions in Minnesota. Part IV describes the resumption of hangings in Minnesota after the state repealed the 1868 law in 1883. All three of these sections detail the state's gradual transition from public executions to semi-private, invitation-only hangings.

Next, Part V describes the passage of the "midnight

10. 1889 Minn. Laws, ch. 20, § 3.

11. *Id.*

12. *Id.* § 5. Several Minnesota newspapers reported that this 1889 law was known as the "midnight assassination law." *Sheriff's Tea Party*, ST. PAUL DISPATCH, Feb. 14, 1906, at 10; *The Smith Execution Law*, MINNEAPOLIS J., Feb. 14, 1906, at 4. *See generally Hanged in Private*, ST. PAUL DISPATCH, July 19, 1889, at 1 ("the famous John Day Smith law . . . requires the execution to take the form of a midnight assassination"); *Last Hours of Life*, MINNEAPOLIS TRIB., Oct. 19, 1894, at 1 (describing how "Senator John Day Smith secured the passage of the law, which is known as the 'John Day Smith midnight assassination law'").

13. 1889 Minn. Laws, ch. 20, § 5.

14. *Id.*

15. *Id.* § 6.

16. Throughout this Article, the terms "midnight assassination law" and "John Day Smith law," which are completely synonymous, will be used interchangeably.

assassination law” in 1889. It relates the intended purpose of the law, and the legislative climate that existed at the time of its enactment. Part VI then explores what impact John Day Smith’s “midnight assassination law” had in the state, including its repercussions for press coverage of hangings. It also discusses the extent to which sheriffs and reporters complied with the provisions of the law. In addition, Part VI recounts the history of a United States Supreme Court ruling, handed down in 1890, in which the Court found that the John Day Smith law was one “which the legislature, in its wisdom, and for the public good, could legally prescribe. . . .”¹⁷

Part VII describes how three Minnesota newspapers attacked the constitutionality of the “midnight assassination law” in the Minnesota courts. That law went unenforced for over sixteen years. However, in 1906, the State prosecuted three St. Paul newspapers under the law after they published detailed accounts of the botched hanging of William Williams.¹⁸ The newspapers assailed the law as infringing on the freedom of the press, but the Minnesota Supreme Court upheld the law’s constitutionality in 1907. Despite the failure of their legal attack, the newspapers’ coverage of Williams’ hanging, which described the horrific nature of his death, led to the eventual abolition of capital punishment in Minnesota. All death sentences after Williams’ hanging were commuted by the state’s governors until the death penalty was abolished by the Minnesota Legislature in 1911.¹⁹

After discussing the successful abolitionist efforts of 1911 in Part VIII, Part IX evaluates how Minnesota’s “midnight assassination law” affected the abolitionist movement in Minnesota. Part X then examines the influence that the “midnight assassination law” had on America’s death penalty debate. In particular, the Article recounts how the two court decisions upholding the constitutionality of Minnesota’s “midnight assassination law”—one by the United States Supreme Court,²⁰ and the other by the Minnesota Supreme Court²¹—contributed to the rise of private,

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

18. *Newspapers Indicted*, MINNEAPOLIS J., Mar. 3, 1906, at 7; *St. Paul Newspapers Procure Indictments*, MINNEAPOLIS J., Mar. 4, 1906, at 5.

19. WALTER TRENERRY, *MURDER IN MINNESOTA: A COLLECTION OF TRUE CASES* 167 (1985).

20. *Holden v. Minnesota*, 137 U.S. 483, 491-94 (1890).

21. *State v. Pioneer Press Co.*, 100 Minn. 173, 176-77, 110 N.W. 867, 868-69 (1907).

nighttime executions in America. In revealing how the private nature of executions has dramatically altered Americans' perceptions of capital punishment, the Article concludes by questioning whether executions should remain private affairs.

II. THE MINNESOTA TERRITORY AND THE EARLY STATEHOOD YEARS, 1849-1867

A. *A Public Execution on the Prairie*

The history of capital punishment in Minnesota dates back to 1849, when an Act of Congress created the Minnesota Territory.²² Under territorial law, all persons convicted of premeditated murder automatically received death sentences. Before executing convicted murderers, the law required that they be put in solitary confinement for lengthy periods of time. The law in effect in 1851 required a full year of isolation before execution, while an 1853 amendment reduced this one-year period to anywhere from one to six months, at the judge's discretion.²³ The governor could issue the warrant of execution only after the period of solitary confinement expired.²⁴

The new Territory would not witness its first hanging until December 29, 1854. On that date, a Dakota Indian named U-hazy was hanged on the outskirts of St. Paul.²⁵ A former officer in the Mexican War, newly appointed Territorial Governor Willis A. Gorman approved of the whole affair, at least initially.²⁶ Just a day before the scheduled hanging, he denied a petition from forty of the "most respectable ladies of St. Paul" to pardon U-hazy.²⁷ Invoking "duty to country," he wrote that he could find "no just reason" to commute U-hazy's sentence.²⁸ The Dakota Indian killed a white woman "without a shadow of excuse."²⁹ She had been "murdered by the side of a poor, but no doubt

22. See 1849 Minn. Laws, ch. 10 (establishing the territorial government of Minnesota); THEODORE BLEGEN, MINNESOTA: A HISTORY OF THE STATE 162-63 (1989).

23. 1851 Minn. Laws, ch. 100, § 2, amended by 1853 Minn. Laws, ch. 2, § 7.

24. *Id.* § 2.

25. DAILY MINN. PIONEER, Dec. 30, 1854, at 2, col. 2 (referring to U-hazy as Yu-he-za); MINN. REPUBLICAN, Jan. 4, 1855, at 2, col. 6 (same).

26. See BLEGEN, *supra* note 22, at 171 (discussing Governor Gorman's appointment).

27. *Letters from Governor Gorman*, DAILY MINN. PIONEER, Jan. 3, 1855, at 2.

28. *Id.*

29. *Id.*

fond and devoted husband," Governor Gorman proclaimed.³⁰

However, Governor Gorman did not anticipate the public spectacle that would accompany the execution. One newspaper account reported that "Total Depravity" was out early in the morning on execution day.³¹ The night before, in fact, "Total Depravity appeared not to have gone to bed at all."³² That night, the firing of guns and pistols frequently disturbed sleeping residents around the jail where U-ha-zy had been confined for two years.³³ By 9:00 A.M., Ramsey County Sheriff Abram M. Fridley appeared a "strong friend of Total Depravity," for he started erecting the scaffold in one of St. Paul's most public places.³⁴ The boisterous crowd "applauded" the sheriff's actions, and "cheered loudly" at learning that the law did not prohibit public hangings.³⁵ "Crucify him!" the mob cried out.³⁶

Only through the "determined interposition of Governor Gorman and many right-minded citizens" was the gallows taken down from the center of St. Paul.³⁷ The execution, urged city authorities, simply could not take place within the public quarter.³⁸ Eventually, Sheriff Fridley relented, and the crowd marched with "great pomp and noise" behind the sheriff and the prisoner to an uninhabited prairie.³⁹ After the scaffold was reerected, U-ha-zy was hanged at around 3:00 P.M. According to one newspaper account:

Liquor was openly passed through the crowd, and the last moments of the poor Indian were disturbed by bacchanalian yells and cries. The crowd revealed the instincts of brutes and was composed of ruffians. A half drunken father could be seen holding in his arms a child, eager to see all; giddy, senseless girls and women chattered gaily with their attendants, and old women were seen competing with drunken

30. *Id.*

31. *Hanging the Indian*, DAILY MINNESOTIAN, Dec. 30, 1854, at 2.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*; see also Merle Potter, *Major Fridley's Kingdom*, J. MAG., Sept. 4, 1932, at 4 (referring to the U-ha-zy execution) (available in the Minnesota Historical Society's biographical file on Abram M. Fridley).

37. DAILY MINNESOTIAN, Jan. 3, 1855, at 2, col. 2.

38. *Id.*

39. *Hanging the Indian*, DAILY MINNESOTIAN, Dec. 30, 1854, at 2.

ruffians for a place near the gallows.⁴⁰

The crowd reportedly left the scene "satisfied and in high glee."⁴¹

Minnesota newspapers provided widely divergent coverage of U-ha-zy's hanging. While *The Daily Minnesotian* gave a complete report, other newspapers had "no inclination to witness the tragedy."⁴² For example, *The Daily Minnesota Pioneer* did not even send a reporter to the hanging, leaving it "unable to give the lovers of the dreadful a detail of the poor fellow's suffering."⁴³ The paper added: "We are gratified to know that but few of our citizens were in attendance."⁴⁴ *The Minnesota Republican* also printed few execution details.⁴⁵ It merely reported that the hanging represented a "disgusting" scene.⁴⁶

In fact, Minnesota newspapers universally condemned the public spectacle created by U-ha-zy's execution. *The Daily Minnesotian* declared that no future attempts should be made "to hang even a dog in the public streets of St. Paul or [in] any other civilized town or city."⁴⁷ "The sooner the scenes connected with that transaction are forgotten," the editors wrote, "the better for the reputation of St. Paul and all Minnesota."⁴⁸ Just two days after U-ha-zy's hanging, even the previously uninterested *Daily Minnesota Pioneer* was compelled to remark on the "barbarity" displayed by those who attended the execution.⁴⁹ These "fiends incarnate" disturbed U-ha-zy's final moments with "laughs and jeers."⁵⁰ The "debauched in the crowd," reported the paper, acted "much more like savages" than the condemned

40. Potter, *supra* note 36.

41. *Hanging the Indian*, DAILY MINNESOTIAN, Dec. 30, 1854, at 2; Potter, *supra* note 36, at 4; *see also The Approaching Execution*, ST. PAUL PIONEER, Nov. 10, 1865, at 1 (describing the execution of U-ha-zy as a "bestly affair" and reporting that "men, women and children thronged the gallows on St. Anthony Hill, and followed the victim with howls and cheers as though it was to be a delightful entertainment. The disgrace of that scene is felt to this day.")

42. DAILY MINN. PIONEER (St. Paul), Dec. 30, 1854, at 2, col. 2.

43. *See id.*

44. *Id.*

45. *The Execution*, MINN. REPUBLICAN (St. Anthony), Jan. 4, 1855, at 2.

46. *Id.*; *see* DAILY MINNESOTIAN, Jan. 3, 1855, at 2, col. 2; DAILY MINN. PIONEER, Dec. 30, 1854, at 2, col. 2.

47. DAILY MINNESOTIAN, Jan. 3, 1855, at 2, col. 2.

48. DAILY MINNESOTIAN, Jan. 1, 1855, at 2, col. 1.

49. *Execution of U-ha-zy*, DAILY MINN. PIONEER, Jan. 1, 1855, at 2.

50. *Id.*

man.⁵¹ The editors concluded that “[s]uch conduct should be frowned upon by every lover of decency in the community.”⁵² Even so, in the wake of U-ha-zy’s hanging, published articles frequently commented upon the “Scriptural lawfulness” of capital punishment.⁵³

B. Lynch Mobs and Frontier Justice

Non-state-sanctioned lynchings of Indians were not uncommon in the years following U-ha-zy’s execution. For example, in the summer of 1857, three Indians were arrested for the murder of a pack peddler near Gull Lake.⁵⁴ Because of the public outcry, Morrison County Sheriff Jonathon Pugh decided to take the prisoners to St. Paul for “safe keeping.”⁵⁵ However, in route, Sheriff Pugh was overtaken by a party of men who took the Indians from him and got them to confess “upon questioning.”⁵⁶ The Indians were hung by the roadside on the south edge of Little Falls. Their bodies were left hanging on the prairie until about ten o’clock the next morning.⁵⁷

Minnesota’s first non-state-sanctioned lynching of a white settler did not occur until after Minnesota was admitted into the Union in May of 1858.⁵⁸ On December 27, 1858, a mob of sixty men entered the town of Lexington to lynch Charles Rinehart, suspected of murdering a thirty-six-year-old carpenter, John Bodell. Le Sueur County’s deputy sheriff defended Rinehart with “great courage,” refusing to surrender the jail key.⁵⁹ However, he was wrestled to the ground and the key taken forcibly from him. During that struggle, the muscular Rinehart, with almost “superhuman” exertion, stripped off his

51. *Id.*

52. *Id.*

53. *The Penalty of Death*, DAILY MINNESOTIAN (St. Paul), Jan. 13, 1855, at 2; *see also The Penalty of Death—Is It Expedient?*, DAILY MINNESOTIAN (St. Paul), Jan. 15, 1855, at 2 (noting that some people rely upon the Holy Scriptures as a basis for supporting the death penalty).

54. *Upon the Scaffold High*, LITTLE FALLS TRANSCRIPT, July 19, 1889, at 3.

55. *Id.*

56. *Id.*

57. *Id.*; *see also Last Hours of Life*, MINNEAPOLIS TRIB., Oct. 19, 1894, at 4 (describing the lynching of two Indians in Bell Prairie “for some devilry”).

58. BLEGEN, *supra* note 22, at 228 (stating that Minnesota was admitted into the Union on May 11, 1858).

59. *Disgraceful Lawlessness in Le Sueur County*, DAILY PIONEER & DEMOCRAT (St. Paul), Dec. 31, 1858, at 2.

handcuffs, taking some skin with them, and tore in two a half-inch iron staple securing his ankle.⁶⁰ He then broke off a cast iron stove leg to defend himself. Wielding the stove leg in his bloody hands, Rinehart held off the lynch mob for over an hour, assisted by his inaccessible location in the jail.⁶¹ Eventually, though, the mob subdued him by axing through the log jail.⁶² Rinehart was then dragged on a sled for three-quarters of a mile and hung from the limb of a tree.⁶³ His body was buried, uncoffined, in a shallow grave.⁶⁴ A St. Paul newspaper later called the incident a "disgrace" that had stigmatized "the good name" of the State.⁶⁵

The murder of twenty-five-year-old Henry Wallace, in 1858, resulted in yet another lynching in Minnesota, this time of Wright County resident Oscar Jackson, who was widely believed to have killed Wallace.⁶⁶ A grand jury indicted Jackson for Wallace's murder on October 6, 1858, but the jury returned a verdict of not guilty on April 3, 1859 after eighteen hours of deliberation.⁶⁷ Jackson, who had received death threats prior to trial, was represented by three St. Paul lawyers, including former Territorial Governor Willis A. Gorman.⁶⁸ When the verdict was delivered, it was quite unpopular, causing Jackson to quickly leave Wright County.⁶⁹ "It is known that threats have been made against Jackson's life, should he re-appear in the county," reported *The St. Paul Pioneer and Democrat* of April 13, "and it is said that fifteen men followed him on the night of his acquittal for the purpose of lynching him, but he managed to elude them by escaping in the woods."⁷⁰

Foolishly, Jackson returned to Wright County on April 21, 1859, leading Wright County Sheriff George Bertram to issue an arrest warrant for Jackson on the charge of stealing items from

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*; see TRENERRY, *supra* note 19, at 3-12.

66. *Oscar F. Jackson Hung*, DAILY PIONEER & DEMOCRAT (St. Paul), Apr. 29, 1859, at 3.

67. TRENERRY, *supra* note 19, at 15.

68. *Id.*

69. *Id.*

70. *Id.* at 15-16.

Henry Wallace's cabin.⁷¹ By the time Sheriff Bertram arrived at the house of Jackson's father-in-law to serve the warrant, a crowd had already surrounded the house. The crowd built fires close to the house after Jackson, who was believed to be inside, refused to come out. When Sheriff Bertram came to the door, he was admitted and Jackson came downstairs to talk with him. He had been hiding upstairs during the crowd's three-day siege of the house.⁷² Jackson told Sheriff Bertram that he feared for his life, but the sheriff assured him that he would not be harmed. After Jackson agreed to surrender, Sheriff Bertram dispersed the crowd and ushered his prisoner out of the house.⁷³

Less than a half mile from the house, an armed mob overtook Sheriff Bertram's procession, taking custody of Jackson. The sheriff relinquished his prisoner without resistance and rode off with his deputies, failing to even report the incident.⁷⁴ After taunting Jackson throughout the night, the lynch mob strung him up, even as his wife arrived to plead for mercy. Her pleas were ignored and she was sent away empty-handed.⁷⁵ The bloodthirsty mob hauled Jackson up and down two times, failing to get Jackson to confess, but successfully mangling his neck. Only when Jackson was hoisted up for a third time, at around 2:00 P.M. on April 25, did his neck break. Jackson's body was left hanging from a beam that protruded from Henry Wallace's cabin.⁷⁶

On April 29, Gov. Henry H. Sibley called the lynching a "high-handed outrage . . . against the peace and dignity of the State," and offered a \$500 reward on May 2 "for the apprehension and conviction of any or all persons concerned."⁷⁷ Alluding to the lynching of Charles Rinehart in Lexington, Governor Sibley proclaimed that "[o]nce before . . . the life of a human being was taken . . . under similar circumstances, and the state disgraced thereby."⁷⁸ "These deeds of violence must cease," he

71. *Id.* at 17.

72. *Id.* at 18.

73. *Id.*

74. 2 WILLIAM FOLWELL, A HISTORY OF MINNESOTA 29 (1961).

75. TREENERY, *supra* note 19, at 19.

76. *Id.*; FOLWELL, *supra* note 74, at 29.

77. TREENERY, *supra* note 19, at 19.

78. *Id.*

declared, "or there will be no safety for life or property in our midst."⁷⁹ Despite Governor Sibley's appeals, no one ever claimed the offered reward. Although three of the lynch mobs participants were later arrested for Jackson's murder, a Wright County grand jury failed to indict any of them. The lynching of Oscar Jackson would go unpunished.⁸⁰

C. Early Abolitionist Efforts and the Execution of Anne Bilansky

The members of the Minnesota Legislature did not seriously debate whether capital punishment should be abolished until the end of 1859, as Anne Bilansky's execution date neared. Earlier that year, the notorious "Mrs. Bilansky" was convicted of killing her husband, Stanislaus Bilansky, with arsenic.⁸¹ Her motive was either to marry or have "more unrestrained intercourse with her paramour," a young carpenter named John Walker.⁸² Mrs. Bilansky had lived with Walker prior to her marriage to Mr. Bilansky.⁸³ After getting convicted, Mrs. Bilansky sought a new trial, but her pleas were rejected by the trial judge. The Minnesota Supreme Court affirmed Mrs. Bilansky's first-degree murder conviction on July 23, 1859, and the court remanded her case back to the trial judge for sentencing.⁸⁴

With hopes of a new trial dashed, Mrs. Bilansky acted out of desperation. On the evening of July 25, 1859, an inattentive jailor left Mrs. Bilansky alone in a hallway. While the jailor was procuring some keys from an adjoining office, Mrs. Bilansky escaped through a basement window.⁸⁵ Upon fleeing to her paramour's boarding house, Mrs. Bilansky and Walker hid out in the countryside. Plans were then hatched to transport her out

79. *Id.*

80. FOLWELL, *supra* note 74, at 29; CLARENCE A. FRENCH & FRANK B. LAMSON, CONDENSED HISTORY OF WRIGHT COUNTY, 1851-1935, at 12-13 (1935); MERLE POTTER, 101 BEST STORIES OF MINNESOTA 210-13 (1931); TRENERRY, *supra* note 19, at 13-24; *Escape of Mrs. Bilansky*, DAILY PIONEER & DEMOCRAT (St. Paul), July 27, 1859, at 3; *Oscar F. Jackson Hung*, DAILY PIONEER & DEMOCRAT (St. Paul), Apr. 29, 1859, at 3.

81. *The Bilansky Murder*, DAILY PIONEER & DEMOCRAT (St. Paul), Mar. 24, 1860, at 3.

82. *Id.*

83. *Id.*

84. *State v. Anne Bilansky*, 3 Minn. 169, 181 (1859); *New Trial Refused in Bilansky Case—The Prisoner Let Out of Jail!*, DAILY PIONEER & DEMOCRAT (St. Paul), July 26, 1859, at 3.

85. *Escape of Mrs. Bilansky*, DAILY PIONEER & DEMOCRAT (St. Paul), July 27, 1859, at 3; *Escape of Mrs. Bilansky*, DAILY PIONEER & DEMOCRAT (St. Paul), July 26, 1859, at 3.

of state. These plans were foiled by police, however, who arrested Walker and Mrs. Bilansky a week after her escape.⁸⁶ Walker was acquitted of all charges against him, but Mrs. Bilansky was forced to reappear before the trial court for sentencing.⁸⁷ Amidst Mrs. Bilansky's sobs, Judge Edward C. Palmer told Mrs. Bilansky on December 2, 1859, that she would be "hung by the neck" until death, and added, "may God, in His infinite compassion, have mercy upon your soul."⁸⁸ He directed the sheriff to select the execution site, and forwarded the certified record of the case to Gov. Henry H. Sibley, who had the legal responsibility of fixing the execution date.⁸⁹

In the wake of Mrs. Bilansky's death verdict, tremendous pressure was put on Governor Sibley to commute her sentence. In fact, on the very day that Mrs. Bilansky's conviction was affirmed by the Minnesota Supreme Court, Justice Charles E. Flandrau, one of its members, penned a personal letter to Governor Sibley asking for clemency.⁹⁰ He wrote:

It is my firm conviction that a strict adherence to the penal code will have a salutary influence in checking crime in the State, but it rather shocks my private sense of humanity to commence by inflicting the extreme penalty on a woman. I believe she was guilty, but nevertheless hope that if you can consistently with your view of Justice and duty, you will commute the sentence which will be pronounced, to imprisonment.⁹¹

Unwilling to set an execution date, Democratic Governor Sibley let his term expire on December 31, 1859, leaving the political problem to his Republican successor, Alexander Ramsey.⁹²

After Mrs. Bilansky's death sentence was handed down, "strenuous efforts" were made in the second session of the

86. *The Bilansky Murder*, DAILY PIONEER & DEMOCRAT (St. Paul), Mar. 24, 1860, at 3.

87. *Id.*

88. *Id.*

89. *Id.*; TRENNERY, *supra* note 19, at 39.

90. TRENNERY, *supra* note 19, at 37-38. See generally MINN. LEGIS. MANUAL, at 100 (1911) (containing biographical sketch of Justice Charles E. Flandrau).

91. *Id.* at 38.

92. *Id.*; see also BLEGEN, *supra* note 22, at 226 (discussing Governor Sibley's 1857 election). See generally MINN. LEGIS. MANUAL, at 97 (1911) (containing biographical sketches of Governor Sibley and Alexander Ramsey).

Minnesota Legislature to abolish capital punishment.⁹³ On December 13, 1859, the House of Representatives asked its Judiciary Committee to "inquire into the propriety of abolishing capital punishment within this State."⁹⁴ The Judiciary Committee produced its report later that month and its members were "unanimously of the opinion" that capital punishment "ought not to be abolished."⁹⁵ The Judiciary Committee cited six reasons for its recommendation. First, "premeditated" killing "ought to be distinguished from every other crime by a distinctive punishment"⁹⁶ Second, "the universal feeling of mankind, in all ages and all places, has been that he who had willfully shed the blood of his fellow, had thereby forfeited his own."⁹⁷ Third, "the death of the murderer is sanctioned by divine authority"⁹⁸ Fourth, abolishing capital punishment would only "increase the crime of murder"⁹⁹ Fifth, the penal code "almost precludes the possibility of an innocent person suffering the death penalty," especially because of the governor's "pardoning or commuting power."¹⁰⁰ Finally, "the abolition of capital punishment would lead to what is termed 'Lynch law.'"¹⁰¹

Although all of the legislators on the House Judiciary Committee wanted to retain the death penalty, a bill was introduced in the House of Representatives on January 18, 1860, by Rep. G. W. Sweet, to abolish capital punishment upon females.¹⁰² It provided that "[n]o woman or girl convicted of

93. *The Bilansky Murder*, DAILY PIONEER & DEMOCRAT (St. Paul), Mar. 24, 1860, at 3. The second session of the Minnesota Legislature convened on December 7, 1859. *See Senate*, DAILY PIONEER & DEMOCRAT (St. Paul), Dec. 8, 1859, at 2; *House of Representatives*, DAILY PIONEER & DEMOCRAT (St. Paul), Dec. 14, 1859, at 2. That session adjourned on March 12, 1860. MINN. LEGIS. MANUAL, at 168 (1879).

94. MINN. HOUSE J., at 50-51 (1860). This resolution was introduced by Rep. Henry Acker. *Id.* *See generally* MINN. LEGIS. MANUAL, at 169 (1879) (containing biographical sketch of Henry Acker).

95. TRENERRY, *supra* note 19, at 38 (citing report); *House of Representatives*, DAILY PIONEER & DEMOCRAT (St. Paul), Dec. 14, 1859, at 2 (same); *House of Representatives*, DAILY PIONEER & DEMOCRAT (St. Paul), Jan. 1, 1860, at 2 (same).

96. MINN. HOUSE J., at 154 (1860).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 155.

101. *Id.*

102. *Id.* at 290 (1860) (referring to H.F. 142). *See generally* MINN. LEGIS. MANUAL, at 169 (1879) (containing biographical sketch of G.W. Sweet).

murder in the first degree, shall suffer the penalty of death, but that punishment in such cases shall be imprisonment in the State prison for life."¹⁰³ On the same day, a bill to abolish capital punishment altogether was also introduced in the Senate by Sen. J. H. Stevens.¹⁰⁴

When Governor Ramsey took office, he did not make an immediate decision about Mrs. Bilansky's fate.¹⁰⁵ However, on

103. MINN. HOUSE J., at 290 (1860) (quoting H.F. 142).

104. MINN. SENATE J., at 220, 224 (1860); *State Legislature—Second Session*, DAILY PIONEER & DEMOCRAT (St. Paul), Jan. 19, 1860, at 2; *The Bilansky Case*, DAILY PIONEER & DEMOCRAT (St. Paul), Jan. 24, 1860; *Senate*, DAILY PIONEER & DEMOCRAT (St. Paul), Dec. 8, 1859, at 2. On January 18, a bill was also introduced in the House of Representatives to require executions to be conducted in private in jails. DAILY PIONEER & DEMOCRAT (St. Paul), Jan. 19, 1860, at 2, col. 4. Despite a prediction by St. Paul's *Daily Pioneer & Democrat* that the bill to abolish public executions would become law, the bill was indefinitely postponed by the House on February 9, 1860. *Execution of Anne Bilansky*, DAILY PIONEER & DEMOCRAT (St. Paul), Jan. 26, 1860, at 3; *State Legislature*, DAILY PIONEER & DEMOCRAT (St. Paul), Feb. 10, 1860, at 2. Opponents of capital punishment "obstinately resisted" the bill's passage. *Execution of Mrs. Bilansky*, DAILY PIONEER & DEMOCRAT (St. Paul), Mar. 24, 1860, at 2.

105. A number of abolitionists lobbied Governor Ramsey for the commutation of Mrs. Bilansky's sentence. For example, the editor of a St. Cloud newspaper, Jane Grey Swisshelm, urged Governor Ramsey to commute the sentence in no uncertain terms. She wrote:

How long shall our Statute Books be disgraced by this code of vengeance and blood; and the most ferocious passions of the human breast fed and fattened in the name of Justice? One execution begets a dozen murders; and the code of "blood for blood" works around in a circle. To talk of society protecting itself by such exhibitions of vengeance is but a farce. What kind of society would that be which would not be able to protect itself against any future crime of such a criminal as Mrs. Bilansky, or any other criminal? The whole code of blood has its origin in the savage instincts of savage humanity—the same instincts which prompts [sic] the Chippewa to follow his Sioux foe to avenge the death of his murdered relatives. No civilized society holds that the individual has a right to avenge murder, and as the powers of organized society are simply those delegated to it by the individual members, whence comes this right to society?

It will not do to go back to the Old Testament law given to Noah and Moses. The government to which these laws applied were theocracies—the executives acted simply as the agents of the Divine Will; and the Giver of life has right to take it by any agency He sees fit to employ. But this Government is based upon the will of the people. It denies the Higher Law as supreme authority; and has, even according to the doctrine of the supporters of capital punishment, no more right to execute a murder than the murderer had to execute his victim. If Mrs. Bilansky is hung, Judge Palmer, Governor Ramsey, the Sheriff, and all aiders and abettors are as much murderers as she can possibly be, and as much deserving of the gallows. Acting as the representatives of the Government, they have no more right to take life than Mrs. Bilansky had, acting as her own representative. The stream cannot rise above its fountain; and if the individual has no right to take life, no collection or combination of individuals can have such right. There is no conceivable number of nothings which will make a something; and no conceivable number

January 26, 1860, he issued the death warrant, instructing the sheriff of Ramsey County to carry out Mrs. Bilansky's sentence between the hours of 10:00 A.M. and 2:00 P.M. on Friday, March 23, 1860.¹⁰⁶ In those days, whether for reasons of custom or superstition, executions were usually conducted on Fridays.¹⁰⁷

On January 31, 1860, the House of Representatives debated Representative Sweet's bill providing that no "woman or girl" be executed.¹⁰⁸ On the House floor, Rep. Henry Acker, calling for the total abolition of capital punishment, moved that the word "person" be substituted for the words "woman or girl."¹⁰⁹ Representative Sweet objected to the amendment as being designed "to kill the bill," but the amendment prevailed by a vote of thirty to twenty-two.¹¹⁰ Representative Acker then moved that the Committee of the Whole report the amended bill to the House with the recommendation that it pass. This motion carried by a tally of twenty-eight to twenty-five.¹¹¹ In spite of the recommendation, the amended version of Representative Sweet's bill was defeated by a vote of twenty-two to thirty-three on the afternoon of January 31.¹¹²

The very next day, February 1, 1860, Representative Acker introduced a new abolitionist bill "to commute the sentence of Mrs. Anne Bilansky, to imprisonment for life in the State Prison."¹¹³ On February 3, the House voted down Representative Acker's bill. However, on February 8, Representative Sweet successfully moved to take up Representative Acker's bill again. Representative Sweet believed that "Minnesota should never be disgraced by the hanging of a woman."¹¹⁴ Other legislators

of individuals, having no right to take life, can combine to arrogate or confer such right.

Opposed to Hanging, DAILY PIONEER & DEMOCRAT (St. Paul), Dec. 23, 1859, at 1; see also FOLWELL, *supra* note 74, at 33-36 (discussing Jane Grey Swisshelm). See generally GEORGE S. HAGE, NEWSPAPERS ON THE MINNESOTA FRONTIER 1849-1860 82-91 (1967) (containing biographical sketch of Jane Grey Swisshelm).

106. TRENERRY, *supra* note 19, at 39.

107. *Death Warrant for Hayward*, ST. PAUL PIONEER PRESS, Dec. 8, 1895, at 6.

108. *State Legislature*, DAILY PIONEER & DEMOCRAT (St. Paul), Feb. 1, 1860, at 2.

109. *Id.*

110. *Id.*

111. *Id.*

112. MINN. HOUSE J., at 361-62 (1860); see also *State Legislature*, DAILY PIONEER & DEMOCRAT (St. Paul), Feb. 1, 1860, at 2 (reporting on House of Representatives' afternoon session).

113. *State Legislature*, DAILY PIONEER & DEMOCRAT (St. Paul), Feb. 2, 1860, at 2.

114. *State Legislature*, DAILY PIONEER & DEMOCRAT (St. Paul), Feb. 9, 1860, at 2.

opposed the bill because it attempted to usurp "judicial powers," as well as the governor's pardoning power. After much debate, Representative Acker's bill passed the House by a vote of forty-one to thirty-two.¹¹⁵ An immediate motion to reconsider that vote, brought by Rep. John Sanborn, a member of the House Judiciary Committee, failed by a vote of thirty-three to forty-one.¹¹⁶ After Representative Acker's bill passed the House, *The Daily Pioneer & Democrat* reported that "the special advocates of the abolition of capital punishment for murder, chuckled, and not very quietly either, that in the second section [of the bill] there was a provision that would prevent capital punishment in any case."¹¹⁷

On February 9, Representative Acker's bill was referred to the Senate, where Senator Stevens, "a consistent advocate of the abolition of capital punishment," planned to use all of his "energies and power" to secure the bill's passage.¹¹⁸ Soon thereafter, Representative Acker's bill was considered by the Senate, which struck out the section of the bill abolishing capital punishment in its entirety.¹¹⁹ On the Senate floor, some legislators, including Sen. William McKusick and Sen. Thomas Cowan, were opposed to executing a woman. For example, Senator Cowan argued that "it was an outrage on public sentiment to make a poor, friendless woman the first victim in the State, to the death penalty."¹²⁰ On the other hand, other legislators, like Sen. J. H. Stewart, opposed efforts to commute Mrs. Bilansky's sentence. Arguing that Mrs. Bilansky "had a full, fair and impartial trial," Senator Stewart wanted the law "to take its course" because Mrs. Bilansky was "a devil incarnate."¹²¹ Ultimately, the Senate passed Representative Acker's bill, as amended, by a vote of nineteen to thirteen.¹²² After much

115. *Id.*

116. MINN. HOUSE J., at 155, 368, 407, 443-45 (1860).

117. *Revising the Verdicts of Juries—Pious Skulduggery*, DAILY PIONEER & DEMOCRAT (St. Paul), Feb. 11, 1860, at 2.

118. *Mrs. Bilansky*, DAILY PIONEER & DEMOCRAT (St. Paul), Feb. 9, 1860, at 3; see also MINN. SENATE J., at 402, 410 (1860) (reporting on Senate activity); *State Legislature*, DAILY PIONEER & DEMOCRAT (St. Paul), Feb. 10, 1860, at 2 (same).

119. *Revising the Verdicts of Juries—Pious Skulduggery*, DAILY PIONEER & DEMOCRAT (St. Paul), Feb. 11, 1860, at 2.

120. *State Legislature*, DAILY PIONEER & DEMOCRAT (St. Paul), Feb. 12, 1860, at 2.

121. *Id.*

122. *Id.* Senator J. S. Winn of Winona later proposed that the bill be retitled "A bill for the encouragement of prostitution and murder." *Id.* He believed "such a title to

legislative wrangling over the House's subsequent refusal to concur in the Senate amendment,¹²³ both the House and the Senate eventually approved the bill to commute Mrs. Bilansky's sentence to life imprisonment.¹²⁴

Before Governor Ramsey announced whether he would veto Representative Acker's bill, Senator Stevens' bill to abolish capital punishment was debated by the Senate. The debate was often intense, if not a bit personal. For example, while attempting to "obviate objections" against Senator Stevens' bill, Sen. D. C. Evans of Blue Earth County proposed that those who favored capital punishment "might have a waiver inserted for their personal benefit."¹²⁵ This suggestion, not surprisingly, was not adopted.¹²⁶ On a fairly evenly divided vote, Senator Stevens' bill failed to gain Senate passage, and was "laid on the table," leaving only Representative Acker's bill to be considered by Governor Ramsey.¹²⁷

On March 8, Governor Ramsey—later the Secretary of War—vetoed Representative Acker's bill. The proposed commutation was "contrary to sound public policy," he said, citing the "fearful" rise of crime and his dislike of lynch mobs.¹²⁸ He recalled the horrible nature of the crime: "The husband will not suspect that

be consistent and in keeping with all the facts in the case, as brought out" at Mrs. Bilansky's trial. *Id.* "The object she had in view of getting rid of her husband," Senator Winn contended, "was that she might live with her paramour, with whom she had for a long time been associated on terms of disgraceful intimacy, during the time her husband was living." *Id.* The Senate resoundingly defeated Senator Winn's proposal to amend the title of Representative Acker's bill by a vote of thirty to two. *Id.*; MINN. SENATE J., at 423 (1860).

123. MINN. SENATE J., at 525-27 (1860); MINN. HOUSE J., at 500, 502, 606, 699-700 (1860); *see also State Legislature*, DAILY PIONEER & DEMOCRAT (St. Paul), Feb. 15, 1860, at 2 (reporting on House of Representatives discussing the Bilansky Commutation Bill); *State Legislature*, DAILY PIONEER & DEMOCRAT (St. Paul), Feb. 29, 1860, at 2 (reporting on Senate discussing Mrs. Bilansky); *State Legislature*, DAILY PIONEER & DEMOCRAT (St. Paul), Feb. 29, 1860, at 2 (reporting on House of Representatives discussing the Bilansky Bill).

124. MINN. HOUSE J., at 660-61 (1860); *Mrs. Bilansky*, DAILY PIONEER & DEMOCRAT (St. Paul), Mar. 7, 1860, at 2.

125. *Capital Punishment*, DAILY PIONEER & DEMOCRAT (St. Paul), Mar. 8, 1860, at 3.

126. *Id.*; *see also State Legislature*, DAILY PIONEER & DEMOCRAT (St. Paul), Mar. 8, 1860, at 2 (reporting on Senate debate).

127. MINN. SENATE J., at 644 (1860); *see also Mrs. Bilansky*, DAILY PIONEER & DEMOCRAT (St. Paul), Mar. 7, 1860, at 2 (discussing the legislature's hearings on capital punishment); *The Bilansky Murder*, DAILY PIONEER & DEMOCRAT (St. Paul), Mar. 24, 1860, at 3 (questioning whether Governor Ramsey would approve the bill).

128. *State Legislature*, DAILY PIONEER & DEMOCRAT (St. Paul), Mar. 9, 1860, at 2.

she who has sworn to love and cherish will betray and destroy; and it shocks the moral sense of the whole community to believe it."¹²⁹ He found the killer's motive particularly egregious. "The reckless woman," he wrote, "having violated her marriage vows, and betrayed her husband's bed, hesitated not to sacrifice her husband's life."¹³⁰ One prominent St. Paul newspaper, *The Daily Pioneer & Democrat*, congratulated Governor Ramsey on his "good sense" and "sound statesmanship" in vetoing the measure.¹³¹ An attempt by Representative Acker to override the governor's veto failed to garner the requisite votes of two-thirds of House members.¹³²

In preparation for the execution, a fence was erected around the gallows in St. Paul's courthouse square. This activity drew many curious onlookers who discussed the approaching execution as they watched the enclosure being built. When the structure was finished, the gallows-posts were still visible to people on the street. Spectators only a few feet above street level had a fair view inside the enclosure.¹³³ No law required private executions, but Ramsey County Sheriff Aaron W. Tullis decided to exclude the general public from the execution. He would later be applauded for "rendering the execution as private as the means at his command permitted."¹³⁴

On execution day, March 23, 1860, the crowd started assembling early in the morning. "[T]hey took possession of the stone piles, the roofs of the various buildings in the neighborhood, and every elevation which offered an opportunity of

129. *Id.*

130. *Id.*

131. *Veto by Governor Ramsey*, DAILY PIONEER & DEMOCRAT (St. Paul), Mar. 9, 1860, at 2.

132. MINN. HOUSE J., at 697-700 (1860); see also BLEGEN, *supra* note 22, at 163-64 (describing Alexander Ramsey's early political career and his first few days as governor); *State Legislature*, DAILY PIONEER & DEMOCRAT (St. Paul), Mar. 9, 1860, at 2 (reporting on House of Representatives' debate of the vetoed Bilansky Bill).

133. *The Bilansky Murder*, DAILY PIONEER & DEMOCRAT (St. Paul), Mar. 24, 1860, at 3.

134. *Execution of Mrs. Bilansky*, DAILY PIONEER & DEMOCRAT (St. Paul), Mar. 24, 1860, at 2; see also *Expiated by the Rope*, ST. PAUL PIONEER PRESS, Aug. 29, 1885, at 2 (praising Sheriff Tullis' actions); *Mrs. Bilansky*, DAILY PIONEER & DEMOCRAT (St. Paul), Jan. 18, 1860, at 3 (urging Governor Ramsey to "exercise his discretion as to make the execution as private as executions usually are in States where public executions are prohibited").

viewing within the enclosure."¹³⁵ At ten o'clock in the morning, the Pioneer Guard, wearing heavy overcoats and fatigue caps, marched into the square, which was by then crowded with people.¹³⁶ They carried "ball cartridge" in readiness for an emergency.¹³⁷ "After a great deal of trouble, requiring . . . the military [to] exercise the utmost prudence and firmness, the crowd was cleared from the vicinity of the fence."¹³⁸ The line of sentinels then formed, "whose duty it was to keep all spectators . . . at least twenty feet from the enclosure."¹³⁹

At 10:15 A.M., Mrs. Bilansky was led out of the jail. She wore a black robe and a brown veil over her head. "Don't let a crowd see me," she pleaded with her escort before leaving the jail.¹⁴⁰ "I am willing to meet my God, but I don't want to have a crowd see me die."¹⁴¹ The crowd outside, however, had already swelled to between 1,500 and 2,000 people.¹⁴² The short procession from the jail to the enclosure, located just across the public square, was anything but private.¹⁴³ Once within the enclosure, the procession "ascended the steps of the gallows."¹⁴⁴ The heads of those on the platform were then visible to anyone at street level. Others, who had perched themselves atop roofs, carriages and hay wagons, enjoyed an unobstructed view of the entire proceedings inside. In all, about 100 persons entered the enclosure, including some twenty-five to thirty women.¹⁴⁵ These women, "falling in the rear," had gained admittance "before the gate could be closed."¹⁴⁶ Some of them carried infants, who "kept up an innocent crying, in unison with their mothers."¹⁴⁷

Additional crowd members, not gaining admittance, "ran

135. *The Bilansky Murder*, DAILY PIONEER & DEMOCRAT (St. Paul), Mar. 24, 1860, at 3.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* (quoting Anne Bilansky).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

the guard" to obtain positions at the fence.¹⁴⁸ Through numerous small openings, these spectators were able to get "as good an opportunity of witnessing the execution as those inside enjoyed."¹⁴⁹ In many instances, attempts to "run the guard" were made by women, many of whom were turned back.¹⁵⁰ Only "a few of the 'tender sex' obtained the coveted position."¹⁵¹ After five minutes of prayer, Mrs. Bilansky uttered her last words, "Lord Jesus Christ receive my soul," and then the rope was fixed around her neck.¹⁵² By and large, spectators possessed an unexpected appreciation of "the solemnity of the occasion."¹⁵³ When it was announced that "the drop had fallen . . . the crowd quietly and silently dispersed."¹⁵⁴ Only a few onlookers took pieces of the rope for mementos or as "a remedy for diseases."¹⁵⁵ Mrs. Bilansky had become the first—and to date, the only—woman executed in Minnesota.¹⁵⁶

After Mrs. Bilansky's execution, *The Daily Minnesotian* came out "furiously and strong for capital punishment."¹⁵⁷ That newspaper labelled death penalty opponents "very weak persons, who allow their nerves alike to control their judgments and their tears."¹⁵⁸ *The Daily Pioneer & Democrat* expressed its general support for capital punishment, but registered a "dissent" to *The Daily Minnesotian's* pointed attack. "[M]uch of the best talent in

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* (quoting Anne Bilansky).

153. *Id.*

154. *Id.*

155. *Id.*

156. TRENERRY, *supra* note 19, at 219; see also *The Bilansky Murder*, DAILY PIONEER & DEMOCRAT (St. Paul), Mar. 24, 1860, at 3 (discussing the events leading up to the execution of Mrs. Bilansky); *Execution of Mrs. Bilansky*, DAILY PIONEER & DEMOCRAT (St. Paul), Mar. 24, 1860, at 2 (same). The *Daily Pioneer & Democrat* later described the "most disgusting feature" of the hanging as "the eagerness and persistency with which females sought to obtain eligible places to view the dying agonies of one of their own sex." *Execution of Mrs. Bilansky*, DAILY PIONEER & DEMOCRAT (St. Paul), Mar. 24, 1860, at 2. Remarking on the women who gained admittance to the enclosure, the newspaper editorialized: "What could have induced these women to voluntarily witness a spectacle so harrowing to the feelings of even the 'sterner sex,' we cannot imagine." *The Bilansky Murder*, DAILY PIONEER & DEMOCRAT (St. Paul), Mar. 24, 1860, at 3. See generally DAILY PIONEER & DEMOCRAT (St. Paul), Mar. 25, 1860, at 3, col. 1 (apologizing for not reporting the correct remarks uttered by Mrs. Bilansky while on the scaffold).

157. *Capital Punishment*, DAILY PIONEER & DEMOCRAT (St. Paul), Mar. 27, 1860, at 3.

158. *Id.*

our land has been and is arrayed against the infliction of death for crime," the editors said.¹⁵⁹ The newspaper objected to *The Daily Minnesotian's* "method of treating" death penalty opponents.¹⁶⁰

In fact, in the wake of Mrs. Bilansky's execution, many prominent civic leaders continued to press for the abolition of capital punishment. On January 15, 1861, Rep. J. D. Hoskins introduced a resolution in the House of Representatives that "the Committee on Judiciary be instructed to bring in a bill abolishing capital punishment within this State."¹⁶¹ However, that resolution was voted down, with ten "ayes" versus twenty "nays."¹⁶² Four legislative sessions later, Rep. William Colvill, a war hero who led the famous charge of the First Minnesota Regiment at Gettysburg,¹⁶³ also introduced a bill to abolish capital punishment.¹⁶⁴ However, Representative Colvill's bill never reached a House vote.¹⁶⁵

D. More Public Hangings

The next hanging to occur in Minnesota after Mrs. Bilansky's would not occur for nearly a year. On March 1, 1861, Henry Kriegler was hanged "on the Commons in the Village of Albert Lea" before an estimated crowd of 1,300 to 2,000 people.¹⁶⁶ Despite "clouds and fog and melting snows," people travelled "some twenty, thirty, and some fifty miles to witness the

159. *Id.*

160. *Id.*

161. MINN. HOUSE J., at 3, 61 (1861).

162. *House of Representatives*, DAILY PIONEER & DEMOCRAT (St. Paul), Jan. 16, 1861, at 2. In 1861, the Minnesota Legislature also debated whether executions should be conducted publicly or privately. *Capital Punishment*, DAILY PIONEER & DEMOCRAT (St. Paul), Feb. 7, 1861, at 1; *see also* MINN. SENATE J., at 103, 109, 124, 372 (1861) (referring to S.F. 61); MINN. HOUSE J., at 139, 151, 156, 203, 207, 217, 226-27, 237 (1861) (same).

163. *Death Calls Minnesota's War Hero*, ST. PAUL PIONEER PRESS, June 14, 1905, at 1. The First Minnesota Volunteers suffered the highest casualty rate of any military unit at the battle of Gettysburg. RICHARD MOE, *THE LAST FULL MEASURE: THE LIFE AND DEATH OF THE FIRST MINNESOTA VOLUNTEERS* 296 (1993); GEOFFREY C. WARD, *THE CIVIL WAR: AN ILLUSTRATED HISTORY* 225 (1991) (82% of the 262 men who comprised the First Minnesota Regiment "fell in less than five minutes, the highest percentage of casualties taken by any Union regiment at the war"). *See generally* MINN. LEGIS. MANUAL, at 66 (1875) (containing biographical sketch of William Colvill).

164. MINN. HOUSE J., at 150, 209, 434 (1865) (referring to H.F. 134).

165. *Id.*; *House of Representatives*, ST. PAUL WEEKLY PIONEER AND DEMOCRAT, Feb. 8, 1865, at 4.

166. *Execution of Henry Kriegler*, FREEBORN COUNTY STANDARD, Mar. 2, 1861.

execution."¹⁶⁷ Kriegler, who had mistreated his wife, had killed another man for protecting her.¹⁶⁸ His last words, which he constantly repeated for ten minutes, were "Me poor man, me poor man."¹⁶⁹

On December 26, 1862, Kriegler's execution was overshadowed by what remains the largest mass hanging in United States history. On that day, thirty-eight Dakota Indians were hanged in Mankato.¹⁷⁰ Originally, over 300 Indians had been sentenced to death, most after hasty trials, for participating in the Dakota Conflict of 1862.¹⁷¹ That conflict, precipitated by the United States government's repeated treaty violations, claimed the lives of more than 500 white settlers.¹⁷² After reviewing the massive number of death sentences, President Abraham Lincoln commuted all but thirty-nine of those sentences on December 6, 1862.¹⁷³ President Lincoln himself wrote out the thirty-nine names of the condemned men on executive mansion stationery.¹⁷⁴ One of the men, Tatemima, received a last-minute reprieve, lowering the final death toll to thirty-eight men.¹⁷⁵

In preparation for the mass hanging, a large number of troops amassed in Mankato.¹⁷⁶ An order was then widely circulated, proclaiming that the executions would occur in the public square at 10:00 A.M. Martial law was imposed, and all intoxicants were banned until a day after the hanging for fear of a "serious riot or breach of the peace."¹⁷⁷ A "vigilant patrol" was organized to enforce this ban, with violations punished by "the immediate seizure and destruction of all the liquors of the

167. *Id.*

168. *Execution at Albert Lea*, DAILY PIONEER & DEMOCRAT (St. Paul), Mar. 8, 1861, at 1.

169. *Execution of Henry Kriegler*, FREEBORN COUNTY STANDARD, Mar. 2, 1861.

170. KENNETH CARLEY, THE SIOUX UPRISING OF 1862, at 66-67 (1961).

171. *Id.* at 63. That conflict is also sometimes referred to as the Sioux Uprising of 1862. See generally DUANE SCHULTZ, OVER THE EARTH I COME: THE GREAT SIOUX UPRISING OF 1862 (1992).

172. FOLWELL, *supra* note 74, at 187, 210.

173. CARLEY, *supra* note 170, at 65; see also THE DAKOTA CONFLICT (KTCA St. Paul/Minneapolis videotape production 1992) [hereinafter DAKOTA CONFLICT].

174. CARLEY, *supra* note 170, at 66; DAKOTA CONFLICT, *supra* note 173.

175. CARLEY, *supra* note 170, at 65; DAKOTA CONFLICT, *supra* note 173.

176. *The Sioux War*, MANKATO WEEKLY RECORD, Dec. 20, 1862, at 2.

177. *Execution of 39 Sioux*, MANKATO WEEKLY RECORD SUPPLEMENT, Dec. 26, 1862, at 1.

offender."¹⁷⁸ A diamond-shaped gallows, designed to hang ten prisoners on each side, was also erected.¹⁷⁹

On execution day, the Dakota Indians began chanting their death songs early in the morning.¹⁸⁰ This ritual continued while officials bound the condemned prisoners' arms with cords and placed white caps upon the Indians' heads.¹⁸¹ At around 10:00 A.M., officials ushered the thirty-eight prisoners to the wooden scaffold, which was surrounded by more than 1,400 soldiers.¹⁸² Three-thousand curious citizens crowded the streets and looked on from rooftops and windows.¹⁸³ While chanting their "Hi-yi-yi" death song, the prisoners ascended the gallows, and officials rolled the caps down over the prisoners' faces.¹⁸⁴ An official began a slow deliberate drumbeat. At the third drum roll, William Duley, a Dakota Conflict survivor, cut the triggering rope.¹⁸⁵ Almost instantaneously, all but one of the thirty-eight men were suspended by the neck. The man whose rope broke was immediately strung up again.¹⁸⁶ As the drop fell, "there was one, not loud, but prolonged cheer" from soldiers and citizens alike.¹⁸⁷

After the mass execution, the only hangings that occurred in Minnesota during the next five years were of other Dakota Indians, "half breeds," or those mistaken as such. For example, two participants in the 1862 uprising, Chiefs Shakopee and Medicine Bottle, were captured in Canada in 1864 and returned to Minnesota, where they were tried, without counsel, and sentenced to death. They were hanged at Fort Snelling at midday on November 11, 1865.¹⁸⁸ A force of 425 military men were present for the public execution, as was a large crowd of civilians, including "one or two carriage loads of ladies."¹⁸⁹ A number of persons from Minneapolis and St. Paul arrived at the

178. *Id.*

179. FOLWELL, *supra* note 74, at 211 (showing printed picture).

180. CARLEY, *supra* note 170, at 66.

181. *Id.*

182. *Id.*

183. *Id.*; DAKOTA CONFLICT, *supra* note 173 (indicating that 3,000 onlookers witnessed the mass execution).

184. CARLEY, *supra* note 170, at 66.

185. *Id.*

186. DAKOTA CONFLICT, *supra* note 173.

187. CARLEY, *supra* note 170, at 67.

188. *Id.* at 66.

189. *The Execution*, ST. PAUL WEEKLY PIONEER, Nov. 12, 1865, at 4.

fort too late for the hanging, much to their disappointment.¹⁹⁰

Likewise, on May 3, 1865, a "half breed" named John Campbell was hanged in Mankato following his conviction for the murder of Andrew Jewitt, a settler from Blue Earth County.¹⁹¹ Campbell's trial lasted only four hours, and was heard by a hastily organized group of Mankato citizens.¹⁹² As Minnesota historian William Folwell recounts:

Early in the afternoon an organization was formed which proceeded to elect a judge, a panel of jurymen, a prosecuting attorney, and an attorney for the accused. At the close of the trial . . . the jury gave a verdict of "guilty" and recommended that the prisoner be kept in jail to be arraigned before the district court, which was soon to convene. By this time the assemblage, or a large part of it, had become a mob and loud protest was voiced against delay of punishment. It was cried out that if the prisoner was not punished immediately the military authorities would take him down to Fort Snelling, hold him in confinement for a short time, and let him go. The mob prevailed and the wretch was soon dangling at the end of a rope thrown over a convenient limb.¹⁹³

On Christmas Day of 1866, two trappers from Mankato were also lynched in New Ulm after killing a man in a barroom brawl and being mistaken for "half breeds." The trappers, Alexander Campbell and George Liscom, were drinking in the saloon dressed in Indian garb, and were imitating Dakota braves taking scalps, when the fatal fight broke out.¹⁹⁴ One of the lynch mob participants, John Gut, was sentenced to death on February 1, 1868, by Judge Horace Austin.¹⁹⁵ Judge Austin ignored the jury's "recommendation" for clemency and sentenced Gut to be hanged between 10:00 A.M. and 2:00 P.M.¹⁹⁶ However, in an ironic twist of fact, the very same Horace Austin, as governor, later commuted Gut's death sentence to life imprisonment in February of 1870. Governor Austin commuted the death sentence to life imprisonment based upon the passage of an

190. See *The Execution*, ST. PAUL WEEKLY PIONEER, Nov. 12, 1865, at 4; DAKOTA CONFLICT, *supra* note 173.

191. TRENERRY, *supra* note 19, at 43-44.

192. *Id.* at 43.

193. FOLWELL, *supra* note 74, at 346-48.

194. TRENERRY, *supra* note 19, at 45-47.

195. *Id.* at 51.

196. *Id.*

1868 law, which provided that the death penalty would not be imposed unless the jury recommended it.¹⁹⁷

III. THE EXECUTION MORATORIUM, 1868-1884

A. *The 1868 Act*

After several legislative failures, death penalty foes renewed their efforts in 1868. On February 3, 1868, Rep. N. H. Miner of Stearns County introduced a bill to abolish the death penalty in all cases, unless the jury verdict specifically prescribed the punishment of death.¹⁹⁸ The bill further prescribed that convicted murderers not receiving death sentences would receive life imprisonment at "hard labor."¹⁹⁹ These convicts would be isolated in solitary confinement for twelve days each year. During that twelve-day period, they would be forced to subsist on a "bread and water diet."²⁰⁰ Representative Miner's bill was given little chance of success,²⁰¹ but just five days after it was proposed, it passed the House of Representatives by a vote of twenty-eight to eight.²⁰²

Several newspapers quickly criticized the House's action. "Any legislation which lowers the standard of the punishment due and paid for crime," *The St. Paul Daily Pioneer* declared, "is an encouragement to lynch law, and we do not favor it."²⁰³ When the bill was sent to the Senate Judiciary Committee, the newspaper again expressed its disdain for the bill. "We trust that it will never get any further," the paper wrote.²⁰⁴ *The Red Wing Argus* also expressed its disapproval, saying the bill had been

197. *Id.* at 52; see also *John Gut to Be Hanged*, ST. PAUL DISPATCH, Feb. 25, 1869, at 4 (reporting the Minnesota Supreme Court affirmed trial court's judgment); *The New Ulm Murders*, ST. PAUL DAILY PIONEER, Feb. 4, 1868, at 1 (indicating that trial court sentenced John Gut to be hanged).

198. *Legislative Topics*, MINN. HOUSE J., at 82, 118-19 (1868) (referring to H.F. 68); ST. PAUL DAILY PIONEER, Feb. 4, 1868, at 1, col. 1; see also MARVIN BOVEE, REASONS FOR ABOLISHING CAPITAL PUNISHMENT 282-83 (1878) (indicating that Representative Miner introduced the bill).

199. *Legislative Topics*, ST. PAUL DAILY PIONEER, Feb. 4, 1868, at 1.

200. *Id.*

201. *Legislative Topics*, ST. PAUL DAILY PIONEER, Jan. 31, 1868, at 1.

202. *Abolishing Capital Punishment*, ST. PAUL DAILY PIONEER, Feb. 9, 1868, at 1.

203. *Capital Punishment in Minnesota*, ST. PAUL DAILY PIONEER, Feb. 9, 1868, at 1.

204. *Legislative Topics*, ST. PAUL DAILY PIONEER, Feb. 12, 1868, at 1; see also MINN. SENATE J., at 106 (1868) (referring to H.F. 68).

“unduly hurried through the House.”²⁰⁵ That newspaper asserted that “our legislators represent the careless injustice of the popular mind . . . by making the character of his punishment as well as the grading of the crime dependent upon the vote of a jury.”²⁰⁶ “The need of the country, just now, is that crime shall be impartially and severely punished: not that new modes of escape for criminals should be devised.”²⁰⁷ The paper urged the Senate to have “sufficient regard” for murder victims and “hold fast to the old law and its rigid enforcement.”²⁰⁸

On February 17, 1868, however, it was announced that Marvin H. Bovee would come to Minnesota to speak against capital punishment. A former state senator from Wisconsin, Bovee had successfully led the movement to abolish Wisconsin’s death penalty in 1853, and had “since extended his labors to other States with like results.”²⁰⁹ A nationally recognized speaker in the abolitionist movement, Bovee had succeeded, in 1867, in getting the Illinois Legislature to pass an abolitionist bill that he had drafted. The bill gave the jury the right to impose the death penalty, a sentence of not less than fourteen years, or life imprisonment for first-degree murder.²¹⁰

Because of his success in Illinois, Bovee was sought after by Minnesota’s Governor, William Marshall, and other state officials to promote a similar law in Minnesota. Invited to speak to both houses of the Minnesota Legislature in mid-January 1868, Bovee accepted. Bovee’s New York collaborator, Gerrit Smith, even sent Bovee fifty dollars toward the “Minnesota campaign.”²¹¹ Bovee would lecture in the hall of the House of Representatives.²¹² *The St. Paul Daily Pioneer* did not favor his views, but the paper “recommended” that its readers “hear Mr. Bovee.”²¹³

205. *Capital Punishment*, RED WING ARGUS, Feb. 13, 1868, at 1.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Legislative Topics*, ST. PAUL DAILY PIONEER, Feb. 18, 1868, at 1; *Address on Capital Punishment*, ST. PAUL DAILY PIONEER, Feb. 19, 1868, at 1; see Elwood R. McIntyre, *Farmer Halts the Hangman: The Story of Marvin Bovee*, WIS. MAG. HIST. 3, 6 (Autumn 1958).

210. McIntyre, *supra* note 209, at 9.

211. *Id.*; MINN. HOUSE J., at 26, 33-34 (1868); MINN. SENATE J., at 19, 23 (1868).

212. BOVEE, *supra* note 198, at 282; *Legislative Topics*, ST. PAUL DAILY PIONEER, Feb. 18, 1868, at 1.

213. *Address on Capital Punishment*, ST. PAUL DAILY PIONEER, Feb. 19, 1868, at 1.

"[T]he discussion of the subject . . .," proclaimed the paper, "can do no harm."²¹⁴

On the evening of February 19, Representative Miner called the meeting to order, and Governor Marshall introduced Bovee, a farmer from Waukesha County, Wisconsin. In addressing his audience, Bovee said "men are apt to nourish prejudices imbibed in childhood."²¹⁵ "They don't like to change their views without good reasons, but when they have those reasons, they should not fear to change."²¹⁶ Bovee argued that the government should not have power to take human life and that capital punishment does not deter crime. Neither Michigan, Rhode Island nor Wisconsin, he asserted, had seen crime increase since abolishing the gallows.²¹⁷ Bovee further argued that amending Minnesota's law would result in better juries. He contended that the "class of Jurors" obtained under Minnesota's current law is "inferior."²¹⁸ "Abolish it, and it would bring better men to the jury box," he asserted.²¹⁹ The following day, *The St. Paul Daily Pioneer* conceded that Bovee had made an "eloquent" appeal for abolition of capital punishment and that he had made "able and convincing arguments."²²⁰

On March 4, the Senate passed the House bill by a vote of thirteen to three.²²¹ However, an amendment was offered to

214. *Id.*; see also MINN. SENATE J., at 19, 23 (1868) (recording Senate invitation to Bovee); MINN. HOUSE J., at 26, 33-34, 165 (1868) (memorializing House invitation to Bovee). See generally BLEGEN, *supra* note 22, at 288-89 (discussing administration of Governor Marshall).

215. *Capital Punishment*, ST. PAUL DAILY PIONEER, Feb. 20, 1868, at 4.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* The *St. Paul Dispatch* was not as impressed with Bovee's address. *The Gallows in Minnesota*, ST. PAUL DISPATCH, Mar. 24, 1868, at 1; see also ST. PAUL DISPATCH, Mar. 2, 1868, at 2 (describing itself as a "radical Republican" newspaper). The *St. Paul Dispatch* described Bovee as "an interminable old bore," stating:

The "man in the moon" had fully as much influence on the Minnesota Legislature as Mr. Bovee. He appeared here after the bill had been introduced, reported upon, discussed and the members committed for and against it. Eight members of the legislature, by actual count listened to his immense speech, and the only effect it had was to disgust them with the subject. If he had arrived here two weeks earlier the bill would have been defeated. Our only regret is, that he was not on hand at the commencement of the session. We hope that the next Legislature will repeal the law. If such a bill is introduced, and Bovee will only come up and oppose it, it will carry.

The Gallows in Minnesota, ST. PAUL DISPATCH, Mar. 24, 1868, at 1.

221. MINN. SENATE J., at 245 (1868) (referring to H.F. 68).

the bill a day later that sought to make the bill inapplicable to offenses already committed. The measure therefore returned to the Senate on a motion to reconsider the previous vote.²²² After the amendment was accepted by unanimous consent, the bill passed again.²²³ This time the vote was sixteen to two.²²⁴ The House quickly concurred with the amendment, and Gov. William Marshall signed the bill into law on March 5, 1868.²²⁵ The law took effect immediately.²²⁶ Although *The St. Paul Daily Pioneer* mentioned Bovee's persuasive arguments, Bovee himself gave "[m]uch credit" to Representative Miner, who Bovee said had "pioneered" the bill's "march through both Houses of the Legislature."²²⁷

Ironically, Minnesota's next hanging, of Andreas Roesch, a farmer from Lafayette, occurred just one day after the new law took effect. To Roesch's great misfortune, the new law did not apply to "any act done, nor offense committed" prior to its passage.²²⁸ Consequently, the law did not invalidate his death sentence. Because Governor Marshall failed to intervene, Roesch was hanged in St. Peter on March 6, 1868.²²⁹ No other state resident would be executed for the next seventeen years.²³⁰

Roesch, a native of Switzerland, was fond of killing his neighbor's animals. A sixteen-year-old boy, Joseph Sauer,

222. *Id.* at 273.

223. *Id.* at 273-74.

224. *Id.* at 274.

225. 1868 Minn. Laws, ch. 88, § 6; MINN. SENATE J., at 273, 284 (1868).

226. MINN. SENATE J., at 273-74, 284 (1868); MINN. HOUSE J., at 299, 302-303, 313-14, 337-39 (1868); *Minnesota Legislature*, ST. PAUL DISPATCH, Mar. 5, 1868, at 4.

227. BOVEE, *supra* note 198, at 283.

228. 1868 Minn. Laws, ch. 88, § 4. *See generally* TRENNERY, *supra* note 19, at 219-20 (describing events leading up to Roesch's execution).

229. *Execution!*, ST. PAUL DISPATCH, Mar. 6, 1868, at 1.

230. TRENNERY, *supra* note 19, at 219-20. Non-state-sanctioned lynchings of Indians continued to occur during this period. For example, two Indians, Gegoonce and Tebekokechickwabe, were lynched by a mob of 300 or 400 people on July 23, 1872 in Brainerd. Lynched on the suspicion that they had murdered a missing woman, the bodies of Gegoonce and Tebekokechickwabe were left hanging, "twisting slowly in the evening breeze." *Id.* at 78-79; Photo of Lynching (July 23, 1872) (available at the Minnesota Historical Society). On January 18, 1873, a Becker County jury found an Indian named Bobolink guilty of first-degree murder and recommended death, "in one of the few cases where the death penalty was actually recommended by jurors acting under the 1868 law." *Id.* at 72. However, Bobolink later died of "the quick consumption" in jail. *Id.* at 73-74.

testified against Roesch at his trial for one of these killings. After the trial, Roesch threatened the boy's life. Later, authorities discovered Sauer's dead body when he failed to return home from hunting.²³¹ Roesch was later convicted, largely on the strength of Roesch's own son's testimony, of murdering Sauer with the boy's own gun. Unbeknownst to Roesch, Roesch's son had witnessed the murder. Roesch's unsuccessful defense at trial was that his own son had committed the murder. Roesch was sentenced to death in November of 1867, the judge ordering that he be hanged "between the hours of ten o'clock in the forenoon and two o'clock in the afternoon."²³² A petition was circulated to spare Roesch's life, but that attempt failed.²³³

At Governor Marshall's request, preparations were made to conduct the execution in private. A "board fence, sixteen feet high," was built around three sides of the jail, with the gallows constructed within the enclosure.²³⁴ Nicollet County Sheriff Azra A. Stone invited only law enforcement officials, clergy and newspaper reporters to attend the hanging. In fact, because he wanted it to be "as private as possible," the sheriff came for the prisoner earlier than anticipated.²³⁵ Despite his early arrival, a dozen people, including five newspaper reporters, were already waiting in the jail when Roesch was brought out at around 10:30 A.M. Approximately 100 to 300 people had also gathered around the jail, some on house tops, although it was reported that "the

231. *Execution!*, ST. PAUL DISPATCH, Mar. 6, 1868, at 1.

232. *Id.*

233. See generally *The Death Penalty in Nicollet County*, ST. PETER TRIB., Jan. 29, 1868, at 2 (stating that Governor Marshall signed Roesch's death warrant); *Execution!*, ST. PAUL DISPATCH, Mar. 6, 1868, at 1 (noting that the governor postponed the execution to consider as petition for a new trial brought by a group of citizens); *The Execution of Roesch Postponed*, ST. PETER TRIB., Feb. 5, 1868, at 2 (reporting that the governor postponed Roesch's execution "upon the urgent request of his counsel, and a petition signed by the leading citizens of St. Peter"); *The Gallows!*, ST. PAUL DAILY PIONEER, Mar. 7, 1868, at 4 (indicating that despite the delay, Roesch was hanged); *Murderer to Be Executed at St. Peter*, ST. PAUL DAILY PIONEER, Jan. 26, 1868, at 1 (stating that the governor scheduled Roesch's execution for Feb. 7, 1868); *The Poor Murderer*, ST. PETER TRIB., Jan. 29, 1868, at 3 (reporting that citizen's circulated a petition asking for a suspension of Roesch's execution); *Roesch*, ST. PETER TRIB., Feb. 12, 1868, at 3 (noting that the governor would likely refuse to take any further action in the *Roesch* case); *The St. Peter Murderer*, ST. PAUL DAILY PIONEER, Jan. 30, 1868, at 1 (indicating the scheduled date for Roesch's execution).

234. *The Gallows!*, ST. PAUL DAILY PIONEER, Mar. 7, 1868, at 4.

235. *Id.*

utmost good order prevailed."²³⁶

After a white cap was drawn over Roesch's head, the trap was swung open. The prisoner immediately fell some six feet, but "bounced back" when he reached the end of the rope.²³⁷ When this happened, some boys outside, who were looking through the cracks in the fence, shouted "he's twitched up, he's gone, and that's all of him."²³⁸ Because the hanging was "a good deal earlier than the country people expected it would be," it was not attended "by as many persons as it otherwise would have been."²³⁹ According to one newspaper report, only forty people were admitted into the enclosure to witness the execution.²⁴⁰ Many heavily loaded teams were seen coming in after the execution was over.²⁴¹

B. *The Repeal of the 1868 Act*

Over the next several years, many legislative efforts were made to repeal the 1868 law, which abolished the death penalty unless specifically prescribed by the jury. Senator William Lochren, a lawyer from St. Anthony, introduced the first repealer bill on February 23, 1869.²⁴² A second lieutenant of the heroic First Minnesota Volunteers during the Civil War, Lochren later became a trial judge and sentenced the notorious Barrett boys, Timothy and Peter, to death in the late 1880s. However, just

236. *Execution!*, ST. PAUL DISPATCH, Mar. 6, 1868, at 1; *The Execution*, ST. PETER TRIB., Feb. 26, 1868, at 3; *The Execution of Andreas Roesch*, ST. PETER TRIB., Mar. 4, 1868, at 3; *The Execution of Roesch*, ST. PETER TRIB., Feb. 19, 1868, at 3; *Expiated by the Rope*, ST. PAUL PIONEER PRESS, Aug. 29, 1885, at 2; *The Gallows!*, ST. PAUL DAILY PIONEER, Mar. 7, 1868, at 4.

237. *The Gallows!*, ST. PAUL DAILY PIONEER, Mar. 7, 1868, at 4.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*; *Execution!*, ST. PAUL DISPATCH, Mar. 6, 1868, at 1. A local newspaper later said that it was a "compliment to the character of the citizens of St. Peter [that] very few of them were present." *The Execution*, ST. PETER TRIB., Mar. 11, 1868, at 3. Notably, many newspapers went to great lengths to quickly disseminate the news of Roesch's death. For example, The *St. Paul Dispatch* reported: "Our special correspondent was present at the execution, and by rapid driving reached Le Sueur with his report in time to telegraph it in full to this evening's *Dispatch*. This is but a moderate sample of the enterprise the *Dispatch* will display in gathering news for its readers." *Execution!*, ST. PAUL DISPATCH, Mar. 6, 1868, at 1.

242. See MINN. SENATE J., at 149 (1869) (referring to S.F. 170). See generally Judge William Lochren, *Old Soldier, Pioneer Resident and Eminent Jurist, Dead*, MINNEAPOLIS J., Jan. 28, 1912, at 1 (describing the military and legal career of William Lochren).

three days after its introduction, a motion prevailed to postpone indefinitely the consideration of Senator Lochren's bill, which had been referred to the Senate Judiciary Committee. The bill failed to reach a third reading.²⁴³

In 1875, Republican Governor Cushman Davis also urged the repeal of the 1868 law, which he declared had "subversively changed" the punishment for murder.²⁴⁴ In his annual message, Governor Davis decreed that the death penalty must not be "left to the caprice, to the mistaken sympathy, or to the fear of responsibility of the jurors."²⁴⁵ He further condemned the 1868 law because it let "red-handed" murderers escape death sentences.²⁴⁶ At that time, it was widely believed by lawyers and the public that a guilty plea procedurally foreclosed the impaneling of a jury. Because only juries could impose death sentences under the 1868 law, the conventional wisdom was that defendants who pled guilty could only be sentenced to life imprisonment by the sitting judge.²⁴⁷ Governor Davis' pleas to repeal the 1868 law went unanswered by the Legislature in 1875 and 1876.²⁴⁸

243. MINN. SENATE J., at 149, 180-81, 389 (1869); *Legislative Topics*, ST. PAUL DAILY PIONEER PRESS, Feb. 26, 1869, at 1; *Minnesota Legislature*, ST. PAUL DAILY PIONEER PRESS, Feb. 24, 1869, at 4. See generally Judge William Lochren, *Old Soldier, Pioneer Resident and Eminent Jurist, Dead*, MINNEAPOLIS J., Jan. 28, 1912, at 1, 4 (noting that Lochren was the district judge at the trials of the Barrett boys). See *infra* text accompanying notes 301-27 (describing the double hanging of the Barrett boys).

244. Cushman K. Davis, Governor's Annual Message to the Minnesota Legislature (Jan. 8, 1875) (transcript available at the Minnesota Historical Society).

245. *Id.*

246. *Id.*

247. TRENERRY, *supra* note 19, at 100-01; *Expiated by the Rope*, ST. PAUL PIONEER PRESS, Aug. 29, 1885, at 2 ("The ends of justice were further thwarted by the fact that there was a provision in the law to the effect that the death penalty should not be inflicted if the prisoner pleaded guilty."); MINNEAPOLIS TRIB., Feb. 7, 1872, at 2, col. 1 ("The *St. Cloud Journal* directs attention to the peculiarity of our law for the punishment of murder, by which a jury may find a verdict upon which the judge must sentence the prisoner to be hung, but if the prisoner should plead guilty, the judge has only the power to sentence him to imprisonment for life."); ST. PAUL PIONEER PRESS, Aug. 29, 1885, at 4, col. 4 (stating that "in aggravated cases a criminal could always escape the extreme penalty by pleading guilty, thus preventing his case from going to the jury"); Orville F. Quackenbush, *The Development of the Correctional, Reformatory, and Penal Institutions of Minnesota: A Sociological Interpretation* 29, 47 n.2 (1956) (unpublished thesis, University of Minnesota) (available at the Minnesota Historical Society).

248. A bill to repeal the 1868 law was introduced in the House of Representatives on February 3, 1875. MINN. HOUSE J., at 141 (1875) (referring to H.F. 122); *House*, ST. PAUL DAILY PIONEER PRESS, Feb. 4, 1875, at 2, col. 6. The bill cleared the House by a vote of 67 to 19. MINN. HOUSE J., at 190, 298, 363 (1875). The Senate, however, voted

In his 1877 inaugural message, newly elected Gov. John Pillsbury renewed the demand for repeal of the 1868 law.²⁴⁹ Like his predecessor, Governor Pillsbury abhorred that murderers could avoid death “by preventing the case from reaching the jury, who alone can inflict it.”²⁵⁰ His objection to the law was amplified by the guilty pleas of the three Younger brothers in November of 1876.²⁵¹ The Younger brothers and their gang had attempted to rob a bank in Northfield, causing the deaths of two civilians.²⁵² All three men, Cole, James, and Robert Younger, pled guilty and obtained life sentences from Judge Samuel Lord, who refused to impanel a jury.²⁵³ These men, who Governor Pillsbury thought “richly deserving”²⁵⁴ of death, had eluded the punishment which “the popular verdict would have demanded.”²⁵⁵ A slew of bills introduced in 1877 to repeal the 1868 law all failed to gain legislative approval.²⁵⁶

down the bill by a tally of 10 to 25. MINN. SENATE J., at 423-24 (1875); *Minnesota Legislature*, ST. PAUL PIONEER, Mar. 5, 1875, at 2; see also *Minnesota Legislature*, ST. PAUL PIONEER, Mar. 2, 1875, at 2 (stating that the Senate Judiciary Committee reported the House bill back without recommendation). The next year, a bill to restore the death penalty for murder was introduced in the House of Representatives on February 17, 1876. MINN. HOUSE J., at 243 (1876) (referring to H.F. 291). The bill passed the House by a vote of 55 to 44, but it never came up for a vote in the Senate. MINN. SENATE J., at 434 (1876); MINN. HOUSE J., at 360-61 (1876); *Afternoon Session*, ST. PAUL PIONEER PRESS, Feb. 27, 1876, at 4; *Capital Punishment*, ST. PAUL PIONEER PRESS, Feb. 25, 1876, at 4; *Restoring Death Penalty*, MINNEAPOLIS DAILY TRIB., Feb. 27, 1876, at 1.

249. John S. Pillsbury, Governor's Annual Messages to the Minnesota Legislature (Jan. 4, 1877) (transcript available at the Minnesota Historical Society). See generally BLEGEN, *supra* note 22, at 294-95 (discussing the Pillsbury administration).

250. Pillsbury, *supra* note 249, at 32; see also Quackenbush, *supra* note 247, at 29, 47 (Governor Pillsbury's speech).

251. Pillsbury, *supra* note 249, at 33-34.

252. TRENERRY, *supra* note 19, at 85-105.

253. *Id.* at 100-01.

254. Pillsbury, *supra* note 249, at 32.

255. Pillsbury, *supra* note 249, at 32; FOLWELL, *supra* note 74, at 113-14.

256. On January 12, 1877, Rep. H. H. Gilman introduced a bill in the House of Representatives prescribing the death penalty for first-degree murder unless the judge or jury believed life imprisonment was sufficient punishment. *House of Representatives*, ST. PAUL PIONEER PRESS, Jan. 13, 1877, at 4. The bill passed the House by a vote of 62 to 36, but it failed to gain Senate passage. MINN. HOUSE J., at 41, 152-53, 368, 388 (1877) (referring to H.F. 39); MINN. SENATE J., at 310, 338, 388, 390, 444, 523 (1877) (referring to H.F. 39); *House of Representatives*, ST. PAUL PIONEER PRESS, Feb. 3, 1877, at 5; *The Death Penalty*, ST. PAUL PIONEER PRESS, Feb. 20, 1877, at 4; *The House*, ST. PAUL PIONEER PRESS, Feb. 22, 1877, at 3; *The Death Penalty*, ST. PAUL PIONEER PRESS, Feb. 24, 1877, at 3. On January 22, 1877, a bill was introduced in the Senate to prescribe the death penalty for first-degree murder, unless the jury fixed the penalty at life imprisonment. MINN. SENATE J., at 66 (1877) (referring to S.F. 88). This bill was

During the next legislative session, Rep. Peter McCracken, a farmer from Fillmore County, introduced a bill on January 27, 1879 to restore the death penalty.²⁵⁷ The House Judiciary Committee recommended that the bill be "indefinitely postponed," but Representative McCracken "rescued it and succeeded in getting it referred to the committee of the whole."²⁵⁸ A man with a reputation for having "something to say on almost everything," Representative McCracken told fellow legislators that he "had been impressed when on a late visit to Stillwater [that] the prisoner might make a strike for freedom and kill a half dozen guards, but could only be punished by imprisonment for life."²⁵⁹ Although the House Judiciary Committee agreed to forward Representative McCracken's bill to the full House, the bill was voted down by a House vote of forty-two to thirty-four on February 18, 1879.²⁶⁰

In 1881, in his annual message, Governor Pillsbury again urged legislators to replace "mere imprisonment" with death.²⁶¹ Four days after Governor Pillsbury delivered his address,

intended to "stop the Younger dodge of pleading guilty in order to save the neck." *The Legislature*, ST. PAUL PIONEER PRESS, Jan. 23, 1877, at 4. This bill passed the Senate, on February 24, by a vote of 22 to 10. MINN. SENATE J., at 340-41 (1877). It was later recommended by the House Judiciary Committee for passage. MINN. HOUSE J. at 446 (1877). However, it never came up for a House vote. MINN. HOUSE J., at 570 (1877). On February 9, 1877, Rep. G. R. Hall introduced a bill providing that the punishment for first-degree murder shall be death or life imprisonment in the discretion of the judge. *House of Representatives*, ST. PAUL PIONEER PRESS, Feb. 10, 1877, at 4. The House recommended that this bill be "indefinitely postponed" ten days after its introduction. MINN. HOUSE J., at 214-15, 269-70, 335, 607 (1877) (referring to H.F. 291). On February 10, 1877, another bill to repeal the 1868 law and make premeditated murder punishable by death was introduced in the Senate. *The Legislature*, ST. PAUL PIONEER PRESS, Feb. 11, 1877, at 4. However, the Senate voted to "indefinitely postpone" consideration of that bill on March 1. MINN. SENATE J., at 188-89, 246-47, 249, 444, 505 (1877) (referring to S.F. 230).

257. MINN. HOUSE J., at 127, 258 (1879) (referring to H.F. 115); *The House*, ST. PAUL PIONEER PRESS, Jan. 28, 1879, at 7; *House*, ST. PAUL DISPATCH, Feb. 4, 1879, at 4. See generally MINN. LEGIS. MANUAL, at 362 (1879) (containing biographical sketch of Peter McCracken); MINN. LEGIS. MANUAL, at 9, 79 (1868) (same).

258. *The House*, ST. PAUL PIONEER PRESS, Feb. 5, 1879, at 3.

259. *Id.*

260. MINN. HOUSE J., at 127, 258 (1879); *The House*, ST. PAUL PIONEER PRESS, Feb. 19, 1879, at 3; *The House*, ST. PAUL DISPATCH, Feb. 19, 1879, at 2; *The House*, ST. PAUL PIONEER PRESS, Feb. 4, 1879, at 2; *The House*, ST. PAUL DISPATCH, Jan. 28, 1879, at 7; *The House*, ST. PAUL PIONEER PRESS, Feb. 19, 1879, at 5; *The Legislature*, ST. PAUL DISPATCH, Jan. 28, 1879, at 4; *Prohibitory Legislation*, MINNEAPOLIS TRIB., Feb. 20, 1879, at 2.

261. John S. Pillsbury, Governor's Annual Message to the Minnesota Legislature (Jan. 6, 1881) (transcript available at the Minnesota Historical Society).



(Photo by H.R. Farr, Minnesota Historical Society)

The Lynching of Frank McManus in Minneapolis, 1882

Representative McCracken introduced a bill prescribing the death penalty for first-degree murder, but allowing a jury to prescribe life imprisonment.²⁶² This bill, as *The Daily Pioneer Press* put it, sought to "exactly reverse the present law."²⁶³ After considering Representative McCracken's bill, the House Judiciary Committee recommended the passage of a substitute bill that also prescribed the death penalty for first-degree murder, but which additionally sought to abolish solitary confinement in the state prison except for prison discipline.²⁶⁴ This substitute bill was favored by House members by a margin of fifty to thirty, but it failed to become law.²⁶⁵

During the 1883 legislative session, Sen. James O'Brien authored the bill that would at last repeal the 1868 law.²⁶⁶ Introduced on January 9, 1883, this bill mandated death for first-degree murderers, unless "exceptional circumstances" warranted a life sentence, and shifted the power of fixing death sentences from juries to trial judges.²⁶⁷ The bill also handed trial judges the responsibility of determining whether "exceptional circumstances" were present.²⁶⁸ Senator O'Brien explained that his bill would prevent a guilty plea from allowing a murderer to escape death.²⁶⁹ His bill passed the Senate on January 31, by a vote of twenty-six to two, and cleared the House on March 1 by an equally safe margin, fifty-six to twelve.²⁷⁰ After gaining the governor's signature, the law took effect on March 3, 1883.²⁷¹

262. MINN. HOUSE J., at 19 (1881) (referring to H.F. 4).

263. ST. PAUL PIONEER PRESS, Jan. 11, 1881, at 2.

264. MINN. HOUSE J., at 178-79 (1881) (referring to H.F. 135).

265. *Id.*; see also *The Legislature*, ST. PAUL PIONEER PRESS, Jan. 11, 1881, at 2; *Routine Report*, MINNEAPOLIS TRIB., Jan. 22, 1881, at 2; MINNEAPOLIS J., Feb. 4, 1906, at 12 (citing newspaper article from February 4, 1881).

266. S.F. 14, 23rd Leg., 1st Sess., Minn. (1883).

267. ST. PAUL PIONEER PRESS, Jan. 31, 1883, at 5.

268. ST. PAUL PIONEER PRESS, Jan. 26, 1883, at 4.

269. ST. PAUL PIONEER PRESS, Jan. 31, 1883, at 4.

270. MINN. SENATE J., at 3, 13, 59-60, 77, 83, 456, 467, 508 (1883) (referring to S.F. 14); MINN. HOUSE J., at 142, 216-17, 227, 538, 603 (1883) (same).

271. 1883 Minn. Laws, ch. 122; *Hanging for Murderers*, ST. PAUL PIONEER PRESS, Jan. 31, 1883, at 5; *Introduction of Bills*, ST. PAUL PIONEER PRESS, Jan. 10, 1883, at 5; ST. PAUL PIONEER PRESS, Jan. 26, 1883, at 4; ST. PAUL PIONEER PRESS, Jan. 31, 1883, at 4, col. 4. The illegal lynching of Frank McManus in Minneapolis on May 28, 1882, for molesting a four-year-old girl may have contributed to the success of Senator O'Brien's bill. *A Leper Lynched*, DAILY PIONEER PRESS, Apr. 28, 1882, at 6; *First and Second Thoughts*, DAILY PIONEER PRESS, Apr. 29, 1882, at 4; Photo of Lynching (Apr. 29, 1882) (available at the Minnesota Historical Society and Minneapolis Public Library, Special Collections).

An Act establishing an official penal code, enacted on March 9, 1885, later recodified the 1883 law, making no substantive changes. It proclaimed:

Murder in the first degree is punishable by death; *Provided*, That if in any such case the court shall certify of record its opinion that by reason of exceptional circumstances the case is not one in which the penalty of death shall be imposed, the punishment shall be imprisonment for life in the state prison.²⁷²

The new penal code took effect on January 1, 1886.²⁷³

IV. THE RESUMPTION OF HANGINGS IN MINNESOTA, 1885-1889

A. *Daytime Executions*

The passage of the 1883 law and the new penal code quickly ended a more than fifteen-year moratorium on executions in Minnesota.²⁷⁴ On August 28, 1885, convicted murderer John Waisenen swung from the gallows in Duluth.²⁷⁵ Less than a hundred people were issued tickets by St. Louis County Sheriff S. C. McQuade to attend the hanging. Aside from twenty-five prominent citizens of Duluth, Sheriff McQuade restricted those in attendance to "brother sheriffs, physicians, the clergy and members of the press."²⁷⁶ Although Sheriff McQuade refused many requests for tickets, nearly 1,000 persons gathered outside the eighteen-foot high enclosure for the event.²⁷⁷ "The crowd was made up, not of the better class of citizens, but of loafers and idlers, who had nothing better to do than to watch with morbid curiosity for some sign of the approaching execution."²⁷⁸ One boy even climbed to the top of a nearby telephone pole in an attempt to get a glimpse of the top of the

272. PENAL CODE OF THE STATE OF MINNESOTA § 156 (1886) (emphasis in original).

273. PENAL CODE OF THE STATE OF MINNESOTA §§ 156, 542 (1886); *Expiated by the Rope*, ST. PAUL PIONEER PRESS, Aug. 29, 1885, at 2; see *Holden v. Minnesota*, 137 U.S. 483, 489-90 (1890) (summarizing the 1883 law and the new penal code); *The Hanging at Duluth*, ST. PAUL PIONEER PRESS, Sept. 3, 1885, at 4 (same).

274. *The Hanging at Duluth*, ST. PAUL PIONEER PRESS, Sept. 3, 1885, at 4 (summarizing history of capital punishment laws in Minnesota from 1868 to 1883).

275. *Expiated by the Rope*, ST. PAUL PIONEER PRESS, Aug. 29, 1885, at 2.

276. *Id.* See generally MINN. LEGIS. MANUAL, at 278 (1883) (containing biographical sketch of S. C. McQuade).

277. *Id.*

278. *Id.*

gallows.²⁷⁹

Shortly before 3:00 P.M., Waisenen was led out of the St. Louis County jail. As he walked the fifty yards to the enclosure, the crowd surged forward, and the police had great difficulty preventing the mob from entering the enclosure or climbing the fence.²⁸⁰ Once inside, seventy spectators looked on as Waisenen was led up the stairs to the platform of the scaffold. While Waisenen stood on the trap door, clergymen recited two short prayers, one in English and one in Swedish.²⁸¹ The clergymen then left the platform, and the trap was swung open at 3:02 P.M.²⁸² Waisenen was pronounced dead twelve minutes later. The death warrant, requiring the execution to take place between 9:00 A.M. and 5:00 P.M., had been faithfully carried out by Sheriff McQuade. The spectators "appetite for the spectacle" was "somewhat reduced after they saw the hands turn purple."²⁸³

On April 13, 1888, Nels Olsom Holong was also hanged.²⁸⁴ A contemporary of Jack the Ripper, Holong had been convicted of killing a girl, mutilating her body, and throwing the pieces into a hog pen.²⁸⁵ Although over 2,000 signatures were obtained in the hopes of commuting his sentence, Republican Gov. Andrew R. McGill refused to intercede.²⁸⁶ Instead, Governor McGill promptly forwarded the death warrant to Otter Tail County Sheriff Alonzo Brandenburg, requiring the execution to take place "between the hours of 9 a.m. and 5 o'clock p.m." at such place as Sheriff Brandenburg might select.²⁸⁷ Upon

279. *Id.*

280. *Id.*

281. *Id.*; *Meets His Doom To-Day*, ST. PAUL PIONEER PRESS, Aug. 28, 1885, at 1.

282. *Expriated by the Rope*, ST. PAUL PIONEER PRESS, Aug. 29, 1885, at 1; *Owened His Guilt*, MINNEAPOLIS J., Aug. 28, 1885, at 1.

283. TRENERRY, *supra* note 19, at 220 (quoting articles from *The Duluth News Tribune*, Aug. 29, 1885, and *The St. Paul Pioneer Press*, Aug. 29, 1885); *Expriated by the Rope*, ST. PAUL PIONEER PRESS, Aug. 29, 1885, at 1.

284. TRENERRY, *supra* note 19, at 220 (quoting articles from *The Duluth News Tribune*, Aug. 29, 1885, and *The St. Paul Pioneer Press*, Aug. 29, 1885). Notably, at least one man, John W. Kelliher, was lynched in Minnesota, in 1886. Having murdered another man in Detroit, Minnesota, Kelliher was taken from the county jail at 10:00 P.M. on June 23, 1886, and hanged by a mob from a tree. Photo of Lynching (June 23, 1886) (available at the Minnesota Historical Society).

285. TRENERRY, *supra* note 19, at 220; *All is Over*, FERGUS FALLS WEEKLY J., Apr. 19, 1888, at 1; *Through a Trap*, ST. PAUL GLOBE, Oct. 23, 1891, at 1.

286. *All Is Over*, FERGUS FALLS WEEKLY J., Apr. 19, 1888, at 1.

287. *Id.*

receiving the death warrant, Sheriff Brandenburg sent invitations to sheriffs all over the state, informing them that the execution would take place in Fergus Falls.²⁸⁸ He also announced that representatives of the press would be allowed to attend the execution.²⁸⁹

At the hour appointed by Sheriff Brandenburg, 2:00 P.M., the condemned man was led to the scaffold.²⁹⁰ After entering the board enclosure, a pastor then offered a short prayer in Norwegian.²⁹¹ "We beseech Thee to have mercy on this man and his sinful soul," Paster Wold prayed.²⁹² "Be with him through the valley of death and bring him to Thy kingdom."²⁹³ He concluded with the Lord's prayer.²⁹⁴ Around 500 people surrounded the enclosure as the execution took place.²⁹⁵ A few succeeded in mounting a high building nearby in order to see the scaffold, with one person shouting down to the crowd with "each successive step" of the hanging.²⁹⁶ Only fifty spectators, limited to sheriffs, doctors, newspaper men, Holong's jury, and several ministers, watched from within the enclosure.²⁹⁷ Several policemen kept the crowd away from the enclosure, and were "quite zealous till the last."²⁹⁸ No unauthorized persons were allowed into the enclosure.²⁹⁹

B. *The Barrett Boys and the Beginning of the 1889 Legislative Session*

On January 8, 1889, the twenty-sixth session of the Minnesota Legislature officially convened. The start of the session, however, was quickly overshadowed by the looming prospect of two double hangings. By late January, convicted murderers John Lee and Martin Moe were scheduled to hang in Alexandria on

288. *No Hope for Holong*, FERGUS FALLS WEEKLY J., Apr. 12, 1888, at 5.

289. *Id.*

290. *All Is Over*, FERGUS FALLS WEEKLY J., Apr. 19, 1888, at 1.

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.* at 2.

February 15, 1889.³⁰⁰ And by late February, the Barrett brothers, Timothy and Peter, were scheduled to hang in Minneapolis on March 22, 1889, for the murder of a street car driver, Thomas Tollefson.³⁰¹

In preparation for the double hanging of John Lee and Martin Moe in Alexandria, Douglas County Sheriff A. W. DeFrate built a jail yard enclosure and invited other county sheriffs to attend the execution.³⁰² Letters poured in seeking permission to attend, but Sheriff DeFrate only invited officers, physicians, ministers and newspaper reporters to attend the execution.³⁰³ When Sheriff DeFrate announced that only ticket holders would be admitted, the local newspaper, *The Alexandria Post*, objected to the hanging's private nature: "Why is it that executions are not generally public in this country? The prime object of hanging is the warning it is intended to convey; but when such occasions are conducted with so much privacy, they lose half the terror they are intended to create."³⁰⁴

On execution day, a snowstorm forced Sheriff DeFrate to construct a board roof over the scaffold.³⁰⁵ Despite the bad weather, by 7:00 A.M. a "stream of people was [already] wading through the snowdrifts to the jail."³⁰⁶ Some were visiting sheriffs seeking passes, and others were farmers and "country people."³⁰⁷ All wanted passes, but few got them.³⁰⁸ At around 10:00 A.M., John Lee was hanged; but in the final hours, Martin Moe's sentence was unexpectedly commuted to life imprisonment by Republican Governor William R. Merriam.³⁰⁹

300. ALEXANDRIA POST, Jan. 25, 1889, at 4, col. 4.

301. MINNEAPOLIS J., Mar. 22, 1889, at 1, cols. 1-4; ST. PAUL PIONEER PRESS, Mar. 22, 1889, at 1, cols. 6-7; ST. PAUL PIONEER PRESS, Feb. 22, 1889, at 6, col. 2.

302. See *The Gallows in Sight*, ST. PAUL PIONEER PRESS, Feb. 10, 1889, at 2 (stating that the sheriff received numerous requests to view the execution); *Lee Is Launched*, ST. PAUL PIONEER PRESS, Feb. 16, 1889, at 1 (same).

303. ALEXANDRIA POST, Jan. 25, 1889, at 4, col. 4; *The Gallows in Sight*, ST. PAUL PIONEER PRESS, Feb. 10, 1889, at 2.

304. ALEXANDRIA POST, Jan. 25, 1889, at 4, col. 4. See generally MINN. LEGIS. MANUAL, at 293 (1889) (containing biographical sketch of A. W. DeFrate).

305. See *Doomed to Death*, ST. PAUL PIONEER PRESS, Feb. 14, 1889, at 1 (describing the construction of the gallows); *Lee Is Launched*, ST. PAUL PIONEER PRESS, Feb. 16, 1889, at 1 (same).

306. *Lee Is Launched*, ST. PAUL PIONEER PRESS, Feb. 16, 1889, at 1.

307. *Id.*

308. *Id.*

309. *Merciful to Moe*, ST. PAUL PIONEER PRESS, Feb. 15, 1889, at 1.

After Lee's body was taken away, 1,500 people were permitted to enter the enclosure to inspect the scaffold.³¹⁰ Only then did the crowd disperse.

After Lee's execution, Hennepin County Sheriff James H. Ege sent out invitations to the Barrett boys' upcoming hanging.³¹¹ The invitations read: "The execution of Timothy and Peter Barrett will take place in Hennepin County jail in Minneapolis on Friday, March 22, 1889, at 11 a.m. This will admit you."³¹² With many citizens requesting admission, Sheriff Ege felt compelled to tell the local press that "there will be no need of people applying to him, for he cannot accommodate another person."³¹³ He wanted "men holding invitations to understand that they cannot bring friends with them."³¹⁴ The execution site would hold only 150 people.³¹⁵

On March 22, the Barrett boys were hanged as planned in the Hennepin County Jail.³¹⁶ With an estimated 5,000 people waiting outside the jail, the trap was sprung open at 11:14 A.M.³¹⁷ County sheriffs and newspaper reporters with telegraphic instruments packed the spectators' platform inside. "Every inch of space was utilized by the lookers-on,"³¹⁸ but a photographer, John Bodley, was notably missing. Having expressed his desire to record the Barretts' last scene on the gallows, he had been imprisoned the day before for selling "obscene pictures" that depicted the condemned men in jail.³¹⁹ The murder victim's widow, Mrs. Thomas Tollefson, who remarried while the Barrett brothers were "under the surveil-

310. *The Drop to Death!*, ALEXANDRIA POST, Feb. 15, 1889, at 1; *Lee is Launched*, ST. PAUL PIONEER PRESS, Feb. 16, 1889, at 1.

311. *See generally Invitations to the Hanging*, ST. PAUL PIONEER PRESS, Mar. 12, 1889, at 6 (quoting the invitation); MINN. LEGIS. MANUAL, at 295 (1889) (containing biographical sketch of James H. Ege).

312. *Invitations to the Hanging*, ST. PAUL PIONEER PRESS, Mar. 12, 1889, at 6 (quoting the official invitation); *see also A Quiet Day*, ST. PAUL PIONEER PRESS, Mar. 19, 1889, at 6 (confirming the sending of invitations).

313. *A Quiet Day*, ST. PAUL PIONEER PRESS, Mar. 19, 1889, at 6.

314. *Id.*

315. *Invitations to the Hanging*, ST. PAUL PIONEER PRESS, Mar. 12, 1889, at 6. *But see A Fight for Life*, ST. PAUL PIONEER PRESS, Mar. 22, 1889, at 2 (stating that approximately 200 passes were issued).

316. *Death's Discount*, ST. PAUL PIONEER PRESS, Mar. 23, 1889, at 1.

317. *Id.*

318. *Id.*

319. *Down to Death!* MINNEAPOLIS J., Mar. 22, 1889, at 1 (reporting Mr. Bodley's arrest).

lance of the death watch," was also unable to attend.³²⁰ When Mrs. Tollefson and her new husband, Morris Lonsberry, requested passes, policemen told her "no ladies would be present at the execution."³²¹

After the double hanging, Sheriff Ege was paid \$1,000 for "the terrible work he performed so artistically."³²² Skull-measuring phrenologists, who tried to ascertain the Barretts' criminal dispositions from their cranial development, also examined the Barretts' bodies at the morgue.³²³ Later, over 2,000 people were permitted to view the gallows. Although rumors circulated that the "Dime Museum" would display the gallows, Sheriff Ege quickly dispelled them.³²⁴ "There is no truth in this whatsoever," he said.³²⁵ The highly sensational hanging of the Barrett boys soon became the subject of local sermons.³²⁶ *The St. Paul Pioneer Press* even suggested that the topic would make "a good, live topic for Sunday school consideration."³²⁷

V. THE PASSAGE OF THE "MIDNIGHT ASSASSINATION LAW" IN 1889

A. Abolitionist Efforts in 1889

In the wake of John Lee's execution in Alexandria, a bill came before the Minnesota House of Representatives to abolish

320. *Time Heals All Wounds*, MINNEAPOLIS J., Mar. 23, 1889, at 1.

321. *Id.*; see *A Fight For Life*, ST. PAUL PIONEER PRESS, Mar. 22, 1889, at 2.

322. *The Barrett Bills*, ST. PAUL PIONEER PRESS, Mar. 31, 1889, at 2.

323. *All Sorts of Cranks*, ST. PAUL PIONEER PRESS, Mar. 25, 1889, at 6; MINNEAPOLIS J., Mar. 25, 1889, at 4, cols. 2-3. The "science" of phrenology was quite popular in nineteenth-century America, including Minnesota. MASUR, *supra* note 6, at 98-100; see, e.g., MINNEAPOLIS J., Mar. 29, 1889, at 4, col. 4 (publicizing "Free Phrenological Lectures"); *Phrenology Free*, MINNEAPOLIS J., Apr. 27, 1889, at 5 (publicizing "Free Phrenological Lectures"); *Scientific Phrenology*, MINNEAPOLIS J., May 15, 1889, at 2 (advocating the science of phrenology).

324. *Can See the Scaffold*, MINNEAPOLIS J., Mar. 23, 1889, at 2 (reporting Sheriff Ege refuting the rumor); *Viewing the Scaffold*, MINNEAPOLIS J., Mar. 26, 1889, at 2 (reporting the rumor).

325. *Viewing the Scaffold*, MINNEAPOLIS J., Mar. 26, 1889, at 2.

326. *The Barrett Hanging*, MINNEAPOLIS J., Apr. 4, 1889, at 2; *The Morals of Hanging*, ST. PAUL PIONEER PRESS, Mar. 25, 1889, at 6.

327. ST. PAUL PIONEER PRESS, Mar. 24, 1889, at 3, col. 1; see *Echoes of the Barrett Execution*, MINNEAPOLIS J., Apr. 4, 1889, at 4; MINNEAPOLIS J., Mar. 25, 1889, at 4, cols. 2-3.

capital punishment.³²⁸ The bill's sponsor, attorney Charles R. Davis, a Republican legislator from St. Peter, argued that the death penalty lacked a "moral, religious or civil" foundation.³²⁹ Objecting to the penalty's "irremediable" nature, he challenged "any adherent of capital punishment to show that where it has been abolished crime has been increased."³³⁰ Other legislators opposed the bill. For example, Rep. Frank E. Searle, a St. Cloud lawyer, feared that the repeal of the death penalty would only prompt people "to take the law in their own hands."³³¹ On March 12, 1889, Representative Davis' bill was indefinitely postponed by a vote of thirty-seven to twenty.³³²

On March 18, Sen. Frank Day, a "progressive" legislator from Fairmont who would later become lieutenant governor, introduced a bill to make electricity the mode of inflicting capital punishment.³³³ A New York law, enacted in 1888, had already made New York the first state to substitute electrocution for hanging.³³⁴ Senator Day's bill also proposed that the state penitentiary warden execute death sentences instead of county sheriffs.³³⁵ The governor would name the week in which the execution would occur, but the warden would actually pick the date of execution. The bill would permit only one jurist, the sheriff, the county attorney, two physicians, seven guards and a clergyman to attend the execution. No other spectators would be allowed to attend. The bill further provided that no account of the execution could be printed in the newspapers, a provision

328. *Capital Punishment*, ST. PAUL PIONEER PRESS, Mar. 13, 1889, at 1.

329. *Id.* See generally MINN. LEGIS. MANUAL, at 637-38 (1889) (containing biographical sketch of Charles R. Davis).

330. *The House Decides that Capital Punishment is Proper and Postpones Mr. Davis' Bill*, ST. PAUL PIONEER PRESS, Mar. 13, 1889, at 1.

331. *Id.* See generally MINN. LEGIS. MANUAL, at 631 (1889) (containing biographical sketch of Frank E. Searle).

332. *The House Decides that Capital Punishment is Proper and Postpones Mr. Davis' Bill*, ST. PAUL PIONEER PRESS, Mar. 13, 1889, at 1.

333. MINN. SENATE J., at 483, 707, 1068 (1889) (referring to S.F. 482); *Minnesota Legislature*, MARTIN COUNTY SENTINEL, Mar. 29, 1889, at 3; *The Death Penalty*, ST. PAUL PIONEER PRESS, Mar. 19, 1889, at 1. See generally MINN. LEGIS. MANUAL, at 615 (1889) (containing biographical sketch of Frank A. Day); PORTRAIT GALLERY OF THE TWENTY-NINTH LEGISLATURE OF THE STATE OF MINNESOTA 7 (1895) (same); *Senator Day Is President*, ST. PAUL PIONEER, Jan. 26, 1895, at 1 (same).

334. 1888 N.Y. Laws, ch. 489, § 505; see also *In re Kemmler*, 136 U.S. 436 (1890) (citing 1888 N.Y. Laws, ch. 489).

335. *The Death Penalty*, ST. PAUL PIONEER PRESS, Mar. 19, 1889, at 1.

modelled after the same New York law.³³⁶ That law contained the following provision:

No account of the details of any . . . execution, beyond the statement of the fact that such convict was on the day in question executed according to law at the prison, shall be published in any newspaper. Any person who shall violate or omit to comply with any provision of this chapter shall be guilty of a misdemeanor.³³⁷

Senator Day's proposal to substitute electricity for hanging was endorsed by the Secretary of the Minnesota Board of Corrections and Charities, who had recently received a report from a New York commission on "the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases."³³⁸ That report had concluded that electricity was "the most potent agent for the destruction of human life," and that death by electricity could be inflicted in a "strictly private" manner.³³⁹ However, Senator

336. *Id.*; 1888 N.Y. Laws, ch. 489, § 7. Senator Day, the publisher of *The Martin County Sentinel* in Fairmont, may also have gotten the idea to prohibit the publication of execution details from a judge's comment that was printed in *The St. Paul Pioneer Press*. See MARTIN COUNTY SENTINEL, Mar. 29, 1889, at 2, col. 1 (listing Frank A. Day as the "Publisher" of *The Martin County Sentinel*). In the February 7, 1889, edition of that paper, Hennepin County District Court Judge John P. Rea said: "I believe that the details of an execution as published in the newspapers are demoralizing, and I would like to see executions so privately done that the only announcement in the papers would be, Blank was executed at such an hour." *Shall It Be Hanging?*, ST. PAUL PIONEER PRESS, Feb. 7, 1889, at 6. See generally MINN. LEGIS. MANUAL, at 103 (1911) (containing biographical sketch of Judge John P. Rea). Senator Day's bill was certainly not the first proposal in Minnesota to restrict newspaper coverage of criminal news. For example, in 1885, a bill was proposed in the Minnesota Legislature to ban "any publication principally made up of police reports, criminal news or accounts of criminal deeds or pictures or stories of deeds of bloodshed, lust and crime." ST. PAUL PIONEER PRESS, Jan. 20, 1885, at 4, col. 3. Notably, Senator Day's two brothers were also engaged in the newspaper business. See *Burt W. Day Dies Suddenly*, HUTCHINSON LEADER, Aug. 22, 1919, at 1; *Burt W. Day, Editor, Dies at Hutchinson*, MINNEAPOLIS J., Aug. 21, 1919, at 20; *Hutchinson Editor Dies*, ST. PAUL PIONEER PRESS, Aug. 21, 1919, at 1.

337. 1888 N.Y. Laws, ch. 489, § 7. See generally Michael Madow, *Forbidden Spectacle: Executions, the Public and the Press in Nineteenth-Century New York*, 43 BUFF. L. REV. 461 (1995) (providing a fascinating account of the events that led to the passage of New York's "gag" law).

338. *Death by Lightning*, ST. PAUL PIONEER PRESS, Mar. 21, 1889, at 5; see *The Death Penalty*, ST. PAUL PIONEER PRESS, Mar. 19, 1889, at 1.

339. *Death by Lightning*, ST. PAUL PIONEER PRESS, Mar. 21, 1889, at 5. Senator Day's proposal in 1889 to substitute electricity for hanging was the first of many such calls for this reform. *A Barbarous Penalty*, ST. PAUL PIONEER PRESS, Oct. 17, 1891, at 4 (stating, "Death by electricity seems preferable to any other means yet contrived, and until something still less objectionable shall be devised it behooves every state government

Day's bill failed to get legislative approval, despite a major newspaper endorsement. After being referred to the Senate Committee on Retrenchment and Reform, that Committee reported the bill back with the recommendation that it be "indefinitely postponed."³⁴⁰ That recommendation was adopted by the Senate on April 9, 1889.³⁴¹

A State Medical Society meeting almost surely contributed to the measure's demise. At that meeting, a doctor lectured on the subject of electricity as a method of capital punishment. He attempted to illustrate his theory with a dog and an "excellent apparatus."³⁴² However, the delivery of an electrical charge only produced a prolonged howl from the dog. The dog continued to howl even after the battery "poles" were switched and another charge was applied. In desperation, the doctor eventually asked his assistants to shave off the dog's hair.³⁴³ This prompted one restless Society member, fully expecting the first shock to kill the dog, to quip that the doctor "should remove some of the [dog's] bark" instead.³⁴⁴

The hanging of the Barrett boys on March 22 "set the

to follow the example of New York and adopt that."); *Another Strangling*, ST. PAUL PIONEER PRESS, Oct. 24, 1891, at 4 ("The next legislature ought to substitute execution by electricity for death by the rope, repeal the absurd and ineffective provisions of the existing law relative to publication of details of executions, and put the state in line with the course of progress and the direction of common decency and humanity."); *Barbarism of the Gallows*, MINNEAPOLIS TRIB., Oct. 17, 1891, at 4 ("The hanging of a criminal should be abandoned for some more effective and less revolting method" and that "[a]mong the various alternatives suggested, electrocution offers many advantages."); *The Execution of Rose*, ST. PAUL GLOBE, Oct. 17, 1891, at 4 (suggesting that Minnesota should follow the "progressive" New York law); *Introduction of Electrocution*, ST. PAUL DISPATCH, Jan. 5, 1899, at 9 ("Mr. Fosness, of Montevideo, introduced a House bill providing for the execution of the death penalty by electrocution. . . . The penalty shall be executed by the warden or his deputy at the state prison on a day designated by the governor before the hour of sunrise.").

340. *Dispense with the Rope*, MINNEAPOLIS TRIB., Apr. 3, 1889, at 4.

341. MINN. SENATE J., at 483, 707, 1068 (1889). An editorial in *The Martin County Sentinel*, which Senator Day published, indicates that Senator Day was opposed to capital punishment. MARTIN COUNTY SENTINEL, July 12, 1889, at 4, col. 1. It stated that:

Capital punishment is to be inflicted today in New York by the electrical method, known as electrocution. We believe the new plan will take the place of the brutal and barbarous rope and scaffold, and when that is done the next thing in the way of progress and reform is to abolish the death penalty altogether.

Id.

342. *Sunday Saunterings*, ST. PAUL PIONEER PRESS, Mar. 24, 1889, at 11.

343. *Id.*

344. *Id.*

tongues of reformers wagging" about the need to abolish capital punishment.³⁴⁵ Just ten days after the double hanging, Representative Davis' bill to outlaw capital punishment was resurrected and debated on the House floor. The bill's sponsor, Charles R. Davis, was absent, but Rep. John Day Smith, an attorney, "championed the bill."³⁴⁶ He emphasized that innocent men had been "sacrificed to satisfy the law."³⁴⁷ Another lawyer, Rep. Eugene G. Hay, also spoke in favor of the bill, calling capital punishment a disgrace to modern civilization. He stressed that Minneapolis' latest executions had only "rendered life less secure in that locality."³⁴⁸ Representative Searle, who previously favored capital punishment, also spoke in support of the bill. The "sickening details of the Barrett hanging . . . broadcast over the land" had changed his mind.³⁴⁹

Other legislators opposed the bill. For example, Rep. Ferdinand A. Husher, a Norwegian immigrant, vehemently opposed the abolitionist measure.³⁵⁰ "This talk about the sacredness of human life is nonsense," he said.³⁵¹ "[H]ave we not a right to kill a man who assaults us?"³⁵² Quoting scriptural passages, Representative Husher stressed that "he who takes the sword shall perish by the sword."³⁵³ After a short debate over the proper interpretation of this Biblical passage, Rep. John Day Smith made a motion to report the bill favorably. This motion lost by a vote of thirty-one to thirty-three.³⁵⁴ The bill

345. *Echoes of the Barrett Execution*, MINNEAPOLIS J., Apr. 4, 1889, at 4.

346. *Murderers Must Hang*, MINNEAPOLIS J., Apr. 2, 1889, at 1.

347. *Id.*; *Hanging Will Do*, MINNEAPOLIS TRIB., Apr. 3, 1889, at 2.

348. *Murderers Must Hang*, MINNEAPOLIS J., Apr. 2, 1889, at 1. See generally ISAAC ATWATER, HISTORY OF THE CITY OF MINNEAPOLIS 484c-484f (1893) (containing biographical sketch of John Day Smith); *John Day Smith—Part I*, ECCO NEWS, at 12-13 (July 1979) (available at the Minneapolis Public Library, Special Collections) (same); *John Day Smith—Part II*, ECCO NEWS, at 10-11 (Sept. 1979) (same); MINN. LEGIS. MANUAL, at 637 (1889) (containing biographical sketches of John Day Smith and Eugene G. Hay).

349. *Capital Punishment*, ST. PAUL PIONEER PRESS, Apr. 3, 1889, at 1. See generally *Hanging Will Do*, MINNEAPOLIS TRIB., Apr. 3, 1889, at 2 (discussing the debate on the bill).

350. See generally MINN. LEGIS. MANUAL, at 636-37 (1889) (containing biographical sketch of Ferdinand A. Husher).

351. *Capital Punishment*, ST. PAUL PIONEER PRESS, Apr. 3, 1889, at 1.

352. *Id.*

353. *Murderers Must Hang*, MINNEAPOLIS J., Apr. 2, 1889, at 1.

354. *Id.*

was then indefinitely postponed by a vote of thirty-eight to thirty.³⁵⁵ A newspaper report later described the close vote on Representative Smith's motion as "surprising" because "hardly a single vote was recorded against the re-establishment" of capital punishment only four years earlier.³⁵⁶

B. *The John Day Smith Law*

A Republican legislator, Rep. John Day Smith, introduced a bill on March 29, 1889, to abolish public executions. The bill was entitled "A bill for an act providing the mode of inflicting the punishment of death, the manner in which the same shall be carried into effect, and declaring a violation of any of the provisions of this act a misdemeanor."³⁵⁷ That same day, Representative Smith's bill got its first reading in the House of Representatives and was referred to the House Judiciary Committee.³⁵⁸ *The Minneapolis Tribune* quickly endorsed the idea of prohibiting the "disgusting and sickening sensationalism" surrounding executions.³⁵⁹ The "extreme penalty of the law should no longer be a source of fun for coarse crowds," the paper opined.³⁶⁰ After the Judiciary Committee recommended the bill's passage, the House amended the bill, and passed the bill as amended³⁶¹ by a vote of sixty-four to zero on April 15.³⁶² The Senate vote was nearly unanimous too. On April 22, in the final hours of the legislative session, the Senate passed Representative Smith's bill by a tally of twenty-eight to one.³⁶³ The governor signed the bill and it took effect on April 24, 1889.³⁶⁴

355. *Id.*

356. *Dispense with the Rope*, MINNEAPOLIS TRIB., Apr. 3, 1889, at 4.

357. H.F. 1185, 26th Leg., 1st Sess., Minn. (1889).

358. See MINN. HOUSE J., at 818 (1889).

359. *Dispense with the Rope*, MINNEAPOLIS TRIB., Apr. 3, 1889, at 4.

360. *Id.*

361. MINN. HOUSE J., at 1045 (1889). *The Journal of the House* only indicates that, on April 13, Representative Smith's bill was "amended" by the Committee of the Whole, and recommended to "pass as amended." *Id.* *The Journal* does not indicate how Representative Smith's bill was amended. Because the Minnesota Historical Society does not have the original version of the bill that Representative Smith introduced, and because no newspaper article could be located describing the amendment, it is unclear how Representative Smith's bill was amended on April 13. The title of the bill, however, suggests that the amendment was a minor one. *Id.*

362. *Id.* at 1062-63.

363. MINN. SENATE J., at 915 (1889) (recording the Senate vote totals).

364. 1889 Minn. Laws, ch. 20, § 8 (stating the effective date of the law); see MINN. SENATE J., at 777, 797, 835, 845, 856, 878, 915 (1889) (providing history of the bill);

The final version of John Day Smith's bill required that executions occur "before the hour of sunrise . . . and within the walls of the jail . . . [or] within an enclosure which shall be higher than the gallows. . . ." ³⁶⁵ Upon issuance of a warrant of execution, the bill required that prisoners be kept in solitary confinement. Only the sheriff and his deputies, the prisoner's attorney, a priest or clergyman, and the prisoner's immediate family members could visit the condemned inmate. ³⁶⁶ The bill also severely restricted attendance at executions. The only persons who could attend executions were the following: the sheriff and his assistants, a clergyman or priest, a physician, three persons designated by the prisoner, and no more than six other persons designated by the sheriff. ³⁶⁷ The law expressly prohibited newspaper reporters from attending executions. ³⁶⁸ Furthermore, "[n]o account of the details" of the execution, "beyond the statement of the fact that such convict was on the day in question duly executed," could be published in any newspaper. ³⁶⁹ Any violation of the law was punishable as a

MINN. HOUSE J., at 818, 907, 917, 1045, 1062-63, 1222, 1418 (1889) (same); *Will It Work*, MINNEAPOLIS J., Apr. 24, 1889, at 8. The John Day Smith law was not the first law in Minnesota requiring private punishments. In 1874, the Minnesota Legislature passed a law making it unlawful "to require any person, as a punishment for crime . . . to labor upon the streets, parks, or other public works with ball and chain attached; or to cause or require any such person as a punishment for crime, to be held, tied or bound in public." 1874 Minn. Laws, ch. 45, § 1; *see also* MINN. SENATE J., at 38, 68-69, 84, 110-12, 296, 308, 338-39, 400-01, 594 (1874) (providing legislative history of "chain gang" law); MINN. HOUSE J., at 102-03, 135, 160, 170-71, 207-08, 228, 229, 241-42, 295-96, 308, 333, 639 (1874) (same); *The Chain Gang Bill*, ST. PAUL DAILY PIONEER, Feb. 13, 1874, at 2; *House of Representatives*, ST. PAUL DAILY PIONEER, Feb. 20, 1874, at 2; *House of Representatives*, ST. PAUL DAILY PIONEER, Feb. 14, 1874, at 2; *House of Representatives*, ST. PAUL DAILY PIONEER, Feb. 13, 1874, at 2; *House of Representatives*, ST. PAUL DAILY PIONEER, Feb. 11, 1874, at 2; *Minnesota Legislature*, ST. PAUL DAILY PIONEER, Feb. 21, 1874, at 2; *Minnesota Legislature*, ST. PAUL DAILY PIONEER, Jan. 29, 1874, at 2. In 1873, a bill to prohibit the ball and chain and the punishment of criminals in public passed the Senate by a vote of 23 to 4. MINN. SENATE J., at 35, 224 (1873) (referring to S.F. 26); *Senate*, ST. PAUL DAILY PIONEER, Jan. 22, 1873, at 2; ST. PAUL DAILY PIONEER, Feb. 26, 1873, at 2, col. 4. The House voted it down that year 50 to 10. MINN. HOUSE J., at 405, 580-81 (1873).

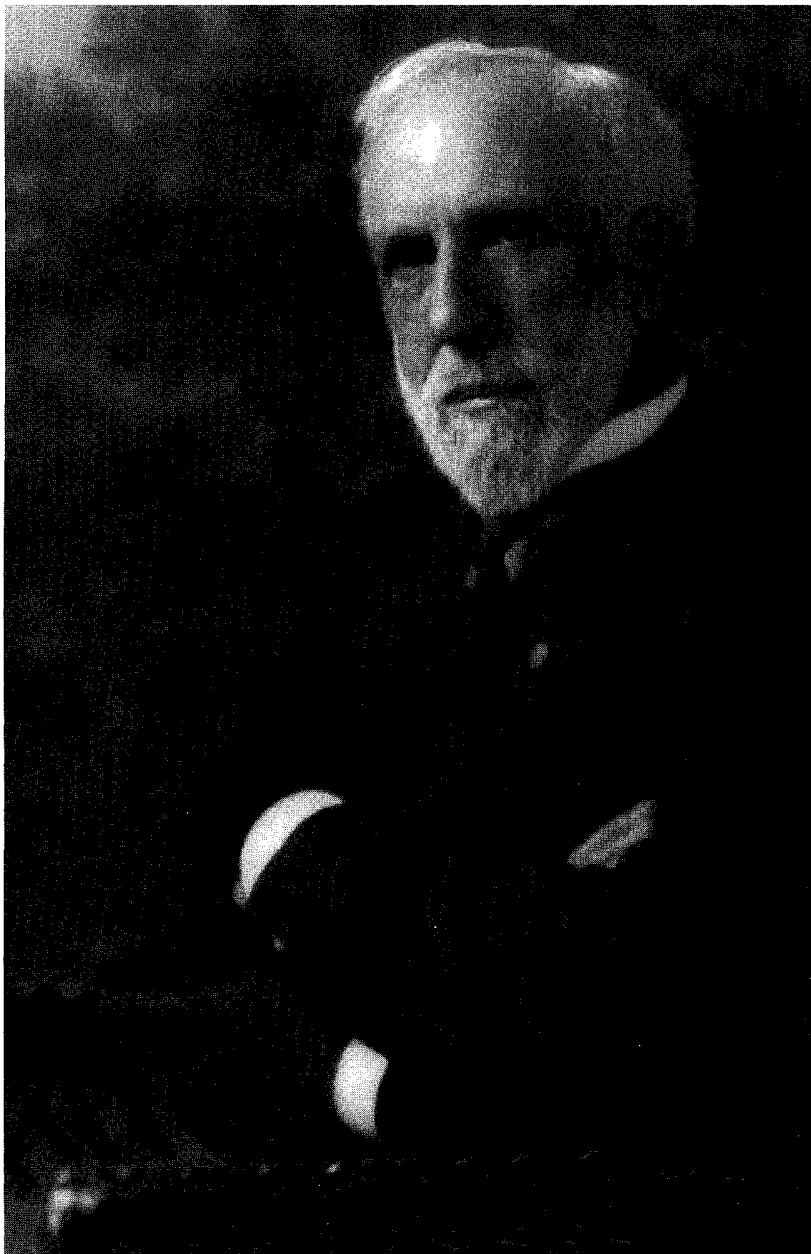
365. 1889 Minn. Laws, ch. 20, § 3.

366. *Id.* § 4.

367. *Id.* § 5.

368. *Id.*

369. *Id.*



Lee Brothers Photo, Minnesota Historical Society)

John Day Smith
Author of the "Midnight Assassination Law"

misdemeanor.³⁷⁰

John Day Smith was reportedly "happy" and "pleased" over the passage of his "pet measure,"³⁷¹ and indicated his intention to proceed against any newspaper that violated the law.³⁷² "The law is intended to promote morality," he said.³⁷³ "It is degrading to humanity to witness executions the way they are sometimes conducted in the country. The sheriff strings his man up out in an open field and invites the whole country to see him do it. The law will prevent all that."³⁷⁴ *The Daily Pioneer Press* of St. Paul, expressing similar sentiments, stated that John Day Smith designed the law "to rob an execution of much of its horror by strictly limiting the number of witnesses and excluding the representatives of the press. . . ."³⁷⁵ *The Minneapolis Journal* focused specifically on the "most unique feature" of the law: the prohibition on the newspaper publication of execution details.³⁷⁶ "This is for the purpose of preventing the circumstantial and sensational accounts of executions usually printed," the paper wrote.³⁷⁷ Noting that a similar New York law had yet to be "tested," the paper called into question the constitutionality of the John Day Smith law.³⁷⁸ "A number of lawyers have expressed the opinion that the newspaper feature of the law won't hold water," the paper reported.³⁷⁹ *The Minneapolis Tribune* later concluded that the provision in the John Day Smith law requiring executions before sunrise "is principally based upon the hope that an execution in the early morning hours will prevent the appearance of details in the morning papers."³⁸⁰

370. *Id.* § 6.

371. *Hard on the Reporters*, ST. PAUL PIONEER PRESS, Apr. 24, 1889, at 3.

372. *Will It Work*, MINNEAPOLIS J., Apr. 24, 1889, at 8.

373. *Id.*

374. *Id.*

375. *Bills That Have Passed*, ST. PAUL PIONEER PRESS, Apr. 23, 1889, at 9.

376. *Will It Work?*, MINNEAPOLIS J., Apr. 24, 1889, at 8.

377. *Id.*

378. *Id.* No newspapers were prosecuted under New York's "gag" law for publishing execution details until 1891. Madow, *supra* note 337, at 547-49. The indictments obtained against the New York newspapers were later dismissed after the New York Legislature repealed the "gag" law in 1892. *Id.* at 555; *see supra* note 9 (quoting pertinent text of the New York law).

379. *Id.*

380. *A Change Required*, MINNEAPOLIS TRIB., Oct. 24, 1891, at 4; *see supra* note 9 (quoting pertinent text of the New York law). Senator Frank A. Day's newspaper, *The Martin County Sentinel*, also commented on the passage of the John Day Smith law:

Thanks to Representative John Day Smith, public executions of criminals will

John Day Smith, a veteran of the Civil War who was slightly wounded at Gettysburg, witnessed numerous public executions during his military service.³⁸¹ As the official historian of his Maine infantry regiment, Smith later wrote that Union men "were ordered out with sickening frequency to witness the execution of men by shooting or hanging."³⁸² He noted:

Desertion was the common offense of these unfortunates. It was regarded as necessary that the faithful soldiers should witness the deserter's ignominious death as an object lesson or warning. This relic of barbarism is still cherished in some of the states. To illustrate its deterrent effect, within two days after one of these shooting parties, four soldiers were reported as deserting to the enemy from the same regiment to which the dead deserter belonged. In the month of August we were compelled to witness the shooting of a soldier for desertion from the Twentieth Massachusetts. The Twentieth was known as the Harvard University Regiment. As shown by its History recently published, there were 190 desertions from this regiment. . . . The story of the Nineteenth Maine is not marred by the recital of the execution of any of its soldiers. No member of the Regiment was ever put to death by military authority. Only thirty-five of its members were guilty of desertion, and some of these were probably captured by the enemy instead of having deserted.³⁸³

hereafter be largely private and newspaper readers will be spared the horrible and sensational reports of a mode of punishment which is a disgrace to our Christian civilization. Every man and woman, whose sense of decency is not morbid and depraved will read H.F. No. 1185 in the law supplements with feelings of satisfaction.

MARTIN COUNTY SENTINEL, May 10, 1889, at 4, col. 1. Interestingly, just shortly before the passage of the John Day Smith law, Senator Day's own newspaper printed a detailed account of the hanging of the Barrett boys. *Two Lives Taken*, MARTIN COUNTY SENTINEL, Mar. 29, 1889, at 2.

381. JOHN DAY SMITH, *THE HISTORY OF THE NINETEENTH REGIMENT OF MAINE VOLUNTEER INFANTRY 1862-1865* (hereinafter *NINETEENTH REGIMENT*) 86-87, 123-24, 317, 336 (1909). Smith was also wounded at the battle of Jerusalem Plank Road. *Id.* at 211, 317, 336; John Day Smith, *What War Meant to a Maine Soldier 1861-1865*, reprinted in *Nat'l Trib.* (Washington, D.C.) Jan. 6, 1927 (providing autobiographical account of the battle of Jerusalem Plank Road) (available at the Minnesota Historical Society).

382. *NINETEENTH REGIMENT*, *supra* note 381, at 123-24, 317.

383. *Id.* at 123-24.

VI. THE "MIDNIGHT ASSASSINATION LAW" IN OPERATION, 1889-1905

A. *The First Five Hangings*

The passage of John Day Smith's "midnight assassination law" was quickly followed by the July 19, 1889, hanging of Albert Bulow in Little Falls. Morrison County Sheriff Henry Rasicot "performed his duties faithfully, obeyed the law literally, and won the commendation of everyone by his wise and prudent course."³⁸⁴ In accordance with the execution warrant, the hanging occurred between 1:00 A.M. and 4:00 A.M. within a high board enclosure adjoining the jail. Sheriff Rasicot sprung the trap at 1:47 A.M.³⁸⁵ One newspaper reported that it was "so dark in the shadows of the enclosure that the features of those who were there could hardly be distinguished."³⁸⁶ The "morbidly curious," who wanted to catch a glimpse of the scaffold, "industriously" bored holes through the board fence.³⁸⁷ Those excluded from the enclosure were forced to call at the Harting & Son's morgue, which welcomed "hundreds" later that day "to see the face of the criminal."³⁸⁸

In the wake of Bulow's hanging, newspapers severely criticized the John Day Smith law. *The Brainerd Journal* called the provision requiring nighttime executions "a relic of barbarism that ought to be repealed at the first opportunity," and described Representative Smith as "undoubtedly insane."³⁸⁹ The newspaper went on to say that "[i]t is very strange that a man like Smith could be elected to the legislature, but still more strange that a bill containing indisputable evidence of having emanated from a madman could run the gauntlet of both branches of the

384. *Upon the Scaffold High*, LITTLE FALLS TRANSCRIPT, July 19, 1889, at 3.

385. *Id.*

386. *The Last of Bulow*, LITTLE FALLS TRANSCRIPT, July 26, 1889, at 3.

387. *Id.*

388. *Id.*; see also *The Drop Falls*, ST. PAUL PIONEER PRESS, July 19, 1889, at 1 ("Sheriff Rasicot has faithfully endeavored to carry out the new Smith law to the very letter, and no one was given tickets of admission to the execution except those specifically mentioned in . . . that law."); *Hanged in Private*, ST. PAUL DISPATCH, July 19, 1889, at 1 ("Sheriff Rasicot was firm in his determination to live up to the requirements of the Smith law, and not a single newspaper man was allowed to enter the place of execution.").

389. *The Last of Bulow*, LITTLE FALLS TRANSCRIPT, July 26, 1889, at 3 (quoting the BRAINERD JOURNAL).

legislature and become a law."³⁹⁰ *The Little Falls Transcript* was only slightly more charitable: "While there are perhaps some good features of the Smith hanging law, we have failed to learn of anybody who endorses it as it now is. The barbarity of killing a criminal in the night is disgusting to people who are not savages."³⁹¹ "The John Day Smith execution law," wrote the paper, "was so indefinite that many papers have been unable to learn just what should be done in order to please that narrow minded gentleman."³⁹² *The Alexandria Post* complained that newspapers had "confined the announcement [sic] of the execution under the John Day Smith law to four columns and editorial [sic] comment. It is not right to limit the prerogatives [sic] of the exponent of public opinion or the public morals."³⁹³

In fact, many newspapers blatantly violated John Day Smith's "midnight assassination law" by printing detailed accounts of Albert Bulow's execution. For example, *The Daily Pioneer Press* reported numerous execution details, including such minutia as "[t]he rope which encircled Bulow's neck was purchased in Chicago, and was five-eighths of an inch in diameter."³⁹⁴ The article itself, entitled "The Drop Falls" began:

In the blackness of night, illuminated only by the twinkling stars and the flickering light from three lanterns suspended from the beams of the scaffold, Albert Bulow was hanged at 2 o'clock this morning. It was a wierd [sic] spectacle at such an unusual hour, and the scene was one . . . [that would] impress itself forever upon the memory of the comparatively few persons who witnessed it. The jail building was a center of attraction for the morbidly curious all night.³⁹⁵

In its article, "Hanged in Private," *The St. Paul Dispatch* described even more graphic execution details.³⁹⁶ Among other things, the front-page story reported:

As the hour of 1 o'clock approached a quiet whispering crowd of citizens of the city began to assemble in small knots outside the line of guards established throughout the later

390. *Id.*

391. *Id.*

392. LITTLE FALLS TRANSCRIPT, July 19, 1889, at 3, col. 1.

393. ALEXANDRIA POST, July 26, 1889, at 1, col. 4.

394. *The Drop Falls*, ST. PAUL PIONEER PRESS, July 19, 1889, at 1.

395. *Id.*

396. *Hanged In Private*, ST. PAUL DISPATCH, July 19, 1889, at 1.

hours of the evening. The crowd was orderly, but the general sentiment was unanimous that the execution ought to be public. One intelligent farmer went so far as to say that there were men enough in Morrison county to demand and insist upon the public execution of the murderer of Eich, and he would be glad to head a party that would see to it that the public was given an opportunity to witness the event. The man had been drinking, however, and little heed was paid to his remarks by the bystanders. . . . [A]t 1:48 the sheriff pulled the lever and Frank Erich's [sic] murderer dropped five feet and ten inches to the space below. During the one minute consumed in adjusting the straps and noose not a word was spoken either within or without the enclosure, and it was almost another minute before the stillness of the surroundings was broken by the sound of a human voice. The crowd outside had heard the sound of the falling of the trap and began to move in toward the scaffold wall. It was only in whispered tones that the guards called to them to "stand back," they, too, being affected by the awful quiet of the surroundings and the events which had just concluded on the inside. Sheriff Rasicot left the inclosure as soon as he pulled the lever of the trap, and there were tears in the eyes of both he and his son as they passed into their private apartments in the jail building.³⁹⁷

The St. Paul Dispatch was particularly critical of the John Day Smith law. One section of its article, "Hanged in Private," was subtitled "An Absurd Law." It read:

According to the provisions of the famous John Day Smith law which requires the execution to take the form of a midnight assassination and at which only twelve persons shall "assist" in the capacity of spectators and otherwise, a wall or fence was erected higher than the scaffold, and after such a design rendered it impossible for outsiders to obtain any view of the execution. But, in its efforts to exclude the public and their representatives, the press, the sagacious law falls short in one particular. It is not provided that there shall be any spikes on top of the wall or fence, so that there was practically nothing to prevent the agile reporter from arming himself with a bullseye lantern, placing a ladder against the outside of the enclosure, climbing up and planting himself astride on top of the wall and watching the whole proceedings. This is really a serious oversight—for doesn't it practically nullify the

397. *Id.*

effect of the law?—that John Day Smith will doubtless spare no energy in engineering an amendment to that effect through the next legislature, now that it has been brought to his attention.³⁹⁸

A separate article in the same day's paper editorialized:

The law, we are informed, was fulfilled to the letter. No "newspaper reporter or representative" was admitted, but strangely enough the readers of newspapers are now in possession of every essential detail of the execution, and of many details that are not essential. Of course, as a result, *The Dispatch* and all its contemporaries in this and the adjacent city are misdemeanants.

Why did not Mr. John D. Smith take the precaution to provide for the creation of a press censor when he was framing that law! It is unique as a piece of paternal, sumptuary law-making, but in the nature of things it is incomplete without the addition we suggest. The "morbid" propensity of the reading public is something lamentable: but not nearly so much so as that of many who undertake, in the making of statues [sic], to dictate to them what they shall and shall not do.

If the people of this state desire to know the particulars of the execution of criminals they have an unquestionable right to be informed. It is their business. They pay for its transaction and they should not be deprived of the right to decide for themselves whether that business is properly or improperly transacted and to know, on unexceptionable authority, whether it has been transacted at all.

If such legislation as this of Mr. Smith is legitimate and proper, where is the line to be drawn? Why, if a newspaper is to be prevented from reporting the particulars of criminal executions, should they not also be prohibited from reporting the proceedings of criminal trials, of any murder or suicide, or street brawl, or railroad accident, or political gathering? Why not, on the principle of this law, have it determined on some scientific basis what sort of reading is and what is not of the "morbid" variety; tell us what novels we shall read and shall not read; and whether it is possible for a given mind to grow "morbid," for instance, in the perusal of religious books? A people who will confine their statutory regulation of printed matter to a mere innocuous provision against sending obscene matter through the mail, when a great scheme of

398. *Id.*

literary supervision, such as is hinted at in this wonderful law, is possible, ought to go out of the business of law-making altogether.

It is, after all, of some moral importance for the public to be informed, as they have been informed in spite of Mr. Smith and his law, that the braggart, swaggering murderer, Bulow, lost control of his wonderful "nerve" when confronted with the certainty of expiating his crime, in the form of the scaffold. The law has been vindicated: the people know it. They are given the opportunity that no one should seek to deprive them of, to know just how it was done. Those of them who think the opportunity to be of no importance may not avail themselves of it. Those who do, can avail themselves of it or not, as they please.³⁹⁹

The author of the newspaper "gag" law, Rep. John Day Smith, was out of town during the Bulow hanging.⁴⁰⁰ *The Minneapolis Journal* described his reaction upon his return: "He is not at all pleased with the way the newspapers have treated him and his new law. He says that allusions made to him were unmannerly. He is even bitter in his abuse of the newspapers for what he terms the slush and filth that they print."⁴⁰¹ When asked whether the newspapers that printed reports of the Bulow hanging would be prosecuted, Smith replied that he had "nothing to say."⁴⁰² He added, smiling, "I am not the prosecuting attorney, you know."⁴⁰³

Smith was, however, quick to note the effect his law had on the Bulow hanging.

Before the law was passed Sheriff Rasicot said if the people wanted to see the hanging he would put a rope around the scaffold and hang him in the open air. Was it not better that that man should be slid off in the night away from the sight and view of the crowd than that the execution of the law should be made the occasion of a gala day and a circus?⁴⁰⁴

Smith added that "the best sentiment of the community favors the law."⁴⁰⁵ When a reporter remarked, "the papers all over

399. A "Morbid" Law, ST. PAUL DISPATCH, July 19, 1889, at 2.

400. *John Day and His Law*, LITTLE FALLS TRANSCRIPT, July 26, 1889, at 2 (citing THE MINNEAPOLIS JOURNAL).

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.*

the country are opposed to it," Smith replied, "No, they are not. The best papers in the state have expressed themselves in favor of it. I don't mean the daily papers in St. Paul and Minneapolis."⁴⁰⁶ Smith said newspapers should be "controlled for [the] health and morals of the community."⁴⁰⁷ He again trumpeted the legality and wisdom of his law.⁴⁰⁸

Some newspapers did, in fact, defend John Day Smith's "midnight assassination law." *The Martin County Sentinel*, published by Smith's legislative colleague Sen. Frank A. Day, ran an editorial entitled "Disreputable Journalism" in the wake of Bulow's hanging.⁴⁰⁹ It read:

The St. Paul and Minneapolis daily newspapers have not only disgraced themselves but they have brought reproach upon the profession of journalism. Last winter Hon. John Day Smith, of Minneapolis, procured the passage of a legislative enactment which prescribed the time and manner in which executions for capital punishment should take place. . . . The law was admitted by all to be a good one and passed both houses of the Legislature by a practically unanimous vote. The attorney general decided that there were no constitutional objections to it and the desire of all good people was for its strict enforcement. The hanging of the Barretts in Minneapolis had ripened public sentiment for this reform. The sheriff who had the execution of those murderers in charge issued printed invitations to hundreds, the same as would be issued to a wedding, a reception or a banquet. People flocked from all parts of the state to see the poor depraved wretches drop from the scaffold, swing by their necks, and dangle in the air until the last breath of life had left their mortal bodies. At the close of the execution the hangman's rope and the scaffold were cut into pieces and distributed among the executioner's select guests as mementos of the great event. In satisfying the demands of justice the morbid and depraved taste of a great multitude had been satiated. And then came the newspapers with every minute detail of the horrifying affair, and enlarged, elaborated, exaggerated and sensationalized. To every refined and sensitive nature these accounts were revolting. They were of no benefit to law or society. They cultivated in the young a

406. *Id.*

407. *Id.*

408. *See id.*; *John Day Smith Succumbs at 88*, MINNEAPOLIS TRIB., Mar. 6, 1933, at 2.

409. *Disreputable Journalism*, MARTIN COUNTY SENTINEL, July 26, 1889, at 4.

taste for sensational blood-and-thunder literature which could but result in their moral debasement.

The press of the country should at all times be the staunch and unyielding defender of law, the active promoter of all reforms tending to the social, moral and intellectual welfare and culture of the people. Instead of adhering to these principles the journals of the twin cities, in the case of the recent hanging of Bulow at Little Falls, seemed to have entered into a rivalry with each other to see which could commit the most flagrant and wanton violation of the law. Their reporters were refused admission to the enclosure where the hanging took place but by the aid of their fertile imaginations and resorting to the tricks which shrewd news-gatherers know too well how to practice, they succeeded in inflicting upon the public about the usual amount of rot regarding the execution. That it was thoroughly unreliable, in addition to being unlawful, is evidenced by the fact that the reports in no two papers harmonized. Truth was disregarded in order to gain a little cheap notoriety for enterprise and to cater to the morbid appetites of lovers of sanguinary and sensational literature.

We hope every newspaper that thus openly and wantonly violated a plain and righteous provision of our statutes will be unsparingly prosecuted, and it would be a feather in the cap of our attorney general if he had the stamina to take the bull by the horns and bring the defiant law-breakers to justice.⁴¹⁰

Despite Senator Day's call for the offending newspapers to be prosecuted, no law enforcement officials commenced prosecutorial actions.

On September 20, 1889, twenty-six-year-old Thomas Brown became the second person to hang under the auspices of John Day Smith's "midnight assassination law."⁴¹¹ Clay County Sheriff Jorgen Jensen hanged Brown in Moorhead, at 4:30 A.M.,

410. *Id.* *The Martin County Sentinel* limited its own coverage of the Bulow hanging to the following five sentences. It reported:

Albert Bulow, the self-confessed murderer, was hanged at 2 o'clock in the morning at Little Falls, Minn., on the 19th in accordance with the provisions of the new John Day Smith law. Less than a dozen persons witnessed the execution. Bulow was game to the last. He wanted no ministerial interference and took no stock in a future of any kind. He committed a brutal murder for money and deserved his fate.

Id.

411. *Executed*, MOORHEAD DAILY NEWS, Sept. 20, 1889, at 1; *The Execution of Brown*, MOORHEAD DAILY NEWS, Sept. 13, 1889, at 4.

for the murder of a policeman, Peter Poull.⁴¹² Jensen, who had originally chosen 4:00 A.M. as the execution time, “faithfully followed” the John Day Smith law.⁴¹³ One newspaper posited that the sheriff would take “extra care” to ensure that no newspaper reporters attend the execution.⁴¹⁴ In accordance with the law, the local newspaper also took care to provide very few execution details.⁴¹⁵ The paper stated only that “no mishap or hitch of any kind” occurred and that “Brown’s neck was broken and he died without a struggle.”⁴¹⁶ While *The Moorhead Daily News* was “cognizant of many details of the execution, [it] refrain[ed] from publishing them” in order to comply with the law.⁴¹⁷ Instead, the paper published a history of Brown’s crime and a summary of the events leading up to the execution.⁴¹⁸ The paper proclaimed that John Day Smith’s law did not prohibit the newspaper publication of these kinds of details.⁴¹⁹ In contrast, some newspapers, such as *The St. Paul Dispatch*, continued to describe the most minute execution details.⁴²⁰

Brown’s execution actually made the “midnight assassination law” the subject of some gallows humor. Originally, the execution warrant directed Brown to hang on June 7, 1889, between the hours of 1:00 A.M. and 4:00 A.M.⁴²¹ Before Brown’s execution was postponed until September 20, 1889, newspapers reported that Sheriff Jensen planned to hang Brown as soon as possible after 1:00 A.M.⁴²² *The Alexandria Post* declared, “As Moorhead is near the north pole, there will be a great hustling to get the prisoner off as soon as the sun sets June

412. *Executed*, MOORHEAD DAILY NEWS, Sept. 20, 1889, at 1; see *Execution of Thomas Brown*, MOORHEAD DAILY NEWS, Sept. 19, 1889, at 4 (stating that the execution was scheduled for September 20, 1889, at 4:00 A.M.).

413. *Executed*, MOORHEAD DAILY NEWS, Sept. 20, 1889, at 1.

414. *The Execution of Brown*, MOORHEAD DAILY NEWS, Sept. 13, 1889, at 4.

415. *Executed*, MOORHEAD DAILY NEWS, Sept. 20, 1889, at 1.

416. *Id.*

417. *Id.*

418. *Id.*

419. *Executed*, MOORHEAD DAILY NEWS, Sept. 20, 1889, at 1; *Execution of Brown*, MOORHEAD DAILY NEWS, Sept. 13, 1889, at 4; *Execution of Thomas Brown*, MOORHEAD DAILY NEWS, Sept. 19, 1889, at 4.

420. *Gone to His Doom*, ST. PAUL DISPATCH, Sept. 20, 1889, at 1.

421. *Murderer Thos. Brown*, MINNEAPOLIS J., May 18, 1889, at 1 (reporting that Jensen “decided to hang Brown as soon after 1 o’clock as . . . possible [because] the hours named in the Governor’s warrant [were] from 1 o’clock to 4 o’clock a.m.”).

422. *Id.*

6. If memory and geography serve us rightly the sun sets there about 10 p.m. and rises at about 3 a.m. in June."⁴²³ The paper quipped, "Brown undoubtedly wishes Moorhead was just north of the arctic circle so the provisions of the law would make it impossible to hang on that day before sunrise."⁴²⁴

In the next two years, three more hangings occurred in Minnesota under the auspices of the "midnight assassination law." Sheriff James McLaughlin hung William Brooker in Pine City on June 27, 1890.⁴²⁵ William Rose was "swung into eternity" in Redwood Falls on October 16, 1891.⁴²⁶ Adelbert Goheen was hanged on October 23, 1891, in Fergus Falls.⁴²⁷ All three men had been convicted of murder.⁴²⁸ The death warrants for Brooker, Rose and Goheen, as was the case with many subsequent death warrants signed by Minnesota governors, specifically referenced the provisions of the John Day Smith law. For example, the death warrant for William Rose, signed by Gov. William R. Merriam on September 10, 1891, stated that the hanging had to be conducted "before the hour of sunrise" in accordance with the John Day Smith law.⁴²⁹ It described that law as "an Act providing the mode of inflicting the punishment of death, the manner in which the same shall be carried into effect, and declaring a violation of any of the provisions of this act to be a misdemeanor."⁴³⁰

The first of the three men, William Brooker, was hanged in the county jail.⁴³¹ A "dull thud" at 3:30 A.M. informed the crowd outside the jail that Brooker "was in the throes of death."⁴³² When asked if he had anything to say, Brooker stated, "No, I only hope that my neck will be broken. I want a

423. ALEXANDRIA POST, May 10, 1889, at 1, col. 4.

424. *Id.*

425. *Through the Trap*, ST. PAUL PIONEER PRESS, June 27, 1890, at 1.

426. *Hanged Until Dead*, REDWOOD REVELLE (Redwood Falls), Oct. 17, 1891, at 3.

427. *Hanged Till Dead*, MINNEAPOLIS TRIB., Oct. 23, 1891, at 1.

428. *Through the Trap*, ST. PAUL PIONEER PRESS, June 27, 1890, at 1; *Hanged Until Dead*, REDWOOD REVELLE (Redwood Falls), Oct. 17, 1891, at 3; *Hanged Till Dead*, MINNEAPOLIS TRIB., Oct. 23, 1891, at 1.

429. Execution Warrant for William Rose (Sept. 10, 1891) (Execution Records, Box 1, available at the Minnesota Historical Society). See generally BLEGEN, *supra* note 22, at 386-87 (providing biographical information on William R. Merriam).

430. Execution Warrant for William Rose (Sept. 10, 1891) (Execution Records, Box 1, available at the Minnesota Historical Society).

431. *Paid the Penalty*, PINE COUNTY PIONEER (Pine City), June 27, 1890, at 4, 1.

432. *Id.* at 1.

good job done, and hope that everything will go off all right."⁴³³ Ironically, an autopsy revealed that Brooker's neck had not been broken.⁴³⁴ He swung from the scaffold for one-half hour before physicians pronounced him dead from strangulation.⁴³⁵

William Rose, the next man to hang, was convicted after three trials of killing a neighboring farmer, Moses Lufkin.⁴³⁶ The two men reportedly quarreled over Rose's unwelcomed advances toward Lufkin's daughter.⁴³⁷ A large crowd gathered for the hanging, including several drunken men. Musket-carrying guards protected the ramshackle execution enclosure.⁴³⁸ Sheriff C.W. Mead allowed only "friends," "cronies," and one local newspaper editor into the enclosure—a "small, unpainted shanty, with the light shining through cracks and knot holes," resembling a "slaughter house, where the lives of cattle are taken," more than a place where a human being should be hanged.⁴³⁹ Only when the guards deserted their posts to watch the execution through "the nearest crevice" were reporters able to look through knotholes to obtain a complete account of what transpired inside.⁴⁴⁰

When the trap swung open at 4:56 A.M., Rose's one hundred ninety pound body broke the rope.⁴⁴¹ Sheriff Mead whispered "pick him up," and officials quickly carried Rose's unconscious body back up the scaffold.⁴⁴² A second noose was placed around his neck, and the trap was sprung again at exactly 5:00 A.M. This time the rope held, and Rose eventually died.⁴⁴³ Rose's final statement blamed the governor for his fate. "I consider Governor Merriam one of the most unfair men on earth," he said.⁴⁴⁴ "We met when he was not governor. It was on the banks of Lake Kampeska, South Dakota. He was with a

433. *Id.* at 4.

434. *Id.* at 1.

435. *Id.*; *Through the Trap*, ST. PAUL PIONEER PRESS, June 27, 1890, at 1.

436. *Full of Horrors*, ST. PAUL PIONEER PRESS, Oct. 16, 1891, at 1.

437. *Dropped to Death*, ST. PAUL GLOBE, Oct. 16, 1891, at 1.

438. *Rose Twice Hanged*, ST. PAUL PIONEER PRESS, Oct. 17, 1891, at 1.

439. *Id.*

440. *Id.*

441. *Id.*; *Full of Horrors*, ST. PAUL PIONEER PRESS, Oct. 16, 1891, at 1.

442. *Rose Twice Hanged*, ST. PAUL PIONEER PRESS, Oct. 17, 1891, at 1.

443. *Full of Horrors*, ST. PAUL PIONEER PRESS, Oct. 16, 1891, at 1.

444. *Hanged Until Dead*, REDWOOD REVEILLE (Redwood Falls), Oct. 17, 1891, at 3.

party of hunters and requested me to do a petty service for him. I refused and he insulted me. He probably remembered that incident when he refused to pardon me, an innocent man."⁴⁴⁵

Rose was soon pronounced dead, but he was not "the only sufferer"—as *The St. Paul Pioneer Press* reported—of the October 16 hanging.⁴⁴⁶ *The St. Paul Globe*, which published a story entitled "Dropped to Death" on the morning of the execution, soon became its second victim. The *Globe's* story, advertised as a "Special to the Globe," reported that Rose was hung "in the early dawn."⁴⁴⁷ The story did not publish the hour and minute of death, but confidently proclaimed that "[t]here were no sensational features, no terrible details" to Rose's hanging.⁴⁴⁸ This latter statement was obviously false, and did not go unnoticed by *The St. Paul Globe's* competitors.

The other major newspapers in Minneapolis and St. Paul quickly accused *The St. Paul Globe* of committing the "very old and very cheap trick" of making up facts to scoop the other papers.⁴⁴⁹ *The St. Paul Pioneer Press* said those who ran *The St. Paul Globe* used "journalistic enterprise" to "evolve facts out of their inner consciousness."⁴⁵⁰ An editorial in *The Minneapolis Tribune* was even more sarcastic: "It costs a little more and requires time and trouble to secure the news, but it pays better in the long run. Newspapers, like politicians, may fool part of the people part of the time, but they cannot fool all of the

445. *Id.* Rose's execution generated widespread commentary and controversy. See *Bungling, Shocking!*, ST. PAUL GLOBE, Oct. 17, 1891, at 1 (stating that the Rose hanging was "as cruel an exhibition as was ever afforded upon the scaffold"); *The Death March*, MINNEAPOLIS TRIB., Oct. 16, 1891, at 1 (reporting that Rose was very cheerful between his trip from New Ulm to Redwood Falls); *Full of Horrors*, ST. PAUL PIONEER PRESS, Oct. 16, 1891, at 1 (reporting that Rose believed Eli Stover was guilty while Rose himself was innocent); *More in Detail*, MINNEAPOLIS TRIB., Oct. 17, 1891, at 1 ("It was more like a hog killing than a judicial execution."); *Rose Twice Hanged*, ST. PAUL PIONEER PRESS, Oct. 17, 1891, at 1 (stating that Rose's execution demonstrated the injustice of the John Day Smith law); *Those Fresh Young Reporters*, REDWOOD REVEILLE (Redwood Falls), Oct. 31, 1891, at 3 (reporting that the guards denied several young reporters a view of the Rose hanging and that subsequently those reporters reported "the affair in the most horrible manner").

446. *It Sometimes Happens*, ST. PAUL PIONEER PRESS, Oct. 17, 1891, at 4.

447. *Dropped to Death*, ST. PAUL GLOBE, Oct. 16, 1891, at 1.

448. *Id.*

449. *Caught in an Old Trick*, MINNEAPOLIS TRIB., Oct. 17, 1891, at 42; see also *It Sometimes Happens*, ST. PAUL PIONEER PRESS, Oct. 17, 1891, at 4 (reporting that *The St. Paul Globe* relied on its reporters' imaginations to recreate the Rose execution).

450. *It Sometimes Happens*, ST. PAUL PIONEER PRESS, Oct. 17, 1891, at 4.

people all of the time."⁴⁵¹ *The St. Paul Globe's* only defense was that its reporter dashed to the telegraph office right after "the sounds of the falling weights told him that the deed was done."⁴⁵² It emphasized the "[p]eculiar difficulties" surrounding execution news coverage "because the existing statutes forbid the presence of reporters at the execution."⁴⁵³ Reporters have to "depend on the information they can obtain from others, who attend it not to tell, but to act."⁴⁵⁴

Although one local newspaper editor managed to witness Rose's hanging, no newspaper reporters whatsoever witnessed Adelbert Goheen's execution in the Fergus Falls jail in October of 1891. Otter Tail County Sheriff John S. Billings was "not an admirer" of the John Day Smith law, but he reluctantly agreed to comply with it.⁴⁵⁵ After the condemned man said "Let her go, Jack," Sheriff Billings let the trap drop at 12:15 A.M.⁴⁵⁶ Only official witnesses and spectators allowed by law were present. The rope used in the hanging was later divided up "among numerous applicants."⁴⁵⁷

The executions of Brooker, Rose, and Goheen all prompted severe press criticism of the John Day Smith law. After the hanging of William Brooker, for example, *The Pine County Pioneer* declared:

If John Day Smith . . . thought he was doing a wonderful thing toward relieving the tragedy of some of its horrors, he was mistaken. . . . The act is but the aimless product of a crank's mind, and should be repealed by the next legislature. If the state is so ashamed of its laws that it compels its officers to fulfill them at the dark hour of midnight, and hidden from the investigation of the world by the exclusion of reporters, it is a good evidence that the law should be repealed.⁴⁵⁸

451. *Caught in an Old Trick*, MINNEAPOLIS TRIB., Oct. 17, 1891, at 4.

452. *News of the Hanging*, ST. PAUL GLOBE, Oct. 18, 1891, at 4.

453. *Id.*

454. *Id.*; see also *Getting Out of a Hole*, ST. PAUL PIONEER PRESS, Oct. 19, 1891, at 4 (noting that *The St. Paul Globe* would have been better off remaining silent rather than blaming an eager reporter).

455. *Rose's Footsteps*, ST. PAUL PIONEER PRESS, Oct. 19, 1891, at 1.

456. *Rosa Bray Avenged*, ST. PAUL PIONEER PRESS, Oct. 23, 1891, at 1.

457. *Goheen Is Buried*, ST. PAUL GLOBE, Oct. 24, 1891, at 1; *Hanged Till Dead*, MINNEAPOLIS TRIB., Oct. 23, 1891, at 1; see also *Rosa Bray Avenged*, ST. PAUL PIONEER PRESS, Oct. 23, 1891, at 1 (describing the Goheen execution); *Through a Trap*, ST. PAUL GLOBE, Oct. 23, 1891, at 1 (same).

458. PINE COUNTY PIONEER (Pine City), July 4, 1890, at 1, col. 2.

The Rose hanging produced an equally virulent response, as evidenced by the following statements from *The St. Paul Pioneer Press*:

The execution of Rose fully demonstrated both the injustice and absurdity of the John Day Smith law. . . . The absurdity of the law was shown by the fact that as full an account of the closing scenes as the morning papers could use was on the wires within twenty minutes after the drop fell. . . . The injustice of the law was equally well shown by the indignities heaped upon the reporters of the daily papers, and the partiality shown to local newspaper men. Among the witnesses of the execution, of which there were about twenty-five, was a representative of *The Sleepy Eye Herald*, who was allowed a position inside the slaughter pen, while the reporters of the dailies were steadfastly refused admission.⁴⁵⁹

Likewise, after Adelbert Goheen's execution, *The Minneapolis Tribune* declared that "[i]t is becoming painfully evident that the John Day Smith execution law has failed to accomplish the purposes for which it was passed."⁴⁶⁰ Its editorial opined:

This law was enacted to squelch if possible that unhealthy and morbid interest which is always aroused by the public execution of a criminal. It was very reasonably supposed that the private execution of a justly convicted criminal would beget fewer flowers and female tears and would cause mankind to reflect more seriously upon the meaning of the gallows in relation to society. The two executions which have recently taken place show that this well meant law has proven altogether futile.⁴⁶¹

"More sentimental twaddle has been written about the last days of William Rose than ever appeared in print in any case prior to the passage of this law," the editorial continued.⁴⁶² "Despite the evident purpose of the law, that extraordinary felon, Adelbert Goheen, is more talked about today than any ten living and virtuous people in the state."⁴⁶³ In the opinion of the editorial's author, John Day Smith's law failed because of "the attempted exclusion of representatives of the press from the scene of execution" and "an overwhelming human curiosity

459. *Rose Twice Hanged*, ST. PAUL PIONEER PRESS, Oct. 17, 1891, at 1.

460. *A Change Required*, MINNEAPOLIS TRIB., Oct. 24, 1891, at 4.

461. *Id.*

462. *Id.*

463. *Id.*

which nothing can eradicate."⁴⁶⁴ When reporters "have been unable to gain admission," the paper asserted, "their accounts of executions have been more harrowing than had they been present upon the spot."⁴⁶⁵

The Minneapolis Tribune concluded that "[a]t least one competent and trustworthy representative of the press should be present to give a brief and unsensational account of the execution. . . ."⁴⁶⁶ The editorial continued by saying that:

All men admit that no good purpose is served by publishing the details of an execution. Nevertheless the public properly demands and is entitled to know the facts attending the enforcement of the law and will insist upon these facts being made known. . . . An execution is a state function and the people of the state should know whether the machinery which they have provided for capital punishment is efficient or otherwise.⁴⁶⁷

The St. Paul Pioneer Press joined the reform chorus, calling for repeal of the provision of the John Day Smith law "relative to publication of details of executions."⁴⁶⁸ Despite these calls for reform, legislative efforts to repeal or amend the John Day Smith law were unsuccessful.⁴⁶⁹

464. *Id.*

465. *Id.*

466. *Id.*

467. *Id.*

468. *Another Strangling*, ST. PAUL PIONEER PRESS, Oct. 24, 1891, at 4.

469. In 1897, Rep. A. F. Ferris introduced a bill in the House of Representatives to allow press access to executions. H.F. 1, 30th Leg., 1st Sess., Minn. (1897). His bill provided that executions would occur at the state prison in Stillwater before sunrise. However, unlike John Day Smith's "midnight assassination law," Representative Ferris' bill provided for the attendance of four representatives of the press. The House passed Representative Ferris' bill by a vote of 65 to 18, but the proposal died in the Senate Judiciary Committee. MINN. SENATE J., at 186, 190 (1897); MINN. HOUSE J., at 31, 107, 192, 202 (1897); *Four Bills Introduced*, ST. PAUL PIONEER PRESS, Jan. 8, 1897, at 2; *The House*, ST. PAUL PIONEER PRESS, Feb. 6, 1897, at 1; *Prevented the Slaughter*, ST. PAUL PIONEER PRESS, Feb. 7, 1897, at 10; *Salaries Must Be Reduced*, ST. PAUL PIONEER PRESS, Jan. 28, 1897, at 3; *Two Houses Get Together*, ST. PAUL PIONEER PRESS, Feb. 6, 1897, at 2. See generally PORTRAIT GALLERY OF THE TWENTY-NINTH LEGISLATURE OF THE STATE OF MINNESOTA 110 (1895) (containing biographical sketch of A. F. Ferris).

In House debate, Representative Ferris told fellow legislators that his bill had the endorsement of the board of prison managers. "We had a hanging at Brainerd last summer, and I think that any member who lives in a town where they have been through this experience will favor this bill," urged Representative Ferris. His colleague, Rep. Henry Johns, expressed similar sentiments. He referred to the hangings of Charles Ermish and Otto Wonigkeit in 1894, where "10,000 or 15,000 people gathered about the courthouse" for the execution. An avid opponent of capital punishment,

B. *The U.S. Supreme Court Ruling in Holden*

Prior to the hanging of William Rose,⁴⁷⁰ the U.S. Supreme Court commented on the constitutionality of John Day Smith's "midnight assassination law" in *Holden v. Minnesota*.⁴⁷¹ That case pitted the State of Minnesota against Clifton Holden, a man convicted of first-degree murder in Redwood County, Minnesota on May 28, 1889. Holden's jury determined that he had shot a man in the head with a pistol in November of 1888.⁴⁷² He was sentenced to death in February of 1890 after the Minnesota Supreme Court refused to grant his request for a new trial.⁴⁷³ On May 21, 1890, Gov. William Merriam issued Holden's death warrant, which mandated compliance with the provisions of the John Day Smith law.⁴⁷⁴ The warrant directed that Holden be "confined" in the county jail until his execution date, and that he be executed "before the hour of sunrise" in accordance with the John Day Smith law.⁴⁷⁵

The issuance of Holden's death warrant prompted Holden's counsel, Charles C. Willson, to file a habeas corpus petition in

Rep. Sylvanus A. Stockwell was one of the most outspoken opponents of Representative Ferris' bill. He called the bill "a silent yet eloquent argument . . . to abolish capital punishment." Representative Stockwell added:

The gentleman from Brainerd says that city wants no more judicial murders. . . . What has Stillwater done that this disgrace should be put upon her? . . . Why should the warden of the penitentiary be made into the state's hangman? The warden is opposed to the passage of the bill because it would destroy his influence among the convicts. If capital punishment is a deterrent from crime, why should it not be executed in the places where crime occurs? It will be a dangerous policy to introduce this punishment into the penitentiary among men susceptible to influences of this character. The infliction of the death penalty ought to be removed from the cities, but it should not be taken to Stillwater.

Two Houses Get Together, ST. PAUL PIONEER PRESS, Feb. 6, 1897, at 2. See generally PORTRAIT GALLERY OF THE TWENTY-NINTH LEGISLATURE OF THE STATE OF MINNESOTA 128 (1895) (containing biographical sketch of Henry Johns); WILLIAM P. EVERTS, NEVER GIVE UP: THE LIFE OF S.A. STOCKWELL OF MINNEAPOLIS (1994) (providing biographical information concerning S. A. Stockwell and his abolitionist efforts) (unpublished manuscript on file with the author). See *infra* text accompanying notes 501-05 (recounting the double hanging of Charles Ermish and Otto Wonigkeit).

470. Rose's hanging was held in abeyance pending the U.S. Supreme Court's decision in Clifton Holden's case. *Holden's Last Chance*, ST. PAUL PIONEER PRESS, Dec. 10, 1890, at 10.

471. 137 U.S. 483 (1890).

472. Transcript of Record at 1, *Holden v. Minnesota*, 137 U.S. 483 (1890).

473. *Holden*, 137 U.S. at 484.

474. *Id.* at 485.

475. Transcript of Record at 7, *Holden*.

federal court against the State of Minnesota.⁴⁷⁶ The petition asserted that the law in effect at the time Holden committed the crime of first-degree murder would result in death, without any "solitary confinement" prior to execution.⁴⁷⁷ He then contended that the John Day Smith law, which required solitary confinement before execution, was an unconstitutional *ex post facto* law because it impermissibly increased his punishment.⁴⁷⁸ In addition, Holden asserted that John Day Smith's "midnight assassination law" contained a provision that repealed all prior inconsistent laws. He argued that this repealing clause granted him complete amnesty for any crime committed prior to the passage of Representative Smith's law.⁴⁷⁹

476. *Id.*

477. *Id.* at 2.

478. *Id.*

479. *Holden v. Minnesota*, 137 U.S. 483, 487 (1890); *How About Clift Holden?*, ST. PAUL PIONEER PRESS, July 3, 1890, at 5. On March 3, 1890, the U.S. Supreme Court had decided that a Colorado law enacted in 1888 was an impermissible *ex post facto* law because it added solitary confinement as punishment for murder. *In re Medley*, 134 U.S. 160 (1890); *In re Savage*, 134 U.S. 176 (1890). In those two companion cases, the petitioners had argued that the Colorado statute was an unlawful *ex post facto* law because it, among other things, required executions to be "enclosed from public view" and contained a provision which prohibited newspapers from printing any execution details. Transcript of Record at 3, *Medley*. In response to these arguments, the State of Colorado contended that neither of these changes affected the petitioners' punishment. According to the State's brief:

It is a part of the public history of the State that prior to the passage of this act the death penalty with us was usually inflicted in public at a previously advertised hour, in the presence of a large concourse of people, and the particulars of the execution published in the public journals. In deference to the wish of many good citizens who were of the opinion that the tendency of such proceedings was detrimental to the public morals, the recent statute was passed, requiring executions in the future to be conducted privately at the penitentiary, enjoining secrecy upon the few persons required or permitted to be present; and making it a misdemeanor punishable by fine for such persons to disclose the details of the execution, or for the press to publish the same. To accomplish the desired change, it became necessary to change certain incidents connected with the punishment, but no attempt was made to change the punishment itself. This remains the same as before the passage of the act.

Brief of Respondent at 7-8, *Medley* (quoting a decision of the Colorado Supreme Court). The State of Colorado added:

[A]t no time and by no law has there been any direction or command that executions shall be public. All this is left to the discretion of the sheriff, who provides the place and manner thereof. That he may have been accustomed to make executions public, in no wise deprived him of the discretion to make them private, or to restrict the number of those who may be present. Before this objection could avail, in any event, it must appear that there was a legal right to a public execution. Had the law been changed in this particular alone, of providing for private executions, leaving all else unchanged, we conceive that this ground of challenge would never have been seriously enter-

In response to Holden's petition, Minnesota Attorney General Moses E. Clapp asserted that the Minnesota law which led to Holden's conviction "has never been repealed."⁴⁸⁰ Clapp further denied that Holden was being kept in solitary confinement, pointing out that Holden had been "permitted to mingle with the other prisoners during the daytime as freely as any person therein confined," and that "no restriction had been placed upon Holden's ability to receive visitors."⁴⁸¹ Ultimately, the United States Circuit Court for the District of Minnesota denied Holden's petition for a writ of habeas corpus on July 3, 1890. The court held that the death warrant of "his excellency the Governor of the State of Minnesota is not contrary to law or in violation of the Constitution of the United States, and that . . . Clifton Holden is not entitled to his liberty."⁴⁸² That decision forced Holden to take his case to the United States Supreme Court, which agreed to hear it.⁴⁸³

In his appellate brief, Holden acknowledged that an "issue of fact in the Court below" was whether law enforcement officials

tained. But the reasons for the change are so clearly referable to penal administration, and not to change in the punishment, that no good reason can be assigned against the law.

Id. at 14. The State was equally dismissive of the petitioners' assertion that their punishment was unlawfully changed by the fact that the Colorado statute prohibited newspapers from publishing any execution details. According to the State's brief:

It is difficult to conceive how this objection affects the rights of the prisoner. Whether his execution be private or public, newspaper comments are so decidedly *ex post facto*, as to the particular occasion, that it can have not the slightest effect on the condition of the prisoner. Besides, it cannot be, and is not the policy or intent of this law, that acts of barbarism, cruelty or any other legitimate grounds of reprehension against the executioner, should forever be excluded from the cognizance of the proper tribunals, or to forbid that punishment be meted out to those guilty of unmerciful acts on so awful an occasion. Witnesses are required to be present for the purpose of seeing that the execution is entirely according to law. The inhibition is directed against the too common practice news-mongers have of parading sickening details under the disguise of enterprise.

Id. at 21. Despite the conflicting views of the petitioners and the State of Colorado, the U.S. Supreme Court found it "unnecessary" to examine these clashing contentions. *Medley*, 134 U.S. at 166. The High Court focused instead on the parties arguments about whether Colorado's imposition of solitary confinement rendered the statute an unconstitutional *ex post facto* law. *Id.* Thus, the U.S. Supreme Court offered no comments about the provisions of the Colorado law which required private executions and prohibited newspaper publication of execution details.

480. Transcript of Record at 11, *Holden*.

481. *Id.*

482. *Id.* at 17.

483. Appellant's Brief at 3, *Holden*.

“disobeyed” the John Day Smith law by giving him “the liberties of the jail.”⁴⁸⁴ However, Holden found it unimportant whether or not he “had actually [been] kept in solitary confinement.”⁴⁸⁵ The John Day Smith law had “full force and operation,”⁴⁸⁶ Holden argued, taking the position that “the actual manner of his imprisonment is irrelevant to the question in debate.”⁴⁸⁷ Holden viewed the Smith law as “not unconstitutional” in and of itself, but asserted that the law, by impermissibly increasing his punishment by adding solitary confinement, became an unconstitutional *ex post facto* law as “to his case.”⁴⁸⁸ Thus, it was inconceivable to Holden that his “jailor” could, “by the manner of confining his prisoner, cause his execution or his discharge,” making the jailor “a most important man in the administration of the criminal law.”⁴⁸⁹ Holden also contended that because the John Day Smith law did not contain “a saving clause” to continue the repealed law in force, it entitled him to “amnesty.”⁴⁹⁰

In its brief, the State of Minnesota countered that the John Day Smith law did not repeal the law under which Holden was convicted of first-degree murder. Attorney General Clapp’s brief further argued that the law was not an unlawful *ex post facto* law, emphasizing that the law “in no wise affects the pre-existing law as to the imposition of the sentence, but appertains wholly to the mode or manner of inflicted the penalty already provided for the crime of murder in the first degree.”⁴⁹¹ The State’s brief noted that John Day Smith’s law “breaths throughout its text a spirit in harmony with the greater light and broader humanity of the age,”⁴⁹² adding:

With wise prudence, it seeks to forestall the gathering of the thoughtless disorderly mob, too frequently an incident to such occasions; it strives to minimize the evils of too much publicity of such awful scenes, and excludes all representatives of the press; it is tenderly regardful of the abject condition of

484. *Id.* at 14.

485. *Id.*

486. *Id.* at 15.

487. *Id.* at 14.

488. *Id.* at 4.

489. *Id.* at 14.

490. *Id.* at 20.

491. Respondent’s Brief at 3, *Holden*.

492. *Id.* at 18.

the accused, and assures him the ministrations of friends and the consolations of religious advisors.⁴⁹³

After hearing oral argument in November of 1890, the United States Supreme Court decided in favor of the State of Minnesota.⁴⁹⁴ In its December 8, 1890, decision, the High Court held that Holden failed to prove he was actually being held in solitary confinement. His *habeas corpus* petition made this allegation, but the State denied it and the Court could find "no proof in the record upon the subject."⁴⁹⁵ In addition, the Court found that the John Day Smith law did not repeal the law under which Holden was sentenced to death.⁴⁹⁶

In rejecting Holden's arguments, the U.S. Supreme Court did briefly comment, in dicta, about the constitutionality of other provisions of the John Day Smith law. One sentence sanctioned the provision requiring private, nighttime executions:

Whether a convict, sentenced to death, shall be executed before or after sunrise, or within or without the walls of the jail, or within or outside of some other enclosure, and whether the enclosure within which he is executed shall be higher than the gallows, thus excluding the view of persons outside, are regulations that do not affect his substantial rights.⁴⁹⁷

The Court added that "[t]he same observation may be made touching the restriction . . . as to the number and character of those who may witness the execution, and the exclusion altogether of reporters or representatives of newspapers."⁴⁹⁸ "These are regulations which the Legislature, in its wisdom, and for the public good, could legally prescribe in respect to executions," the Court declared.⁴⁹⁹ Ironically, after being upheld by the United States Supreme Court, Holden's death sentence was later commuted to life imprisonment by the state's

493. *Id.*

494. *Holden v. Minnesota*, 137 U.S. 483, 493-94 (1890); see *Holden Must Hang*, ST. PAUL PIONEER PRESS, Dec. 9, 1890, at 4; *To Stretch Hemp*, MINNEAPOLIS TRIB., Dec. 9, 1890, at 1; see also *Clifton Holden's Case*, ST. PAUL PIONEER PRESS, Nov. 22, 1890, at 5 (reporting on the final day of oral arguments); *The Holden Case*, MINNEAPOLIS TRIB., Nov. 21, 1890, at 3 (reporting on the first day of oral arguments).

495. *To Stretch Hemp*, MINNEAPOLIS TRIB., Dec. 9, 1890, at 1 (including the full text of Justice Harlan's decision).

496. *Holden*, 137 U.S. at 494-95.

497. *Id.* at 491.

498. *Id.*

499. *Id.*

governor.⁵⁰⁰

C. Non-Compliance, Non-Enforcement

Despite the U.S. Supreme Court's pronouncement in *Holden*, the provisions of the "midnight assassination law" restricting execution attendance were frequently ignored. For example, on October 19, 1894, two teenagers, Charles Ermisch and Otto Wonigkeit, were hanged on a double gallows in St. Paul for the murder of a bartender. In spite of the John Day Smith law, about fifty men packed the enclosure for the 5:05 A.M. hanging.⁵⁰¹ Many were friends of the sheriff, and others were newspaper reporters.⁵⁰² Before the execution took place, some 15,000 people viewed the gallows.⁵⁰³ Flasks of whiskey were actually passed among the spectators inside the enclosure on the plea that a "bracer" was needed.⁵⁰⁴ Newspapers later accused spectators of coming "to get a few minutes of doubtful entertainment" and of "making an orgy of a solemn act of justice."⁵⁰⁵

After the double hanging, *The Minneapolis Tribune* reported that there had been "quite a wide-spread popular protest against the hangings of the two boy murderers."⁵⁰⁶ Ermisch and Wonigkeit were "only 19 years old each," the paper wrote.⁵⁰⁷ "[T]hey have hardly had a fair chance in life, their surroundings from their earliest years having been vicious, and it is felt that the state owed them something better than death on the gallows."⁵⁰⁸ Ramsey County Sheriff Charles E. Chapel ex-

500. *Full of Horrors*, ST. PAUL PIONEER PRESS, Oct. 16, 1891, at 1.

501. *Paid the Penalty*, MINNEAPOLIS TRIB., Oct. 20, 1894, at 3.

502. *Well Rid of Gottschalk*, ST. PAUL PIONEER PRESS, July 22, 1905, at 6.

503. *Last Hours of Life*, MINNEAPOLIS TRIB., Oct. 19, 1894, at 1; *Nearing Their End*, DULUTH NEWS TRIB., Oct. 18, 1894, at 1; see also *The Debt Is Paid*, ST. PAUL PIONEER PRESS, Oct. 19, 1894, at 4 (stating that thousands of people clamored to view the gallows prior to the hanging); *Ready for the Drop*, DULUTH NEWS TRIB., Oct. 19, 1894, at 1 (describing the efforts of men and women to view the murderers).

504. *Well Rid of Gottschalk*, ST. PAUL PIONEER PRESS, July 22, 1905, at 1.

505. *Id. But cf. Paid the Penalty*, MINNEAPOLIS TRIB., Oct. 20, 1894, at 3 (describing the proceedings as silent and solemn). See generally *The Gallows Tree Bears Its Fruit*, ST. PAUL PIONEER PRESS, Oct. 19, 1894, at 1, 2 (providing an in-depth recounting of the convicts' last days and a description of the gallows construction); *Last Hours of Life*, MINNEAPOLIS TRIB., Oct. 19, 1894, at 1, 4 (describing the morbid curiosity of the crowd).

506. *What To Do With Criminals*, MINNEAPOLIS TRIB., Oct. 19, 1894, at 4.

507. *Id.*

508. *Id.*

pressed similar sentiments by stating that "[t]he youth of the men and other features of the case will have much to do with bringing about the feeling that will surely result in the repeal of the laws providing for capital punishment."⁵⁰⁹ Noting "a growing sentiment against capital punishment everywhere," *The Minneapolis Tribune* suggested establishing a penal colony in the Aleutian Islands instead of inflicting the death penalty.⁵¹⁰ In contrast, *The St. Paul Pioneer Press* asked that electricity be substituted for hanging as the method of imposing death.⁵¹¹ The Legislature took no action on either of these two proposals.

Later in 1894, one of Minnesota's most notorious crimes occurred, vaulting John Day Smith back into the capital punishment limelight, if only for a short time. On the night of December 3, 1894, an unmarried, twenty-nine-year-old dressmaker named Catherine Ging was murdered by an off-hour elevator operator, Claus Blixt.⁵¹² Blixt lived in an apartment in the Ozark Flats, a complex owned and managed by William Hayward. Hayward's two sons, Harry and Adry, lived in Ozark Flats and occasionally helped their father in the office.⁵¹³

A professional gambler, Harry Hayward was probably deeply in debt when he hatched a scheme to kill his would-be bride, Ms. Ging. He first lent her large sums of counterfeit money,⁵¹⁴ and then took out a \$10,000 insurance policy on her life.⁵¹⁵ He named himself as the beneficiary, purportedly as security for her indebtedness to him. Next, Harry took Ms. Ging to a restaurant and got her to publicly display a big roll of cash, building her image as a person who recklessly carried money, and making her a potential robbery target.⁵¹⁶ When Harry could not get his brother Adry to kill Ms. Ging, he turned to Blixt, a man of low intelligence. Blixt agreed to commit the murder after Harry offered him \$2,000 of the insurance money, threatened his life, and forced him to drink a full bottle of

509. *Last Act of The Tragedy*, ST. PAUL PIONEER PRESS, Oct. 20, 1894, at 2.

510. *What To Do With Criminals*, MINNEAPOLIS TRIB., Oct. 19, 1894, at 4.

511. *A "Painless" Death*, ST. PAUL PIONEER PRESS, Oct. 21, 1894, at 4; *see also Last Act of The Tragedy*, ST. PAUL PIONEER PRESS, Oct. 20, 1894, at 2; *What To Do With Criminals*, MINNEAPOLIS TRIB., Oct. 19, 1894, at 4.

512. *State v. Hayward*, 62 Minn. 474, 481, 65 N.W. 63, 64 (1895).

513. *Id.*

514. TRENNERY, *supra* note 19, at 144.

515. *Hayward*, 62 Minn. at 485, 65 N.W. at 64.

516. TRENNERY, *supra* note 19, at 144.

whisky. Full of liquor, Blixt finally relented.⁵¹⁷ He shot Ms. Ging in the head on a secluded buggy ride.⁵¹⁸

In just four days, Harry's plot unraveled. Before the murder, Harry's brother, Adry, told a man named Levi Stewart that Harry planned to kill Ms. Ging.⁵¹⁹ While Stewart refused to believe Adry at first, Ms. Ging's murder convinced him to notify the county attorney. Authorities immediately arrested Blixt and the Hayward brothers. Initially, Adry would not incriminate Harry, even though Harry had already told him the details of his crime.⁵²⁰ However, when confronted by Stewart, Adry broke down and revealed Harry's plot.⁵²¹ Both Harry and his accomplice, Blixt, were indicted for first-degree murder. No charges were brought against Adry.⁵²²

Harry's lead trial attorney was renowned criminal defense lawyer, William W. Erwin, also known as the "Tall Pine Tree of the Northwest."⁵²³ He was also represented by John Day Smith, who served as a state senator in the Minnesota Legislature from 1891 to 1895.⁵²⁴ The trial lasted forty-six days and 136 witness-

517. *Hayward*, 62 Minn. at 481, 65 N.W. at 65.

518. *Id.* at 481, 65 N.W. at 64.

519. TRENERRY, *supra* note 19, at 148.

520. *Id.*

521. *Id.* at 148-49.

522. *Id.* at 149.

523. *Id.* at 126.

524. See *State v. Hayward*, 62 Minn. 474, 476, 65 N.W. 63, 65 (1895). John Day Smith was born in Litchfield, Maine, on February 25, 1845. THE GOPHER 66 (1899) (available at the Minneapolis Public Library, Special Collections); HISTORY OF LITCHFIELD AND AN ACCOUNT OF ITS CENTENNIAL CELEBRATION 1895 308 (1897) (available at the Maine Historical Society). With a law degree from Columbia University, Smith had practiced law since 1881 in both Washington, D.C. and Minneapolis. MINN. LEGIS. MANUAL, at 104, 629 (1911). An author and frequent lecturer of constitutional law at the University of Minnesota, Smith got elected to the Hennepin County bench in 1904. *Brooks Leads Judicial Vote*, MINNEAPOLIS TRIB., Nov. 10, 1904, at 2; *Holt Led the Judges*, MINNEAPOLIS J., Nov. 11, 1904, at 6; *John Day Smith Endorsed*, MINNEAPOLIS TRIB., Nov. 5, 1904, at 11; *Judge J. D. Smith Dies At Age 88, Funeral Tuesday*, MINNEAPOLIS J., Mar. 6, 1933, at 9; *How Hennepin's Votes Were Cast*, MINNEAPOLIS J., Nov. 15, 1904, at 5. See generally JOHN DAY SMITH, CASES ON CONSTITUTIONAL LAW (1897); *John Day Smith Succumbs at 88*, MINNEAPOLIS TRIB., Mar. 6, 1933, at 2. As a judge, Smith founded Hennepin County's juvenile court system, and became its first, and for a time its only, juvenile court judge. *His Idea Started Glen Lake Farm*, MINNEAPOLIS J., Sept. 27, 1931, at 3; *Judge J. D. Smith Dies At Age 88, Funeral Tuesday*, MINNEAPOLIS J., Mar. 6, 1933, at 9. Badly overworked on the juvenile bench, Smith suffered a "nervous breakdown" in 1911, and had to take refuge for two months with his daughter in Berkeley, California. *Judge John Day Smith III: Jurist Suffers From a Nervous Breakdown—He Will Go to California*, MINNEAPOLIS TRIB., Feb. 22, 1911, at 9. After Judge Smith's "nervous

es testified, but the jury returned a "guilty" verdict against Harry in less than three hours.⁵²⁵ The jury rejected Harry's suggestion at trial that his brother, Adry, may have killed Ms. Ging for money.⁵²⁶ Harry was sentenced to death on March 11, 1895, by Judge Seagrave Smith.⁵²⁷ The sentence was affirmed by the Minnesota Supreme Court on November 20, 1895.⁵²⁸ Blixt, who was tried separately, received only a life sentence.⁵²⁹

After his conviction, John Day Smith, who would later become a district court judge,⁵³⁰ continued to represent Hayward, mounting a strenuous effort to get Hayward's sentence commuted. A group of physicians filed a petition questioning

breakdown" the Minnesota Legislature authorized another juvenile court judge. *Court Burden Figures Prove Need of Judge*, MINNEAPOLIS TRIB., Mar. 26, 1911, at 10; *Judge Waite Chosen as Children's Judge*, MINNEAPOLIS TRIB., Apr. 15, 1911, at 17; *Jury Urges Juvenile Judge*, MINNEAPOLIS TRIB., Mar. 23, 1911, at 10; *Juvenile Judge Approved*, MINNEAPOLIS TRIB., Apr. 13, 1911, at 1; *Juvenile Judge Bill Favored by Jurists*, MINNEAPOLIS TRIB., Mar. 12, 1911, at 3; *Juvenile Judge Bill Goes Before Solons*, MINNEAPOLIS TRIB., Mar. 30, 1911, at 4; *Juvenile Judge Is Urged*, MINNEAPOLIS TRIB., Mar. 18, 1911, at 1. Smith served as a Hennepin County district court judge from January 2, 1905 until he resigned in 1913, "when it became evident that he could not resume his judicial duties" due to his "disabling illness." *Judge John Day Smith, 1845-1933* (memorial prepared by John Day Smith's life-long friend, E. F. Waite, and presented on February 3, 1934) (Minneapolis Bar Association Papers, 1916-1934, available at the Minnesota Historical Society). After his resignation, John Day Smith's "days were spent in the retirement of semi-invalidism." *Id.* "He died suddenly and peacefully at his home March 5, 1933, at the age of eighty-eight." *Id.* Those who knew him best believed that Judge Smith's "breakdown in 1911" was due to "overwork." *Id.* His dying words to his family were from John's Gospel: "[L]et not your heart be troubled—In my Father's house are many mansions—I go to prepare a place for you—Peace I leave with you—Let not your heart be troubled, neither let it be afraid." *Id.*

525. TRENERRY, *supra* note 19, at 149; see also *Hemp for Hayward*, ST. PAUL PIONEER PRESS, Mar. 9, 1895, at 1 (describing the jury verdict); *Harry Expects Conviction*, ST. PAUL PIONEER PRESS, Mar. 5, 1895, at 6 (John Day Smith comments on the weakness of the state's case); *Hayward's Salvation*, ST. PAUL PIONEER PRESS, Jan. 30, 1895, at 6 (discussing Hayward's defense); *Hemp for Hayward*, ST. PAUL PIONEER PRESS, Mar. 9, 1895, at 1, 6 (recounting the announcement of the "guilty" verdict); *He's a Liar," Says Harry*, ST. PAUL PIONEER PRESS, Mar. 3, 1895, at 3, 6 (summarizing a portion of John Day Smith's role at trial); *Many Were Called*, ST. PAUL PIONEER PRESS, Jan. 24, 1895, at 6 (discussing jury selection in *Hayward* case); *One Juror in Addition*, ST. PAUL PIONEER PRESS, Jan. 23, 1895, at 6 (noting that jury selection in Hayward's trial created controversy).

526. TRENERRY, *supra* note 19, at 151.

527. *Id.*; see also *Sentenced To Be Hanged*, ST. PAUL PIONEER PRESS, Mar. 12, 1895 at 1 (describing the sentence).

528. *State v. Hayward*, 62 Minn. 114, 64 N.W. 90, *aff'd*, 62 Minn. 474, 65 N.W. 63 (1895).

529. TRENERRY, *supra* note 19, at 154.

530. *Judge J. D. Smith Dies At Age of 88, Funeral Tuesday*, MINNEAPOLIS J., Mar. 6, 1933, at 9.

Hayward's sanity, and a second petition, containing 156 names, was dropped off at the governor's mansion by Smith himself.⁵³¹ Smith later penned a personal letter to Gov. David Clough, emphasizing a simple message: "[T]he state cannot afford to hang a lunatic."⁵³² But Governor Clough refused to commute Hayward's sentence and the execution date was set for December 11, 1895.⁵³³ The execution warrant, which referenced John Day Smith's law, specifically commanded that the hanging occur "before sunrise." By fixing the execution date for a Wednesday, Governor Clough broke a superstitious tradition of conducting executions on Fridays.⁵³⁴

Prior to execution day, Hayward requested that the gallows be painted red.⁵³⁵ This request was honored. With no prospect for clemency for Hayward, Hennepin County Sheriff John E. Holmberg was deluged with requests to view the hanging. Some even offered to pay for the privilege of attending. Indeed, a "continuous string of people" came to Minneapolis from all over Minnesota, Iowa and Wisconsin seeking passes, "as if they had not read that the law only allowed a limited number of people to be present."⁵³⁶ Sheriff Holmberg "turned them away with the best grace possible, but many . . . were inclined to be angry that they were not taken care of."⁵³⁷

By December 10, the jail office was becoming so crowded with visitors that the outer door to the jail had to be locked. Even so, curiosity seekers gathered outside the jail all day long, with large numbers arriving at around 6:00 P.M.⁵³⁸ The noisy

531. *Death Warrant For Hayward*, ST. PAUL PIONEER PRESS, Dec. 8, 1895, at 6.

532. *John Day Smith Pleads*, MINNEAPOLIS TRIB., Dec. 10, 1895, at 4; see also *The Awful Curse Of A Brother*, MINNEAPOLIS TRIB., Dec. 9, 1895, at 2; *Hayward's Latest Trick*, ST. PAUL PIONEER PRESS, Dec. 10, 1895, at 1 (discussing Hayward's behavior and conversations just prior to the day of execution).

533. *Hayward's Death Warrant*, MINNEAPOLIS TRIB., Dec. 8, 1895, at 3. See generally *Death Warrant for Hayward*, ST. PAUL PIONEER PRESS, Dec. 8, 1895, at 6 (recounting the death warrant in the case, its history, and relevant actors); *Hanging Hayward*, ST. PAUL PIONEER PRESS, Dec. 3, 1895, at 6 (describing efforts to commute Hayward's death sentence based on insanity).

534. *A Noose Ready for His Neck*, MINNEAPOLIS TRIB., Dec. 8, 1895, at 1 (describing superstitions accompanying executions); *Hayward's Death Warrant*, MINNEAPOLIS TRIB., Dec. 8, 1895, at 3 (discussing the "advantages" of executing people on Wednesday).

535. TRENERRY, *supra* note 19, at 152.

536. *Hayward's Latest Trick*, ST. PAUL PIONEER PRESS, Dec. 10, 1895, at 2.

537. *Id.*

538. *Waning!*, MINNEAPOLIS TRIB., Dec. 11, 1895, at 3.

crowd became so dense at one point that deputies refused to open the jail door, even to those with passes, for fear that the surging masses would enter the jail.⁵³⁹ The "many prominent citizens" in the crowd were "treated as roughly as any."⁵⁴⁰

Around midnight, Hayward was visited by John Day Smith, who made Hayward "promise that he would declare his trust in Christ on the scaffold."⁵⁴¹ Smith was active in church affairs, and his Christian faith "guided" Smith throughout his life.⁵⁴² After Smith's visit, deputies clothed Hayward in a black robe and cap, and Sheriff Holmberg led him to the gallows. When asked for a final statement, Hayward rambled on for quite some time. Eventually, out of "great respect" for his attorney, Hayward kept his promise to Smith. "[H]e is a religious man, as well as an attorney," he said, "and I told him I would pledge him what he asked of me to say. I pledged it to him, although if I honestly believed it, I would say it, and satisfy myself, and it was this: 'Oh, God, for Christ's sake, forgive me for my sins.'"⁵⁴³

The trap was swung open at 2:05 A.M. after Hayward uttered his last words, and Hayward was pronounced dead a few minutes later.⁵⁴⁴ Only about two dozen people witnessed the hanging. "A half dozen women, evidently from Sheriff Holmberg's household, attempted to get in, but the sheriff ordered them back."⁵⁴⁵ After his body was cut down, cranial measurements were taken and the autopsy determined that Hayward had an "abnormal" brain and an "unusually thick" skull.⁵⁴⁶ The red gallows was later sold to the Palace Museum, which had already

539. *Id.*

540. *Id.*; see also TRENNERY, *supra* note 19, at 152; *Has But A Single Day To Live*, MINNEAPOLIS TRIB., Dec. 10, 1895, at 1; *Watchers Outside*, ST. PAUL PIONEER PRESS, Dec. 11, 1895, at 2 (discussing the great crowd that gathered outside the jail).

541. *Close of a Chapter of Crime*, ST. PAUL PIONEER PRESS, Dec. 11, 1895, at 1.

542. *John Day Smith, 1845-1933*, *supra* note 525, at 3, 6. Smith was a deacon at the First Baptist Church, located on the corner of Hennepin Avenue and Fifth Street, and later a member of the Calvary Church on Pillsbury Avenue. ATWATER, *supra* note 348, at 201-03, 484f.

543. *The Wages of Sin*, MINNEAPOLIS TRIB., Dec. 11, 1895, at 1.

544. *Id.*; "I Die Game," *Says Harry*, ST. PAUL PIONEER PRESS, Dec. 11, 1895, at 1, 2.

545. *The Wages of Sin*, MINNEAPOLIS TRIB., Dec. 11, 1895, at 1. *But see infra* text accompanying note 614 (newspaper article indicating that there were "upward of a hundred persons" at Hayward's execution).

546. *Hayward is Laid to Rest*, ST. PAUL PIONEER PRESS, Dec. 12, 1895, at 6; see also *The Sorrow of His Mother*, MINNEAPOLIS TRIB., Dec. 12, 1895, at 1, 7 (discussing doctor's surprise at the thickness of Hayward's skull).

obtained a phonographic recording of Hayward's voice.⁵⁴⁷ Sheriff Holmberg was paid \$250 for his services.⁵⁴⁸

After Hayward's hanging, *The St. Paul Pioneer Press* expressed its high regard for private executions. "It is a wise provision of our modern laws that these horrible spectacles are no longer ghastly public shows for the entertainment of crowds of brutal men and women, but are secluded as far as possible from the public gaze."⁵⁴⁹ *The Minneapolis Tribune* believed additional reform was still necessary. The paper wrote:

Out in Colorado . . . the law governing executions requires that the condemned man shall be taken to the penitentiary as soon as sentence is pronounced, instead of being kept in the county jail. . . . This tends to do away with much of the local morbid interest and excitement that grows up about a condemned murderer.⁵⁵⁰

The paper concluded that the next legislature should adopt "an act modeled on the Colorado law."⁵⁵¹

From 1896 to 1905, ten more men swung from the gallows in Minnesota.⁵⁵² During this time period, newspaper reporters were sometimes excluded from hangings, as was the case at the hanging of convicted murderer C. D. Crawford. Crawford was hanged at 1:48 A.M. on December 5, 1905, in an enclosure in Elk River.⁵⁵³ Only thirty-five to forty men, most of them visiting sheriffs, witnessed the hanging.⁵⁵⁴ Several reporters made "vigorous efforts to get in," but Sherburne County Sheriff E. L. Ward obeyed the John Day Smith law "to the letter."⁵⁵⁵ Sheriff Ward's literal compliance was most likely the result of a personal letter from newly elected Gov. John A. Johnson, a popular Democratic politician in a traditionally Republican state.⁵⁵⁶ A

547. *The Hayward Gallows*, MINNEAPOLIS TRIB., Dec. 15, 1895, at 16; *The Voice of Hayward*, MINNEAPOLIS TRIB., Dec. 18, 1895, at 7.

548. *Hanging Hayward*, ST. PAUL PIONEER PRESS, Dec. 3, 1895, at 6.

549. *Exit Hayward*, ST. PAUL PIONEER PRESS, Dec. 11, 1895, at 4.

550. *A Good Law*, MINNEAPOLIS TRIB., Dec. 12, 1895, at 6.

551. *Id.*

552. See TRENERRY, *supra* note 19, at 223-26 (listing nine of the ten executions).

553. *Crawford Calmly Goes to Execution*, ST. PAUL PIONEER PRESS, Dec. 6, 1905, at 11; *Crawford's Day of Doom*, ST. PAUL PIONEER PRESS, Dec. 5, 1905, at 10; *Hanged*, MINNEAPOLIS TRIB., Dec. 5, 1905, at 1; *Paid the Penalty*, SHERBURNE COUNTY STAR NEWS, Dec. 7, 1905, at 11.

554. *Paid the Penalty*, SHERBURNE COUNTY STAR NEWS, Dec. 7, 1905, at 5.

555. *Id.*

556. *Sheriff to Obey the Law*, ST. PAUL DISPATCH, Feb. 10, 1906, at 24.

former newspaper editor, Governor Johnson called Sheriff Ward's attention to the provisions of the John Day Smith law in his letter. In a "pleasant, but at the same time unmistakable manner," Johnson suggested that Sheriff Ward had a duty to enforce the law.⁵⁵⁷ After Crawford's execution, one newspaper actually accused Sheriff Ward of refusing to admit Crawford's three invited friends because Sheriff Ward suspected they were newspaper men.⁵⁵⁸ Ward denied the charge, but his suspected actions nevertheless sparked severe press criticism. However, the press' call for a gubernatorial investigation fell on deaf ears. A local paper's demand that executions take place at the state penitentiary in Stillwater also failed to produce legislative results.⁵⁵⁹

In accordance with John Day Smith's "midnight assassination law," all Minnesota hangings from 1896 to 1905 occurred "before the hour of sunrise." On July 23, 1896, confessed killer John Pryde was hanged at 1:05 A.M. in Brainerd.⁵⁶⁰ On March 23, 1897, a man known as George Kelly (he never revealed his true

557. *Id.*

558. *Hanged*, MINNEAPOLIS TRIB., Dec. 5, 1905, at 1; *see also The Revenge of a Newspaper*, MINNEAPOLIS J., Dec. 5, 1905, at 1 (discussing *The Minneapolis Tribune* article). After the passage of the John Day Smith law, several newspaper reporters "used their ingenuity—one dressed as a priest—so that they could watch and then continue to write their description stories" about executions. *John Day Smith—Part II*, ECCO NEWS, at 11 (Sept. 1979) (available at the Minneapolis Public Library, Special Collections).

559. SHERBURNE COUNTY STAR NEWS (Elk River), Dec. 14, 1905, at 5, col. 2; *see also BLEGEN*, *supra* note 22, at 457-58 (discussing Gov. John A. Johnson's gubernatorial administration). Legislative attempts to move executions to the state prison at Stillwater always failed. MINN. SENATE J., at 493-95, 840, 1369 (1903) (referring to H.F. 285); MINN. HOUSE J., at 263, 529-30, 536, 600-01, 621-22, 638, 1589 (1903) (same); *Murderers May Be Electrocutted*, DULUTH NEWS TRIB., Mar. 6, 1903, at 1. For example, in 1899, a bill was introduced in the House of Representatives to conduct executions at the state prison before the hour of sunrise. MINN. HOUSE J., at 33, 212 (1899) (referring to H.F. 2); *Execution of Murderers*, ST. PAUL DISPATCH, Feb. 7, 1899, at 3 ("The . . . bill provides the hanging shall occur within the walls of the [state] prison between sundown and sunrise, within an enclosure screened from public gaze."); *Introduction of Electrocuttion*, ST. PAUL DISPATCH, Jan. 5, 1899, at 9. However, the House voted to "indefinitely postpone" a substitute for that legislative proposal on February 28, 1899. MINN. HOUSE J., at 212, 435 (1899) (referring to H.F. 243).

560. *See Execution of John E. Pryde*, BRAINERD DISPATCH, July 24, 1896, at 1 ("[I]n 12 minutes from the time the trap fell he was pronounced dead by the physicians present"); *John E. Pryde Is Hanged*, ST. PAUL PIONEER PRESS, July 23, 1896, at 4 (discussing plans for the hanging); *Pryde Will Hang*, BRAINERD DISPATCH, July 17, 1896, at 4 (discussing the time of the execution). *See generally* Execution Records, Box 1 (containing documentation on the Pryde execution) (available at the Minnesota Historical Society).

identity) was hanged in a shed in Center City at 12:56 A.M.⁵⁶¹ On March 18, 1898, convicted murderer John Moshik was hanged within the walls of the Hennepin County Jail in Minneapolis at 3:35 A.M.⁵⁶² A noisy mob of about 1,000 people, some drunk, gathered outside the jail despite the late hour to await "news from the jail."⁵⁶³ Ole Oleson, who killed his eighteen-year-old daughter, Josephine, was hanged on March 20, 1903, at 1:50 A.M., in Aitkin.⁵⁶⁴ Charles Henderson, the only black man legally executed in Minnesota, was hanged in Duluth at 1:40 A.M. on March 6, 1903, for killing his mistress.⁵⁶⁵ And wife-murderer William Chounard was dispatched at 1:07 A.M. on August 30, 1904, in Walker.⁵⁶⁶

However, between 1896 and 1905, county sheriffs often violated the spirit of the "midnight assassination law" by inviting more than six witnesses to attend executions. This was done by deputizing men as execution "assistants."⁵⁶⁷ Thus, 125 specta-

561. See *Sentenced to Death*, ST. PAUL PIONEER PRESS, Jan. 8, 1897, at 5 (reporting the signing of the death warrant and the facts of the murders). Somewhat ironically, considering the time of night that Kelly met his fate, Kelly's body was later interred in a potter's field in the town of Sunshine. *Kelly's Expiation*, ST. PAUL PIONEER PRESS, Mar. 23, 1897, at 1. See generally Execution Records, Box 1 (containing documentation on the Kelly execution) (available at the Minnesota Historical Society).

562. *John Moshik Dies*, MINNEAPOLIS J., Mar. 18, 1898, at 2.

563. *Lemke's Murder Is Avenged*, ST. PAUL PIONEER PRESS, Mar. 18, 1898, at 6; see also Affidavit of Hennepin County Sheriff Alonzo Phillips, Mar. 19, 1898 ("I executed the within Warrant, in due form of law, before the hour of sunrise and within the walls of the Hennepin County Jail.") (Execution Records, Box 1, available at the Minnesota Historical Society).

564. *A Life for a Life*, AITKIN AGE, Mar. 24, 1903, at 4; *Oleson Dies on the Gallows*, ST. PAUL PIONEER PRESS, Mar. 20, 1903, at 6.

565. *Slayer of Ida M'Cormack Dies Upon the Scaffold*, DULUTH NEWS TRIB., Mar. 6, 1903, at 1; see also Letter from St. Louis County Sheriff W. W. Butchart to Gov. Samuel R. Van Sant (undated) (stating that Henderson's execution occurred "before Sunrise" "in the immediate vicinity of the County Jail") (Execution Records, Box 1, available at the Minnesota Historical Society). In 1920, three African-Americans were illegally lynched from a lamppost in Duluth by a 5,000-man lynch mob. The three men were falsely suspected of raping a white woman. The lynching caused the Minnesota Legislature to pass the nation's first anti-lynching law in 1922. It punishes law enforcement officers who fail to stop a lynch mob. *Dies at End of Noose*, ST. PAUL PIONEER PRESS, Mar. 6, 1903, at 1; *Henderson Prays for Prisoners*, DULUTH NEWS TRIB., Mar. 2, 1903, at 5 (referring to Henderson as the "Negro Murderer"); Dan Robrish, *Reflections of Hate: Bigotry Mars History*, MINN. DAILY, Jan. 23, 1995, at 1, 14.

566. *Chounard, A Wife Murderer, Dies*, MINNEAPOLIS J., Aug. 30, 1904, at 5.

567. *Wallert Hanged*, HUB (Gaylord), Mar. 29, 1901, at 4; see also *John Day Smith—Part II*, ECCO NEWS, at 11 (Sept. 1979) (available at the Minneapolis Public Library, Special Collections) ("[S]heriffs were not averse to sending invitations, some engraved, to several hundred 'select friends' to witness an execution. One sheriff served drinks and

tors were sworn in as deputy sheriffs by Sheriff August Gaffke before Theodore Wallert's 1:00 A.M. hanging in Henderson, on March 29, 1901.⁵⁶⁸ Likewise, 150 people were sworn in as deputies before the 12:45 A.M. hanging of Andrew Tapper in Chaska, on February 18, 1902.⁵⁶⁹ Over 400 spectators crowded the enclosure when wife-murderer Joseph Ott was hanged at 1:27 A.M. in Granite Falls.⁵⁷⁰

One man who was sentenced to death in Minnesota "cheated the gallows" by committing suicide,⁵⁷¹ but the events surrounding his death sparked some renewed interest in John Day Smith's "midnight assassination law." On July 19, 1905, the condemned man, Edward Gottschalk, hanged himself when a member of the "death watch" went home for dinner, leaving no one to watch him.⁵⁷² His suicide note accused Ramsey County Sheriff Anton Miesen of treating him "like a dog."⁵⁷³ Indeed, it was later reported that "Gottschalk's idea in committing suicide was not alone to hasten death, but as well to prevent the sheriff from getting the \$500 fees for the hanging."⁵⁷⁴ A medical examination of Gottschalk's brain revealed a "abnormally thick" skull.⁵⁷⁵ From this, a physician concluded that Gottschalk had "peculiar, if not criminal traits."⁵⁷⁶

Governor Johnson was an opponent of capital punishment, but prior to Gottschalk's suicide, a gubernatorial spokesman told

refreshments to his guests while an underling cut the rope used in the hanging into pieces that were distributed as a memento of a social affair.").

568. *Wallert Hanged*, ST. PAUL PIONEER PRESS, Mar. 29, 1901, at 1; *Wallert Hanged*, HUB (Gaylord), Apr. 15, 1901, at 6.

569. *Rosa Mixa Is Avenged*, WEEKLY VALLEY HERALD (Chaska), Feb. 20, 1902, at 1; *Tapper Pays the Penalty*, ST. PAUL PIONEER PRESS, Feb. 18, 1902.

570. Affidavit of Yellow Medicine County Sheriff Joseph Schwalier, Oct. 20, 1898 (stating that the execution took place "between the hours of one and two o'clock in the morning" on October 20, 1898) (Executions Records, Box 1, available at the Minnesota Historical Society); see also *Joe Ott Hung*, GRANITE FALLS J., Oct. 20, 1898, at 5; *Ott Is Hanged*, MINNEAPOLIS TRIB., Oct. 28, 1898, at 1; GRANITE FALLS J., Oct. 27, 1898, at 4, cols. 2-3 (picturing scaffold used in hanging); MINNEAPOLIS TRIB., Oct. 21, 1898, at 3, cols. 2-3.

571. *Well Rid of Gottschalk*, ST. PAUL PIONEER PRESS, July 22, 1905, at 6.

572. *Gottschalk His Own Executioner*, ST. PAUL PIONEER PRESS, July 20, 1905, at 1.

573. *Id.*

574. *Inquest To-Day for Gottschalk*, ST. PAUL PIONEER PRESS, July 21, 1905, at 2.

575. *Id.*

576. *Id.*

the press that the governor "will, of course, execute the law."⁵⁷⁷ Accordingly, Johnson had set Gottschalk's execution date for August 8, 1905, a date that corresponded, whether coincidentally or not, with the fourteenth annual meeting of the Interstate Sheriffs' Association in St. Paul.⁵⁷⁸ After Gottschalk's execution date was set, Sheriff Miesen—the sheriff for the St. Paul area—selected a room in the basement of the jail, capable of accommodating 200 people, as the execution site.⁵⁷⁹ He then sent out a large number of invitation cards, inviting friends to attend the hanging. The cards declared: "You have been appointed Deputy Sheriff to assist me at the Execution of Edward Gottschalk. You will report at County Jail at 1 o'clock a.m. sharp, August 8, 1905."⁵⁸⁰

The existence of these cards was not discovered until after Gottschalk's suicide. When they were unearthed, however, *The St. Paul Pioneer Press* quickly charged Sheriff Miesen with intending to violate the "spirit," if not the "letter," of the John Day Smith law.⁵⁸¹ The newspaper opined that the cards make "the hollow pretense of appointing deputies as if there were not already more than enough deputies to afford all possible assistance in the execution."⁵⁸² The paper concluded that it was "high time" that "abuses of this kind, with their purely brutalizing effects, should be brought to an end."⁵⁸³

After Gottschalk's suicide, *The St. Paul Pioneer Press* also declared that a "stop should be put to all possibility of turning an execution into a public orgy and spectacle. . . ."⁵⁸⁴ "[T]he

577. *Gottschalk's End to Be the Gallows*, ST. PAUL PIONEER PRESS, May 12, 1905, at 1; see also *Fix Early Date for Hanging*, ST. PAUL PIONEER PRESS, May 15, 1905, at 2 (recounting Governor Johnson's decision in fixing a hanging date).

578. *Gottschalk to Be Hanged Aug. 8*, ST. PAUL PIONEER PRESS, May 16, 1905, at 2; *Sheriffs Are Coming*, ST. PAUL PIONEER PRESS, July 14, 1905, at 2; *Sheriffs Meet in Annual Convention*, ST. PAUL PIONEER PRESS, Aug. 9, 1905, at 3.

579. *Gallows Ready for Gottschalk*, ST. PAUL PIONEER PRESS, July 18, 1905, at 2.

580. *No Last Resting Place for Gottschalk's Body*, ST. PAUL PIONEER PRESS, July 22, 1905, at 1; *Well Rid of Gottschalk*, ST. PAUL PIONEER PRESS, July 22, 1905, at 6. One paper report: "It was freely asserted and was apparently substantiated by evidence that one sheriff in this county had issued a large enough quantity of tickets of admission to the approaching show to make it economical to print them. Only the suicide of the condemned man prevented a carnival." *State Executions*, ST. PAUL PIONEER PRESS, Feb. 2, 1907, at 6.

581. *Well Rid of Gottschalk*, ST. PAUL PIONEER PRESS, July 22, 1905, at 6.

582. *Id.*

583. *Id.*

584. *Id.*

only effectual way to put a stop to this sort of thing, as long as sheriffs ignore the plain intent of the law, is to impose the duty of carrying out death sentences on state prison authorities," the paper proclaimed.⁵⁸⁵ That same year Sheriff J. W. Dreger of Minneapolis, the President of the Interstate Sheriffs' Association, indicated his agreement. In his annual address to the Association, he said he "favored the plan of having all executions held at the state prison."⁵⁸⁶ However, the state prison warden opposed the plan because of the negative effect it would have on other prisoners, and the proposal went nowhere.⁵⁸⁷

VII. A LEGAL CHALLENGE TO THE "MIDNIGHT ASSASSINATION LAW," 1906-1907

A. *The Hanging of William Williams*

William Williams was the last person executed in Minnesota. He had been convicted of first-degree murder on May 19, 1905, and sentenced to death for killing Johnny Keller, a teenager with whom Williams was suspected of having "a strong and strange attachment to."⁵⁸⁸ During jury selection, Ramsey County Attorney Thomas R. Kane had "succeeded in having excluded one or two [jurors] that might otherwise have proved acceptable, on the score of having scruples against the infliction of the death penalty. . . ."⁵⁸⁹ The judge told Williams, right after the verdict was read, that he would be "hanged by the neck until dead."⁵⁹⁰ On December 8, 1905, the Minnesota Supreme Court affirmed his conviction and death sentence, with one justice dissenting, arguing that Williams was entitled to a new trial.⁵⁹¹ Governor John A. Johnson set Williams' execution date for February 13, 1906, and the federal courts refused to interfere with it.⁵⁹²

Because Sheriff Miesen had previously invited a large number of his friends to witness Gottschalk's execution, Gover-

585. *Id.*

586. *Executions At Penitentiary*, ST. PAUL PIONEER PRESS, Aug. 10, 1905, at 2.

587. *Well Rid Of Gottschalk*, ST. PAUL PIONEER PRESS, July 22, 1905, at 6.

588. *State v. Williams*, 96 Minn. 351, 354, 105 N.W. 265, 266 (1905).

589. TRENERRY, *supra* note 19, at 160 (quoting THE ST. PAUL DISPATCH, May 12, 1905).

590. *Id.* at 162; *see also Williams Is Doomed to Gallows*, ST. PAUL PIONEER PRESS, May 20, 1905, at 1 (describing the sentencing of William Williams).

591. *Williams*, 96 Minn. at 364-65, 105 N.W. at 270.

592. TRENERRY, *supra* note 19, at 163.

nor Johnson sent Sheriff Miesen a letter accompanying Williams' death warrant. His letter asked Sheriff Miesen to "observe" that the John Day Smith law "is very specific as to who may witness executions of this state."⁵⁹³ His letter continued:

In view of violations of this law in the past I deem it necessary to charge you with a strict observance of the law. It has been customary in some cases for the sheriff to designate many people as deputy sheriffs for the sole purpose of permitting them to be present and witness the execution.

Persons permitted by you, except those specifically named in the statute, must not exceed six in number. I trust that the custom that has hitherto obtained will not obtain in this instance.

It is the duty of this office to hold all officers of the law to a strict accountability in the performance of their duties in upholding the majesty of the law and it would become my duty in case this law is violated to take proper action in the premises.

Believing that you will do your full duty in this matter and be governed strictly by the letter and spirit of the law, I am, sir, yours with great respect.⁵⁹⁴

Sheriff Miesen pledged to "faithfully" abide by all of the provisions of the Smith law.⁵⁹⁵ Indeed, in response to numerous solicitations for invitations, the sheriff told people that "he did not make the law, and that his duty is merely to carry out its provisions strictly."⁵⁹⁶ Although the law had never been construed by a Minnesota court, Sheriff Miesen took the word "assistants" in the statute to mean only those on his staff, not such persons as the sheriff might deputize for the night. When one invitation seeker was shown the statute, the person responded, "To hell with the law, I want to see the execution."⁵⁹⁷ It was "foreign to his nature" to refuse such requests, but Sheriff Miesen was under intense political pressure to restrict the number of invitations.⁵⁹⁸ According to one newspaper report:

593. *Must Face the Gallows*, ST. PAUL DISPATCH, Feb. 12, 1906, at 7.

594. *Id.* See generally *Governor Will Quiz Miesen*, ST. PAUL PIONEER PRESS, Feb. 14, 1906, at 3; *Newspaper Indicted for Giving News*, ST. PAUL PIONEER PRESS, Mar. 3, 1906, at 1.

595. *Sheriff to Obey the Law*, ST. PAUL DISPATCH, Feb. 10, 1906, at 24.

596. *Id.*

597. *Id.*; *Must Face The Gallows*, ST. PAUL DISPATCH, Feb. 12, 1906, at 7.

598. *Sheriff to Obey the Law*, ST. PAUL DISPATCH, Feb. 10, 1906, at 24.

[T]he sheriff, who stands accountable to the governor for obedience to the requirements of his office, knows that he has the alternative of facing two potent factors in his future career—the authority of the governor of the state to remove him for disobedience, and the political power wielded by persons who become enemies through his refusal.⁵⁹⁹

On February 13, 1906, Williams was hung as planned in the sub-basement of the Ramsey County Jail by Sheriff Miesen. But when the trap door was swung open at 12:31 A.M., Williams' body immediately hit the floor. "He's on the floor!" shouted the spectators.⁶⁰⁰ Sheriff Miesen, who attended a dinner party earlier that evening, had miscalculated the length of the rope. Three deputies, standing on the scaffold, instantly seized the rope and pulled it up so Williams' feet would not touch the floor.⁶⁰¹ The deputies had to hold up Williams' body for fourteen and a half minutes until the coroner pronounced him dead from strangulation.⁶⁰²

After the hanging, several newspapers printed detailed accounts of it. *The St. Paul Pioneer Press* reported that the death trap was swung in the basement of the county jail, and fourteen and a half minutes later William Williams was pronounced dead.⁶⁰³ Some execution details were described, but the paper did not report that the hanging was botched. The paper blandly reported that "the trap dropped, and with a snap the body hung suspended."⁶⁰⁴ Other newspaper reports were more graphic. For example, *The St. Paul Daily News* reported that Williams' "feet touched the ground by reason of the fact that his neck stretched

599. *Id.*

600. *Displayed His Nerve to the Very Last*, ST. PAUL DISPATCH, Feb. 13, 1906, at 3.

601. *Goes to Gallows in Dead of Night*, MINNEAPOLIS J., Feb. 13, 1906, at 6.

602. *See Displayed His Nerve to the Very Last*, ST. PAUL DISPATCH, Feb. 13, 1906, at 3; *Goes to Gallows in Dead of Night*, MINNEAPOLIS J., Feb. 13, 1906, at 6 (describing the botched execution of William Williams); *Sheriff To Obey The Law*, ST. PAUL DISPATCH, Feb. 10, 1906, at 24 (picturing gallows in the sub-basement); *Sheriff Will Kill Williams*, ST. PAUL PIONEER PRESS, Feb. 12, 1906, at 4 (describing Sheriff Meisen's preparation for William's execution); ST. PAUL DISPATCH, Feb. 12, 1906, at 1 (diagram depicting William's route to the gallows). *See generally* Affidavit of Sheriff Anton Miesen, Feb. 14, 1906 (stating that the hanging occurred at "12:31 a.m. in the basement of the County Jail") (Execution Records, Box 2, available at the Minnesota Historical Society).

603. *Williams Is Hanged at County Jail*, ST. PAUL PIONEER PRESS, Feb. 13, 1906, at 1.

604. *Id.*

four and one-half inches and the rope nearly eight inches.”⁶⁰⁵ It added that the three sheriff’s deputies, who the newspaper named, “took turns at holding up the body” by pulling on the rope “so that Williams’ head was kept up and strangulation could slowly go on.”⁶⁰⁶

Likewise, *The St. Paul Dispatch* described in great detail the fourteen and a half minutes that the spectators were forced to endure. The actual newspaper account is worth repeating:

Slowly the minutes dragged.

The surgeon, watch in hand, held his fingers on Williams’ pulse as he scanned the dial of his watch.

Five minutes passed.

There was a slight rustle, low murmurs among the spectators and then silence.

Another five minutes dragged by.

Would this man never die?

Fainter and fainter grew the pulsations of the doomed heart as it labored to maintain its function.

The dead man’s suspended body moved with a gentle swaying.

The deputies wiped their perspiring brows with their handkerchiefs.

Members of the crowd shifted from one foot to another.

There were few murmurs, which died at once.

Eleven, twelve, thirteen minutes.

The heart was beating now with spasmodic movement, fainter and fainter.

Fourteen minutes—only a surgeon’s fingers could detect the flow of blood now.

Fourteen and one-half minutes.

“He is dead,” said Surgeon Moore.

The end had come.⁶⁰⁷

In the aftermath of the hanging, *The St. Paul Dispatch* reported that Sheriff Miesen had violated the John Day Smith law. The paper stated that:

605. Joseph E. Hennessey, *This Is Murder: I Am Innocent*, ST. PAUL DAILY NEWS, Feb. 13, 1906, at 1.

606. *Id.* *The St. Paul Daily News* also printed Williams’ last words, which were: Gentlemen, you are witnessing an illegal hanging. This is a legal murder. I am accused of killing Johnny Keller. He was the best friend I ever had, and I hope I meet him in the other world. I never had improper relations with him. I am resigned to my fate. Goodbye.

Id.

607. *Displayed His Nerve to the Very Last*, ST. PAUL DISPATCH, Feb. 13, 1906, at 3.

It is safe to say that the feature of a crowded execution was eliminated by Sheriff Miesen: but, if the number of persons who left the jail at its close are any index of the number who saw it, it is certain that the six persons designated in the law as the number the sheriff may personally invite, was unmercifully stretched.⁶⁰⁸

The paper also reported a rumor that Governor Johnson's office was "going to probe the sheriff's office."⁶⁰⁹ However, it expressed the opinion that Sheriff Miesen had not "committed any offense that calls for gubernatorial review."⁶¹⁰

In contrast, *The Minneapolis Journal* asked that Governor Johnson "take cognizance of any flagrant infringements" of the John Day Smith law.⁶¹¹ The paper asserted:

If the sheriff of Ramsey county has deliberately defied the law made for his guidance, he should be punished. Perhaps the deposition of one sheriff would do as much to enlarge respect for the Smith law as anything that could be done. Politicians like to oblige their friends, but they do not like to do it at the risk of losing their jobs.⁶¹²

The newspaper conceded that John Day Smith's "midnight assassination law" had "never been strictly enforced," and that "[t]here have always been more persons present at executions than the law allowed."⁶¹³ The newspaper specifically recalled Harry Hayward's hanging: "[T]here were upward of a hundred persons [present at that execution and] the newspapers were represented by all kinds of persons except (happily) by the person who gives the woman's view."⁶¹⁴ The paper blamed the lack of enforcement on "political sheriffs" who made it "difficult to enforce the law literally."⁶¹⁵ While "not rigorously enforced," the newspaper praised John Day Smith's creation as "a good law."⁶¹⁶ The law had done "a great deal" to curtail "morbid public curiosity about the legal killing of an individu-

608. *Id.*

609. *Sheriff's Tea Party*, ST. PAUL DISPATCH, Feb. 14, 1906, at 10.

610. *Id.*

611. *The Smith Execution Law*, MINNEAPOLIS J., Feb. 14, 1906, at 4.

612. *Id.*

613. *Id.*

614. *Id.*

615. *Id.*

616. *Id.*

al.⁶¹⁷ “There is no sense nor civilization in making the execution of a criminal a public spectacle,” the paper explained, “and the world has come a great ways since condemned men were hanged in the public square for the edification of men and women and children.”⁶¹⁸

After Williams’ execution, newspapers urged that executions should be conducted at the state penitentiary in Stillwater, rather than in local jails. For example, *The St. Paul Dispatch* wrote that county executions perpetuated a “local morbid element that exists in human nature.”⁶¹⁹ “Just as long as a hanging is made in a local jail,” the paper opined, “will newspapers that give all the news feel it necessary to give ‘the bare details’ of the affair.”⁶²⁰ Only if convicts were executed at the remote Stillwater prison would newspapers “give no more value to it as news than could be put in the space of a ‘stick’ or two of type.”⁶²¹ Likewise, *The St. Paul Pioneer Press* wrote:

[T]o put the execution in the hands of local officials subject to local influences and desirous, for political reasons, to cater to friends and local newspapers is bound to result in the presence of witnesses beyond those prescribed by law. The place for executions is Stillwater, where they would be conducted by competent men who would soon gain the experience necessary to insure a swift and certain death and where the warden who is directly responsible to the board of control, and not to the public, would not dare to ignore the law in respect to witnesses even if he wanted to. . . . So long as executions are made local affairs they will be local spectacles, local scandals, and ought in the interests of decency to be fully reported.⁶²²

Despite repeated calls to move executions to Stillwater, legislative efforts aimed at accomplishing this reform always failed to pass.⁶²³

617. *Id.*

618. *Id.*

619. *What Should Result*, ST. PAUL DISPATCH, Feb. 28, 1906, at 10.

620. *Id.*

621. *Id.*

622. *An Unsafe Law and the Remedy*, ST. PAUL PIONEER PRESS, Mar. 6, 1906, at 6.

623. *E.g., Death by Electricity*, ST. PAUL PIONEER PRESS, Feb. 24, 1907, at 1 (“The bill provides that all the executions shall take place at the state prison. A bill covering that feature was introduced some weeks ago by F. B. Phillips of St. Paul.”); *Well Rid of Gottschalk*, ST. PAUL PIONEER PRESS, July 22, 1905, at 6 (“It is to be regretted that the last legislature did not pass that bill for the execution of all criminals at Stillwater . . .”).

B. *The Gubernatorial Investigation*

On the evening of February 13, 1906, Governor Johnson⁶²⁴—a former editor and publisher of *The St. Peter Herald*, who still maintained his association with that newspaper—announced that an investigation of Williams' hanging would be conducted. "I shall examine into the execution," he proclaimed, "and if there has been the slightest violation of the law, even a technical violation, Sheriff Miesen will have to answer for it."⁶²⁵ Governor Johnson continued: "I meant just exactly what I said when I sent the letter cautioning Miesen and if he has violated the law I shall go after him. . . . I understood from official circles, only ten persons were present at the execution."⁶²⁶ Thus, Johnson was surprised to learn from another source that over twenty-five witnesses may have been present.⁶²⁷ Also, because two newspaper reporters supposedly attended the hanging, Governor Johnson announced that he would investigate whether reporters were present with the cognizance of Sheriff Miesen or his deputies.⁶²⁸ If this fact could be proved, Governor Johnson declared, the sheriff's office would be held accountable. "I have laid aside all the accounts in the newspapers and shall examine them carefully tomorrow," Governor Johnson concluded.⁶²⁹

The next day, Governor Johnson personally questioned Sheriff Miesen. "The official reports of the meeting in the governor's private office were that the governor got after the sheriff 'real fierce' and cross-questioned him closely."⁶³⁰ However, Johnson ultimately accepted every explanation offered by Sheriff Miesen. For instance, Johnson accepted Sheriff

624. MINN. LEGIS. MANUAL, at 5-6 (1911) (providing obituary of Gov. John Albert Johnson).

625. *Governor Will Quiz Miesen*, ST. PAUL PIONEER PRESS, Feb. 14, 1906, at 3 (quoting Governor Johnson).

626. *Id.*

627. *Id.*

628. *Governor Will Quiz Miesen*, ST. PAUL PIONEER PRESS, Feb. 14, 1906, at 3; see also *Newspaper Indicted For Giving News*, ST. PAUL PIONEER PRESS, Mar. 3, 1906, at 1 (suggesting three newspapers—*The St. Paul Pioneer Press*, *The St. Paul News*, and *The St. Paul Dispatch*—violated the John Day Smith law); *The Only Newspaper Man Who Witnessed the Hanging*, ST. PAUL DAILY NEWS, Feb. 13, 1906, at 1 (reporting the execution "was witnessed by 32 persons").

629. *Governor Will Quiz Miesen*, ST. PAUL PIONEER PRESS, Feb. 14, 1906, at 3.

630. *Won't Do A Thing To The Sheriff*, ST. PAUL PIONEER PRESS, Feb. 15, 1906, at 3.

Miesen's explanation that a newspaper reporter slipped in through an oversight when a door was left unlocked.⁶³¹ Likewise, he found satisfactory Sheriff Miesen's explanation that while thirty-two persons admittedly witnessed the hanging, twenty of them were deputies.⁶³²

By February 25, Governor Johnson had completed his investigation of the botched hanging. He found that "the letter of the law" had been carried out by Sheriff Miesen, and decided that no further action would be taken.⁶³³ However, the details of Williams' death "grated on the governor's nerves."⁶³⁴ Consequently, Johnson announced that he would recommend the abolition of capital punishment in his next legislative message. The death penalty is a "survival of the relic of the past," he said, "and the sooner it is done away with the better."⁶³⁵ "If I as governor personally had to aid in the execution of a condemned man," he told a friend, "I would resign my office in preference to carrying out such a duty."⁶³⁶ Governor Johnson's willingness to accept Sheriff Miesen's rather feeble explanations led to a charge of political favoritism by *The St. Paul Pioneer Press*. "[A] search of the political calendar suggests that this is the closed season on Democratic sheriffs," wrote the paper.⁶³⁷ Both Governor Johnson and Sheriff Miesen were Democrats.⁶³⁸

C. Three Newspapers Indicted

On February 15, 1906, representatives of the Law and Order

631. *Id.*

632. *Id.*

633. *Death Penalty Decried By State's Executive*, MINNEAPOLIS J., Feb. 25, 1906, at 7.

634. *Id.*

635. *Id.*

636. *Id.*; see *St. Paul Newspapers Procure Indictments*, MINNEAPOLIS J., Mar. 4, 1906, at 5 (concluding Governor Johnson's investigation "found nothing to cause action to be taken on his part"). For whatever reason, Governor Johnson did not mention the subject of capital punishment in his annual message to the Minnesota Legislature in 1907. John A. Johnson, Governor's Inaugural Message to the Minnesota Legislature (1907) (transcript available at the Minnesota Historical Society).

637. *Won't Do A Thing To The Sheriff*, ST. PAUL PIONEER PRESS, Feb. 15, 1906, at 3; see also *St. Paul Newspapers Procure Indictments*, MINNEAPOLIS J., Mar. 4, 1906, at 5 (concluding the John Day Smith law is "almost forgotten" and "never . . . enforced").

638. MINN. LEGIS. MANUAL, at 5-6 (1911) (containing biographical sketch of John Albert Johnson); ST. PAUL HERALD, Mar. 16, 1918, at 1, col. 1 (containing biographical sketch of Anton Miesen).

League formally protested the newspaper accounts of the botched hanging. They first complained to Municipal Court Judge John W. Finehout,⁶³⁹ who promptly referred them to the county attorney's office.⁶⁴⁰ County Attorney Thomas R. Kane was "most courteous" in hearing their complaint, but he handed them over to the prosecuting city attorney, Emil W. Helmes.⁶⁴¹ Although Mr. Helmes was busy, he met them late that afternoon.⁶⁴² After lodging these numerous complaints, the Law and Order League was eventually successful in alerting Ramsey County District Court Judge George L. Bunn to the legal violations committed by the newspapers.⁶⁴³

On February 19, a Ramsey County grand jury convened before Judge Bunn, who singled out the newspapers' violation of the John Day Smith law. Judge Bunn told the grand jurors:

There is but one thing I desire to call your attention to at this time, and that is this: I call your attention to the fact that it is the law of this state relating to executions that the newspapers shall publish only a bare statement of the fact that the convict has been executed. I call your attention to the existence of that law on our statute book and the apparent gross violation of that law by all the newspapers of this city, with reference to the execution of Williams lately. Now, there is a matter that in your discretion you may take up and consider.⁶⁴⁴

This was the first time that a Minnesota court had ever taken notice of the John Day Smith law.⁶⁴⁵

On March 2, after a "lively discussion," the twenty-one-

639. MEN OF MINNESOTA 53 (1902) (containing biographical sketch of John W. Finehout).

640. *Protest To Prosecutor*, ST. PAUL DISPATCH, Feb. 15, 1906, at 4.

641. *Id.*

642. *Id.* See generally ST. PAUL CITY DIRECTORY (1906) (listing Emil W. Helmes as "Asst Corporation Atty" in "City Hall").

643. *Goes After Papers*, ST. PAUL PIONEER PRESS, Feb. 20, 1906, at 2; TRENNERY, *supra* note 19, at 160.

644. *Goes After Papers*, ST. PAUL PIONEER PRESS, Feb. 20, 1906, at 2 (quoting Judge Bunn).

645. Such was the observation of *The St. Paul Pioneer Press*, which reported:

Although the John Day Smith law has been in force for seventeen years, this is the first indictment of a newspaper under it, and as far as the records show the first time that the courts have taken notice of its violation, though the newspapers of the state have printed detailed accounts of every hanging that has taken place in the state since the law was passed.

Newspaper Indicted For Giving News, ST. PAUL PIONEER PRESS, Mar. 3, 1906, at 1; see *Newspapers Indicted*, MINNEAPOLIS J., Mar. 3, 1906, at 7.

member grand jury indicted three St. Paul newspapers: *The St. Paul Pioneer Press*, *The St. Paul Dispatch*, and *The St. Paul Daily News*. The three newspapers were indicted on "the crime of publishing a detailed account of the recent Williams hanging."⁶⁴⁶ One faction of the all-male grand jury, who opposed the indictments, felt that the portion of the John Day Smith law relating to newspapers had been "carried out in the breach rather than in the observance."⁶⁴⁷ The other faction "took the view that the law was on the books and if it was a bad law the best way to defeat it would be to obey it to the letter."⁶⁴⁸ After several sessions, where the advice of County Attorney Kane was frequently sought, a "small majority" voted in favor of the indictments.⁶⁴⁹ The "true bills" were drawn up against the newspapers in their corporate capacity and not against the managers, editors or reporters.⁶⁵⁰ A violation of John Day Smith's "midnight assassination law" was a misdemeanor, punishable by up to a \$100 fine or ninety days imprisonment.⁶⁵¹ Because only the corporations were indicted, however, County Attorney Kane announced that the newspapers, if found guilty, could only be fined.⁶⁵² Although Sheriff Miesen was widely believed to have "flagrantly violated" the law, he was not indicted by the grand jury.⁶⁵³

Rumors existed that the three St. Paul newspapers, wishing to "test" the constitutionality of the John Day Smith law, actually helped to procure the indictments by bringing evidence before the grand jury.⁶⁵⁴ An editorial in *The St. Paul Pioneer Press* certainly did not dispel these rumors, perhaps even lending credence to them. The newspaper noted that it had "demurred

646. *Seeking to Curb Press*, ST. PAUL DISPATCH, Mar. 3, 1906, at 7; *Newspapers Indicted*, MINNEAPOLIS J., Mar. 3, 1906, at 7; see Indictment of *The Pioneer Press*, State v. Pioneer Press Co. (No. 4695) (Criminal Register I, available at the Minnesota Historical Society); Indictment of *The Dispatch*, State v. Dispatch Printing Co. (File No. 4696) (same); Indictment of *The Daily News*, State v. Daily News Publishing Co., (File No. 4697) (same).

647. *Seeking to Curb Press*, ST. PAUL DISPATCH, Mar. 3, 1906, at 7.

648. *Id.*

649. *Id.*

650. *Id.*

651. *Id.*; *Newspaper Indicted For Giving News*, ST. PAUL PIONEER PRESS, Mar. 3, 1906, at 1.

652. *Newspaper Indicted For Giving News*, ST. PAUL PIONEER PRESS, Mar. 3, 1906, at 1.

653. *Seeking to Curb Press*, ST. PAUL DISPATCH, Mar. 3, 1906, at 7.

654. *St. Paul Newspapers Procure Indictments*, MINNEAPOLIS J., Mar. 4, 1906, at 5.

and will carry the case to the supreme court for a ruling on the validity of the law."⁶⁵⁵ Thus, even though "its own ox" had been "gored," the paper could find "no fault" with the attempt to enforce the law.⁶⁵⁶

If it is an improper provision either it should be declared so by the courts or it should be repealed by the legislature. And the way to secure repeal by court or legislature is to force the issue. So long as it is on the statute books, it, like other laws, should be enforced.⁶⁵⁷

Although indicted, *The St. Paul Pioneer Press* was "thoroughly in sympathy" with the "spirit and purposes" of the John Day Smith law.⁶⁵⁸ The paper editorialized: "There has been altogether too much sickening pandering to morbid tastes and too much cultivation of those tastes by hyperbolic accounts of the doings of murderers before executions and of the executions themselves."⁶⁵⁹ In addition, the paper noted that it "tried to treat the Williams hanging as it treats all other news matters."⁶⁶⁰ The paper had attempted "to give an accurate account of an event of public interest, to give essential details, omitting ghastly particulars, without pandering to the demand of the morbid."⁶⁶¹ It had attempted "to give a decent and uncolored story."⁶⁶² "[I]n short," it had tried "to avoid the methods of 'yellow journalism,' in which some of the other newspapers delight to revel."⁶⁶³ *The Pioneer Press* wrote: "Had all stories of hangings been of the same type [as its news story of Williams' hanging] there would have been no occasion for the John Day Smith law."⁶⁶⁴

Nevertheless, *The Pioneer Press* was indignant about having been indicted under the John Day Smith law "for printing the news."⁶⁶⁵ "[W]e do not believe it is a safe or a proper law, so far as it attempts to regulate newspaper accounts," the paper

655. *An Unsafe Law And The Remedy*, ST. PAUL PIONEER PRESS, Mar. 6, 1906, at 6.

656. *Id.*

657. *Id.*

658. *Id.*

659. *Id.*

660. *Newspaper Indicted For Giving News*, ST. PAUL PIONEER PRESS, Mar. 3, 1906, at 1.

661. *Id.*

662. *An Unsafe Law And The Remedy*, ST. PAUL PIONEER PRESS, Mar. 6, 1906, at 6.

663. *Newspaper Indicted For Giving News*, ST. PAUL PIONEER PRESS, Mar. 3, 1906, at 1.

664. *An Unsafe Law And The Remedy*, ST. PAUL PIONEER PRESS, Mar. 6, 1906, at 6.

665. *Newspaper Indicted For Giving News*, ST. PAUL PIONEER PRESS, Mar. 3, 1906, at 1.

wrote, stressing that “[i]t is questionable whether any law on the subject would be safe.”⁶⁶⁶ According to the paper:

Here was a case of atrocious bungling in the execution itself and of flat violation of the law and of the direct orders of the governor. Under the restrictions of the John Day Smith law the newspapers could make no reference to either the execution or to the presence of witnesses prohibited by the same law or any of the other circumstances which it was of importance that the public should know. Evidence of the incompetence of the sheriff so clearly indicated in the details of the hanging and of his utter disregard of the law would have to pass unnoticed. Under the press muzzling provisions of this law the worst orgies could be held and even the cruelest barbarities could be practiced, and those responsible for them would be protected from criticism and exposure. Such restrictions are thoroughly and palpably unsafe.⁶⁶⁷

The Pioneer Press emphasized that, ironically, it had actually first drawn attention to the lack of enforcement of the John Day Smith law. In printing a facsimile of one of Sheriff Miesen’s invitations to the Gottschalk hanging, it had exposed Sheriff Miesen’s “plan for a gross violation of the law.”⁶⁶⁸ It was this article that had prompted Governor Johnson to pen his letter to the sheriff to remind him of the law. Only after “calling attention” to the law’s lack of enforcement had the paper “got itself indicted.”⁶⁶⁹ The paper quipped: “The alleged publication of the alleged facts regarding the recent alleged hanging of a reputed convicted murderer seems to be producing more alleged effect than the alleged exposure of alleged irregularities at the time of the alleged hanging.”⁶⁷⁰

On March 3, the three indicted newspapers were arraigned and pled “not guilty.” Judge Bunn presided. Because all three newspapers anticipated filing amended pleas, the newspapers reserved the right to change their pleas or file demurrers to the indictments. Although the newspapers wanted four days to accomplish this task, Judge Bunn allowed them only two extra days. All three newspapers did, in fact, withdraw their “not guilty” pleas within that time frame. In their place, the newspa-

666. *An Unsafe Law and the Remedy*, ST. PAUL PIONEER PRESS, Mar. 6, 1906, at 6.

667. *Id.*

668. *Pioneer Press Enters Plea*, ST. PAUL PIONEER PRESS, Mar. 4, 1906, at 1.

669. *Id.*

670. ST. PAUL PIONEER PRESS, Mar. 3, 1906, at 6, col. 3.

pers filed demurrers to the indictments on the ground that the publication of execution details did not "constitute a public offense."⁶⁷¹ The newspapers, represented by separate legal counsel, all decided to attack the constitutionality of John Day Smith's "midnight assassination law."⁶⁷²

D. *The District Court Ruling*

On March 10, 1906, the respective parties appeared before Judge Bunn concerning their demurrers. The attorney for *The St. Paul Dispatch*, N. M. Thygeson, argued that the John Day Smith law violated the newspapers' constitutionally guaranteed freedom of the press. He argued that "the officers performing the execution should be responsible to an intelligent public opinion for the proper performance of their important duties."⁶⁷³ He added, "cruel and inhuman treatment of the convict might be indulged in, yet no newspaper would have the right to state such facts for the purpose of remedying the wrong."⁶⁷⁴ Mr. Thygeson also asserted that the Smith law violated the accused's right to a "public trial."⁶⁷⁵ "Can it be possible that the accused is entitled to a public trial, where the public can watch and see that he is accorded fair treatment," Mr. Thygeson asked rhetorically, "but when it comes to the execution of the judgment of that trial then the accused need not have the protection of publicity?"⁶⁷⁶

The newspapers' lawyers also argued that a county sheriff could carry out an execution "in a brutal manner without the public ever knowing anything about it."⁶⁷⁷ "While it might be proper to prohibit gruesome details of the execution, which appeal to the morbid tastes of a part of the community," it was argued, "a plain uncolored statement of the manner of the carrying out of the mandate of the law is not against the morals

671. Appellant's Brief at 9, *State v. Pioneer Press Co.*, 100 Minn. 173, 110 N.W. 867 (1907) (available at the Minnesota State Law Library).

672. *Seeking to Curb Press*, ST. PAUL DISPATCH, Mar. 3, 1906, at 7; *Papers Demur*, ST. PAUL DISPATCH, Mar. 5, 1906, at 6; see also *Papers to Test Law*, ST. PAUL PIONEER PRESS, Mar. 6, 1906, at 7; *Pioneer Press Enters Plea*, ST. PAUL PIONEER PRESS, Mar. 4, 1906, at 1.

673. *Validity Of Law Attached*, ST. PAUL DISPATCH, Mar. 10, 1906, at 9.

674. *Id.*

675. *Id.*

676. *Id.*

677. *Muzzle Law Not Constitutional*, ST. PAUL PIONEER PRESS, Mar. 11, 1906, at 1.

of the community.”⁶⁷⁸ The newspapers’ lawyers then argued that the press, “as the medium through which the public is informed of current events,” had a right to be present at executions.⁶⁷⁹ Indeed, it was noted that the John Day Smith law did not prohibit the publication of pamphlets or books “containing just the matter which the newspapers are prohibited from publishing.”⁶⁸⁰ All three newspapers specifically alleged that the John Day Smith law contravened Article 1, Section 3 of the Minnesota Constitution, providing: “The liberty of the press shall forever remain inviolate and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right.”⁶⁸¹

The papers’ lawyers, including Mr. Thygeson, further argued that the public had a right to know a condemned person’s last words. In particular, they contended that the John Day Smith law should not be allowed to prevent the publication of a condemned convict’s dying words or an admission of guilt uttered at the execution.⁶⁸² In contrast, County Attorney Thomas R. Kane asserted that the legislature possessed the power to enact the Smith law. He said the object of the law was to prevent the publication of execution details that appealed to morbid tastes and lowered public morals.⁶⁸³ At the conclusion of the hearing, Judge Bunn took the matter under advisement.⁶⁸⁴

On April 16, 1906, Judge Bunn upheld the constitutionality of John Day Smith’s “midnight assassination law” in open court. His written order stated that the “object and chief purpose of the

678. *Id.*

679. *Id.*

680. *Id.*

681. Case Certification, File No. 4695 (Criminal Register I, Ramsey County); Demurrers to Indictment, File Nos. 4696, 4697 (same).

682. *Muzzle Law Not Constitutional*, ST. PAUL PIONEER PRESS, Mar. 11, 1906, at 1; *Validity Of Law Attached*, ST. PAUL DISPATCH, Mar. 10, 1906, at 9.

683. *Muzzle Law Not Constitutional*, ST. PAUL PIONEER PRESS, Mar. 11, 1906, at 1; *Validity Of Law Attached*, ST. PAUL DISPATCH, Mar. 10, 1906, at 9.

684. Respondent’s Brief at 15, 21, *State v. Pioneer Press Co.*, 100 Minn. 173, 110 N.W. 867 (1907) (available at the Minnesota State Law Library). In a coincidental twist of fate, that same day in an unrelated case, Judge John Day Smith, the author of the newspaper “muzzle” law, held a 22-year-old newsboy in contempt of court for creating a disturbance in his courtroom. *Young Prisoner Affronts Court*, ST. PAUL PIONEER PRESS, Mar. 10, 1906, at 5.

act was to avoid general publicity,"⁶⁸⁵ and continued:

It is quite clear that forbidding the publication of the details tends strongly to accomplish the purpose of the act. . . . The purpose of the act is in a large measure defeated if the morbidly curious public, who are forbidden to see the hanging, may satisfy their curiosity by reading the ghastly details in a newspaper, and feasting their eyes on pictures of the scene.⁶⁸⁶

Judge Bunn had "no doubt" that "the legislature had the right to enact the law in the interest of public morals."⁶⁸⁷ He wrote: "The legislature has said that the publication of the details of an execution is bad for public morals. Its decision should be upheld unless the court can see plainly that it is wrong. I think the decision is right, and the law wise and wholesome."⁶⁸⁸ He specifically cited the United States Supreme Court's decision in *Holden v. Minnesota* in support of his ruling. Because of the question's "importance," however, Judge Bunn agreed to certify the question of the statute's constitutionality to the Minnesota Supreme Court. On May 8, 1906, Judge Bunn—who himself would later become a member of the Minnesota Supreme Court—certified the case at the request of *The Pioneer Press'* attorneys, Frederick Ingersoll and Charles Hart.⁶⁸⁹ *The St. Paul Dispatch* and *The St. Paul Daily News* agreed to be bound by the result of *The Pioneer Press'* case.⁶⁹⁰

E. *The Minnesota Supreme Court Case*

On appeal, *The St. Paul Pioneer Press* conceded that the legislature had "the power to restrict the publication of matters

685. Certified Case at 13, *Pioneer Press Co.*; *Law Is Held to Be Legal*, ST. PAUL DISPATCH, Apr. 16, 1906, at 1; *Muzzle Law Is Sustained*, ST. PAUL PIONEER PRESS, Apr. 17, 1906, at 2; *Validity Of Law Upheld By Court*, ST. PAUL DAILY NEWS, Apr. 16, 1906, at 1.

686. *Law Is Held to Be Legal*, ST. PAUL DISPATCH, Apr. 16, 1906, at 1.

687. Certified Case at 14, *Pioneer Press Co.*

688. *Id.*

689. *Justice Bunn On The Bench*, ST. PAUL DISPATCH, Mar. 1, 1911, at 11 (regarding the swearing in of Justice Bunn). See generally Certified Case and Report at 2-3, 9-16, *State v. Pioneer Press Co.*, 100 Minn. 173, 110 N.W. 867 (1907) (providing case history) (available at the Minnesota State Law Library).

690. Demurrers to Indictment, File Nos. 4696, 4697 (Criminal Register I, Ramsey County) (indicating that the cases against *The St. Paul Dispatch* and *The St. Paul Daily News* were stayed pending a final determination of *Pioneer Press'* case); see TRENNERY, *supra* note 19, at 165.

which tend to demoralize or degrade the public morals."⁶⁹¹ However, the newspaper contended that the John Day Smith law went too far.⁶⁹² According to the newspaper's appellate brief:

A newspaper performs a public function in that it places before the public, accounts of occurrences in which the public has a right to be interested and of which there should be a public criticism. While conceding that the gruesome details of an execution of a criminal are not necessary subjects of public information, yet we assert that there are many things surrounding the manner of an execution which the public are entitled to know and upon which the public are entitled to pass criticism.⁶⁹³

For example, the paper asserted that the public has a right to know how the sheriff performs his duties and the condemned man's dying declarations.⁶⁹⁴ Thus, the newspaper believed that the Smith law was overbroad, arguing: "The statute in question prohibits not only those things that are detrimental to the public, and we concede that ghastly accounts of gruesome details might be harmful in effect, *but prohibits everything* save the legal conclusion, that the execution took place."⁶⁹⁵

The Pioneer Press took the position that "sensational" articles should be the subject of "proper censorship."⁶⁹⁶ Its brief declared that "it is true that cartoons illustrating such affairs are objectionable and that the publication of all degrading or demoralizing particulars should be forbidden."⁶⁹⁷ However, the newspaper vehemently argued that its article was not sensational.⁶⁹⁸ The article was "remarkably brief, well timed and carefully written."⁶⁹⁹ There were no cartoons in its edition and "there was an absence of any attempt to give it more than ordinary prominence in the paper."⁷⁰⁰

In its responsive brief, the State of Minnesota declared that the John Day Smith law was intended "to do away with public

691. Brief of Appellant at 12-13, *Pioneer Press Co.*

692. *Id.*

693. *Id.*

694. *Id.*

695. *Id.* at 15.

696. *Id.* at 16.

697. *Id.*

698. *Id.* at 24.

699. *Id.*

700. *Id.* at 16.

executions, and to make all future executions secret except so far as certain specified witnesses may be present. The obvious purpose of the act is the suppression of details which are nauseating and horrible and whose dissemination arouses morbidness."⁷⁰¹ The State surmised that the publication of execution details might even "tend directly to promote crime, while subserving no useful purpose."⁷⁰² It argued that the press was not deprived of its right to print the "News," because the law "expressly authorizes the publication of the fact that the criminal was executed."⁷⁰³ Publication of execution details "tends only to gratify a debased morbid curiosity or sensualism which is demoralizing to the public good."⁷⁰⁴ Thus, the State argued that the Smith law did not "prevent the newspapers from discussing the advisability of capital punishment . . . or giving their sentiments on the subject as a public question."⁷⁰⁵

On February 21, 1907, the Minnesota Supreme Court upheld the constitutionality of John Day Smith's "midnight assassination law," ruling that the "evident purpose of the act was to surround the execution of criminals with as much secrecy as possible, in order to avoid exciting an unwholesome effect on the public mind."⁷⁰⁶ To accomplish this objective, the court believed that executions "must take place before dawn, while the masses are at rest, and within an inclosure, so as to debar the morbidly curious."⁷⁰⁷ The court also upheld the statutory provisions barring newspaper reporters from attending executions and prohibiting the publication of execution details. This was necessary "to give further effect" to the law's "purpose of avoiding publicity."⁷⁰⁸ "Publication of the facts in a newspaper would tend to offset all the benefits of secrecy provided for," the court ruled.⁷⁰⁹ The court noted that *The Pioneer Press* article

701. Brief of Respondent at 7, *State v. Pioneer Press Co.*, 100 Minn. 173, 110 N.W. 867 (1907) (available at the Minnesota State Law Library).

702. *Id.* at 7-8.

703. *Id.* at 15.

704. *Id.*

705. *Id.* at 21.

706. *State v. Pioneer Press Co.*, 100 Minn. 173, 175, 110 N.W. 867, 868 (1907); *see also Must Not Tell About Hangings*, ST. PAUL PIONEER PRESS, Feb. 22, 1907, at 5 (reporting on ruling).

707. *Pioneer Press Co.*, 100 Minn. at 175, 110 N.W. at 868.

708. *Id.*

709. *Id.*

was "moderate" and did not "resort to any unusual language, or exhibit cartoons for the purpose of emphasizing the horrors of executing the death penalty."⁷¹⁰ Nonetheless, the court stressed that "if, in the opinion of the Legislature, it is detrimental to public morals to publish anything more than the mere fact that the execution has taken place, then, under the authorities and upon principle, the appellant was not deprived of any constitutional right in being so limited."⁷¹¹

As a result of the ruling, the case was remanded back to the district court to be tried on the merits.⁷¹² On March 17, 1908, a twelve-person jury was impanelled, although *The St. Paul Pioneer Press* refused to enter a plea, forcing the court to enter a plea of "not guilty" for the newspaper.⁷¹³ The next day, the jury returned a verdict of "guilty as charged in the indictment."⁷¹⁴ Consequently, on March 19, the court imposed a twenty-five dollar fine against *The Pioneer Press*. *The St. Paul Dispatch* and *The St. Paul Daily News* were also fined twenty-five dollars each.⁷¹⁵

In an editorial, *The St. Paul Pioneer Press* denounced the Minnesota Supreme Court's ruling. The paper said that it was "in full sympathy" with any law which suppressed "purely unimportant and unwholesome details of an execution."⁷¹⁶ It declared, however, that the John Day Smith law "is not so entirely wise as its intent is worthy." The hanging of William Williams "showed that except for publication in newspapers of something more than a bare mention there was no way in which to inform the public whether a hanging was properly or even legally conducted."⁷¹⁷ Its editorial continued:

The prohibition of newspapers accounts of any incidents connected with an execution throws the door wide open to

710. *Id.*

711. *Id.* at 177, 110 N.W. at 868-69.

712. *Newspapers Lose Appeal*, ST. PAUL DISPATCH, Feb. 21, 1907, at 1.

713. Case Certification, File No. 4695 (Criminal Register I, Ramsey County).

714. *Id.* (containing the verdict form).

715. *Lid Forced Down On All Executions*, ST. PAUL DAILY NEWS, Feb. 21, 1907, at 3; *Newspapers Lose Appeal*, ST. PAUL DISPATCH, Feb. 21, 1907, at 1; *see also* Case Certification, File No. 4695 (Criminal Register I, Ramsey County) (containing case chronology, "List of Jurors," "Verdict," and "Judgment"); Demurrers to Indictment, File Nos. 4696, 4697 (containing case chronologies) (Criminal Register I, Ramsey County).

716. *Publicity and Hangings*, ST. PAUL PIONEER PRESS, Feb. 23, 1907, at 1.

717. *Id.*

unmolested violation of the other clauses of that law. The exclusion of newspaper reporters leaves the newspapers dependent on hearsay evidence. The law goes a little too far. For under it a sheriff, secure in the knowledge that no newspaper can describe what occurred, can make a hanging a gala occasion. That this is no imaginary possibility but a serious probability is a matter of experience. The pressure upon a sheriff to admit to an execution more than the prescribed witnesses is so great that few of them withstand it. There are, too, other and more important details about which the public ought, as a matter of policy, to be kept informed.⁷¹⁸

The editorial concluded by asking that executions be moved to the state prison, "where the warden is more responsible and less subject to political pressure than the average prison sheriff, where there would be less danger of bungling, and where there would be no morbid crowd hovering about trying to catch a glimpse of the proceedings."⁷¹⁹ Again, however, no legislative proposals to move executions to the Stillwater state prison were ever successful.⁷²⁰

VIII. THE ABOLITION OF CAPITAL PUNISHMENT

A. *Abolitionist Efforts from 1891 to 1910*

Toward the end of the nineteenth century, several efforts were made in the Minnesota Legislature to abolish the death penalty. On February 2, 1891, Rep. Hans P. Bjorge, a farmer and merchant from Otter Tail County, introduced a bill in the House of Representatives to outlaw capital punishment and substitute life imprisonment as the punishment for murder.⁷²¹ In House debate, Representative Bjorge argued that capital punishment was "cruel" and "unnecessary," and that "the prison walls were sufficient to exercise a deterrent and preventative influence upon murderers or would be murderers."⁷²² He cited numerous instances "where innocent lives had been taken

718. *Id.*

719. *Id.* at 6.

720. *See supra* note 559.

721. *To Abolish Capital Punishment*, ST. PAUL DISPATCH, Jan. 19, 1893, at 8. *See generally* MINN. LEGIS. MANUAL, at 249 (1891) (containing biographical sketch of Hans P. Bjorge); MINN. LEGIS. MANUAL, at 593 (1893) (same).

722. *Capital Punishment*, ST. PAUL PIONEER PRESS, Feb. 27, 1891, at 2.

away by the public executioner," and said that "many great criminals were turned loose on the community because the death punishment was so severe and so serious that juries hesitated to ask for its infliction."⁷²³ Despite Representative Bjorge's pleas, a motion to indefinitely postpone consideration of his bill "carried by a large majority."⁷²⁴

On January 19, 1893, Representative Bjorge introduced the same version of his 1891 bill to abolish capital punishment.⁷²⁵ On the House floor,

[m]any eloquent speeches were made for and against the bill, in which the time honored arguments about "judicial murders," "relic of barbarism," "the bloody teachings of the Mosaic law," etc., were used with as much effect as ever. It was shown by the friends of the bill beyond a doubt that in states where capital punishment is the law there are more murders and more lynchings. It was shown with equal clearness by the opponents of the measure that in states where capital punishment is abolished the crime of murder has alarmingly increased and lynchings were shockingly frequent.⁷²⁶

After a half-hour debate, Representative Bjorge's bill passed the House on March 24 by a vote of sixty-seven to twenty-six.⁷²⁷ The vote was followed with "some applause."⁷²⁸

The next day, Representative Bjorge's bill was referred to

723. *Id.*

724. *Id.*; see also MINN. HOUSE J., at 149, 371 (1891) (referring to H.F. 222); *In the House*, ST. PAUL PIONEER PRESS, Feb. 3, 1891, at 2.

725. MINN. HOUSE J., at 84 (1893) (referring to H.F. 126); *To Abolish Capital Punishment*, ST. PAUL DISPATCH, Jan. 19, 1893, at 8; *Weary Legislators*, ST. PAUL PIONEER PRESS, Jan. 20, 1893, at 1. On February 23, 1893, a bill was also introduced in the House by Rep. John J. Furlong to give a person sentenced to death a year between the date of his sentence and the day of execution "to repent and prepare for a better world." MINN. HOUSE J., at 302 (1893) (referring to H.F. 634); *For Good Roads*, ST. PAUL PIONEER PRESS, Feb. 24, 1893, at 2. See generally MINN. LEGIS. MANUAL, at 578 (1893) (containing biographical sketch of John J. Furlong); PORTRAIT GALLERY OF THE TWENTY-NINTH LEGISLATURE OF THE STATE OF MINNESOTA 115 (1895) (same). Although the House Judiciary Committee recommended the bill's passage on March 30, no further legislative action was ever taken on Representative Furlong's bill. MINN. HOUSE J., at 644, 931 (1893).

726. *Necklaces of Hemp*, ST. PAUL PIONEER PRESS, Mar. 24, 1893, at 2.

727. MINN. HOUSE J., at 593-94, 889 (1893) (referring to H.F. 126); *Capital Punishment*, MINNEAPOLIS J., Mar. 24, 1893, at 4; ST. PAUL DISPATCH, Mar. 24, 1893, at 3, col. 4; ST. PAUL DISPATCH, Mar. 25, 1893, at 2, col. 3.

728. *To Abolish Capital Punishment*, ST. PAUL PIONEER PRESS, Mar. 25, 1893, at 4.

the Senate Judiciary Committee.⁷²⁹ On March 26, 1893, a group of ministers from Minneapolis debated the propriety of capital punishment and their opinions differed "as much as those of individuals in the legislature."⁷³⁰ Two days later, the Senate Judiciary Committee, of which Sen. John Day Smith was the chairman, voted six to five to report Representative Bjorge's bill out of committee without recommendation.⁷³¹ On March 29, Senator Smith—who was also advocating a number of bills against animal cruelty that year⁷³²—reported the Senate Judiciary Committee's recommendation, or lack thereof, to the full Senate. Representative Bjorge's bill never reached a vote on the Senate floor.⁷³³

In 1895, two more bills were introduced in the House of Representatives to abolish capital punishment. The first of these, seeking to substitute life imprisonment for death, was introduced on January 23 by Rep. John D. Knuteson, a farmer from Polk County.⁷³⁴ On the same day that jurors convicted Harry Hayward of first-degree murder, the House Committee on Crimes and Punishment recommended the passage of Representative Knuteson's bill.⁷³⁵ However, on March 30, 1895, the House eventually voted to "indefinitely postpone" consideration of the bill.⁷³⁶

729. MINN. SENATE J., at 588 (1893) (referring to H.F. 126).

730. *The Death Penalty*, ST. PAUL PIONEER PRESS, Mar. 27, 1893, at 6; *On Capital Punishment*, MINNEAPOLIS J., Mar. 27, 1893, at 8.

731. *Judiciary Committee*, ST. PAUL PIONEER PRESS, Mar. 29, 1893, at 2; see also *Lost, Strayed or Stolen*, ST. PAUL PIONEER PRESS, Mar. 29, 1893, at 2 (indicating John Day Smith was the chairman of the Senate Judiciary Committee).

732. *House Declines*, ST. PAUL DISPATCH, Feb. 24, 1893, at 1 (discussing John Day Smith's bill to prohibit the docking of horses' tails); *No More New Bills*, ST. PAUL PIONEER PRESS, Mar. 28, 1893, at 2, 7 (same); *Senate Files*, ST. PAUL PIONEER PRESS, Mar. 25, 1893, at 4 (discussing John Day Smith's bills to "prevent mutilation of horses" and "cruelty to animals"); *Want A New Bill*, ST. PAUL PIONEER PRESS, Mar. 30, 1893, at 9 (same); ST. PAUL DISPATCH, Mar. 28, 1893, at 2 (same); ST. PAUL PIONEER PRESS, Mar. 31, 1893, at 6 (discussing John Day Smith's support for a bill to prohibit the trap shooting of live birds).

733. MINN. SENATE J., at 620, 995 (1893).

734. *In The House*, ST. PAUL PIONEER PRESS, Jan. 24, 1895, at 1. See generally PORTRAIT GALLERY OF THE TWENTY-NINTH LEGISLATURE OF THE STATE OF MINNESOTA 137 (1895) [hereinafter PORTRAIT GALLERY] (containing biographical sketch of John D. Knuteson).

735. *Hemp for Hayward*, ST. PAUL PIONEER PRESS, Mar. 9, 1895, at 1; *The Senate Approves*, ST. PAUL PIONEER PRESS, Mar. 9, 1895, at 2.

736. MINN. HOUSE J., at 64, 367, 581 (1895) (referring to H.F. 94); *In the House*, ST. PAUL PIONEER PRESS, Jan. 24, 1895, at 1; *Some May Be Woodchucks*, ST. PAUL PIONEER

On February 16, 1895, Rep. Edward Zier, a physician from Minneapolis, introduced a second abolitionist bill.⁷³⁷ Dr. Zier's bill sought to "wipe out the penalty of death for murder in the first degree by providing that the punishment shall be imprisonment for the offender's natural life."⁷³⁸ Although the House Committee on Crimes and Punishment recommended the passage of Representative Zier's bill, the full House failed to pass the bill after intense debate.⁷³⁹ Some legislators, like Reps. Henry Johns and Jens Grondahl, spoke in favor of the bill, finding capital punishment to be a "relic of barbarism."⁷⁴⁰ Other legislators spoke out against Dr. Zier's bill. Rep. Patrick H. Kelly implored: "The blood of Catherine Ging is crying for vengeance, and by all means retain the present law on the statute books until her murderers have been hanged, as they deserve to be."⁷⁴¹ Rep. J. D. Jones was equally virulent by saying, "I believe the skeleton hands of the murdered victims are stretching up from their graves through their thin covering of earth beckoning to us for vengeance."⁷⁴² Representative Henry Feig, another death penalty proponent, added that the abolitionist movement "was the result of the wave of sentimentality which sweeps over the country every little while."⁷⁴³ He did not believe there was any "popular demand" for the abolition of capital punishment, stating his belief that "seven-tenths of the

PRESS, Mar. 31, 1895, at 8. When the President of the Senate, Frank A. Day, announced to the Senate on March 8, 1895, that Harry Hayward had been found guilty, there was "a general burst of applause" in the Senate chamber. Five minutes of "confusion and conversation," which "ruled supreme," followed the announcement. *The Senate Approves*, ST. PAUL PIONEER PRESS, Mar. 9, 1895, at 2; *Senator Day Is President*, ST. PAUL PIONEER PRESS, Jan. 26, 1895, at 1.

737. H.F. 371, 29th Leg., 1st Sess., Minn. (1895). See generally PORTRAIT GALLERY, *supra* note 734, at 194 (containing biographical sketch of Edward Zier).

738. *Will Please H. Hayward*, ST. PAUL PIONEER PRESS, Feb. 17, 1895, at 2.

739. MINN. HOUSE J., at 204, 221, 322-23, 330 (1895).

740. *Id.* See generally PORTRAIT GALLERY, *supra* note 734, at 120, 128 (containing biographical sketches of Jens Grondahl and Henry Johns).

741. *Hayward May Hang*, ST. PAUL PIONEER PRESS, Mar. 5, 1895, at 6. See generally PORTRAIT GALLERY, *supra* note 734, at 135 (containing biographical sketch of Patrick H. Kelly).

742. *Hayward May Hang*, ST. PAUL PIONEER PRESS, Mar. 5, 1895, at 6. See generally PORTRAIT GALLERY, *supra* note 734, at 131 (containing biographical sketch of J. D. Jones).

743. *Hayward May Hang*, ST. PAUL PIONEER PRESS, Mar. 5, 1895, at 6. See generally PORTRAIT GALLERY, *supra* note 734, at 109 (containing biographical sketch of Henry Feig).

people were opposed to the bill." Representative Feig advocated "an eye for an eye and a tooth for a tooth."⁷⁴⁴ On March 4, the full House "indefinitely postponed" consideration of Dr. Zier's bill, with "not over a dozen members voting against the motion."⁷⁴⁵

Another bill to abolish capital punishment was introduced in the House of Representatives on January 15, 1897.⁷⁴⁶ This bill was authored by Rep. Sylvanus A. Stockwell, a life insurance agent from Minneapolis.⁷⁴⁷ On January 28, the House Committee on Crimes and Punishment recommended that the bill pass.⁷⁴⁸ However, the Committee's chairman, Rep. Samuel T. Littleton, "served notice that the minority of his committee was opposed to the bill, and that he would fight it in committee of the whole."⁷⁴⁹ On the House floor, Representative Littleton, a Republican lawyer from Kasson, was true to his word. He contended that "it was not the duty of the legislature to legislate from sympathy."⁷⁵⁰ "This is called a barbaric relic," he said, "but if it is, it is the only barbaric relic that has found its way onto the statute books of every civilized nation."⁷⁵¹ Representative Littleton added that "[a] modern penitentiary is not regarded as much of a menace by the criminal."⁷⁵² He continued sarcastically, "It is almost a palace. It is a credit to the warden who keeps it in the condition it is in, but it struck me as a very nice place for a summer resort where one might take his family and spend a few days."⁷⁵³

For his part, Representative Stockwell delivered "one of the best speeches [that was made] in support of any measure"

744. *Hayward May Hang*, ST. PAUL PIONEER PRESS, Mar. 5, 1895, at 6.

745. *Id.*

746. MINN. HOUSE J., at 59, 120 (1897) (referring to H.F. 63).

747. See generally EVERTS, *supra* note 469 (containing biographical sketch of Sylvanus Stockwell).

748. MINN. HOUSE J., at 59, 120 (1897) (referring to H.F. 63).

749. *Arbitration Commended*, ST. PAUL PIONEER PRESS, Jan. 29, 1897, at 3. See generally MINN. LEGIS. MANUAL, at 615 (1897) (containing biographical sketch of Samuel T. Littleton).

750. *Busy Day For Stockwell*, ST. PAUL PIONEER PRESS, Feb. 10, 1897, at 2.

751. *Id.*

752. *Id.*

753. *Id.*; *Arbitration Commended*, ST. PAUL PIONEER PRESS, Jan. 29, 1897, at 3; *House Will Work To-Day*, ST. PAUL PIONEER PRESS, Jan. 16, 1897, at 1, 2; *We Will Still Hang*, ST. PAUL PIONEER PRESS, Feb. 10, 1897, at 2.

during the legislative session.⁷⁵⁴ In fact, "old members" of the Legislature described "Mr. Stockwell's defense of his bill . . . [as] the best argument in favor of the abolition of capital punishment that has been made for a great many sessions. . . ."⁷⁵⁵ Representative Stockwell opened by calling "for the breaking of one more link in the chain that binds us to our savage ancestry."⁷⁵⁶ Responding to the argument that capital punishment deters crime, Representative Stockwell insisted that "it is a developer of crime."⁷⁵⁷ He quoted at length from criminologists and read newspaper extracts "detailing crimes committed in the very shadow of the gallows."⁷⁵⁸ "If capital punishment deters from crime why not enlarge its scope?" questioned Representative Stockwell.⁷⁵⁹ "We enjoy our present civilization in spite of it and not because of it" he added.⁷⁶⁰ Stockwell went on to quote a statement by the Stillwater state prison warden, Henry Wolfer, that "capital punishment did not amount to a snap of the fingers as a deterrent from crime."⁷⁶¹ Despite Representative Stockwell's pleas, the House voted down his bill seventy-three to twenty-three after two hours of debate.⁷⁶²

After the turn of the century, legislative efforts to abolish capital punishment continued. On January 29, 1901, Rep. Peder M. Hendricks, a farmer from Otter Tail County, introduced an abolitionist bill.⁷⁶³ However, on April 10, the House voted to "indefinitely postpone" consideration of that bill.⁷⁶⁴

754. *We Will Still Hang*, ST. PAUL PIONEER PRESS, Feb. 10, 1897, at 2.

755. *Id.*

756. *Id.*

757. *Id.*

758. *Id.*

759. *Id.*

760. *Id.*

761. *We Will Still Hang*, ST. PAUL PIONEER PRESS, Feb. 10, 1897, at 2.

762. MINN. HOUSE J., at 219-20 (1897). Representative Grondahl also favored Representative Stockwell's bill. *We Will Still Hang*, ST. PAUL PIONEER PRESS, Feb. 10, 1897, at 2. "You may clothe murder in the garb of law and call it justice," he said, "but it is the same bloodthirstiness that animated our forefathers centuries ago." *Id.* Representative Grondahl added: "If you can prove to me that capital punishment is a deterrent of crime, and that no innocent man will ever be executed, I will favor capital punishment." *Id.*

763. MINN. HOUSE J., at 104, 1007, 1119 (1901) (referring to H.F. 114). See generally MINN. LEGIS. MANUAL, at 696 (1901) (containing biographical sketch of Peder M. Hendricks).

764. *Id.* at 104, 1119; *New House Bills*, MINNEAPOLIS J., Jan. 29, 1901, at 12; *To Remove Death Penalty*, MINNEAPOLIS J., Jan. 29, 1901, at 12.

In 1905, two more bills were introduced in the Minnesota Legislature to abolish capital punishment.⁷⁶⁵ The first bill was introduced in the Senate on January 24 by Sen. John T. Alley, a Republican lawyer from Wright County.⁷⁶⁶ That bill established life imprisonment as the punishment for first-degree murder, unless the jury prescribed the punishment of death.⁷⁶⁷ A second bill was introduced in the House of Representatives on February 6 by Rep. John G. Lund, the owner of a land agency in Minneapolis.⁷⁶⁸ *The Minneapolis Journal* reported that "[i]t is a simple affair of two lines, and only says that the penalty for murder in the first degree shall be imprisonment for life.
...⁷⁶⁹

After Representative Lund introduced his bill, *The Minneapolis Journal* took a "canvass of representative Minneapolis men" that revealed "a general opposition to capital punishment."⁷⁷⁰ Those opposed to it included a bishop, two judges, and two county attorneys, including Frank M. Nye, the county attorney who prosecuted Harry Hayward.⁷⁷¹ Representative Lund's bill was "strongly advocated by the author and a number of friends of the idea."⁷⁷² However, when his bill failed to make it out of the Committee on Crimes and Punishment, Representative Lund moved, on April 5, to have Senator Alley's bill substituted for his bill, and that consideration of his own bill be "indefinitely postponed."⁷⁷³ That motion prevailed, but Senator Alley's bill

765. *Senate Session Remarkable for Nothing but New Measures*, MINNEAPOLIS J., Jan. 24, 1905, at 9.

766. MINN. SENATE J., at 98 (1905) (referring to S.F. 48). See generally MINN. LEGIS. MANUAL, at 661 (1905) (containing biographical sketch of John T. Alley).

767. MINN. SENATE J., at 98 (1905).

768. MINN. HOUSE J., at 166 (1905) (referring to H.F. 199). See generally MINN. LEGIS. MANUAL, at 677 (1905) (containing biographical sketch of John G. Lund).

769. *Short Session*, MINNEAPOLIS J., Feb. 7, 1905, at 4. A biennial report of the Minnesota Attorney General's office illustrates how infrequently death sentences were imposed in 1904 and 1905. In those two years, Minnesota had 39 prosecutions for first-degree murder. Of those 39 first-degree murder trials, 13 resulted in life sentences, and only three death sentences were imposed. *Only Three Hangings*, ST. PAUL PIONEER PRESS, Feb. 22, 1907, at 5.

770. *Think Death Penalty Wrong*, MINNEAPOLIS J., Feb. 8, 1905, at 7.

771. *Id.*; *Harry Expects Conviction*, ST. PAUL PIONEER PRESS, Mar. 5, 1895, at 6; *Hayward's Trial*, ST. PAUL PIONEER PRESS, Jan. 29, 1895, at 6.

772. *Death Penalty Decried By State's Executive*, MINNEAPOLIS J., Feb. 25, 1906, at 7; *Short Session*, MINNEAPOLIS J., Feb. 7, 1905 at 4.

773. MINN. HOUSE J., at 166, 799, 1061-62, 1141, 1662 (1905) (referring to H.F. 199).

never reached a House vote.⁷⁷⁴

During the 1907 legislative session, abolitionist efforts continued. The first bill related to capital punishment was introduced in the House of Representatives, on January 31, by Rep. Frederick B. Phillips, a thirty-two-year-old lawyer from White Bear.⁷⁷⁵ Representative Phillips' bill required that executions take place before sunrise at the Stillwater state prison.⁷⁷⁶ Representative Phillips was particularly concerned about "the evil effect upon the community of having hangings at the county jail."⁷⁷⁷ In particular, he cited the hanging of William Williams in St. Paul where "men, women and children came in groups around the county jail to get a glimpse of the prisoner."⁷⁷⁸ Representative Phillips believed that if executions took place at the state prison, these "hanging parties" would be abolished.⁷⁷⁹ Representative Phillips' bill retained the provisions against admitting newspaper reporters to executions and prohibiting newspapers from printing execution details.⁷⁸⁰

After its introduction, *The St. Paul Pioneer Press* called Representative Phillips' bill "a sensible, wholesome measure."⁷⁸¹ *The Pioneer Press* wrote:

The infrequency of hangings in this state renders it practically certain that the task will fall into inexperienced hands. What the result has been on many occasions every one knows. Instead of the breaking of the neck of the victim at the fall of

774. *Id.* In the Senate, Senator Alley's bill was referred to the Senate Judiciary Committee, which reported it back on February 15 with the recommendation that it be amended to provide that the sentence for first-degree murder shall be death, unless the judge or jury determined otherwise. That amendment was adopted, and on February 21 the Senate recommended that the bill pass. MINN. SENATE J., at 98, 207-08, 298, 313, 1279 (1905); *May Abolish Hanging*, MINNEAPOLIS J., Feb. 15, 1905, at 9; *Punishment for Murder*, MINNEAPOLIS J., Feb. 21, 1905, at 5. As amended, Senator Alley's bill—although it never went any further—passed the Senate on March 2 by a vote of 44 to four. *Legislative Doings Today*, MINNEAPOLIS J., Mar. 2, 1905, at 4; *Legislative Proceedings*, MINNEAPOLIS TRIB., Mar. 2, 1905, at 4; *Bills Passed*, ST. PAUL PIONEER PRESS, Mar. 3, 1905, at 2.

775. *Hangings at State Prison*, ST. PAUL PIONEER PRESS, Feb. 1, 1907, at 2 (reporting on contents of H.F. 190). See generally MINN. LEGIS. MANUAL, at 671 (1907) (containing biographical sketch of Frederick B. Phillips).

776. *Hangings at State Prison*, ST. PAUL PIONEER PRESS, Feb. 1, 1907, at 2.

777. *Bill to Abolish Death Penalty*, ST. PAUL PIONEER PRESS, Mar. 6, 1907, at 4.

778. *Id.*

779. *Id.*

780. *Hangings at State Prison*, ST. PAUL PIONEER PRESS, Feb. 1, 1907, at 2.

781. *State Executions*, ST. PAUL PIONEER PRESS, Feb. 2, 1907, at 6.

the trap there have been frequent slow strangulations, attended in some cases, as at the hanging of Williams in this county, by horrible and sickening circumstances. The present system, in a word, is unnecessarily brutal and brutalizing. For most if not all of the bungling could be avoided if all the executions took place at the state prison where they would naturally fall to some one deputy and be subject to observation by his assistants, who would thus not be entirely novices when the duty fell to them.⁷⁸²

The newspaper also railed against "the cruel, unwholesome and dangerous practice of local executions."⁷⁸³

[T]he approach of such an event in any community arouses an interest to which all newspapers, whether justifiable or not, feel compelled to cater as a matter both of business competition and of honest dealing with those to whom they have contracted to sell the news of the day. Remove the execution to Stillwater, where the rigid discipline of the prison and the more serious sense of responsibility of its officials would insure compliance with the law, and half the interest in the event would be gone. It would no longer be a home affair. No newspaper could secure admission and the strict letter of the law would be complied with as it is rarely complied with under the sheriffs, most of whom want to cater to one or all of the local newspapers or at least do not want to offend them or run the risk of offense.⁷⁸⁴

Although the House Judiciary Committee recommended the passage of Representative Phillips' bill,⁷⁸⁵ the House Committee on Crimes and Punishment failed to endorse it.⁷⁸⁶ The House voted to indefinitely postpone consideration of Representative Phillips' bill on April 12, 1907, by a tally of thirty-nine to twenty-eight.⁷⁸⁷

A second bill was introduced in the House of Representatives on February 20, 1907, by Rep. Fred B. Wright, a Republican lawyer from Minneapolis.⁷⁸⁸ His bill sought to move execu-

782. *Id.*

783. *Id.*

784. *Id.*

785. MINN. HOUSE J., at 161, 301 (1907) (referring to H.F. 190).

786. *Id.* at 1380-81.

787. *Id.* at 1400, 1901; *Bills Introduced*, ST. PAUL PIONEER PRESS, Feb. 1, 1907, at 2; *Sheriff the Hangman*, ST. PAUL PIONEER PRESS, Apr. 13, 1907, at 5.

788. MINN. HOUSE J., at 376 (1907) (referring to H.F. 473). See generally MINN. LEGIS. MANUAL, at 672 (1907) (containing biographical sketch of Fred B. Wright).

tions to the state prison at Stillwater and to substitute the electric chair for hanging as the method of execution.⁷⁸⁹ "Electrocution was the coming process," he said.⁷⁹⁰ State Prison Warden Henry Wolfer agreed "that the present method is not what it ought to be and that there should be a central place where executions could be performed methodically and uniformly and away from the usual notoriety."⁷⁹¹ However, Wolfer did not want to oversee executions at the state prison and stated, "I feel that placing this duty on the head of that institution is hardly in keeping with the spirit of the general purpose of the institution, not because of the effect on the warden but because of the effect upon the inmates."⁷⁹² He emphasized that "[t]he state has a duty to those inmates and the duty of reforming them is hardly compatible with the duty of performing executions."⁷⁹³ Wolfer suggested that the state execute people in a building "on an island perhaps away from where people congregate," instead of executing them at the state prison.⁷⁹⁴ After Representative Wright's bill was referred to the House Committee on Crimes and Punishment, which reported it back "without recommendation," no further action on the bill was ever taken.⁷⁹⁵

On March 6, Representatives Phillips and Wright, authors of the two previous death penalty bills, introduced a third bill in the 1907 legislative session.⁷⁹⁶ The Phillips-Wright bill sought to substitute life imprisonment for death as the punishment for first-degree murder, and prohibited the pardoning of convicted murderers unless indisputable evidence of innocence was established.⁷⁹⁷ The House Committee on Crimes and Punishment recommended the passage of a slightly modified version of the Phillips-Wright bill on March 8,⁷⁹⁸ but when the bill came

789. *Bills Introduced*, ST. PAUL PIONEER PRESS, Feb. 21, 1907, at 5; *Death By Electricity*, ST. PAUL PIONEER PRESS, Feb. 24, 1907, at 1; *In the House*, MINNEAPOLIS TRIB., Feb. 21, 1907, at 8.

790. *Bill to Abolish Death Penalty*, ST. PAUL PIONEER PRESS, Mar. 6, 1907, at 4.

791. *Id.*

792. *Id.* (quoting Warden Wolfer).

793. *Id.*

794. *Id.*

795. MINN. HOUSE J., at 376, 1381-82, 1942 (1907). A similar attempt to substitute electrocution for hanging also failed in 1903. *Murderers May Be Electrocuted*, DULUTH NEWS TRIB., Mar. 6, 1903, at 1.

796. MINN. HOUSE J., at 551 (1907) (referring to H.F. 657).

797. *Would Abolish Capital Punishment*, MINNEAPOLIS TRIB., Mar. 7, 1907, at 9.

798. MINN. HOUSE J., at 586-87 (1907).

before the full House, Representative Phillips offered an amendment providing that the punishment shall be death where a person once sentenced to life imprisonment commits murder.⁷⁹⁹ This proposed amendment was voted down, however, with Rep. Frank T. White of Elk River arguing "that if capital punishment is to be abolished, it should be abolished entirely."⁸⁰⁰

In debating the Phillips-Wright bill, Rep. Clarence B. Miller, a lawyer from Duluth, said that statistics showed that capital punishment had no deterrent effect.⁸⁰¹ Miller stated:

Passing over the right of the state to take human life. . . . I do not think that as a matter of practical utility it ever did a bit of good. The abolition of capital punishment will facilitate verdicts. Juries will not hesitate when the evidence is clear unless they know that their verdict will send the man to the gallows.⁸⁰²

In contrast, Rep. Burdette Thayer of Spring Valley argued that "[y]ou can get statistics on either side."⁸⁰³ Representative Thayer added:

Under the law as it existed at one time the Younger brothers escaped the death penalty and later were pardoned. Now one is making a hero of himself and exhibiting himself at circuses in Missouri. He is coining the Northfield tragedy into gold. Would it not have been better if the capital punishment had been inflicted in that case?⁸⁰⁴

Ultimately, the House voted forty-seven to thirty-four to indefinitely postpone consideration of the Phillips-Wright bill on April 8.⁸⁰⁵

In 1909, the abolitionists renewed their legislative fight. On January 19, Rep. C. M. Bendixen, a farmer from Redwood

799. *Gallows Stay in Minnesota*, ST. PAUL PIONEER PRESS, Apr. 9, 1907, at 5.

800. *Id.* (quoting Representative White).

801. *Gallows Stay in Minnesota*, ST. PAUL PIONEER PRESS, Apr. 9, 1907 at 5. *See generally* MINN. LEGIS. MANUAL, at 675 (1907) (containing a biographical sketch of Clarence B. Miller).

802. *Gallows Stay in Minnesota*, ST. PAUL PIONEER PRESS, Apr. 9, 1907, at 5 (quoting Representative Miller).

803. *Id.* (quoting Representative Thayer).

804. *Id.*

805. *Id.*; *see also Bills Introduced*, ST. PAUL PIONEER PRESS, Mar. 7, 1907, at 4 (listing bills introduced in the House and Senate); *To Stop Hangings*, ST. PAUL PIONEER PRESS, Mar. 8, 1907, at 2 (stating that Phillips-Wright bill to be reported out of committee).

County, introduced a bill to abolish capital punishment.⁸⁰⁶ That same day, he also introduced a companion bill that sought to take away the Board of Pardons' right to grant reprieves and commute the sentences of convicted first-degree murderers.⁸⁰⁷ Although the House Committee on Crimes and Punishment recommended passing Representative Bendixen's bill to abolish capital punishment,⁸⁰⁸ the full House voted down the bill by a vote of thirty-five to thirty-one, on March 9.⁸⁰⁹ Representative Bendixen's bill to change the powers of the Board of Pardons also failed to pass, with the House Committee on Crimes and Punishment recommending that "the bill be returned to its author."⁸¹⁰

Although the House did not pass it, the House debated Representative Bendixen's bill to abolish capital punishment for nearly an hour.⁸¹¹ Aside from Representative Bendixen, Rep. George A. MacKenzie, a Republican lawyer from Gaylord, was practically the only person who spoke in support of the measure.⁸¹² In what *The St. Paul Pioneer Press* called an "eloquent plea," Representative MacKenzie urged that the State abandon its "barbaric power of taking human life."⁸¹³ "The law is inconsistent," Representative MacKenzie argued, in that "it makes it unlawful for a man to take his own life, yet lets the state take life."⁸¹⁴ He added that the infliction of the death penalty only "nourishes the spirit of revenge, demoralizes the community, lessens the sacredness of human life [and] largely prevents the prosecution and punishment of crime."⁸¹⁵ "If the death

806. MINN. HOUSE J., at 101 (1909) (referring to H.F. 131); *Anti-Hanging Bill Again*, ST. PAUL DISPATCH, Jan. 19, 1909, at 5; *Would Abolish Death Penalty*, ST. PAUL PIONEER PRESS, Jan. 20, 1909, at 6. See generally MINN. LEGIS. MANUAL, at 721 (1909) (containing a biographical sketch of C. M. Bendixen).

807. MINN. HOUSE J., at 101 (1909) (referring to H.F. 132); *Anti-Hanging Bill Again*, ST. PAUL DISPATCH, Jan. 19, 1909, at 5.

808. *Would Abolish Death Penalty*, ST. PAUL PIONEER PRESS, Jan. 20, 1909, at 6.

809. *Death Penalty to Remain*, ST. PAUL DISPATCH, Mar. 9, 1909, at 3; *Will Not Abolish Hanging*, ST. PAUL PIONEER PRESS, Mar. 10, 1909, at 8; *Would Abolish Hanging*, ST. PAUL DISPATCH, Feb. 11, 1909, at 3. On March 10, Representative Bendixen's motion to reconsider the previous day's vote also lost. MINN. HOUSE J., at 386, 783, 798 (1909).

810. MINN. HOUSE J., at 1019 (1909).

811. *Death Penalty to Remain*, ST. PAUL DISPATCH, Mar. 9, 1909, at 3.

812. *Id.* See generally MINN. LEGIS. MANUAL, at 722 (1909) (containing biographical sketch of George A. MacKenzie).

813. *Will Not Abolish Hanging*, ST. PAUL PIONEER PRESS, Mar. 10, 1909, at 8.

814. *Id.*

815. *Id.*

penalty deters others from murder," he asked rhetorically, "why not have executions public?"⁸¹⁶

In contrast, several House members spoke against Representative Bendixen's bill to abolish capital punishment. Among them was Rep. Frank T. White, who served for ten years as the county attorney for Sherburne County.⁸¹⁷ Representative White reminded the House "of how the Younger brothers got out of prison" and said that "one of them is now running a vaudeville show exploiting their crimes."⁸¹⁸ Another county attorney, Rep. Burdett Thayer of Fillmore County, further emphasized that "if there is no capital punishment, mobs would be more likely to lynch criminals."⁸¹⁹

The Legislature, which normally met every other year, did not convene in 1910. However, in December of that year, Ramsey County Attorney Richard D. O'Brien called for the abolition of capital punishment. In a newspaper article entitled "To Abolish Death Penalty," O'Brien was quoted as saying:

I wish somebody would start agitation for the abolition of capital punishment in this state. . . . The law allowing the imposition of [the] death sentence upon conviction of murder makes it practically impossible for the state to obtain the right sort of jury, and after the jury is secured the chances of conviction, even with the strongest evidence, are at a minimum. There are many men, otherwise competent to serve as jurymen, who honestly have conscientious scruples against taking a life into their hands. There are many more men of high character who, deliberately or otherwise, seize upon the death penalty as an excuse from serving. I am convinced that should the death penalty for murder be stricken from the statutes the state would be in [a] much better position to secure convictions. . . .⁸²⁰

816. *Id.*

817. MINN. LEGIS. MANUAL, at 738 (1909) (containing biographical sketch of Frank T. White).

818. *Will Not Abolish Hanging*, ST. PAUL PIONEER PRESS, Mar. 10, 1909, at 8.

819. *Death Penalty to Remain*, ST. PAUL DISPATCH, Mar. 9, 1909, at 3; *Will Not Abolish Hanging*, ST. PAUL PIONEER PRESS, Mar. 10, 1909, at 8. See generally MINN. LEGIS. MANUAL, at 713 (1909) (containing biographical sketch of Burdett Thayer).

820. *To Abolish Death Penalty*, ST. PAUL DISPATCH, Dec. 10, 1910, at 9 (quoting County Attorney Richard D. O'Brien). See generally MEN OF MINNESOTA 186 (1915) (containing a picture of Richard D. O'Brien).

B. *The 1911 Legislative Session*

The thirty-seventh session of the Minnesota Legislature convened on January 3, 1911. A day later, in his inaugural message to a joint session of the Legislature, Gov. Adolph O. Eberhart called for the abolition of capital punishment. He remarked:

The ancient ideas and methods of punishment were far different from those of today. It was then a question of punishment and the idea of reform received little consideration. Today the primary question is one of reform and punishment is a secondary consideration. The experience of this and other states, as well as the verdict of most criminologists, agrees on the question of abolishing capital punishment, and I am firmly convinced that there would be more convictions for murder in the first degree if either capital punishment were abolished, or imposed only in extreme cases, and then only upon the order of the court or the unanimous recommendation of the jury. The old argument against its abolition on the ground that the board of pardons would frequently reduce the life sentence is amply refuted by the records of the present state board of pardons, and the question is before this legislature entirely upon its merits. I believe the interests of justice and humanity demand the repeal of the law and I am convinced that the state would secure more convictions in capital cases and that consequently crime in general would be reduced by the abolition of this antiquated practice in criminal procedure.⁸²¹

On January 5, Rep. George A. MacKenzie, a long-time death penalty opponent, introduced a bill in the House of Representatives to abolish capital punishment.⁸²² That bill was referred

821. Adolph O. Eberhart, Governor's Inaugural Message to the Minnesota Legislature (Jan. 4, 1911) (available at the Minnesota Historical Society); *see also* MINN. SENATE J., at 14 (1911) (referring to speech); MINN. HOUSE J., at 19-20 (1911) (same); *Eberhart Address Longest on Record*, MINNEAPOLIS J., Jan. 4, 1911, at 1 (same).

822. MINN. HOUSE J., at 44 (1911) (referring to H.F. 2); *see Ask Inquiry Into Governor's Delay*, MINNEAPOLIS J., Feb. 23, 1911, at 1; *Daily News Calls Roll on House and Senate*, ST. PAUL DAILY NEWS, Apr. 19, 1911, at 1. *The Minneapolis Journal* later reported:

Members of the legislature are beginning to discuss capital punishment, and George A. MacKenzie . . . is getting ready to make a hard fight in the house for his bill abolishing the death penalty. The question is put up to the legislators harder than ever this year, in view of the fact that two condemned men are waiting for the governor to fix the date of execution, and the governor is delaying his action in hope that the legislature will relieve him.

to the House Committee on Crimes and Punishment, which recommended its passage on February 2.⁸²³ One person who spoke in favor of abolition before the Committee was Henry Wolfer, the warden of the Stillwater state prison. "I never have favored capital punishment," he said, "and the more I study methods of dealing with the criminal classes the more convinced I am that the death penalty should not be invoked."⁸²⁴ He emphasized that the death penalty did not deter crime. "Experience shows and penologists are quite agreed that as a deterring influence this form of punishment is without effect."⁸²⁵

On February 23, before Representative MacKenzie's bill came to a House vote, a Le Sueur County grand jury requested that the Minnesota Legislature inquire into why Gov. Adolph O. Eberhart, a Swedish-born Republican, who succeeded John A. Johnson as governor in 1909, "refuses and neglects" to set an execution date for Martin O'Malley.⁸²⁶ The grand jury's resolution, criticizing Governor Eberhart, was presented to both houses of the Legislature on February 24.⁸²⁷ On October 29, 1910, Judge P. W. Morrison had sentenced O'Malley to death for murdering his two stepchildren with poison.⁸²⁸ However, Eberhart refused to set an execution date because of his

Minnesota Politics, MINNEAPOLIS J., Jan. 11, 1911, at 18. See generally MINN. LEGIS. MANUAL, at 674 (1911) (containing biographical sketch of George A. MacKenzie); *Facts About Minnesota Lawmakers*, MINNEAPOLIS J., Jan. 8, 1911, at 2 (same); Memorial of George A. MacKenzie (Dec. 6, 1948) (available at the Nicollet County Historical Society under "MacKenzie Family" file).

823. MINN. HOUSE J., at 44, 232-33 (1911) (referring to H.F. 2).

824. *Opposes Death Sentence*, MINNEAPOLIS J., Feb. 11, 1911, at 3.

825. *Id.* Another abolitionist bill was introduced in the Senate on January 9 by Sen. Edward Peterson, a lawyer from Litchfield. That bill, however, was never reported out of the Senate Judiciary Committee, where it was initially referred. It was Representative MacKenzie's bill that the full Senate would later consider and vote upon. MINN. SENATE J., at 44, 1435 (1911) (referring to S.F. 16); see also *Ask Inquiry Into Governor's Delay*, MINNEAPOLIS J., Feb. 23, 1911, at 1 (referring to Representative MacKenzie's bill); *New Senate Bills*, MINNEAPOLIS J., Jan. 10, 1911, at 8 (referring to Senator Peterson's bill). See generally MINN. LEGIS. MANUAL, at 647 (1911) (containing biographical sketch of Edward Peterson); *Facts About Minnesota Lawmakers*, MINNEAPOLIS J., Jan. 8, 1911, at 2 (referring to Sen. Edward P. Peterson).

826. *Ask Inquiry Into Governor's Delay*, MINNEAPOLIS J., Feb. 23, 1911, at 1; see also *Hear Governor Criticized*, MINNEAPOLIS J., Feb. 24, 1911, at 1 (stating that both the House and Senate resolutions called for an explanation by the governor as to why he refused to set an execution date for Martin O'Malley).

827. *Ask Inquiry Into Governor's Delay*, MINNEAPOLIS J., Feb. 23, 1911, at 1.

828. *Id.*

opposition to capital punishment.⁸²⁹ "I have always been opposed to capital punishment," Eberhart told the press, offering this explanation as to why he refused to set O'Malley's execution date:

I have been told that the MacKenzie bill will pass and until its consideration nothing will be done. I do not have to fix the date of hanging until I am ready, and for the reasons given I am going to take all the time necessary. You can say, though, that I will not shirk my duty if I find the abolishment of capital punishment impossible.⁸³⁰

The same day that the Le Sueur County grand jury's resolution was presented to the Legislature, the House Committee of the Whole recommended passage of the MacKenzie bill by a vote of fifty-seven to twelve.⁸³¹

Just four days later, on February 28, the House passed Representative MacKenzie's bill by an overwhelming vote of ninety-five to nineteen.⁸³² This represented a "personal triumph" for Representative MacKenzie, who had worked for the bill's passage for six years and whose prior legislative attempts met with "sturdy opposition."⁸³³ Representative MacKenzie made "one of the most eloquent anti-death penalty speeches ever given in the House chamber."⁸³⁴ He implored his fellow legislators:

Mr. Speaker. Six years ago in the first Legislature which convened in this beautiful building, I had the honor of lifting my voice in support of a bill similar to the one now under consideration . . . and as the years have gone by, my earnest conviction that Capital Punishment is wholly wrong has become deepened and settled. . . .

If punishment is what you want to inflict, would it not be much more of a punishment to incarcerate the criminal within prison walls, where conscience might bring remorse to torture him through the slow lapse of years, cut off from the job and sunshine of freedom, not hearing the songs of the wild birds, sense the breath and perfume of the flowers,

829. *Id.*

830. *Id.*

831. MINN. HOUSE J., at 471 (1911); *Death Penalty's Doom Seen*, MINNEAPOLIS TRIB., Feb. 25, 1911, at 17.

832. MINN. HOUSE J., at 512-13 (1911).

833. *House Votes to Abolish Hanging*, MINNEAPOLIS J., Mar. 1, 1911, at 10.

834. *House Votes to Abolish Hanging*, ST. PAUL PIONEER PRESS, Mar. 1, 1911, at 8.

where no rustle of the autumn leaves could reach him? . . .

Did Domitian stamp out Christianity by putting to death 40,000 Christians? . . . Did the English retrieve their fallen fortunes in France by burning Joan of Arc or crush Erin's love and hope of liberty by the execution of Robert Emmet?

. . . Have women ever been unfaithful since Henry VIII made an example of Anne Boleyn? Have army spies been unknown since Nathan Hale gave up his life for his country? . . .

Let us bar this thing of Vengeance and the Furies from the confines of our great State; Let not this harlot of judicial murder smear the pages of our history with her bloody fingers, or trail her crimson robes through our Halls of Justice, and let never again the Great Seal of the Great State of Minnesota be affixed upon a warrant to take a human life.

. . . ⁸³⁵

Representative MacKenzie dramatically described witnessing the death penalty being inflicted, and objected to hanging on the basis that the state does not have the right to kill.⁸³⁶ He said that the death penalty breaks down the sanctity of human life and is irrevocable.⁸³⁷ When Representative MacKenzie concluded, the members of the House warmly applauded his remarks.⁸³⁸

Many other House members also spoke in favor of Representative MacKenzie's bill. St. Paul attorney Charles Orr said that "if the matter had been left in the hands of attorneys of the state, hanging would have been abolished long ago."⁸³⁹ Even

835. Joyce Peterson, *Bills To Restore Death Penalty Often Short-Lived*, SESSION WEEKLY (Minnesota Legislature), Feb. 28, 1992, at 12 (quoting Representative MacKenzie).

836. *House Votes to Abolish Hanging*, ST. PAUL PIONEER PRESS, Mar. 1, 1911, at 8. It was after witnessing the hanging of Theodore Wallert in 1901, "vigilante hangings out west and the hanging of an innocent man in Redwood County" that George MacKenzie "became bitterly opposed to taking human life as punishment for crime." Memorial of George A. MacKenzie (Dec. 6, 1948) (available at the Nicollet County Historical Society under "MacKenzie Family" file). As the Sibley County Attorney from 1901 to 1905, MacKenzie prosecuted Wallert's conviction. *Id.*; see *supra* text accompanying note 568 (describing Theodore Wallert's execution).

837. *Id.*

838. *Id.*; see also *Capital Punishment Rapped by the House*, MINNEAPOLIS TRIB., Mar. 1, 1911, at 1 (noting that few voices were raised in defense of capital punishment); *Death Penalty Abolished*, MINNEAPOLIS J., Apr. 19, 1911, at 15 (referring to Governor Eberhart's support for the bill).

839. *House Votes to Abolish Hanging*, ST. PAUL PIONEER PRESS, Mar. 1, 1911, at 8. See generally MINN. LEGIS. MANUAL, at 684 (1911) (containing biographical sketch of Charles Orr).

prior proponents of capital punishment, like newspapermen George H. Mattson and W. D. Washburn Jr., spoke in favor of the bill.⁸⁴⁰ Representatives Mattson and Washburn, who both voted against abolition two years earlier, remarked to the effect that they were now convinced that the death penalty “serves no good purpose, does not diminish crime and is brutal in the extreme.”⁸⁴¹

Only a “few voices were raised in defense” of capital punishment.⁸⁴² One farmer from Swift Falls, Rep. Knute Knutson, said “he was as sympathetic as any member in the House, but his sympathies went out to the friends of the victim of the murderer rather than to the criminal.”⁸⁴³ Others raised objections to Representative MacKenzie’s bill, fearing that convicted murderers could be paroled by the State Board of Pardons.⁸⁴⁴ This latter concern was alleviated, however, by the House’s passage of Rep. Joseph R. Keefe’s bill on the same day that Representative MacKenzie’s bill passed the House. Representative Keefe’s bill, which passed by a vote of ninety-five to four, took away the Board of Pardons’ right to pardon convicted first-degree murderers, unless their innocence could be established beyond a reasonable doubt.⁸⁴⁵

After the MacKenzie bill passed the House, its advocates admitted that it would have “a harder row to hoe in the Senate than it had in the House.”⁸⁴⁶ *The Minneapolis Journal* even speculated that Representative MacKenzie’s bill might need to be returned to the House for revision.⁸⁴⁷ It reported that lawyers were worried that the bill in its present form might offer complete freedom to two convicted murderers—Martin O’Malley

840. See generally MINN. LEGIS. MANUAL, at 688, 704 (1911) (containing biographical sketches of W. D. Washburn Jr. and George H. Mattson); *Facts About Minnesota Lawmakers*, MINNEAPOLIS J., Jan. 8, 1911, at 2 (referring to George H. Mattson).

841. *House Votes to Abolish Hanging*, MINNEAPOLIS J., Mar. 1, 1911, at 10.

842. *Capital Punishment Rapped By the House*, MINNEAPOLIS TRIB., Mar. 1, 1911, at 1.

843. *House Votes to Abolish Hanging*, ST. PAUL PIONEER PRESS, Mar. 1, 1911, at 8. See generally MINN. LEGIS. MANUAL, at 698 (1911) (containing biographical sketch of Knute Knutson).

844. *Capital Punishment Rapped by the House*, MINNEAPOLIS TRIB., Mar. 1, 1911, at 1; *House Votes to Abolish Hanging*, ST. PAUL PIONEER PRESS, Mar. 1, 1911, at 8.

845. MINN. HOUSE J., at 125, 145, 235-36, 471, 514, 1796 (1911) (referring to H.F. 143). Representative Keefe’s bill later died in the Senate Judiciary Committee. MINN. SENATE J., at 474, 476, 1553 (1911) (referring to H.F. 143).

846. *House Votes to Abolish Hanging*, ST. PAUL PIONEER PRESS, Mar. 1, 1911, at 8.

847. *Fear Bill May Set Murderers Free*, MINNEAPOLIS J., Mar. 1, 1911, at 10.

and Michelangelo Rossi, both already under sentence of death—and “interfere with cases now pending.”⁸⁴⁸ Governor Eberhart, who was “greatly opposed to capital punishment,” had refused to fix the execution dates for both O’Malley and Rossi until the outcome of Representative MacKenzie’s bill was decided.⁸⁴⁹ Eberhart was reportedly “greatly pleased” when Representative MacKenzie’s bill passed the House, saying he “hoped some way would be found of making it holeproof.”⁸⁵⁰ *The St. Paul Pioneer Press* reported:

Martin O’Malley is a problem. To settle his case the law books are being searched with the greatest care. Cases which were decided in courts of the Eastern States before the Civil war are being reviewed by Attorney General Simpson in an endeavor to determine just what to do with him. Attorney General Simpson has asked that the bill relating to capital punishment be held until it can be decided just what changes, if any, are needed to see that Martin O’Malley does not go free instead of being hung, and that the law is not made void.⁸⁵¹

Representative MacKenzie’s bill was transmitted to the Senate on March 1, and immediately referred to the Senate Judiciary Committee. The bill “slept” there for a week,⁸⁵² but was then reported back to the full Senate “without recommendation except that the bill be printed and placed on general orders.”⁸⁵³ After resolving itself into the Committee of the Whole, the Senate recommended passage of Representative MacKenzie’s bill on March 30.⁸⁵⁴ A final Senate vote on the bill, however, would not take place until April 18.⁸⁵⁵

In the meantime, on March 25, the Board of Pardons held a special session to consider the applications of Martin O’Malley and Michelangelo Rossi for commutation of their death sentences to life imprisonment. The Board took the cases under advisement, but finally decided that nothing would be done

848. *Id.*; see also *Quirk is Near Parole*, MINNEAPOLIS J., Apr. 20, 1911, at 7 (identifying Rossi as second murderer).

849. *Fear Bill May Set Murderers Free*, MINNEAPOLIS J., Mar. 1, 1911, at 10.

850. *Id.*

851. *O’Malley a Problem*, ST. PAUL PIONEER PRESS, Mar. 7, 1911, at 4.

852. *Death Penalty Abolished*, MINNEAPOLIS J., Apr. 19, 1911, at 15.

853. MINN. SENATE J., at 528 (1911) (referring to H.F. 2).

854. *Id.* at 951.

855. *Id.* at 1366.

unless the Legislature passed Representative MacKenzie's bill to abolish capital punishment.⁸⁵⁶ Shortly thereafter, threats were "freely made" on the streets of Le Sueur to lynch O'Malley, a seventy-six-year-old man who was being held in the local county jail.⁸⁵⁷ The county sheriff, Patrick Keogh, had stationed armed guards around the jail to protect O'Malley, but Governor Eberhart promised Keogh that the militia would be brought in if necessary.⁸⁵⁸ Because of the strong sentiment in Le Sueur County favoring the death penalty for O'Malley, O'Malley was actually later "removed to the Carver county jail for safekeeping."⁸⁵⁹

A provision of the Minnesota Constitution required the Legislature to adjourn at midnight on April 18.⁸⁶⁰ In the closing hours before adjournment on that day, the Senate passed Representative MacKenzie's bill with "no debate" by a vote of thirty-five to nineteen.⁸⁶¹ No debate on the measure occurred on the Senate floor because "[c]areful polls previously made showed that at least thirty-five senators favored it. . . ."⁸⁶² Governor Eberhart signed Representative MacKenzie's bill into law on April 22.⁸⁶³ He proclaimed that the abolition of capital punishment entitled the members of the Legislature "to a large measure of credit."⁸⁶⁴

In the aftermath of the bill's passage, Minnesota newspapers described the reasons behind the success of Minnesota's abolitionist movement. The first reason related to the "barbarity" of capital punishment and the unwillingness of jurors to

856. See generally *Many Prisoners Ask for Pardons*, MINNEAPOLIS J., Jan. 8, 1911, at 6 (listing applicants for clemency); *Plea to Save Two Lives*, ST. PAUL PIONEER PRESS, Mar. 26, 1911, at 1 (reporting Governor's delay of hanging).

857. *Armed Deputies Guard O'Malley*, ST. PAUL PIONEER PRESS, Apr. 4, 1911, at 1; *Pass Measure to Abolish Hanging*, ST. PAUL PIONEER PRESS, Apr. 19, 1911, at 1.

858. *Armed Deputies Guard O'Malley*, ST. PAUL PIONEER PRESS, Apr. 4, 1911, at 1.

859. *Pass Measure to Abolish Hanging*, ST. PAUL PIONEER PRESS, Apr. 19, 1911, at 1.

860. *End of Legislature Sees Surfeit of Bills*, MINNEAPOLIS TRIB., Apr. 18, 1911, at 1.

861. *Death Penalty Abolished*, MINNEAPOLIS J., Apr. 19, 1911, at 15; *O'Malley's Life Saved; Hanging Is Abolishing*, MINNEAPOLIS TRIB., Apr. 19, 1911, at 7; *Pass Measure to Abolish Hanging*, ST. PAUL PIONEER PRESS, Apr. 19, 1911, at 1.

862. *Pass Measure to Abolish Hanging*, ST. PAUL PIONEER PRESS, Apr. 19, 1911, at 1; see also MINN. SENATE J., at 1366 (1911) (reporting Senate activity); *Important Bills Passed on Last Legislative Day*, ST. PAUL PIONEER PRESS, Apr. 19, 1911, at 1 (reporting Senate action on bill for abolition of capital punishment).

863. 1911 Minn. Laws 387.

864. *Faint Praise By Governor*, ST. PAUL DAILY NEWS, Apr. 19, 1911, at 2.

convict guilty persons out of fear that the gallows would be used. Thus, *The St. Paul Pioneer Press* wrote that abolitionists had maintained that hanging was "so repulsive to most people" that many persons "who should be convicted escape punishment."⁸⁶⁵ "Jurors are loath to vote death even when they are not in doubt about the guilt of the accused," the paper stated, concluding that capital punishment had come to be viewed as "a detriment rather than an aid in the suppression of crime."⁸⁶⁶ "It should be much easier to secure convictions under the new law," the paper predicted, noting that "Jurors should be more willing to return verdicts when they know the punishment to be meted out will not be irrevocable."⁸⁶⁷ *The Minneapolis Journal* agreed: "The abolition of capital punishment will have the effect of making conviction easier in many murder cases. Juries hesitate to condemn a man to death, even when the evidence is plain. But imprisonment for life leaves room for the liberation of the condemned man, if new evidence is discovered that clears him."⁸⁶⁸

A second reason for the success of the abolitionist movement was the willingness of the Board of Pardons to curtail the use of its pardoning power. After the Senate voted to abolish hanging, *The St. Paul Pioneer Press* remarked that one objection that had been urged against life imprisonment was "the claim that too many life-term prisoners are pardoned after serving a few years."⁸⁶⁹ Similarly, *The Minneapolis Journal* noted that "the principle objection to life imprisonment" was that "by reason of unwise use of the pardoning power such sentences are rarely carried out. . . ."⁸⁷⁰ The newspaper pointed out that objection had been "removed in Minnesota by the labors of the State Board of Pardons."⁸⁷¹ "This body acts with great caution and wisdom on all applications for pardons," the paper declared.⁸⁷²

Before Governor Eberhart signed the MacKenzie bill, the Board of Pardons commuted the death sentences of Michelange-

865. *Hanging is Abolished*, ST. PAUL PIONEER PRESS, Apr. 20, 1911, at 6.

866. *Id.*

867. *Id.*

868. *Our Progress in Penology*, MINNEAPOLIS J., Apr. 20, 1911, at 12.

869. *Hanging Is Abolished*, ST. PAUL PIONEER PRESS, Apr. 20, 1911, at 6.

870. *Our Progress in Penology*, MINNEAPOLIS J., Apr. 20, 1911, at 12.

871. *Id.*

872. *Id.*

lo Rossi and Martin O'Malley to life imprisonment.⁸⁷³ The Board was worried that, unless this action was taken, the two men might wholly escape punishment on a technicality.⁸⁷⁴ Their commutations were not the result of clemency appeals, but "because of the passage of the act by the Legislature abolishing capital punishment in Minnesota."⁸⁷⁵ Governor Eberhart signed Representative MacKenzie's bill before the appropriate local officials received the two men's notices of commutation.⁸⁷⁶

A front-page cartoon in *The Minneapolis Journal* marked the culmination of the abolitionist's fight. The cartoon, which had two panels, was captioned "Spring Fashions for Minnesota."⁸⁷⁷ The first panel depicted a noose, and contained the inscription "This necktie will not be worn in Minnesota hereafter." The next panel, depicting a striped prison uniform with a patch on it labelled "Life Sentence," stated simply: "While this suit will be worn a little longer."⁸⁷⁸ After many hard-fought legislative battles, the abolitionists had triumphed; no longer would people be put to death in Minnesota. The court ruled:

In fact, in November of 1912, the Minnesota Supreme Court, echoing much of Governor Eberhart's 1911 legislative message, emphasized that "one of the principal aims" of Minnesota's penal system was "reform."

Anciently, when, under the barbarous doctrine of an eye for an eye and a tooth for a tooth, "punishment" was deemed to be, as the word implies, largely compensatory, the natural and logical conception of a sentence for a crime was that the "punishment" should be nicely graduated to the nature and circumstances of the offense. . . . The modern conception of "punishment," however, and the one that, so far as we can ascertain, has always obtained in this state, takes practically no account of compensation. . . . No longer is proportionate

873. *Death Sentences Commuted*, ST. PAUL PIONEER PRESS, Apr. 22, 1911, at 6.

874. *Id.*

875. *Id.*

876. *See id.* (indicating Governor will sign the bill before officials receive the commutation notices); *see also O'Malley Escapes Noose*, ST. PAUL DAILY NEWS, Apr. 19, 1911, at 2 (noting that the state pardon board commuted O'Malley's sentence after the legislature passed the bill abolishing capital punishment but before Governor Eberhart signed the bill); *Quirk Is Near Parole*, MINNEAPOLIS J., Apr. 20, 1911, at 7 (reporting sentences were commuted before the Governor signed the bill).

877. *Spring Fashions for Minnesota*, MINNEAPOLIS J., Apr. 20, 1911, at 1.

878. *Id.*

punishment to be meted out to the criminal, measure for measure; but the unfortunate offender is to be committed to the charge of the officers of the state, as a sort of penitential ward, to be restrained so far as necessary to protect the public from recurrent manifestations of his criminal tendencies, with the incidental warning to others who may be criminally inclined or tempted, but, if possible, to be reformed, cured of his criminality, and finally released, a normal man, and a rehabilitated citizen.⁸⁷⁹

IX. CONCLUSION

Public executions were once common on the Minnesota frontier. Yet, over time and in some locales quicker than others, Minnesota's civic leaders came to abhor such spectacles. These leaders came to the realization that execution-day crowds were not coming to hangings to honor the sanctity of life. They were coming out of "morbid curiosity," or worse yet, for entertainment. Community leaders found it particularly troubling that alcohol consumption sometimes occurred at hangings, and that women, who the nineteenth-century newspapermen labelled "the tender sex," were exposed to hangings. Some public officials even feared the possibility of rioting because of the unruly execution-day crowds. Because community leaders came to view public executions as uncivilized, these leaders put tremendous pressure on county sheriffs to privatize executions.

Prior to 1889, many executions in Minnesota were, in fact, conducted by county sheriffs in a semi-private fashion. These law enforcement officials generally constructed the gallows within the county jail or the confines of board enclosures, some up to eighteen feet high. They usually invited sheriffs, friends, ministers and newspaper reporters to attend these private affairs, but almost always excluded the general public from attending executions. Women and children were rarely able to witness the gallows in operation. The general public was forced to rely on newspaper accounts of executions to get information about them.⁸⁸⁰

The public's ability to get information about executions suffered further erosion in 1889 when Rep. John Day Smith successfully spearheaded a legislative effort to ensure that no

879. *State ex rel. Kelly v. Wolfer*, 119 Minn. 368, 375-76, 138 N.W. 315, 319 (1912).
880. See *supra* text accompanying notes 25-197 and 274-327.

public executions would ever occur in Minnesota again. This effort resulted in the passage of the “midnight assassination law,” which took effect on April 24, 1889. That law required private, nighttime executions and placed severe limitations on the number of people who could attend them. The law specifically prohibited newspaper reporters from attending executions, and made it a crime for newspapers to publish any execution details. Newspapers could only publish the bare fact that the execution took place.⁸⁸¹

Many newspapers ignored the provisions of the “midnight assassination law,” but others altered their news coverage of executions to comply with the provisions. For example, after the 1889 execution of Thomas Brown—the second person hanged under the auspices of the John Day Smith law—*The Moorhead Daily News* refrained from publishing the details of the hanging, even though it was cognizant of many of those details. Other newspapers made accounts of executions less sensational, even if this meant inaccurate news reporting. Thus, when William Williams was hanged in 1906, *The St. Paul Pioneer Press* did not report that the sheriff bungled the hanging. The paper merely reported that it took Williams fourteen and a half minutes to die, without explaining why it took so long for his death to occur. Regardless of editorial decisions, however, the Smith law hindered the ability of all newspapers to report about hangings. County sheriffs sometimes enforced the provision of John Day Smith’s “midnight assassination law” that prohibited newspaper reporters from attending executions, making news coverage extremely difficult.

Ironically, the newspapers that exposed the gruesome details of Williams’ execution, in direct violation of the “midnight assassination law,” made it Minnesota’s last hanging. Only after these newspapers printed a full account of Williams’ death did Gov. John A. Johnson announce that he would recommend the abolition of capital punishment in Minnesota. The details of Williams’ death reportedly “grated on the governor’s nerves,” and while capital punishment was not abolished until 1911, the press exposure of Williams’ botched hanging certainly gave momentum to the abolitionist movement.⁸⁸² Indeed, Minneso-

881. See *supra* text accompanying notes 357-80.

882. See *supra* text accompanying notes 384-864.

ta governors commuted all death sentences after Williams' death.⁸⁸³ If newspapers had not violated John Day Smith's "midnight assassination law" and printed the details of Williams' execution, Minnesota might have retained capital punishment, or the Minnesota Legislature might not have abolished the death penalty as quickly.

The history of Minnesota's "midnight assassination law" thus holds two important lessons. First, press coverage of executions does affect public opinion. By reporting about William Williams' execution, the newspapers' exposure of the details of that botched hanging eventually led to the abolition of capital punishment in Minnesota. In other instances, exposure of execution details led to calls for moving executions to the Stillwater state prison or for substituting electrocution as the method of death. This was widely believed to be a more humane form of punishment in the late nineteenth century.

Second, and perhaps more importantly, restrictions on press access to executions, as shown by the history of Minnesota's "midnight assassination law," are rooted in paternalism and secrecy. This historical fact—that laws requiring private, night-time executions were intended to shield ordinary citizens from the workings of government—is particularly troublesome, because openness-in-government is the hallmark of America's democracy. After all, if ordinary citizens are unfit to monitor executions because politicians believe executions are too gruesome or would have a detrimental effect on the public at-large, why is it that politicians authorize capital punishment in the first place?

X. POSTSCRIPT: THE DARK LEGACY OF MINNESOTA'S "MIDNIGHT ASSASSINATION LAW"

The two court decisions that addressed the constitutionality of John Day Smith's "midnight assassination law" dramatically affected how executions are now conducted in America. In *Holden v. Minnesota*,⁸⁸⁴ decided in 1890, the U.S. Supreme Court held that the John Day Smith law was a statute "which the legislature, in its wisdom, and for the public good, could legally prescribe. . . ."⁸⁸⁵ In particular, the Supreme Court sanctioned

883. TREENERY, *supra* note 19, at 167.

884. 137 U.S. 483 (1890).

885. *Id.* at 491.

the use of private, nighttime executions. The Court stated that whether someone is "executed before or after sunrise, or within or without the walls of the jail, . . . are regulations that do not affect his substantial rights."⁸⁸⁶ The Court also stated that, "The same observation may be made touching the restriction . . . as to the number and character of those who may witness the execution, and the exclusion altogether of reporters or representatives of newspapers."⁸⁸⁷ These two sentences, off-handedly written in an opinion about the legality of *ex post facto* laws, put the High Court's imprimatur on statutes requiring private, nighttime executions. The Minnesota Supreme Court's ruling against *The Pioneer Press* in 1907⁸⁸⁸ also signalled to the nation's lawmakers that laws requiring private, nighttime executions were constitutionally permissible. Undoubtedly, these two court cases led to the proliferation of such laws.⁸⁸⁹

886. *Id.*

887. *Id.*

888. *State v. Pioneer Press Co.*, 100 Minn. 173, 110 N.W. 867 (1907).

889. In 1908, the State of Virginia enacted a law similar to Minnesota's John Day Smith law. The Virginia law required executions to take place at the state penitentiary. 1908 Va. Acts, ch. 398, § 1. It further provided: "No newspaper or person shall print or publish the details of the execution of criminals under this act. Only the fact that the criminal was executed shall be printed or published." *Id.* § 10. In 1909, the State of Washington also passed a law, which was not repealed until 1982, which made the publication of execution details a crime. 1909 Wash. Laws, ch. 249, § 209, *repealed by* 1982 Wash. Laws, ch. 184, § 11. After the U.S. Supreme Court's ruling in *Holden*, in 1890, many states enacted laws requiring private, nighttime executions. In 1893, Connecticut passed a law requiring executions to "be inflicted within the walls" of the state prison "before the hour of sunrise." 1893 Conn. Pub. Acts, ch. 137, § 3. The law made provision for the attendance of newspaper reporters, but it permitted only "adult males" to attend executions. *Id.* § 3. In 1898, Massachusetts enacted a law requiring executions to take place "within an enclosure or building" at "an hour between midnight and sunrise." 1898 Mass. Acts, ch. 326, §§ 3, 4. North Dakota passed a law requiring executions "before the hour of sunrise" in 1903, and Wyoming joined the ranks of states requiring executions "before the hour of sunrise" in 1905. 1903 N.D. Laws, ch. 99, § 2; 1905 Wyo. Sess. Laws, ch. 11, § 1. Texas and Alabama followed suit in 1923. 1923 Ala. Acts 587, § 7; 1923 Tex. Gen. Laws, ch. 51, § 1. Alabama's law gave the prison warden the discretion to admit reporters to executions. 1923 Ala. Acts 587, § 7. South Dakota passed its law requiring executions between 12:01 A.M. and 6:00 A.M. in 1939, and Kentucky's law requiring executions "before sunrise" passed in 1944. 1939 S.D. Laws, ch. 135, § 2; 1944 Ky. Acts, ch. 145, § 1. Louisiana and Delaware enacted their laws requiring executions between midnight and 3:00 A.M. in 1952 and 1994, respectively. DEL. CODE ANN. tit. 11, § 4209(f) (Supp. 1994); 1952 La. Acts, ch. 160, § 1. Notably, some states, like Texas, used to require executions to take place during daylight hours. TEX. PENAL CODE art. 826 (1885) ("The warrant for the execution of the sentence of death may be carried into effect at any time after eleven o'clock, and before sunset, on the day stated in such warrant.").

Yet are laws that forbid the general public from watching executions really constitutional? American lawyers and law students have hotly debated this question,⁸⁹⁰ and the United States Supreme Court has never fully considered the issue of whether the Constitution permits bans on television cameras in execution chambers. Regardless of one's position on whether executions should be televised, the passage and enforcement of laws requiring private, nighttime executions have quite undeniably altered America's death penalty debate. Because death row inmates are executed behind prison walls and cameras are forbidden in execution chambers, Americans have been unable to watch executions since 1936, when the last public execution took place in the United States in Owensboro, Kentucky.⁸⁹¹ Consequently, citizens are no longer able to assess for themselves the morality of capital punishment. They must rely on second-

890. See Jeff Angeja, Note, *Televising California's Death Penalty: Is There a Constitutional Right to Broadcast Executions?*, 43 HASTINGS L.J. 1489, 1491 (1992) (arguing that the television media has a right of access to the execution chamber based upon the First Amendment); Dane A. Drobny, Note, *Death TV: Media Access to Executions Under the First Amendment*, 70 WASH. U. L.Q. 1179, 1181 (1992) (arguing that the press does not have a First Amendment right to attend or televise an execution); Patrick D. Filbin, Note, "Pictures at an Execution," 9 COOLEY L. REV. 137, 137-38 (1992) (examining arguments behind televising executions and asserting that there is not a constitutional right of media access to executions); Roderick C. Patrick, Note, *Hiding Death*, 18 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 117, 119 (1992) (stating that the government's prohibition of public executions is violative of the impermissible ends doctrine of *Shapiro v. Thompson*, 394 U.S. 618 (1969) and the "rational relation" test of *Turner v. Safley*, 482 U.S. 78 (1987)); Jef I. Richards & R. Bruce Easter, *Televising Executions: The High-Tech Alternative to Public Hangings*, 40 UCLA L. REV. 381, 419 (1992) (arguing in favor of televising executions on a First Amendment basis); William Bennett Turner & Beth S. Brinkman, *Televising Executions: The First Amendment Issues*, 32 SANTA CLARA L. REV. 1135, 1138 (1992) (arguing that the prohibition on cameras in execution chambers in California is unconstitutional); Jerome T. Tao, Note, *First Amendment Analysis of State Regulations Prohibiting the Filming of Prisoner Executions*, 60 GEO. WASH. L. REV. 1042, 1045 (1992) (arguing that prohibitions against the filming of executions are unconstitutional content-based restrictions on First Amendment freedoms); Comment, *Broadcasters' News-Gathering Rights Under the First Amendment: Garrett v. Estelle*, 63 IOWA L. REV. 724, 729 (1978) (criticizing the Fifth Circuit's 1977 decision in *Garrett*, upholding Texas' ban on cameras in the execution chamber). See generally 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) (arguing that private execution laws are unconstitutional); Katherine A. Mobley, Note, 11 CREIGHTON L. REV. 1031, 1052 (1978) (arguing that "graphic information about executions must be made available to the public"); David Sternbach, *Hanging Pictures: Photographic Theory and the Framing of Images of Execution*, 70 N.Y.U. L. REV. 1100 (1995) (discussing theories of photographic representation in the context of execution proceedings).

891. Bessler, *supra* note 890, at 365 n.49, 370 n.69.

hand accounts of executions from newspapers and magazines to form an opinion about the propriety of capital punishment. Indeed, even this kind of news coverage is limited because private execution laws generally restrict the number of media representatives who can attend executions. For example, South Carolina only admits “a group of not more than five representatives of the South Carolina media,”⁸⁹² and South Dakota requires that only one media representative be present at executions.⁸⁹³

The fact that the vast majority of executions take place in the middle of the night, when most Americans are sound asleep, further compounds the lack of information about executions. As the Appendix to this Article shows, over eighty-two percent of the executions that occurred in the United States from 1977 to 1995 took place between the hours of 11:00 P.M. and 7:30 A.M. Of the 313 executions carried out during those years, over fifty percent of them occurred between midnight and 1:00 A.M.⁸⁹⁴ Given that executions frequently take place in the dead of night and usually occur in remote physical locations like Huntsville, Texas or Potosi, Missouri, executions get very little news coverage and execution-day demonstrations at prisons become difficult to organize.

Laws requiring private, nighttime executions are flagrantly anti-democratic. By prohibiting Americans from witnessing the ultimate act of the state, citizens are unable to monitor what their own government is doing. Moreover, in sanitizing the news, these paternalistic laws—which the Minnesota Supreme Court specifically interpreted as having the purpose of protecting “the masses” and reducing execution “publicity”—have literally blinded Americans to the reality of what happens behind prison walls. Instead of executing people openly in public squares at high noon, as Americans did a century ago, people are now executed in prisons under cover of darkness. These covert executions more closely resemble England’s fifteenth-century Star Chamber justice than America’s democratic tradition with its Sunshine Laws and free and open debate.⁸⁹⁵

892. S.C. CODE ANN. § 24-3-550 (Law. Co-op. Supp. 1995).

893. S.D. CODIFIED LAWS ANN. § 23A-27A-34 (1988).

894. See *infra* Appendix.

895. The Star Chamber was “a court existing in England from the 15th Century until 1641 characterized by secrecy and often being irresponsibly arbitrary and

The saga of Minnesota's "midnight assassination law" and the state's anti-death penalty movement poses troubling questions for all Americans. In an open, democratic society, what do laws requiring private, nighttime executions say about the strength of America's democracy? Should American public policy be carried out behind prison walls under cover of darkness? Or should Americans and American courts insist that politicians, who are increasingly taking more strident pro-death penalty positions,⁸⁹⁶ pass laws requiring televised executions? Would televising executions not allow citizens to decide for themselves whether capital punishment is morally justifiable? After all, if Americans really want capital punishment, as some polls suggest,⁸⁹⁷ why should Americans fear watching executions?

In Minnesota, life imprisonment without the possibility of parole is now the maximum penalty for first-degree murder.⁸⁹⁸

oppressive." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1150 (9th ed. 1990). The United States Supreme Court has recognized the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). As the High Court stated: "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments [and] if there be any danger that the people cannot evaluate the information and arguments . . . it is a danger contemplated by the Framers of the First Amendment." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 (1978) (footnotes omitted).

896. After the Oklahoma City bombing, President Clinton called for the death penalty and the U.S. Senate voted unanimously, 97-0, that a jury should have the right to impose that penalty. *Senators Vote to Condemn Bombing, Cheer White House*, MINNEAPOLIS STAR TRIB., Apr. 26, 1995, at 7A. Even long-time opponents of capital punishment are abandoning opposition to it. For instance, former California Assembly Speaker Willie Brown—now the mayor of San Francisco—renounced his opposition to the death penalty just hours after California executed David Mason in 1993. *Willie Brown Now Supports Death Penalty*, S.F. EXAMINER, Aug. 25, 1993, at A4.

897. A 1991 CNN/Gallup poll showed public support for capital punishment at 76%. SISTER HELEN PREJEAN, *DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES* 116 (1994). Such poll results are, in fact, highly misleading. In answer to the simple question "Do you favor or oppose the death penalty?" over 70% of Americans admittedly express approval of capital punishment. However, polls also indicate that pro-death penalty sentiment drops to as low as 41% when life imprisonment without the possibility of parole is offered as an alternative. DEATH PENALTY INFORMATION CENTER, *SENTENCING FOR LIFE: AMERICANS EMBRACE ALTERNATIVES TO THE DEATH PENALTY* 4 (1993) (citing a poll conducted by the polling firms of Greenberg/Lake and the Tarrance Group); PREJEAN, *supra* at 116. These latter polls suggest that what the public really wants is protection from criminals, not the killing of criminals.

898. MINN. STAT. §§ 609.185 (Supp. 1995), 609.184, subd. 2 (1994); MINN. STAT. ANN. § 244.05, subd. 4 (West Supp. 1996).

However, since 1911, bills have been repeatedly introduced in the Minnesota Legislature to reinstate capital punishment.⁸⁹⁹ For example, in 1995, Rep. Hilda Bettermann offered an amendment to a judiciary finance bill seeking to statutorily authorize capital punishment.⁹⁰⁰ Her proposed amendment required executions to take place at a maximum security prison “enclosed from public view,” and permitted only twelve citizens and six media representatives to attend them.⁹⁰¹ When it was debated on the House floor, Rep. Dee Long offered what she termed a “friendly amendment” to Representative Bettermann’s amendment, proposing that executions be televised and occur in “prime time” between 7:00 P.M. and 9:00 P.M.⁹⁰² Representative Long believed that the legislators who supported capital punishment—Long pointed out that she did not—“ought to be willing to let the public,” which some legislators maintained were crying for executions, “observe those executions and see what the result of their desires in this matter are.”⁹⁰³

Representative Bettermann refused to accept Representative Long’s amendment as “friendly.” Bettermann stated that she wanted to “take violence off television” because she feared that executions “would be portrayed as violence.”⁹⁰⁴ Another death penalty proponent, Rep. Ron Abrams, added that executions ought to be conducted “in private.”⁹⁰⁵ Surprised by Representative Bettermann’s refusal to accept her “friendly amendment,” Representative Long voluntarily withdrew it. Although the Legislature soundly defeated Representative Bettermann’s proposed amendment on May 2, 1995, by a vote of thirty-seven

899. Pro-death penalty bills were introduced in the Minnesota Legislature in 1913, 1915, 1919, 1921, 1923, 1927, 1931, 1933, 1937, 1974, 1975, 1988, 1989, 1992, and 1995. These legislative proposals have all failed to become law. *Since 1911 . . . Bills to Restore Death Penalty Often Short-Lived*, SESSION WEEKLY (Minnesota Legislature), Feb. 28, 1992, at 1, 13 (summarizing failed legislative attempts to reinstate capital punishment); see also S.F. 104, 79th Leg., 1st Sess., Minn. (1995); S.F. 622, 79th Leg., 1st Sess., Minn. (1995); Patrick D. McGowan, *The Death Penalty*, 14 HAMLINE J. PUB. L. & POL’Y 144, 145 (1993) (discussing legislative efforts in 1989 and 1992 to reinstate capital punishment).

900. H.F. 1700, 79th Leg., 1st Sess., Minn. (1995); see *Crime*, SESSION WEEKLY (Minnesota Legislature), May 5, 1995, at 5.

901. MINN. HOUSE J., at 3542 (1995).

902. Tape of Legislative Proceedings, Minnesota House of Representatives (May 2, 1995) (tape on file at Minnesota Legislature).

903. *Id.*

904. *Id.*

905. *Id.*

to ninety-six,⁹⁰⁶ her proposal was not taken lightly by death penalty foes since Minnesota Governor Arne Carlson publicly stated a few months earlier that he was "willing to rethink" his long-time opposition to capital punishment.⁹⁰⁷

Today, state-sanctioned killing throughout the United States remains shrouded in secrecy. State laws permit only a few citizens, hand-picked by governmental officials, to witness executions. Television cameras are universally prohibited in execution chambers.⁹⁰⁸ Some state laws even prohibit persons invited to attend executions from disclosing that fact. For example, South Dakota, Massachusetts, Colorado and Maryland all have laws requiring executions to take place at any time within a one-week period, leaving correctional officials to set the exact date and time of the execution. In South Dakota, the time fixed by the warden is to be "kept secret" and in "no manner divulged," except to persons invited to attend the execution.⁹⁰⁹ No previous announcement of the date or time of the execution can be made, and it is a crime for those invited to disclose their invitation or the time of the execution. Likewise, in Massachusetts, the law does not allow any "previous announcement" of the execution time, except to official witnesses.⁹¹⁰ In Colorado, the timing decision by the head of the department of corrections must "not be made public by him."⁹¹¹

Maryland recently used a similar law in implementing that state's first execution in nearly thirty-three years. That law provides that:

906. Jim Ragsdale, *Death Penalty Amendment Voted Down in House*, ST. PAUL PIONEER PRESS, May 3, 1995, at 1B & 6B; see also MINN. HOUSE J., at 3542-52 (1995); Patricia Lopez Baden, *House OKs Crime Bill Without Death Penalty*, MINNEAPOLIS STAR TRIB., May 3, 1995, at 2B; Tape of Legislative Proceedings, Minnesota House of Representatives (May 2, 1995) (tape on file at Minnesota Legislature). See generally MINN. LEGIS. MANUAL, at 109, 74, 124 (containing biographical sketches of Ron Abrams, Hilda Bettermann, and Dee Long, respectively).

907. Betty Wilson, *Is There an Electric Chair in Minnesota's Future?*, MINN. J.L. & POL., Feb. 1995, at 8.

908. Bessler, *supra* note 890, at 368-72. An Arkansas law which is still on the books, and which bears a striking resemblance to Minnesota's "midnight assassination law," forbids any person or newspaper from publishing any execution details. Only the fact that the criminal was executed can be lawfully printed. ARK. CODE ANN. § 16-90-504 (Michie 1987). This Arkansas law was enacted in 1913. 1913 Ark. Acts, ch. 55, § 10 (1913).

909. S.D. CODIFIED LAWS ANN. §§ 23A-27A-15, 23A-27A-17, 23A-27A-37 (1988).

910. MASS. ANN. LAWS, ch. 279, § 59 (1995).

911. COLO. REV. STAT. § 16-11-404 (1990).

The time of the execution within such week shall be left to the discretion of the warden of the Maryland Penitentiary. No previous announcement of the day or hour of the execution shall be made except to the persons who shall be invited or permitted to be present at the execution. . . .⁹¹²

Death row inmate, John Thanos, received just one-hour's warning before being executed by lethal injection at 1:10 A.M., thereby depriving him of a special last meal.⁹¹³ The execution team, led by Frank Mazzone, tried extremely hard to keep the timing of the execution secret. The execution team required the six invited journalists to sign statements that they would not notify their news organizations when the team summoned them to the prison just three hours before the execution.⁹¹⁴

Although private execution laws prohibit the public from watching executions, politicians are not keeping their increasing level of support for capital punishment in the closet. On the contrary, politicians in recent years have actually begun to brag about how many executions they have overseen. For example, when Florida Governor Bob Martinez ran for reelection in 1990, he aired a television commercial in which he proclaimed: "I now have signed some ninety death warrants in the State of Florida."⁹¹⁵ The advertisement ended by freezing on a picture of the convicted serial killer Ted Bundy smiling slightly.⁹¹⁶ In another 1990 race, former Texas Governor Mark White ran a television commercial in his bid for the Democratic gubernatori-

912. MD. CODE ANN., art. 27, § 75(e) (1957).

913. Dennis Cauchon, *Killer of Three Teens Executed in Maryland*, USA TODAY, May 17, 1994, at 3A; Tom Stuckey, *Maryland Couldn't Keep Secret, Media Flocked to Execution*, NEW ORLEANS TIMES PICAYUNE, May 18, 1994, at A7; Paul Valentine, *Execution of Thanos Went "Like Clockwork"*, WASH. POST, May 18, 1994, at D1; see *infra* Appendix (listing time of John Thanos' execution).

914. Like Minnesota's "midnight assassination law," the Maryland law prohibiting public executions was enacted to squelch publicity surrounding executions. In particular, the Maryland law states:

The intention of this entire Act being to centralize the hanging of convicted felons wherein sentence of death is imposed, at the Maryland Penitentiary and to remove the same from the county or city jail as the law now provides, and to relieve the counties of this State from the curious mobs that frequent hangings taking place in the counties of this State, and who attempt to make public affairs of the same.

1922 Md. Laws, ch. 465, § 10.

915. Kenneth Bresler, *Seeking Justice, Seeking Election, and Seeking the Death Penalty: The Ethics of Prosecutorial Candidates' Campaigning on Capital Convictions*, 7 GEO. J. LEGAL ETHICS 941, 944 n.14 (1994).

916. *Id.*

al nomination.⁹¹⁷ The ad declared: "These hardened criminals will never again murder, rape or deal drugs. As governor, I made sure they received the ultimate punishment—death."⁹¹⁸ His opponent, Jim Mattox, also emphasized his pro-death penalty credentials as the Attorney General of Texas. "Mark White carried out the death penalty one time," his television commercial stated, "I carried it out 32 times."⁹¹⁹ That same year, California Attorney General John Van de Kamp aired a similar advertisement in his quest for that state's Democratic gubernatorial nomination.⁹²⁰ "As District Attorney and Attorney General," the ad boasted, "he's put or kept 277 murderers on death row."⁹²¹

While politicians publicly tout their support for capital punishment, the private nature of executions makes politicians largely unaccountable for their pro-death penalty stances. Legislators are free to use get-tough-on-crime rhetoric when passing death penalty laws, knowing full well that the public will never see the resulting executions. Elected prosecutors, like Johnny Holmes Jr. of Houston and Lynne Abraham of Philadelphia, can also seek death sentences with impunity, knowing that their constituents will never actually see condemned inmates in the throes of death.⁹²² The condemned inmates will be executed behind prison walls in the dead of night, beyond the reach of television cameras which might engender sympathy for them.⁹²³

In fact, no one in the entire criminal justice system is now fully accountable for death sentences. Legislators, who pass death penalty statutes, merely authorize capital punishment; it is prosecutors who seek death sentences, and judges and juries who impose them. Conversely, prosecutors, judges and juries merely

917. *All Things Considered: Capital Punishment Series* (transcript at 26) (National Public Radio broadcast, Sept. 26, 1994).

918. Dan Balz, *Politicians Tout Death Penalty: Candidates Hoping to Establish Credentials as Crime Fighters*, S.F. CHRON., Mar. 5, 1990, at A7.

919. *All Things Considered: Capital Punishment Series* (transcript at 26) (National Public Radio broadcast, Sept. 26, 1994).

920. John Balzar, *Van de Kamp TV Ads Focus on Death Row, Will Air Today*, L.A. TIMES, Mar. 25, 1990, at A3.

921. *All Things Considered: Capital Punishment Series* (transcript at 26) (National Public Radio broadcast, Sept. 26, 1994); Bresler, *supra* note 915, at 944 nn.16-19 (citing Michael Oreskes, *The Political Stampede on Execution*, N.Y. TIMES, Apr. 4, 1990, at A16).

922. Tina Rosenberg, *The Deadliest D.A.*, N.Y. TIMES MAG., July 16, 1995, at 21.

923. *Id.*

enforce death penalty statutes as enacted by legislators.⁹²⁴ In addition, trial court judges and jurors are aware that any death sentence imposed will be reviewed by several appellate courts, further diffusing personal responsibility for the decision.⁹²⁵ Even governors, who possess the clemency power, can sidestep responsibility for executions by taking the position that they are simply deferring to judicial determinations.⁹²⁶ Executioners themselves are oftentimes absolved from personal responsibility for executions. For example, a blank cartridge is put in one of the firing squad guns,⁹²⁷ or only one of two buttons—pushed by different individuals—activates the lethal injection machine.⁹²⁸ Indeed, executioners usually remain anonymous, wearing black hoods or getting paid in cash for their services to keep their identities secret.⁹²⁹

924. The Capital Jury Project found that over 30% of jurors in capital cases described “the law” as “the most responsible for the defendant’s punishment.” In contrast, only 6.4% of individual jurors believed that they were the most responsible agent for the punishment, and only 8.8% believed that the jury as a body was the most responsible agent. The Capital Jury Project is an ongoing fourteen-state multidisciplinary study of how jurors make life and death sentencing decisions in capital cases. William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1094-95 (1995).

925. The Capital Jury Project found that “three-fourths” of jurors “saw themselves as sharing responsibility with the judicial authorities, because their decision may be overturned, because it will be reviewed, or because it is only the first step in a process that will determine the defendant’s punishment.” *Id.* at 1097.

926. The rate of executive clemency has, in fact, fallen dramatically in the past two decades. Hugo Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255, 263 (1990) (citing statistics showing the decline); see also Bruce Ledewitz & Scott Staples, *The Role of Executive Clemency in Modern Death Penalty Cases*, 27 U. RICH. L. REV. 227 (1993) (discussing the factors that influence clemency decisions).

927. This happened at Gary Gilmore’s execution in Utah in 1977, where an anonymous five-member firing squad—concealed behind a gray sailcloth partition—fired four .30 caliber bullets into Gilmore’s heart. One rifle was loaded with a blank. Jon Nordheimer, *Gilmore Is Executed After Stay Is Upset; “Let’s Do It!” He Said*, N.Y. TIMES, Jan. 18, 1977, at 1.

928. See STEPHEN TROMBLEY, *THE EXECUTION PROTOCOL* 106, 216 (1992).

929. For instance, a black-hooded executioner threw the switch that electrocuted John Spenkelink in Florida in 1979. Reuters Ltd., May 26, 1979, available in LEXIS, News Library, REUNA File; Thomas Slaughter, *Domestic News*, Associated Press, May 26, 1979, available in LEXIS, News Library, AP File. The identity of executioners is protected by statute in states like Florida, Illinois, Montana, New Jersey and New York. FLA. STAT. ANN. § 945.10(1) (West 1995) (“The identity of the executioner” is “confidential”); ILL. ANN. STAT., ch. 725, para. 5/119-5(e) (Smith-Hurd Supp. 1992); MONT. CODE ANN. § 46-19-103 (1993) (“The identity of the executioner must remain anonymous.”); N.J. STAT. ANN. § 2C:49-7(a) (West Supp. 1995) (“The names of the execution technicians shall not be disclosed.”). For example, Illinois’ statute provides:

The lack of publicity surrounding executions, along with the unaccountability of politicians for them, has caused many Americans to start questioning whether executions should be televised. Frustrated by their inability to fully report about executions, some media representatives have even sued for the right to film executions. For example, in 1990, San Francisco's public television station, KQED, sued San Quentin Warden Daniel Vasquez seeking the right to film Robert Alton Harris' execution. This was California's first execution in twenty-five years.⁹³⁰ Likewise, Phil Donahue brought a lawsuit in North Carolina against the warden of Raleigh's Central Prison in 1994 after the warden denied Donahue's request to film the execution of David Lawson.⁹³¹

However, all of the media's attempts to capture executions on film have been unsuccessful. KQED's lawsuit against Warden Vasquez was dismissed by U.S. District Court Judge Robert Schnacke, and the station never appealed the ruling because of negative publicity generated by the lawsuit.⁹³² "Prison officials are the experts," Judge Schnacke ruled, finding that the "[p]rohibition of cameras . . . is a reasonable and valid regulation."⁹³³ Likewise, in response to Donahue's lawsuit, the North Carolina Supreme Court found that no constitutional right exists to film executions. Donahue applied to the federal courts for relief, but the U.S. Court of Appeals for the Fourth Circuit refused to even address the merits of his appeal. The Fourth

The identity of executioners and other persons who participate or perform ancillary functions in an execution and information contained in records that would identify those persons shall remain confidential, shall not be subject to disclosure, and shall not be admissible as evidence or be discoverable in any action of any kind in any court or before any tribunal, board, agency, or person. In order to protect the confidentiality of persons participating in an execution, the Director of Corrections may direct that the Department make payments in cash for such services.

ILL. ANN. STAT., ch. 725, para. 5/119-5(e) (Smith-Hurd Supp. 1992).

930. Steve Keeva, *Watching a Killer Die: A California TV Station Sues to Televisify Execution*, ABA J., Oct. 1990, at 24, 24-25.

931. *Lawson v. Dixon*, 446 S.E.2d 799 (N.C. 1994); *Lawson v. Dixon*, 22 MEDIA L. REP. 1839 (4th Cir. June 13, 1994).

932. KQED's decision was fueled by lost donations and membership cancellations that followed KQED's filing of the lawsuit. As of March 1991, roughly 200 of KQED's 250,000 members had canceled their memberships because of the lawsuit. WENDY LESSER, PICTURES AT AN EXECUTION 94 (1993); Amy Singer, *Station Seeks To Televisify Executions*, AM. LAWYER, Mar. 1991, at 23; *TV Bill Killed*, NAT'L L.J., Sept. 16, 1991, at 6.

933. *KQED, Inc. v. Vasquez*, 18 MEDIA L. REP. 2323, 2327 (N.D. Cal. 1991).

Circuit ruled that the North Carolina Supreme Court's ruling precluded Donahue's federal lawsuit.⁹³⁴

Although Donahue filed a certiorari petition with the U.S. Supreme Court, the Court refused to review the Fourth Circuit's decision,⁹³⁵ leaving the legality of laws and regulations banning televised executions judicially unresolved. As a result, the debate about whether or not to put executions on television continues, sparking fierce debates in academic circles and state legislatures. For example, a bill introduced in the California Assembly in 1991 to require televised executions prompted "spirited debate," although it failed by a vote of twenty-eight to forty.⁹³⁶ The controversy has even divided organizations such as the American Bar Association, the American Civil Liberties Union, and the National Coalition to Abolish the Death Penalty.⁹³⁷

Those favoring televised executions usually fall into three categories. The first group, which counts prosecutors among them, seeks to harness their potential deterrent value.⁹³⁸ For example, the mayor of Columbus, Dana Rinehart, has proposed putting executions on television as "one way to stop the spiraling murder rate in Columbus."⁹³⁹ "I think you'd have an overnight reduction in homicides if we had capital punishment. Let the first person who is in the electric chair be on television. Let people watch that," Rinehart said.⁹⁴⁰ This view is bolstered by the belief of sociologist Steven Stack, who has studied the effects

934. *Lawson v. Dixon*, 446 S.E.2d 799 (N.C. 1994); *Lawson v. Dixon*, 22 MEDIA L. REP. 1839 (4th Cir. June 13, 1994).

935. *Justices Deny Donahue Appeal to Videotape Execution*, Reuters, Ltd., June 14, 1994, available in LEXIS, News Library, REUNA File.

936. Jerry Gillam, *Bill to Permit TV Coverage of Executions Fails in Assembly*, L.A. TIMES, May 30, 1991, at A27; Greg Lucas, *State Assembly Defeats Bill to Allow Televising of Executions*, S.F. CHRON., May 30, 1991, at A23; Greg Lucas, *Televised Executions Bill Dies: Assembly Votes It Down for a Second Time*, S.F. CHRON., Sept. 4, 1991, at A14.

937. Filbin, *supra* note 890, at 137 (describing disputes within the American Civil Liberties Union and the National Coalition to Abolish the Death Penalty); Richards & Easter, *supra* note 890, at 420 n.169 (describing dispute within the Young Lawyers Division of the ABA).

938. Michael Schwarz, *TV in the Death Chamber: A News Story Like Any Other*, N.Y. TIMES, May 17, 1991, at 30. "[M]any prominent death penalty supporters—including law enforcement officers like Joseph Russoniello, former United States Attorney for California's Northern District—have publicly said that putting executions on television will enhance their deterrent effect." *Id.*

939. *Mayor Suggests Televised Executions to Cut Down on Murders*, U.P.I., Apr. 26, 1991, available in LEXIS, News Library, UPI File.

940. *Id.*

of well-publicized executions: "Media publicity regarding executions is a necessary condition for deterrence because if the public is unaware of executions, they can have very little impact on homicide."⁹⁴¹

A second group favoring televised executions believes that "the spectacle will so disgust the public that it will turn against capital punishment."⁹⁴² Anti-death penalty advocates, like Sister Helen Prejean, who seek to educate the public about capital punishment, fall into this category. They hope that the power of television will reinvigorate the abolitionist movement. In her book, *Dead Man Walking*, Sister Prejean writes:

I have no doubt that we will one day abolish the death penalty in America. It will come sooner if people like me who know the truth about executions do our work well and educate the public. . . . I am convinced that if executions were made public, the torture and violence would be unmasked, and we would be shamed into abolishing executions.⁹⁴³

The third group favoring televised executions opposes government censorship. They want broadcasters, rather than wardens or state legislators, to decide whether executions are put on television. For example, after David Lawson's gas chamber death, talk show host Phil Donahue said that he would have broadcasted the execution despite its gruesome and lengthy nature. "From what I hear and read, it was awful," Donahue said, alluding to the thirteen minutes it took Lawson to die.⁹⁴⁴ "But so was the killing of John F. Kennedy and executions in Sarajevo and I'm going to continue to make a First Amendment effort not to sanitize the reality, make it convenient for viewers."⁹⁴⁵ On CNN's *Crossfire* program, Donahue argued that television broadcasts would spark a "robust, informed, good old American free speech debate" about capital punishment.⁹⁴⁶ "I believe that if you give people light they will find their own way,"

941. Steven Stack, *Publicized Executions and Homicide, 1950-1980*, 52 AM. SOC. REV. 532, 532 (Aug. 1987).

942. *Let TV Cameras Show Executions*, USA TODAY, July 18, 1990, at 6A.

943. PREJEAN, *supra* note 897, at 197.

944. John Carmody, *The TV Column*, WASH. POST, June 16, 1994, at C6.

945. *Id.*

946. *Crossfire* (CNN television broadcast, June 1, 1994) (transcript available in LEXIS, News Library, CNN File).

he explained.⁹⁴⁷ "That's the Scripps Howard motto and I subscribe to it."⁹⁴⁸

Persons opposed to putting executions on television articulate a number of reasons for their position. Some commentators, like George Will, believe televised executions will only "further coarsen American life."⁹⁴⁹ Thomas Sowell echoes this sentiment. He writes: "The public has no more desire to see executions than to see abdominal surgery. Nor is there any reason why they should be presented with either on the six o'clock news, as they sit down to dinner."⁹⁵⁰ Columnist Anthony Lewis further worries that television will only "trivialize executions—reduce them to the level of entertainment, to be clicked on and off."⁹⁵¹ He worries that people will "invite friends over for beer, pretzels and death."⁹⁵² Outspoken proponents of capital punishment—like Ernest van den Haag, a former professor at Fordham University—often express the greatest opposition to televised executions. An execution "should not serve as public entertainment," van den Haag declares, wedged in "between game shows, situation comedies and the like."⁹⁵³

However, if death penalty proponents really believe capital punishment is such sound public policy, why do they so vehemently oppose television stations fully publicizing executions? Do they fear Americans would lack the stomach to watch executions, and might question their necessity? If so, maybe politicians need to ask whether Americans really want capital punishment in the first place. In the end, the salient inquiry

947. *Id.*

948. Some individuals fit into more than one category. For example, KQED's lawyer and long-time death penalty opponent, William Bennett Turner, assumes that televised executions "would be degrading in some way for all. . . ." However, he does not want executions hidden from public view. Not only does he oppose government censorship, but he believes that "the evil is the death penalty" itself. "The only thing worse than having executions and watching them," Turner says, "is having executions and having our government prohibit us from watching them." LESSER, *supra* note 932, at 40, 106.

949. George F. Will, *Capital Punishment and Public Theater*, WASH. POST, May 12, 1991, at C7.

950. Thomas Sowell, *Televised Executions? Media Bias at 11*, DETROIT NEWS, July 22, 1991, at 10A.

951. Anthony Lewis, *Their Brutal Mirth*, N.Y. TIMES, May 20, 1991, at 15.

952. *Id.*

953. Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1667 n.22 (1986).

about whether executions should be televised is not whether such broadcasts will deter crime, lead to the abolition of capital punishment, "coarsen American life" or "trivialize" death.⁹⁵⁴ Rather, the important question is whether Americans will be allowed to monitor what their own government does to human beings in the dark of night, and whether politicians and bureaucrats will be permitted to sanitize the news, interfering with America's death penalty debate by restricting press access to executions.

In the nineteenth century, Americans got the vast majority of their news from newspapers. In this century, however, television has usurped much of the power that the print media once monopolized. On average, American adults spend over forty percent of their leisure time, or more than thirty hours each week, watching television.⁹⁵⁵ Moreover, sixty-nine percent of adults acquire most of their news from television.⁹⁵⁶ In contrast, only five to seven percent of Americans rely on magazines for news,⁹⁵⁷ and only half of American households even receive newspaper subscriptions.⁹⁵⁸ Not only is television the primary source of news for most Americans, but television is regarded as the most complete and unbiased source of news.⁹⁵⁹ This fact is hardly surprising. Television produces unfiltered images, while newspapers and magazines provide only second-hand accounts of newsworthy events.

Televised executions would restore accountability to America's death-penalty debate. If executions were put on television, no longer could politicians advocate the use of capital punishment as a crime-fighting technique without having to live with the real consequences of their "get-tough-on-crime"

954. Anthony Lewis, *Their Brutal Mirth*, N.Y. TIMES, May 20, 1991, at 15; George F. Will, *Capital Punishment and Public Theater*, WASH. POST., May 12, 1991, at C7.

955. Don R. Le Duc, *Recognizing the Interests of the Public in Broadcast Programming*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 75, 82 n.25 (1992) (citing A.C. Nielsen Co., *Nielsen Report on Television*, 8 (1990)).

956. Bessler, *supra* note 890, at 426 n.408 (citing Roper Organization, *America's Watching: Public Attitudes Towards Television*, at 4 (1983)); see also Elliot E. Slotnick, *Television News and the Supreme Court: A Case Study*, 77 JUDICATURE 21, 22 (1993).

957. William C. Bailey & Ruth D. Peterson, *Capital Punishment and Non-Capital Crimes: A Test of Deterrence, General Prevention, and System-Overload Arguments*, 54 ALB. L. REV. 681, 692 n.51 (1990).

958. William A. Babcock, *The War of the Weeklies*, MINN. J.L. & POL. 8 (Sept. 1995).

959. Bessler, *supra* note 890, at 426 n.408 (citing Roper Organization, *America's Watching: Public Attitudes Towards Television* at 4 (1983)).

rhetoric. The public would watch as brain-damaged or mentally retarded inmates are executed. They would look on as young men are executed for crimes they committed as teenagers. And they would watch men catch fire in the electric chair. If Americans witnessed such spectacles, they might continue to support capital punishment. On the other hand, they might very well clamor for the abolition of the death penalty, its narrower enforcement (e.g., no capital punishment for juveniles), or more humane forms of punishment (e.g., lethal injection). In any event, putting executions on television will let the American people decide for themselves whether or not capital punishment is morally justified.

The history of Minnesota's "midnight assassination law" will probably not help Americans decide whether capital punishment is right or wrong. However, it serves as a stern warning about the dangers of regulating press access to executions, and the impact such governmental interference can have on the democratic process. In America, the press is a vital organ of the public. It keeps the public informed about newsworthy events, and it exposes governmental abuses, fulfilling its role, as the "Fourth Estate," as a check and balance on the three official branches of government.⁹⁶⁰ The First Amendment, which guarantees the freedom of the press, was adopted to protect that role, and it becomes nothing more than a hollow promise if the press is denied access to important governmental proceedings

960. United States Supreme Court Justice Potter Stewart has written that "[t]he primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches." In discussing that constitutional guarantee, Justice Stewart used the metaphor of the "Fourth Estate," a reference to what Thomas Carlyle wrote about the British political system a century earlier. As Carlyle wrote: "Burke said there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all. It is not a figure of speech or witty saying; it is a literal fact—very momentous to us in these times." Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975). Justice Stewart later wrote:

"Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised. . . ." Our society depends heavily on the press for that enlightenment. Though not without its lapses, the press "has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences. . . ."

Houchins v. KQED, Inc., 438 U.S. 1, 17 (1978) (Stewart, J., concurring) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 726 (1972) and *Estes v. Texas*, 381 U.S. 532, 539 (1965), respectively).

like executions.

When the freedom of the press is curtailed, as it was under Minnesota's "midnight assassination law," the public is left uninformed about newsworthy events, and democracy is threatened. Indeed, it is a tragic commentary on America's democracy when governmental policies—especially those involving life and death—are carried out behind thick prison walls in the middle of the night. As James Madison warned: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."⁹⁶¹ Because an informed citizenry is essential to America's democracy, Americans can no longer afford to tolerate death in the dark. The press must be allowed to put executions on television, lest Americans relinquish to their government "the power which knowledge gives"—something that should only occur in a George Orwell novel, not in America.

961. Neil Nussbaum, *Film at Eleven . . .*—*Does the Press Have the Right to Attend and Videotape Executions*, 20 N.C. CENT. L.J. 121 (1992) (quoting James Madison).

APPENDIX
TIME OF EXECUTIONS IN THE UNITED STATES,
1977-1995†

Name of Defendant	Date of Execution	Time of Execution††	Site of Execution
1. Jerry White	12-04-95	12:18 p.m.	Starke, Florida ¹
2. Daniel Thomas	04-15-86	12:19 p.m.	Starke, Florida ²
3. Darrell Devier	05-17-95	1:28 p.m.	Jackson, Georgia ³
4. David Livingston Funchess	04-22-86	5:11 p.m.	Starke, Florida ⁴
5. Ronald J. Straight	05-20-86	5:12 p.m.	Starke, Florida ⁵
6. Jeffrey J. Daugherty	11-07-88	5:16 p.m.	Starke, Florida ⁶
7. Jimmie Jeffers	09-13-95	6:07 p.m.	Florence, Arizona ⁷
8. Esquel Banda	12-11-95	6:21 p.m.	Huntsville, Texas ⁸
9. Hai Hai Vuong	12-07-95	6:22 p.m.	Huntsville, Texas ⁹
10. Harold J. Lane	10-04-95	6:28 p.m.	Huntsville, Texas ¹⁰
11. Bernard Amos	12-06-95	6:31 p.m.	Huntsville, Texas ¹¹
12. James Briddle	12-12-95	6:35 p.m.	Huntsville, Texas ¹²
13. Anthony Bertolotti	07-27-90	7:07 p.m.	Starke, Florida ¹³
14. Hoyt Clines	08-03-94	7:11 p.m.	Varner, Arkansas ¹⁴
15. Billy Mitchell	09-01-87	7:21 p.m.	Jackson, Georgia ¹⁵
16. Timothy McCorquodale	09-21-87	7:23 p.m.	Jackson, Georgia ¹⁶
17. James Messer Jr.	07-28-88	7:23 p.m.	Jackson, Georgia ¹⁷
18. Joseph Mulligan	05-15-87	7:25 p.m.	Jackson, Georgia ¹⁸
19. William Boyd Tucker	05-29-87	7:29 p.m.	Jackson, Georgia ¹⁹
20. Darryl Richley	08-03-94	7:59 p.m.	Varner, Arkansas ²⁰
21. Jonas Whitmore	05-11-94	8:08 p.m.	Varner, Arkansas ²¹
22. John Evans	04-22-83	8:44 p.m.	Atmore, Alabama ²²
23. John Edward Swindler	06-18-90	9:05 p.m.	Varner, Arkansas ²³
24. Willie Lloyd Turner	05-26-95	9:07 p.m.	Jarratt, Virginia ²⁴
25. Edward C. Pickens	05-11-94	9:08 p.m.	Varner, Arkansas ²⁵
26. Dennis Stockton	09-27-95	9:09 p.m.	Jarratt, Virginia ²⁶
27. Steven Douglas Hill	05-07-92	9:10 p.m.	Varner, Arkansas ²⁷
28. Barry Lee Fairchild	08-31-95	9:11 p.m.	Varner, Arkansas ²⁸
29. Dana Ray Edmonds	01-24-95	9:14 p.m.	Jarratt, Virginia ²⁹
30. Nicholas Ingram	04-07-95	9:15 p.m.	Jackson, Georgia ³⁰
31. Richard Snell	04-19-95	9:16 p.m.	Varner, Arkansas ³¹
32. R. Gene Simmons	06-25-90	9:19 p.m.	Varner, Arkansas ³²
33. James Holmes	08-03-94	9:24 p.m.	Varner, Arkansas ³³
34. Ricky Lee Grubbs	10-21-92	9:35 p.m.	Potosi, Missouri ³⁴
35. Winford Stokes	05-11-90	9:39 p.m.	Potosi, Missouri ³⁵
36. Mickey Davidson	10-19-95	9:41 p.m.	Jarratt, Virginia ³⁶
37. Christopher Burger	12-07-93	9:51 p.m.	Jackson, Georgia ³⁷
38. Larry Joe Johnson	05-09-93	10:07 p.m.	Starke, Florida ³⁸
39. "Rickey" Ray Rector	01-24-92	10:09 p.m.	Varner, Arkansas ³⁹
40. William H. Hance	03-31-94	10:10 p.m.	Jackson, Georgia ⁴⁰
41. Herman Barnes	11-13-95	10:11 p.m.	Jarratt, Virginia ⁴¹
42. Keith Zettlemoyer	05-02-95	10:25 p.m.	Rockview, Pennsylvania ⁴²
43. Linwood Briley	10-12-84	11:05 p.m.	Richmond, Virginia ⁴³
44. Alton Way	08-30-89	11:05 p.m.	Richmond, Virginia ⁴⁴
45. Buddy Earl Justus	12-13-90	11:06 p.m.	Richmond, Virginia ⁴⁵
46. James D. Briley	04-18-85	11:07 p.m.	Richmond, Virginia ⁴⁶
47. Morris Odell Mason	06-25-85	11:07 p.m.	Richmond, Virginia ⁴⁷
48. Richard Lee Whitley	07-06-87	11:07 p.m.	Richmond, Virginia ⁴⁸
49. Earl Clanton Jr.	04-14-88	11:07 p.m.	Richmond, Virginia ⁴⁹
50. Richard T. Boggs	07-19-90	11:07 p.m.	Richmond, Virginia ⁵⁰

† The names and dates of the executions in this chart were obtained from Death Row, U.S.A. (Winter 1995), published by the NAACP Legal Defense and Education Fund, Inc. The information regarding execution times and sites was gathered from original research.

†† The "Time of Execution" indicates when an inmate was pronounced dead.

51.	Albert J. Clozza	07-24-91	11:07 p.m.	Jarratt, Virginia ⁵¹
52.	Andrew Chabrol	06-17-93	11:07 p.m.	Jarratt, Virginia ⁵²
53.	Willie Leroy Jones	09-16-92	11:08 p.m.	Jarratt, Virginia ⁵³
54.	Wilbert Lee Evans	10-17-90	11:09 p.m.	Richmond, Virginia ⁵⁴
55.	David Pruett	12-16-93	11:11 p.m.	Jarratt, Virginia ⁵⁵
56.	Johnny Watkins	03-03-94	11:11 p.m.	Jarratt, Virginia ⁵⁶
57.	Edward Fitzgerald	07-23-92	11:12 p.m.	Jarratt, Virginia ⁵⁷
58.	Derick Lynn Peterson	08-22-91	11:13 p.m.	Jarratt, Virginia ⁵⁸
59.	Svasky Poyner	03-18-93	11:13 p.m.	Jarratt, Virginia ⁵⁹
60.	Timothy Spencer	04-27-94	11:13 p.m.	Jarratt, Virginia ⁶⁰
61.	Charles Stamper	01-19-93	11:15 p.m.	Jarratt, Virginia ⁶¹
62.	Thomas Dean Stevens	06-29-93	11:15 p.m.	Jackson, Georgia ⁶²
63.	Henry Willis	05-18-89	11:20 p.m.	Jackson, Georgia ⁶³
64.	Timothy Bunch	12-10-92	11:20 p.m.	Jarratt, Virginia ⁶⁴
65.	Frank Coppola	08-10-82	11:27 p.m.	Richmond, Virginia ⁶⁵
66.	Roger Coleman	05-20-92	11:38 p.m.	Jarratt, Virginia ⁶⁶
67.	Michael Smith	07-31-86	11:42 p.m.	Richmond, Virginia ⁶⁷
68.	Leon Moser	08-15-95	11:47 p.m.	Rockview, Pennsylvania ⁶⁸
69.	Willie Clisby	04-28-95	12:01 a.m.	Atmore, Alabama ⁶⁹
70.	James D. Clark	04-14-93	12:07 a.m.	Florence, Arizona ⁷⁰
71.	Anthony R. Murray	07-26-95	12:07 a.m.	Potosi, Missouri ⁷¹
72.	Frank J. Guinan	10-06-93	12:08 a.m.	Potosi, Missouri ⁷²
73.	George C. "Tiny" Mercer	01-06-89	12:09 a.m.	Jefferson City, Missouri ⁷³
74.	Gerald Smith	01-18-90	12:09 a.m.	Potosi, Missouri ⁷⁴
75.	Leonard Laws	05-17-90	12:09 a.m.	Potosi, Missouri ⁷⁵
76.	Westley A. Dodd	01-05-93	12:09 a.m.	Walla Walla, Washington ⁷⁶
77.	Martsay Bolder	01-27-93	12:09 a.m.	Potosi, Missouri ⁷⁷
78.	Robert Sawyer	03-05-93	12:09 a.m.	Angola, Louisiana ⁷⁸
79.	Varnall Weeks	05-12-95	12:09 a.m.	Atmore, Alabama ⁷⁹
80.	Michael Lindsey	05-26-89	12:10 a.m.	Atmore, Alabama ⁸⁰
81.	George C. Gilmore	08-31-90	12:10 a.m.	Potosi, Missouri ⁸¹
82.	Andrew Lee Jones	07-22-91	12:10 a.m.	Angola, Louisiana ⁸²
83.	Frederick Lashley	07-28-93	12:11 a.m.	Potosi, Missouri ⁸³
84.	Steven J. Judy	03-09-81	12:12 a.m.	Michigan City, Indiana ⁸⁴
85.	John Brogdon	07-30-87	12:12 a.m.	Angola, Louisiana ⁸⁵
86.	Edward Byrne Jr.	06-14-88	12:12 a.m.	Angola, Louisiana ⁸⁶
87.	Charles Walker	09-12-90	12:12 a.m.	Joliet, Illinois ⁸⁷
88.	Emmett Foster	05-03-95	12:12 a.m.	Potosi, Missouri ⁸⁸
89.	Thomas Lee Ward	05-16-95	12:12 a.m.	Angola, Louisiana ⁸⁹
90.	Anthony Lee LaRette	11-29-95	12:12 a.m.	Potosi, Missouri ⁹⁰
91.	Timothy Baldwin	09-10-84	12:13 a.m.	Angola, Louisiana ⁹¹
92.	Alvin Moore	06-09-87	12:13 a.m.	Angola, Louisiana ⁹²
93.	Maurice Oscar Byrd	08-23-91	12:13 a.m.	Potosi, Missouri ⁹³
94.	Greg Resnover	12-07-94	12:13 a.m.	Michigan City, Indiana ⁹⁴
95.	Elmo Sonnier	04-05-84	12:14 a.m.	Angola, Louisiana ⁹⁵
96.	Jimmy Glass	06-12-87	12:14 a.m.	Angola, Louisiana ⁹⁶
97.	Wayne Felde	03-15-88	12:14 a.m.	Angola, Louisiana ⁹⁷
98.	Herbert Lee Richardson	08-18-89	12:14 a.m.	Atmore, Alabama ⁹⁸
99.	Charles Rodman Campbell	05-27-94	12:14 a.m.	Walla Walla, Washington ⁹⁹
100.	Robert Lee Willie	12-28-84	12:15 a.m.	Angola, Louisiana ¹⁰⁰
101.	Arthur Lee Jones Jr.	03-21-86	12:15 a.m.	Atmore, Alabama ¹⁰¹
102.	Leo Edwards Jr.	06-21-89	12:15 a.m.	Parchman, Mississippi ¹⁰²
103.	Anthony Cook	11-10-93	12:15 a.m.	Huntsville, Texas ¹⁰³
104.	John Taylor	02-29-84	12:16 a.m.	Angola, Louisiana ¹⁰⁴
105.	David Dene Martin	01-04-85	12:16 a.m.	Angola, Louisiana ¹⁰⁵
106.	Benjamin Berry	06-07-87	12:16 a.m.	Angola, Louisiana ¹⁰⁶
107.	Sterling Rault	08-24-87	12:16 a.m.	Angola, Louisiana ¹⁰⁷
108.	Arthur Gary Bishop	06-10-88	12:16 a.m.	Point of the Mountain, Utah ¹⁰⁸
109.	Curtis Lee Johnson	08-11-92	12:16 a.m.	Huntsville, Texas ¹⁰⁹
110.	Markham Duff-Smith	06-29-93	12:16 a.m.	Huntsville, Texas ¹¹⁰
111.	David Holland	08-12-93	12:16 a.m.	Huntsville, Texas ¹¹¹
112.	Richard Wilkerson	08-31-93	12:16 a.m.	Huntsville, Texas ¹¹²
113.	Ernest Knighton	10-30-84	12:17 a.m.	Angola, Louisiana ¹¹³
114.	Jesse de la Rosa	05-15-85	12:17 a.m.	Huntsville, Texas ¹¹⁴
115.	Jimmy Wingo	06-16-87	12:17 a.m.	Angola, Louisiana ¹¹⁵
116.	James "Skip" Paster	09-20-89	12:17 a.m.	Huntsville, Texas ¹¹⁶
117.	Mikel Derrick	07-18-90	12:17 a.m.	Huntsville, Texas ¹¹⁷

118. G.W. Green	11-12-91	12:17 a.m.	Huntsville, Texas ¹¹⁸
119. Jeffery Lee Griffin	11-19-92	12:17 a.m.	Huntsville, Texas ¹¹⁹
120. Johnny L. James	09-03-93	12:17 a.m.	Huntsville, Texas ¹²⁰
121. Jimmy Lee Gray	09-02-83	12:18 a.m.	Parchman, Mississippi ¹²¹
122. Kenneth Brock	06-19-86	12:18 a.m.	Huntsville, Texas ¹²²
123. Wayne J. Ritter	08-28-87	12:18 a.m.	Atmore, Alabama ¹²³
124. Ignacio Cuevas	05-23-91	12:18 a.m.	Huntsville, Texas ¹²⁴
125. Joe Angel Cordova	01-22-92	12:18 a.m.	Huntsville, Texas ¹²⁵
126. Johnny Frank Garrett	02-11-92	12:18 a.m.	Huntsville, Texas ¹²⁶
127. Justin Lee May	05-07-92	12:18 a.m.	Huntsville, Texas ¹²⁷
128. Kavin Lincecum	12-10-92	12:18 a.m.	Huntsville, Texas ¹²⁸
129. John Brewer	03-03-93	12:18 a.m.	Florence, Arizona ¹²⁹
130. Ramon Montoya	03-25-93	12:18 a.m.	Huntsville, Texas ¹³⁰
131. Danny Harris	07-30-93	12:18 a.m.	Huntsville, Texas ¹³¹
132. Elisio Moreno	03-04-87	12:19 a.m.	Huntsville, Texas ¹³²
133. Wallace Norrell Thomas	07-13-90	12:19 a.m.	Atmore, Alabama ¹³³
134. George Lott	09-20-94	12:19 a.m.	Huntsville, Texas ¹³⁴
135. Jesse D. Jacobs	01-04-95	12:19 a.m.	Huntsville, Texas ¹³⁵
136. William Vandiver	10-16-85	12:20 a.m.	Michigan City, Indiana ¹³⁶
137. Chester Lee Wicker	08-26-86	12:20 a.m.	Huntsville, Texas ¹³⁷
138. John R. Thompson	07-08-87	12:20 a.m.	Huntsville, Texas ¹³⁸
139. Robert Black	05-22-92	12:20 a.m.	Huntsville, Texas ¹³⁹
140. Cornelius Singleton	11-20-92	12:20 a.m.	Atmore, Alabama ¹⁴⁰
141. Freddie Webb Sr.	03-31-94	12:20 a.m.	Huntsville, Texas ¹⁴¹
142. Paul Rougeau	05-03-94	12:20 a.m.	Huntsville, Texas ¹⁴²
143. Jessie Gutierrez	09-16-94	12:20 a.m.	Huntsville, Texas ¹⁴³
144. Jeffrey D. Motley	02-07-95	12:20 a.m.	Huntsville, Texas ¹⁴⁴
145. Jesse Bishop	10-22-79	12:21 a.m.	Carson City, Nevada ¹⁴⁵
146. Charles William Bass	03-12-86	12:21 a.m.	Huntsville, Texas ¹⁴⁶
147. Rudy Ramos Esquivel	06-09-86	12:21 a.m.	Huntsville, Texas ¹⁴⁷
148. Michael Wayne Evans	12-04-86	12:21 a.m.	Huntsville, Texas ¹⁴⁸
149. Edward Earl Johnson	05-20-87	12:21 a.m.	Parchman, Mississippi ¹⁴⁹
150. Arthur James Julius	11-17-89	12:21 a.m.	Atmore, Alabama ¹⁵⁰
151. Lawrence Lee Buxton	02-26-91	12:21 a.m.	Huntsville, Texas ¹⁵¹
152. Jerry Joe Bird	06-18-91	12:21 a.m.	Huntsville, Texas ¹⁵²
153. Walter Williams	10-05-94	12:21 a.m.	Huntsville, Texas ¹⁵³
154. Mario S. Marquez	01-17-95	12:21 a.m.	Huntsville, Texas ¹⁵⁴
155. Samuel Hawkins	02-21-95	12:21 a.m.	Huntsville, Texas ¹⁵⁵
156. Jeffrey Allen Barney	04-16-86	12:22 a.m.	Huntsville, Texas ¹⁵⁶
157. Anthony Williams	05-28-87	12:22 a.m.	Huntsville, Texas ¹⁵⁷
158. Connie Ray Evans	07-08-87	12:22 a.m.	Parchman, Mississippi ¹⁵⁸
159. James Demouchette	09-22-92	12:22 a.m.	Huntsville, Texas ¹⁵⁹
160. Carl Kelly	08-20-93	12:22 a.m.	Huntsville, Texas ¹⁶⁰
161. Ruben Cantu	08-24-93	12:22 a.m.	Huntsville, Texas ¹⁶¹
162. Denton Alan Crank	06-14-94	12:22 a.m.	Huntsville, Texas ¹⁶²
163. Robert Drew	08-02-94	12:22 a.m.	Huntsville, Texas ¹⁶³
164. Billy Gardner	02-16-95	12:22 a.m.	Huntsville, Texas ¹⁶⁴
165. Thomas Grasso	03-20-95	12:22 a.m.	McAlester, Oklahoma ¹⁶⁵
166. John Fearance Jr.	06-20-95	12:22 a.m.	Huntsville, Texas ¹⁶⁶
167. Doyle Skillern	01-16-85	12:23 a.m.	Huntsville, Texas ¹⁶⁷
168. Randy Woolls	08-20-86	12:23 a.m.	Huntsville, Texas ¹⁶⁸
169. John Sawyers	05-18-93	12:23 a.m.	Huntsville, Texas ¹⁶⁹
170. David Mason	08-24-93	12:23 a.m.	San Quentin Village, California ¹⁷⁰
171. Karl Hammond	06-21-95	12:23 a.m.	Huntsville, Texas ¹⁷¹
172. Ivon Stanley	07-12-84	12:24 a.m.	Jackson, Georgia ¹⁷²
173. Thomas Barefoot	10-30-84	12:24 a.m.	Huntsville, Texas ¹⁷³
174. Larry Smith	08-22-86	12:24 a.m.	Huntsville, Texas ¹⁷⁴
175. Carlos DeLuna	12-07-89	12:24 a.m.	Huntsville, Texas ¹⁷⁵
176. Carl Johnson	09-19-95	12:24 a.m.	Huntsville, Texas ¹⁷⁶
177. Charles Albanese	09-20-95	12:24 a.m.	Joliet, Illinois ¹⁷⁷
178. Jay Pinkerton	05-15-86	12:25 a.m.	Huntsville, Texas ¹⁷⁸
179. Leslie Lowenfield	04-13-88	12:25 a.m.	Angola, Louisiana ¹⁷⁹
180. Stephen McCoy	05-24-89	12:25 a.m.	Huntsville, Texas ¹⁸⁰
181. Darryl Stewart	05-04-93	12:25 a.m.	Huntsville, Texas ¹⁸¹
182. Warren Bridge	11-22-94	12:25 a.m.	Huntsville, Texas ¹⁸²
183. Vernon Sattiewhite	08-15-95	12:25 a.m.	Huntsville, Texas ¹⁸³
184. John Young	03-20-85	12:26 a.m.	Jackson, Georgia ¹⁸⁴

185. Jerome Butler	04-21-90	12:26 a.m.	Huntsville, Texas ¹⁸⁵
186. Van R. Solomon	02-20-85	12:27 a.m.	Jackson, Georgia ¹⁸⁶
187. Charles Rumbaugh	09-11-85	12:27 a.m.	Huntsville, Texas ¹⁸⁷
188. Willie Celestine	07-20-87	12:27 a.m.	Angola, Louisiana ¹⁸⁸
189. Leon Rutherford King	03-22-89	12:27 a.m.	Huntsville, Texas ¹⁸⁹
190. Horace Dunkins Jr.	07-14-89	12:27 a.m.	Atmore, Alabama ¹⁹⁰
191. Larry Heath	03-20-92	12:27 a.m.	Atmore, Alabama ¹⁹¹
192. Curtis P. Harris	07-01-93	12:27 a.m.	Huntsville, Texas ¹⁹²
193. Harold Barnard	02-02-94	12:27 a.m.	Huntsville, Texas ¹⁹³
194. Roosevelt Green	01-09-85	12:28 a.m.	Jackson, Georgia ¹⁹⁴
195. Antonio Bonham	09-28-93	12:28 a.m.	Huntsville, Texas ¹⁹⁵
196. Herman Clark	12-06-94	12:28 a.m.	Huntsville, Texas ¹⁹⁶
197. Girvies Davis	05-17-95	12:28 a.m.	Joliet, Illinois ¹⁹⁷
198. Donald E. Harding	04-06-92	12:29 a.m.	Florence, Arizona ¹⁹⁸
199. Richard Lee Beavers	04-04-94	12:29 a.m.	Huntsville, Texas ¹⁹⁹
200. Clifton C. Russell	01-31-95	12:29 a.m.	Huntsville, Texas ²⁰⁰
201. Joseph Starvaggi	09-10-87	12:30 a.m.	Huntsville, Texas ²⁰¹
202. Donald Gene Franklin	11-03-88	12:30 a.m.	Huntsville, Texas ²⁰²
203. Johnny Ray Anderson	05-17-90	12:30 a.m.	Huntsville, Texas ²⁰³
204. Stephen Nethery	05-27-94	12:30 a.m.	Huntsville, Texas ²⁰⁴
205. Roger Stafford	07-01-95	12:30 a.m.	McAlester, Oklahoma ²⁰⁵
206. George Del Vecchio	11-22-95	12:30 a.m.	Joliet, Illinois ²⁰⁶
207. Henry Martinez Porter	07-09-85	12:31 a.m.	Huntsville, Texas ²⁰⁷
208. James Smith	06-26-90	12:31 a.m.	Huntsville, Texas ²⁰⁸
209. Joseph P. Jernigan	08-05-93	12:31 a.m.	Huntsville, Texas ²⁰⁹
210. Richard Andrade	12-18-86	12:32 a.m.	Huntsville, Texas ²¹⁰
211. Harold LaMont Otey	09-02-94	12:33 a.m.	Lincoln, Nebraska ²¹¹
212. Nelson Shelton	03-17-95	12:34 a.m.	Smyrna, Delaware ²¹²
213. Charles Troy Coleman	09-10-90	12:35 a.m.	McAlester, Oklahoma ²¹³
214. Mark Hopkinson	01-22-92	12:35 a.m.	Rawlins, Wyoming ²¹⁴
215. Andre Deputy	06-23-94	12:35 a.m.	Smyrna, Delaware ²¹⁵
216. Robert Sidebottom	11-15-95	12:35 a.m.	Potosi, Missouri ²¹⁶
217. Alpha Otis Stephens	12-12-84	12:36 a.m.	Jackson, Georgia ²¹⁷
218. Ronald K. Allridge	06-08-95	12:38 a.m.	Huntsville, Texas ²¹⁸
219. James Autry	03-14-84	12:40 a.m.	Huntsville, Texas ²¹⁹
220. Robyn Leroy Parks	03-10-92	12:40 a.m.	McAlester, Oklahoma ²²⁰
221. Larry Anderson	04-26-94	12:42 a.m.	Huntsville, Texas ²²¹
222. James Free	03-22-95	12:42 a.m.	Joliet, Illinois ²²²
223. Raymond Landry	12-13-88	12:45 a.m.	Huntsville, Texas ²²³
224. Ronald O'Bryan	03-31-84	12:48 a.m.	Huntsville, Texas ²²⁴
225. Keith Eugene Wells	01-06-94	12:50 a.m.	Boise, Idaho ²²⁵
226. Clifford Phillips	12-14-93	12:53 a.m.	Huntsville, Texas ²²⁶
227. Stephen Peter Morin	03-13-85	12:55 a.m.	Huntsville, Texas ²²⁷
228. Elliot Johnson	06-24-87	12:55 a.m.	Huntsville, Texas ²²⁸
229. William W. White	04-23-92	12:58 a.m.	Huntsville, Texas ²²⁹
230. John Wayne Gacy	05-10-94	12:58 a.m.	Joliet, Illinois ²³⁰
231. Donald Gaskins	09-06-91	1:10 a.m.	Columbia, South Carolina ²³¹
232. John Thanos	05-16-94	1:10 a.m.	Baltimore, Maryland ²³²
233. Sylvester Adams	08-18-95	1:10 a.m.	Columbia, South Carolina ²³³
234. Dale Selby Pierre	08-28-87	1:12 a.m.	Point of the Mountain, Utah ²³⁴
235. Ronald Woomer	04-27-90	1:12 a.m.	Columbia, South Carolina ²³⁵
236. Ramon Hernandez	01-30-87	1:13 a.m.	Huntsville, Texas ²³⁶
237. Robert Wayne Williams	12-14-83	1:15 a.m.	Angola, Louisiana ²³⁷
238. Charlie Brooks Jr.	12-07-82	1:16 a.m.	Huntsville, Texas ²³⁸
239. Robert O'Neal	12-06-95	1:17 a.m.	Potosi, Missouri ²³⁹
240. James Russell	09-19-91	1:20 a.m.	Huntsville, Texas ²⁴⁰
241. Fletcher T. Mann	06-01-95	1:20 a.m.	Huntsville, Texas ²⁴¹
242. Dalton Prejean	05-18-90	1:21 a.m.	Angola, Louisiana ²⁴²
243. Charles Milton	06-25-85	1:33 a.m.	Huntsville, Texas ²⁴³
244. Walter Blair	07-21-93	1:35 a.m.	Potosi, Missouri ²⁴⁴
245. David Michael Clark	02-28-92	1:38 a.m.	Huntsville, Texas ²⁴⁵
246. Jesus Romero	05-20-92	1:40 a.m.	Huntsville, Texas ²⁴⁶
247. Noble D. Mays	04-06-95	1:42 a.m.	Huntsville, Texas ²⁴⁷
248. Hernando Williams	03-22-95	1:45 a.m.	Joliet, Illinois ²⁴⁸

249. William Andrews	07-30-92	1:46 a.m.	Point of the Mountain, Utah ²⁴⁹
250. Robert Brecheen	08-11-95	1:55 a.m.	McAlester, Oklahoma ²⁵⁰
251. Willie Ray Williams	01-31-05	1:57 a.m.	Huntsville, Texas ²⁵¹
252. Willie Watson	07-24-87	2:09 a.m.	Angola, Louisiana ²⁵²
253. William Paul Thompson	06-19-89	2:09 a.m.	Carson City, Nevada ²⁵³
254. Sean Patrick Flannagan	06-23-89	2:09 a.m.	Carson City, Nevada ²⁵⁴
255. Carroll Cole	12-06-85	2:10 a.m.	Carson City, Nevada ²⁵⁵
256. John Rook	09-19-86	2:11 a.m.	Raleigh, North Carolina ²⁵⁶
257. Kermit Smith Jr.	01-24-95	2:12 a.m.	Raleigh, North Carolina ²⁵⁷
258. Phillip Ingle	09-22-95	2:14 a.m.	Raleigh, North Carolina ²⁵⁸
259. Margie Velma Barfield	11-02-84	2:15 a.m.	Raleigh, North Carolina ²⁵⁹
260. John Gardner	10-23-92	2:15 a.m.	Raleigh, North Carolina ²⁶⁰
261. James Hutchins	03-16-84	2:18 a.m.	Raleigh, North Carolina ²⁶¹
262. David Lawson	06-15-94	2:18 a.m.	Raleigh, North Carolina ²⁶²
263. Michael McDougall	10-18-91	2:20 a.m.	Raleigh, North Carolina ²⁶³
264. Duncan McKenzie	05-10-95	2:22 a.m.	Deer Lodge, Montana ²⁶⁴
265. Larry Griffin	06-21-95	2:47 a.m.	Potosi, Missouri ²⁶⁵
266. Carlos Santana	03-23-93	2:54 a.m.	Huntsville, Texas ²⁶⁶
267. Warren McCleskey	09-25-91	3:13 a.m.	Jackson, Georgia ²⁶⁷
268. Robert Streetman	01-07-88	3:26 a.m.	Huntsville, Texas ²⁶⁸
269. Edward Ellis	03-03-92	3:44 a.m.	Huntsville, Texas ²⁶⁹
270. Leonel Herrera	05-12-93	4:49 a.m.	Huntsville, Texas ²⁷⁰
271. Joseph Carl Shaw	01-11-85	5:16 a.m.	Columbia, South Carolina ²⁷¹
272. James Terry Roach	01-10-86	5:16 a.m.	Columbia, South Carolina ²⁷²
273. Raymond Carl Kinnamon	12-11-94	5:56 a.m.	Huntsville, Texas ²⁷³
274. Robert Alton Harris	04-21-92	6:21 a.m.	San Quentin Village, California ²⁷⁴
275. Olan Randle Robison	03-13-92	6:29 a.m.	McAlester, Oklahoma ²⁷⁵
276. Roy Allen Harich	04-24-91	7:06 a.m.	Starke, Florida ²⁷⁶
277. Raymond Robert Clark	11-19-90	7:07 a.m.	Starke, Florida ²⁷⁷
278. Bobby Marion Francis	06-25-91	7:07 a.m.	Starke, Florida ²⁷⁸
279. Edward D. Kennedy	07-21-92	7:07 a.m.	Starke, Florida ²⁷⁹
280. Anthony Antone	01-26-84	7:08 a.m.	Starke, Florida ²⁸⁰
281. Arthur Goode	04-05-84	7:09 a.m.	Starke, Florida ²⁸¹
282. David Washington	07-13-84	7:09 a.m.	Starke, Florida ²⁸²
283. James Dupree Henry	09-20-84	7:09 a.m.	Starke, Florida ²⁸³
284. Aubrey Adams Jr.	05-04-89	7:09 a.m.	Starke, Florida ²⁸⁴
285. John Paul Witt	03-06-85	7:10 a.m.	Starke, Florida ²⁸⁵
286. Robert Dale Henderson	04-21-93	7:10 a.m.	Starke, Florida ²⁸⁶
287. James Adams	05-10-84	7:11 a.m.	Starke, Florida ²⁸⁷
288. James Raulerson	01-30-85	7:11 a.m.	Starke, Florida ²⁸⁸
289. Beauford White	08-28-87	7:11 a.m.	Starke, Florida ²⁸⁹
290. Roy Allen Stewart	04-22-94	7:11 a.m.	Starke, Florida ²⁹⁰
291. Willie Darden	03-15-88	7:12 a.m.	Starke, Florida ²⁹¹
292. Carl Shriner	06-20-84	7:12 a.m.	Starke, Florida ²⁹²
293. James William Hamblen	09-21-90	7:12 a.m.	Starke, Florida ²⁹³
294. Jessie Joseph Tafero	05-04-90	7:13 a.m.	Starke, Florida ²⁹⁴
295. Nollie Lee Martin	05-12-92	7:13 a.m.	Starke, Florida ²⁹⁵
296. Thomas Baal	06-03-90	7:14 a.m.	Carson City, Nevada ²⁹⁶
297. Theodore Bundy	01-24-89	7:16 a.m.	Starke, Florida ²⁹⁷
298. Michael Durocher	08-25-93	7:16 a.m.	Starke, Florida ²⁹⁸
299. Marvin Francois	05-29-85	7:18 a.m.	Starke, Florida ²⁹⁹
300. Richard Tucker Jr.	05-22-87	7:23 a.m.	Jackson, Georgia ³⁰⁰
301. Gary Gilmore	01-17-77	8:07 a.m.	Point of the Mountain, Utah ³⁰¹
302. John Eldon Smith	12-15-83	8:17 a.m.	Jackson, Georgia ³⁰²
303. Steven Brian Pennell	03-14-92	9:01 a.m.	Smyrna, Delaware ³⁰³
304. Kenneth DeShields	08-31-93	9:17 a.m.	Smyrna, Delaware ³⁰⁴
305. Timothy Palmes	11-08-84	10:07 a.m.	Starke, Florida ³⁰⁵
306. Ernest Dobbert	09-07-84	10:09 a.m.	Starke, Florida ³⁰⁶
307. Jerome Bowden	06-24-86	10:13 a.m.	Jackson, Georgia ³⁰⁷
308. Robert Sullivan	11-30-83	10:16 a.m.	Starke, Florida ³⁰⁸
309. Phillip Atkins	12-05-95	10:17 a.m.	Starke, Florida ³⁰⁹
310. John Spenkelink	05-25-79	10:18 a.m.	Starke, Florida ³¹⁰
311. Bernard Bolender	07-18-95	10:19 a.m.	Starke, Florida ³¹¹

312. James Allen Red Dog	03-03-93	10:28 a.m.	Smyrna, Delaware ³¹²
313. Joe Louis Wise Jr.	09-14-93	11:12 a.m.	Jarratt, Virginia ³¹³

¹2nd Inmate This Year Dies in Florida's Electric Chair, SUN-SENTINEL, Dec. 5, 1995.

²Killers Executed in Separate Cases, N.Y. TIMES, APR. 16, 1986, at B9.

³Vietnam Veteran Is Put to Death in Florida, N.Y. TIMES, APR. 23, 1986, at A10; Judge Refuses to Block Execution in Florida, N.Y. TIMES, APR. 22, 1986, at A10.

⁴Vietnam Veteran Is Put to Death in Florida, N.Y. TIMES, APR. 23, 1986, at A10; Judge Refuses to Block Execution in Florida, N.Y. TIMES, APR. 22, 1986, at A10.

⁵Florida Executes Second Man for Murder of a Store Owner, N.Y. TIMES, MAY 21, 1986, at A19.

⁶Daugherty Execution Makes Him "Free", UPI, NOV. 8, 1988, available in LEXIS, News Library, UPI File; Florida Executes Killer of 4 Women, N.Y. TIMES, NOV. 8, 1988, at B22.

⁷Judi Villa, Jeffers Dies Cursing His Executioners, ARIZONA REPUBLIC, SEPT. 14, 1995, at A1.

⁸Convict Put to Death After Rejecting Appeals, SAN ANTONIO EXPRESS-NEWS, DEC. 12, 1995.

⁹Texas Puts to Death First Asian Executed in U.S. in 19 Years, DALLAS MORNING NEWS, DEC. 8, 1995.

¹⁰Michael Graczyk, Texas Executes 100th Inmate, Killer of 17-Year-Old Cashier, ASSOCIATED PRESS, OCT. 4, 1995, available in WESTLAW, DIALOG-GW Library, AP-NEWS File.

¹¹Tracey Everbach, Man Who Killed Officer in '88 Is Executed, DALLAS MORNING NEWS, DEC. 7, 1995.

¹²Michael Graczyk, Inmate Executed for Robbery in Which 2nd Men Killed, HOUSTON CHRONICLE, DEC. 13, 1995.

¹³Florida Inmate Dies in Electric Chair, COURIER-J., JULY 28, 1990, at 6A; Killer, 38, Is Executed in Florida, N.Y. TIMES, JULY 28, 1990, at 9.

¹⁴Three Murderers Die in Triple Execution, COLUMBIAN (Vancouver, Wash.), AUG. 4, 1994, at C2.

¹⁵David Beasley & Amy Wallace, Mitchell Dies in Georgia's Electric Chair, ATLANTA CONST., SEPT. 2, 1987, at 1A & 6A; Amy Wallace, Convicted Killer Scheduled to Die in Chair Tonight, ATLANTA CONST., SEPT. 1, 1987, at 19A & 21A.

¹⁶Amy Wallace & David Beasley, McCorquodale Dies in State's Electric Chair, ATLANTA CONST., SEPT. 22, 1987, at 1A & 7A.

¹⁷Amy Wallace & W. Steven Ricks, Messer Is Executed for Kidnap-Murder of 8-Year-Old Niece, ATLANTA CONST., JULY 29, 1988, at 1A & 8A.

¹⁸David Beasley & Scott Thurston, Convicted Murderer Mulligan Executed, ATLANTA CONST., MAY 16, 1987, at 1A & 10A.

¹⁹David Beasley, Tucker Dies Calmly After Wink, Smiles, ATLANTA CONST., MAY 30, 1987, at 5A.

²⁰Three Murderers Die in Triple Execution, COLUMBIAN (Vancouver, Wash.), AUG. 4, 1994, at C2.

²¹2 Killers Executed in Arkansas, ST. LOUIS POST-DISPATCH, MAY 12, 1994, at 10A.

²²Alabama Killer Is Executed as High Court Rejects Pleas, L.A. TIMES, APR. 23, 1983, at 3.

²³Arkansas Electrocutes Killer of Police Officer, N.Y. TIMES, JUNE 19, 1990, at A17.

²⁴June Arney & Laura Lafay, Executed Inmate Had Hidden Gun, DAYTON DAILY NEWS, MAY 27, 1995.

²⁵2 Killers Executed in Arkansas, ST. LOUIS POST-DISPATCH, MAY 12, 1994, at 10A.

²⁶Stockton Executed, ROANOKE TIMES & WORLD NEWS, SEPT. 28, 1995, at A1.

²⁷Killer Executed After Clinton Denies Clemency, N.Y. TIMES, MAY 8, 1992, at A17; Cathleen Decker, Inmate Is Executed After Clinton Denies Clemency Plea, L.A. TIMES, MAY 8, 1992, at A32.

²⁸Man Executed in Arkansas for '83 Murder, DALLAS MORNING NEWS, SEPT. 1, 1995.

²⁹Two Inmates Executed in a Day, N.Y. TIMES, JAN. 26, 1995, at A17.

³⁰British-Born Killer Put to Death in Ga., CHARLESTON DAILY MAIL, APR. 8, 1995, at 3A.

³¹Nazi Who Accused Clinton of Treason, DAILY MAIL, APR. 22, 1995.

³²Arkansas Executes Killer of 16; Texas Kills Inmate by Injection, N.Y. TIMES, JUNE 26, 1990, at A21.

³³Three Murderers Die in Triple Execution, COLUMBIAN (Vancouver, Wash.), AUG. 4, 1994, at C2.

³⁴R. B. Fallstrom, Missouri Man, 33, Executed for Killing, ST. LOUIS POST-DISPATCH, OCT. 22, 1993, at 8A.

³⁵Murderer Is Executed in Missouri After Supreme Court Lifts a Stay, N.Y. TIMES, MAY 12, 1990, at 10.

³⁶Man Who Killed Wife, Tow Stepdaughters Is Executed, VIRGINIAN-PILOT, OCT. 20, 1995, at B7.

³⁷Georgia Executes Killer of Soldier, N.Y. TIMES, DEC. 9, 1993, at B18.

³⁸Florida Executes Man Who Killed During Robbery, N.Y. TIMES, MAY 10, 1993, at A20; Court Lifts Johnson's Stay of Execution, UPI, MAY 7, 1993, available in LEXIS, News Library, UPI File.

³⁹Peter Applebome, Arkansas Execution Raises Questions on Governor's Politics, N.Y. TIMES, JAN. 25, 1992, at 8; Hugh Aynesworth, Execution in Arkansas Draws Clinton to State, WASH. TIMES, JAN. 24, 1992, at A4.

⁴⁰Prisoner Is Executed in Georgia: Objections Were Made by a Juror, and Lawyers Who Said He Was Retarded, PHILA. INQUIRER, APR. 1, 1994, at A4.

⁴¹Frank Green, Inmate Executed for Killing 2 People, RICHMOND TIMES-DISPATCH, NOV. 14, 1995.

⁴²Pennsylvania Execution Is 1st in 33 Years, L.A. TIMES, MAY 3, 1995, at A14.

⁴³Organizer of Death-Row Escape Is Executed in a Virginia Prison, N.Y. TIMES, OCT. 13, 1984, at 19.

⁴⁴Virginia Executes Killer of Woman, N.Y. TIMES, AUG. 31, 1989, at A22.

⁴⁵Virginia Executes Killer of 3 Women, N.Y. TIMES, DEC. 14, 1990, at A26.

- ⁴⁶*Killer Is Put to Death in Virginia After Inmates Riot in His Support*, N.Y. TIMES, Apr. 19, 1985, at A16.
- ⁴⁷*Two Men Convicted of Murder Are Executed in Virginia and Texas*, N.Y. TIMES, June 26, 1985, at A18.
- ⁴⁸*Convicted Killer Is Put to Death in Virginia*, N.Y. TIMES, July 7, 1987, at B6.
- ⁴⁹*Earl Clanton Jr. Dies in Virginia Electric Chair*, WASH. POST, Apr. 15, 1988, at D7.
- ⁵⁰*Virginia Electrocutes Killer of an Elderly Woman*, N.Y. TIMES, July 20, 1990, at A12.
- ⁵¹*Man Is Put to Death in Virginia for Rape and Murder of Girl*, N.Y. TIMES, July 25, 1991, at B8.
- ⁵²*Ex-Navy Officer Executed in Enlisted Woman's Death*, ORLANDO SENTINEL, June 18, 1993, at A12.
- ⁵³*Virginia Sends Man to the Electric Chair for Couple's Slaying*, N.Y. TIMES, Sept. 17, 1992, at A18; Sue Anne Pressley, *Slayer Says Goodbye, Smiling*, WASH. POST, Sept. 16, 1992, at A1 & A17.
- ⁵⁴Ann Gibson, *Inmate Executed for Killing Sheriff's Deputy*, Associated Press, Oct. 18, 1990, available in LEXIS, News Library, AP File; *Virginia Executes Killer of Deputy*, N.Y. TIMES, Oct. 18, 1990, at A22.
- ⁵⁵*Virginia Man Executed for Rape, Murder*, WASH. POST, Dec. 17, 1993, at D6.
- ⁵⁶*Virginia Executes Killer of 2 Store Clerks*, SUN SENTINEL, Mar. 4, 1994, at 6A.
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