THE CASE FOR TELEVISED EXECUTIONS

I. INTRODUCTION

> Here's how I'd produce this show of shows: Open with a shot of the empty death chamber and a somber voiceover spelling out the details of the condemned man's background and his crime. Cut to the corridor showing him being led to the chair and then strapped in. The viewers would hear his last words, hopefully words of remorse and warnings to the young, though the producer would stand ready to bleep out possible obscenities or profanities . . . .
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> . . . .
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> And then, before your eyes, he does die—hanged, electrocuted, gassed or injected with poison, depending on the method of choice in the state where the execution is being performed.[1]

Although executions are no longer performed publicly in the United States,[2] public executions were the norm in this country until the beginning of the nineteenth century.[3] The public display of the condemned person being led to the gallows, his last words, the didactic words of the minister warning the gathered crowd that they too would meet a similar fate if they did not lead orderly Christian lives, and the condemned's subsequent death by hanging, all served as a means of inculcating into the populace what the social elite of the period deemed to be positive values.[4] Indeed, in the tumultuous and uncertain post-Revolutionary period, execution day was used by authorities as a means of deterring crime and civil disobedience, thereby promoting civil and religious order.[5]

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[1] Henry Lee, *Televising Executions Might Settle Debate*, DAILY NEWS, Aug. 11, 1991, at 29.

[2] *See infra* note 13 and accompanying text.

[3] *See* LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776-1865, at 3 (1989). *See also* WILLIAM J. BOWERS, EXECUTIONS IN AMERICA 31 (1974).

[4] *See* MASUR, *supra* note 3, at 27. "What is certain is that hanging day embodied political, theological, and cultural assumptions that mattered dearly to social elites in the early Republic . . . . [and] the overriding civil theme of execution day was the preservation of order." *Id.*

[5] *Id.* at 47. *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 47-50 (Alan Sheridan trans., 1977). Writing about public executions in France during the late seventeenth and early eighteenth centuries, Foucault maintains that public executions were more about the rulers' demonstration of their tremendous power and superiority than an effort to re-establish justice. *Id.* at 49. The aim of public executions, he writes, is "to bring into play, as its extreme point, the dissymetry between the subject who has dared to violate the law and the all-powerful sovereign who displays his

By the 1830s, however, public executions were abolished in most states and were replaced by private ceremonies which took place within the confines of prison walls.[6] There were several reasons for this change. First, by the 1820s, merchants, legislators, manufacturers and professionals began to view public life on America's urban streets as a threat to their person, property, and livelihood.[7] The crowds that gathered at executions frequently became angered and unruly when hangings were performed incorrectly or when the condemned person received a last minute reprieve. Execution days were increasingly viewed as "festivals of disorder that subverted morals, increased crimes, [and] excited sympathy with the criminal . . . ."[8]

Second, the public performance of the penitent criminal confessing his crime and begging for forgiveness lost much of its significance as a means of maintaining social order, as people began to doubt whether this conversion from remorseless criminal to supplicant sinner was genuine.[9] When people no longer believed that this transformation was authentic, there was no reason for them to view the whole process as a lesson in justice and the supposed deterrent effect served by public executions was thereby negated.[10]

Finally, by the 1830s, people began to view public executions as inhumane.[11] In the end, "[d]isgusted by a 'loathsome exhibition,' anxious over public order, and convinced that public hangings failed to prevent crime, legislatures [from every state eventually] took execution day away from the general public."[12] By the twentieth century, public executions were extremely rare in the United States. The last two were the hangings of Rainey Bethea, in Owensboro, Kentucky, on August 14, 1936, and the hanging of Roscoe Jackson, in Galena, Missouri, on May 21,

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strength." *Id.* at 48-49. By breaking the law, the "offender has touched the very person of the prince; and it is the prince—or at least those to whom he has delegated his force—who seizes upon the body of the condemned man and displays it marked, beaten, broken." *Id.* at 49.

6 In 1834, Pennsylvania became the first state to abolish public executions. Similar acts calling for private executions were passed in New York, New Jersey and Massachusetts in the following year. By 1845, all of the states in New England and the mid-atlantic region had eliminated public executions in favor of private hangings. *Id.* at 94. *See also* BOWERS, *supra* note 3, at 31; THE DEATH PENALTY IN AMERICA 13 (Hugo A. Bedau ed., 3d ed., 1982)[hereinafter DEATH PENALTY].

7 *See* MASUR, *supra* note 3, at 102.

8 *Id.* at 95; BOWERS, *supra* note 3, at 31.

9 *See* MASUR, *supra* note 3, at 108.

10 *Id.*

11 *Id.* at 116. *See also* BOWERS, *supra* note 3, at 31.

12 MASUR, *supra* note 3, at 116.

1937.[13]

More than half a century after the last public execution and fifteen years after the Supreme Court declared in *Gregg v. Georgia*[14] that the punishment of death "does not invariably violate the Constitution,"[15] some are beginning to question the wisdom of keeping executions out of public view. Included in this group are those who feel that executions should be televised.

It has been argued that televising executions would "settle" the controversial death penalty debate, and that people need to be adequately informed in order to properly decide the issue one way or the other.[16] Televising an execution would allow people to see for themselves what is being done to citizens who are put to death supposedly in the name of the People.[17] Others argue that if executions were carried out in front of the television camera, there would be more public accountability for bungled executions, thus putting added pressure on those carrying out the sentence to perform it more precisely and more humanely.[18]

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[13] DEATH PENALTY, *supra* note 6, at 13. The *New York Times* reported that over 10,000 spectators from several states came to Owensboro, Kentucky, to witness Rainey Bethea's hanging. *10,000 See Hanging of Kentucky Negro*, N.Y. TIMES, Aug. 15, 1936, at 30.

[14] 428 U.S. 153 (1976).

[15] *Id.* at 169.

[16] *See, e.g.*, Lee, *supra* note 1 (arguing that by televising executions the American people would be able to "see exactly what they are so passionately arguing about."). Tom Goldstein, Dean of the Journalism School at the University of California at Berkley, stated on a recent television program that "[t]he public should see how its dollars are being used, how the system of punishment is being meted out in this country and that may give them information with which to change their mind or not change their mind, but they should have that information." *MacNeil/Lehrer News Hour: Focus-TV Drama* (WNET and WETA television broadcast, June 6, 1991) (transcript on file with *Cardozo Arts & Ent. L. J.*) [hereinafter *MacNeil/Lehrer*]. *See also* Plaintiff's Trial Brief at 16, KQED, Inc. v. Vasquez, No. 90-1383 (N.D. Cal. June 7, 1991) [hereinafter Plaintiff's Trial Brief] (arguing that since the public ultimately decides whether a given state retains capital punishment, public awareness and information as to how exactly the penalty is applied is of "critical importance," because it is only a fully informed public that can vote intelligently); Furman v. Georgia, 408 U.S. 238, 361 (1972) (Marshall, J., concurring) (stating that "[w]hether or not a punishment is cruel and unusual depends . . . on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable").

[17] *See, e.g.*, DEATH PENALTY, *supra* note 6, at 14 (noting that "[t]he relative privacy of executions nowadays . . . means that the average American literally does not know what is being done when the government, in his name and presumably on his behalf, executes a criminal").

[18] *See, e.g.*, Lee, *supra* note 1. "[B]ungled jobs" have been reported at least in Florida, Alabama and Texas. In Virginia, allegations of one such bungled job in which the victim bled profusely at the moment of electrocution were dismissed by the state corrections officer, who maintained that the hemorrhaging was a simple nosebleed. Instead, "[i]f wardens knew that the whole country was watching, and not just a privileged few observers, they damn well would make sure that their equipment was in top working order." *Id. See also* ARTHUR KOESTLER, REFLECTIONS ON HANGING 139 (1956) (stating that officials in England, taking advantage of the fact that executions were no longer open to the public during the 1950s, tried to falsely convince the public that modernized hanging was a nice and smooth affair that was always carried out "expeditiously and without a

Some also maintain that if the death penalty is to serve as a deterrent, then televising it would be the most efficacious means of delivering the message that "crime does not pay."[19] Finally, in the words of Horace Greeley, it is said that "it is absurd that an act which is claimed has a beneficial effect on the public, should be performed in secrecy,"[20] and that "those considerations which forb[id] executions from occurring in public view should prevent their taking place altogether."[21]

Thus far, however, with the exception of a district court decision in Texas that was subsequently overturned on appeal,[22] the few attempts made to get courts to recognize a constitutional right to televise executions have been rejected.[23] Some courts have even gone so far as to completely deny the press any right of access to attend executions.[24]

This Note will argue that these courts have erred in denying the media the right to televise executions. Part II will survey and critique the major Supreme Court cases which deal with the right of the press to obtain access to newsworthy information, and will conclude that there is no justification for preventing reporters

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hitch"). Although this Note will not detail the various methods by which the federal and state governments put people to death, it should be noted that a number of states still retain hanging as a method of execution.

19 *See, e.g.*, Lee, *supra* note 1 (noting that the prisoner's last words before dying on television would have more impact than any anti-crime sermon). *See also* Plaintiff's Trial Brief, *supra* note 16, at 17 (arguing that "*[d]eterrence* and *retribution* values—considered by the courts as validating the death penalty—could only be enhanced by maximum public exposure of the consequences of committing capital crimes.").

20 MASUR, *supra* note 3, at 20 (quoting N.Y. TRIB., May 25, 1849).

21 *Id. See also* Garrett v. Estelle, 424 F. Supp. 468, 473 n.2 (N.D. Tex.), *rev'd*, 556 F.2d 1274 (5th Cir. 1977), *cert. denied*, 438 U.S. 914 (1978) (stating that "[i]t might be suggested here that if what the government is doing is so terrible [that the public may not see it], perhaps the government should not be doing it. At the very least, the people should have the widest possible information about such 'shocking' governmental proceedings.").

22 The district court decision in *Garrett*, 424 F. Supp. at 468, held that the press has a first amendment right to televise executions. Its holding, however, was subsequently reversed on appeal and therefore may not be considered good law. *See* Garrett v. Estelle, 556 F.2d 1274 (5th Cir. 1977), *cert. denied*, 438 U.S. 914 (1979). Even so, this Note will argue that the district court's decision in *Garrett* was incorrectly reversed.

23 *See* KQED, Inc. v. Vasquez, No. 90-1383 (N.D. Cal. June 7, 1991) (holding that the press has a right to be present at an execution but no right to film it). There was no appeal from the judgment in *KQED*. *See KQED Won't Appeal Execution Ruling*, UPI, Sept. 4, 1991, *available in* LEXIS, Nexis Library, UPI file. *See also* Halquist v. Dep't of Corrections, 783 P.2d 1065 (Wash. 1989) (denying a journalist and independent producer of television and radio documentaries the right to videotape an execution in Washington State).

24 *See, e.g.*, Holden v. Minnesota, 137 U.S. 483, 491 (1890) (stating that a state could legitimately restrict attendance at executions); Kearns-Tribune, Corp. v. Utah Bd. of Corrections, 2 Media L. Rep. (BNA) 1353 (D. Utah Jan. 13, 1977) (holding that representatives of the printed and electronic news media had no constitutional right of access to attend and report on the execution of Gary Gilmore).

from filming or video taping executions for subsequent broadcast on television. It will also examine and critique the few cases that have considered the issue of televised executions, and will conclude that the First Amendment requires that representatives of the media be entitled to film executions. Part III, arguing in the alternative, will show that those states which already permit members of the press to witness executions must allow them to use television as a reporting tool, since it is the most effective means of reporting the event. Although the press would have to comply with certain reasonable safety and security precautions which the attending corrections officials may prescribe, limiting the press to using papers and pencils is tantamount to a content-based restriction prohibited by the Supreme Court.[25] Part III will also show that preventing members of the media from filming executions is not a valid "time, place and manner restriction" since it is unreasonable and is based on the content of what the reporters would broadcast. Further, in the case of reporting executions, print is not a valid alternative to television. Finally, Part IV will conclude that courts should allow executions to be televised.

II. The Rights of the Press to Gather News and What This Means in the Context of Executions

The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the . . . freedom . . . of the press."[26] Yet, it was not until recently that the Supreme Court began to clarify just how much weight that "freedom" carries. Does it mean the right to publish anything through all forms of the media? Does it mean that members of the press have an unlimited right to access and report on anything they deem newsworthy? Indeed, does it mean that the press must be treated as a separate entity, legally distinct from "the People"?

Although this area of the law is still unsettled in some respects, a fairly consistent doctrine has emerged from the Court's recent holdings. Specifically, as the law stands today, members of the press do not have a special right of access to information not available to the general public. This doctrine of "equal ac-

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[25] For a discussion of content-based restrictions, see *infra* notes 195-97.

[26] The First Amendment provides in full, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

cess" has been used to keep television reporters from filming executions on the grounds that members of the public may not film them either.

A. *The Press Access Cases*

In order to analyze the press's right to televise executions, it is necessary to discuss those cases that have set forth the standard for determining the limits of the press's right to gather news in other contexts. The first of these cases dealing with the right of the press to acquire information is *Zemel v. Rusk*.[27] In that case, the plaintiff was denied a passport to Cuba and claimed that this constituted an infringement of his asserted first amendment right to gather information.[28] In rejecting this claim, the Supreme Court held that although a member of the press or public does not have an "unrestrained" right to gather any desired information at any given time,[29] the First Amendment does include a "qualified" right to gather information.[30] The *Zemel* Court, however, left unresolved what the limits of this qualified right might be. In *Branzburg v. Hayes*, the Court balanced the limited right to gather information against the asserted interests of both the state and federal governments in the context of a judicial proceeding. Specifically, the Court had to determine whether members of the press could be required to appear and testify before state and federal grand juries, where they could be required to reveal the identities of confidential news sources.[31] Since the press argued that this would ultimately diminish their news-gathering ability,

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[27] 381 U.S. 1 (1965).

[28] *Id.* at 16-17. The plaintiff argued that the trip was not for leisure purposes, but to see for himself what the Cuban government under Fidel Castro was really like. *Id.* at 4.

[29] *Id.* at 16-17. In an often-quoted passage, Justice Warren stated that

> [t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a [f]irst [a]mendment right. The right to speak and publish does not carry with it the unrestrained right to gather information.

Id.

[30] *See* Branzburg v. Hayes, 408 U.S. 665, 681 (1972) (asserting that "news gathering" qualifies for first amendment protection and that "without some protection for seeking out the news, freedom of the press could be eviscerated"). *See also id.* at 728 n.4 (Stewart, J., dissenting) (stating that "[t]he necessary implication [of the *Zemel* Court's use of the word 'unrestrained' when referring to the right to gather information] is that some right to gather information does exist").

[31] *See id.* at 665-75. The reporters involved in the suit maintained that if they were forced to divulge confidential information and sources, these sources would refuse, or at least be more reluctant to furnish them with information that they could not otherwise obtain. *Id.* at 679-81.

the essence of the conflict before the Court was the press's desire to gather information on the one hand and the public's interest in an effective judicial process on the other.

In a five-four decision, the *Branzburg* Court stated that any curtailment of first amendment rights must be justified by a competing public interest that is "compelling" or "paramount."[32] After noting that "without some protection for seeking out the news, freedom of the press could be eviscerated,"[33] the majority went on to conclude that in complying with grand jury investigations, the press's burden would be "consequential, but uncertain," and therefore not sufficient to outweigh the public's interest in effective law enforcement.[34] To support its holding, the Court cited *Zemel* for the proposition that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."[35] While *Zemel* and *Branzburg* make clear that the press does not

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[32] *Id.* at 680 (quoting NAACP v. Button, 371 U.S. 415, 439 (1963)) (holding that a newspaper reporter has no first amendment privilege to conceal facts or conduct relevant to a grand jury investigation); De Gregory v. Attorney Gen. of New Hampshire, 383 U.S. 825, 829 (1966) (requiring an "overriding and compelling state interest" before intruding on first amendment rights); Bates v. Little Rock, 361 U.S. 516, 524 (1960) (holding that a state must demonstrate a compelling interest where there is a "significant encroachment upon personal liberty"); Thomas v. Collins, 323 U.S. 516, 530 (1945) (stating that "any attempt to restrict [speech or personal liberty] must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger"). *See also* Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 546 (1963) (stating that a government must "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest"); NAACP, Western Region v. City of Richmond, 743 F.2d 1346, 1354 (9th Cir. 1984) (holding that "the government bears the burden of proof . . . in all [f]irst [a]mendment cases").

[33] *Branzburg*, 408 U.S. at 681.

[34] *Id.* at 690. The *Branzburg* Court found

> no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.

Id. at 690-91. The Court recognized that the press's right to access information is limited in other contexts as well, including judicial conferences, "the meetings of other official bodies gathered in executive session, and the meetings of private organizations." *Id.* at 684.

In his dissenting opinion, Justice Douglas wrote that the government's claim did not rise to the level of being a "compelling" interest. *See id.* at 717-18 (Douglas, J., dissenting). He also stated that "effective self-government cannot succeed unless the people are immersed in a steady, robust, unimpeded, and uncensored flow of opinion and reporting." *Id.* at 715.

[35] *Id.* at 684. In his dissenting opinion, Justice Stewart wrote that "[a] corollary of the right to publish must be the right to gather news." *Id.* at 727 (Stewart, J., dissenting). According to Stewart, "[n]o less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised." *Id.* at 728.

merit "special" treatment with regard to the First Amendment, the resolution of any claim involving the press ultimately depends on the balancing of the competing interests involved.[36]

The next two relevant Supreme Court cases were *Pell v. Procunier*[37] and *Saxbe v. Washington Post Co.*[38] Both cases involved challenges to similar prison regulations which barred the press from interviewing specific individual prisoners.[39] The issue in both cases was whether the press had a right to access information that was distinct from the public's right to obtain information. The press was not claiming any impairment of its freedom to publish information once obtained.[40] In denying the press's claim, the *Pell* Court held that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public."[41] The Court concluded that there was no support for the proposition "that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally."[42] In other words, according to *Pell* and *Saxbe*, if for

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36 The *Branzburg* Court specifically stated that the state's interests were "compelling" or "paramount," thus justifying the "burden" on first amendment rights. *Id.* at 700. The Court also analyzed the burden that the state's interests would have on the press. *See supra* notes 33-34. In *Zemel*, the Court examined the appellant's first amendment claims and concluded that there was no protected interest involved. Zemel v. Rusk, 381 U.S. 1, 16 (1965). The Court, however, still analyzed the justifications given for the Secretary of State's refusal to validate the passports of the United States citizens for travel to Cuba. *Id.* at 14-16.

37 417 U.S. 817 (1974).

38 417 U.S. 843 (1974).

39 *See Pell*, 417 U.S. at 819. The challenged regulation in *Pell* was section 415.071 of the California Department of Corrections Manual (Aug. 23, 1971) which provided that "[p]ress and other media interviews with specific individual inmates will not be permitted." In *Saxbe*, the regulation at issue was para. 4b (6) of Policy Statement 1220.1A of the Federal Bureau of Prisons (Feb. 11, 1972), which "prohibited any personal interviews between newsmen and individually designated federal prison inmates." *Saxbe*, 417 U.S. at 844. Although the regulation in *Pell* was challenged by inmates as well as journalists, this Note will only focus on the decision as it relates to members of the press. In *Saxbe*, no prisoners challenged the no-interview policy; the suit was brought solely by the *Washington Post* and one of its reporters.

40 *Pell*, 417 U.S. at 829-30; *Saxbe*, 417 U.S. at 844-45. Writing for the majority in *Pell*, Justice Stewart took care to emphasize that "California imposes no restrictions on what may be published about its prisons, the prison inmates, or the officers who administer the prisons." *Pell*, 417 U.S. at 829. Similarly, in *Saxbe*, Justice Stewart wrote that the regulation at issue was "not part of any attempt by the Federal Bureau of Prisons to conceal from the public the conditions prevailing in federal prisons." *Saxbe*, 417 U.S. at 848. In the televised execution context, however, both issues would be present: the right to access information (i.e., to be present at executions) and the right to transmit the news to the public free from government interference.

41 *Pell*, 417 U.S. at 834. The Court applied the same holding in *Saxbe*, as the majority found that case to be "constitutionally indistinguishable" from *Pell* on the issue of press access. *See Saxbe*, 417 U.S. at 850.

42 *Pell*, 417 U.S. at 834. In his dissent to *Saxbe*, however, Justice Powell wrote that the "public debate must not only be unfettered; it must also be informed. For that reason

valid reasons the public has no right to obtain certain information or evidence, neither does the press, since the press has no rights superior to those of the public. In these two cases, as in *Zemel* and *Branzburg*, the equal access proposition did not prevent the Court from examining and balancing the competing first amendment and governmental interests involved before rendering a decision.[43] As a result, none of these press access cases clearly indicates what purpose is served by the concept of equal access, since it in no way affected their outcome, or the way that outcome was achieved.[44]

A few years later in *Houchins v. KQED, Inc.*,[45] some members of the Court appeared to broaden the holdings of *Pell* and *Saxbe* in denying the media a right to gather information under the government's control. In this case, however, there was no opinion that garnered the support of more than three justices. *Houchins* should therefore be viewed as one more case that followed the concept of equal access as articulated in *Zemel*,

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this Court has repeatedly stated that [f]irst [a]mendment concerns encompass the receipt of information and ideas as well as the right of free expression." *Saxbe*, 417 U.S. at 862-63 (Powell, J., dissenting).

[43] Although the *Saxbe* Court stated that it would not engage in any balancing of first amendment and governmental interests, it appears that to a certain extent, this is precisely what it did. *Saxbe*, 417 U.S. at 849.

The *Saxbe* Court examined the adverse impact the prison regulation would have on the press's first amendment interests and also explored the security concerns raised by the government. *Id.* at 846-48. To some degree then, the Court did consider the competing interests involved. Otherwise, the Court would not have felt the need to justify the relative importance of the government's concerns compared to the first amendment claims asserted by the press.

In *Pell*, the Court addressed the justifications given for the prison regulation and explained that "[i]t is against this background [of the security justifications given for upholding the regulation] that we consider the media plaintiffs' claims under the First and Fourteenth Amendments." *Pell*, 417 U.S. at 832. Further, the *Pell* Court disagreed with the media plaintiffs' contention that the prison regulation "constitutes governmental interference with their newsgathering activities that is neither consequential nor uncertain, and that no substantial governmental interest can be shown to justify the denial of press access to specifically designated prison inmates." *Id.* at 833. These passages indicate that the Court examined and balanced the competing governmental and first amendment interests involved before rendering a decision.

[44] In his dissent to *Pell*, Justice Douglas wrote that "[p]risons, like all other public institutions, are ultimately the responsibility of the populace. . . . and people have the right and the necessity to know not only of the incidence of crime but of the effectiveness of the system designed to control it." *Id.* at 840 (Douglas, J., dissenting). In his dissent to *Saxbe*, Justice Powell wrote that "[f]or good reasons, unrestrained public access [to prisons and other public institutions] is not permitted. The people must therefore depend on the press for information concerning public institutions." *Saxbe*, 417 U.S. at 864 (Powell, J., dissenting).

[45] 438 U.S. 1 (1978). In *Houchins*, a psychiatrist's report concluded that conditions in a certain section of the prison were responsible for the mental illness of some prisoners. The San Francisco public television station KQED obtained a preliminary injunction from the district court permitting it to investigate these allegations, but the Supreme Court reversed. *Id.* at 3-16.

Branzburg, *Pell* and *Saxbe*.[46]

Chief Justice Burger's opinion in *Houchins* argued that the lower court's injunction granting journalists access to certain portions of the prison violated the principle enunciated in *Pell* and *Saxbe* that "the media have no special right of access to [prisons] different from or greater than that accorded the public generally."[47] More significantly, however, Burger's opinion took this principle one step further, stating that "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."[48]

Justice Stewart, writing a concurring opinion, agreed that the lower court's injunction should be reversed, but disagreed that the press should be totally denied prison access. Rather, he concurred with the plurality in reversing the lower court's injunction because he believed that it granted the press too much access and was therefore overbroad.[49] While agreeing with the majority that "[t]he Constitution does no more than assure the public and the press equal access once the government has opened its doors,"[50] Stewart disagreed on what exactly constitutes "equal access." In his view, "the concept of equal access must be accorded more flexibility in order to accommodate the practical distinctions between the press and the general public."[51] As Stewart explained,

> [a] person touring Santa Rita jail can grasp its reality with his own eyes and ears. But if a television reporter is to convey the jail's sights and sounds to those who cannot personally visit the place, he must use cameras and sound equipment. In short, terms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public

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46 *Houchins* was a 3-1-3 decision which produced no majority opinion. Justices Marshall and Blackmun did not participate and Justice Stewart, whose vote was decisive, concurred in the opinion but on narrower grounds. Although the decision produced no majority opinion, the seven Justices did agree that the press does not have a greater right to access prisons than the general public does.

47 *Id.* at 16.

48 *Id.* at 15. *But see* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 583 (1980) (Stevens, J., concurring) (noting that since Justice Marshall and Blackmun were unable to participate in *Houchins*, a majority of the Court neither accepted nor rejected Justice Burger's opinion).

49 *Houchins*, 438 U.S. at 16-19 (Stewart, J., concurring).

50 *Id.* at 16.

51 *Id.*

what the visitors see.[52]

The dissent in *Houchins*, written by Justice Stevens and joined by Justices Brennan and Powell, argued that the First Amendment protects the receipt of information and ideas with as much force as it protects the press's freedom to publish information once it is obtained.[53] Stevens justified this assertion by employing a "functional" first amendment argument. He noted that one aim of the First Amendment is to ensure that the "process of self-governance contemplated by the Framers" is preserved. For this intended process of self-governance to be effective, the public must have all of the pertinent facts "about the operation of public institutions such as prisons."[54] Without access to these relevant facts, Stevens argued, the public cannot adequately discharge its democratic duties by making informed voting decisions.[55]

The following year, in *Richmond Newspapers, Inc. v. Virginia*,[56] a plurality opinion held that both the public and the press have a first amendment right to attend criminal trials.[57] According to Justice Stevens's concurring opinion, this case was the first to hold "unequivocally" that the press may not be arbitrarily denied access to information.[58]

Similarly, in a line of cases that followed *Richmond Newspapers*, the Court found that the press and the public had a right of access to specific portions of criminal trials.[59] Each of these cases

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52 *Id.* at 17.

53 *Id.* at 30 (Stevens, J., dissenting).

54 *Id.* at 32 (footnote omitted).

55 *Id.* at 31-32.

56 448 U.S. 555 (1980).

57 Although there was no majority opinion of the Court, seven Justices recognized that a right of access to criminal trials is embodied in the First Amendment and applied to the states through the Fourteenth Amendment. *Id.* at 580 (plurality opinion); *Id.* at 582 (White, J., concurring); *Id.* at 584 (Stevens, J., concurring); *Id.* at 585 (Brennan, J., with whom Marshall, J., joins, concurring); *Id.* at 599 (Stewart, J., concurring); *Id.* at 604 (Blackmun, J., concurring). *See also* Charles W. McKinnon, Comment, *Freedom of the Press—The Press' Right of Access to Trials Versus the Victim's Interest in Testifying Privately:* Globe Newspaper Co. v. Superior Court, 11 FLA. ST. U. L. REV. 487, 487-91 (1983) (arguing that the expanded right of the public and press to attend criminal trials that was found to exist in *Richmond Newspapers* and subsequent cases, comes at the expense of the crime victim's ability to testify privately).

58 *Richmond Newspapers*, 448 U.S. at 583 (Stevens, J., concurring).

59 *See* Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 13 (1986) [hereinafter *Press-Enterprise II*] (holding that the first amendment right of access to criminal proceedings applies to preliminary hearings); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 511 (1984) [hereinafter *Press-Enterprise I*] (stating that without considering alternatives to closure, a trial court cannot constitutionally bar the press and the public from observing the voir dire in a case trying a capital offense); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (invalidating as overbroad a rule of mandatory closure respecting the courtroom testimony of minors who are victims of sex offenses). Writing

applied the same two-step analysis in their decisions. First, the Court concluded that the particular part of "the criminal trial [at issue] historically has been open to the press and general public."[60] Second, the right of access to criminal trials was found to "play[] a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process . . . . [and also] fosters an appearance of fairness . . . ."[61]

Thus, following the Court's analysis in *Richmond Newspapers* and its progeny, the finding of a right of press access to parts of a criminal trial was predicated on two factors. First, the public and press have historically been granted access to criminal trials for the purpose of witnessing and reporting them to the general public. Second, public and press access to criminal trials was granted in these cases because it was found to serve the "functional" role of fostering the appearance of justice, thereby preserving respect for the legal system and its laws. Therefore, equal access issues never entered into the Court's analyses.

Relying on the *Richmond Newspapers* line of cases, several courts have held that the right of the press to access courtroom proceedings does not translate into a corresponding right to televise those proceedings. Rather, these cases weighed the purported benefits of televising a proceeding against any negative impact that such publicity would have on the trial. In an early case, *Estes v. Texas*,[62] the Court found that the presence of television cameras recording a trial denied the defendant the right to a fair trial.[63] The Court, however, retreated from this holding six-

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for the Court in *Globe*, Justice Brennan stated that "[w]here, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Id.* at 606-07.

60 *Id.* at 605. *Accord Press-Enterprise II*, 478 U.S. at 10 (noting that preliminary hearings have always been open to the public in the United States); *Press-Enterprise I*, 464 U.S. at 505-08 (using the same historical analysis with regard to voir dire); *Richmond Newspapers*, 448 U.S. at 564-69 (chronicling the "presumptively open" nature of criminal trials in the Anglo-Saxon tradition).

61 *Globe*, 457 U.S. at 606. *Accord Press-Enterprise II*, 478 U.S. at 11-12 (finding the public observance of preliminary hearings to serve a positive societal function); *Press-Enterprise I*, 464 U.S. at 508-10 (finding the same with regard to voir dire); *Richmond Newspapers*, 448 U.S. at 595-97 (noting that public access to trials displays their fairness, prevents public resentment, dissuades judges from excesses, and calls the attention of important, but unknown witnesses).

62 381 U.S. 532 (1965).

63 *Id.* at 544. Specifically, the Court stated that television cameras in court would distract jurors and the judge, would be a form of harassment of the defendant, and would intrude into the confidential attorney-client relationship. *Id.* at 546-49.

teen years later in *Chandler v. Florida*,[64] limiting *Estes* to the technological circumstances that existed in 1962 when the case was tried. The Court further held that televising a criminal trial was not a per se violation of a defendant's due process rights if certain procedural norms were followed.[65] Therefore, both of these cases illustrate that although no constitutional right to televise a trial exists, a reporter will be denied such access to film a trial only after a compelling showing that the presence of cameras would harm the rights of the accused.

B. *The Televised Execution Cases*[66]

Those cases which have rejected attempts by the media to film executions have relied on decisions dealing with press access and televised coverage of trials. In these televised execution cases, the media also was denied the right to film executions on the grounds that the public had no right to film them. In addition, the court in *KQED v. Vasquez*[67] upheld a ban on filming executions by saying that the restriction on cameras was a valid security measure.

The first of two federal court cases addressing the issue of televised executions, *Garrett v. Estelle*,[68] challenged the media policy of the Texas Department of Corrections which barred the use of audio or video recording devices in the execution chamber.[69] The district court granted a preliminary injunction permitting a reporter to televise an execution. Several justifications were given for granting the injunction. First, the court rejected as invalid the state's arguments that a broadcast of an execution would be offensive or distasteful.[70] Second, the court reasoned

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64 449 U.S. 560 (1981).

65 *Id.* at 575. *But cf.* FED. R. CRIM. P. 53 (prohibiting radio broadcasts and the taking of photographs in the courtroom while court is in session); Conway v. United States, 852 F.2d 187 (6th Cir. 1988) (denying reporters permission to telecast, broadcast or photograph a trial), *cert. denied*, 488 U.S. 943 (1988); United States v. Edwards, 785 F.2d 1293 (5th Cir. 1986) (holding that television coverage of a trial is not constitutionally mandated); Mazzetti v. United States, 518 F.2d 781 (10th Cir. 1975) (upholding a contempt conviction for taking photographs in the "environs" of a federal courthouse).

66 Halquist v. Department of Corrections, 783 P.2d 1065 (Wash. 1989), which denied a journalist the right to film executions will not be discussed because it was decided solely with reference to state law.

67 No. 90-1383 (N.D. Cal. June 7, 1991).

68 Garrett v. Estelle, 424 F. Supp. 468, 468-70 (N.D. Tex.), *rev'd*, 556 F.2d 1274 (5th Cir. 1977), *cert. denied*, 438 U.S. 914 (1978).

69 *Id.* at 468-70.

70 The district court judge wrote that "[t]he government cannot be allowed to bar cameras from governmental proceedings without more compelling and factually demonstrable reasons than such vague and highly subjective concepts as 'taste' and 'dignity.'" *Id.* at 473.

that the people permitted by statute[71] to witness an execution "can in no sense of the word be considered as representative of the public. Only representatives of the news media can be considered to be representatives of the public . . . ."[72] Third, the court explained that since capital punishment is "one of the most important and controversial public issues of the day," it merits television coverage.[73] Finally, the district court concluded that the difficulties posed by cameras in courtrooms, as delineated by the *Estes* Court, were inapplicable in the context of executions. While cameras are often excluded from trials and other deliberative proceedings because they "tend to disrupt the proceedings," the court asserted that "an execution . . . is an entirely mechanical process carried out only after all deliberative proceedings have been completed."[74] The court also expressed doubts that a camera could "in any way" interfere with the carrying out of an execution.[75]

The Court of Appeals for the Fifth Circuit reversed.[76] Relying on *Pell* and *Saxbe*, the court held that "the [F]irst [A]mendment does not invalidate nondiscriminatory prison access regulations."[77] Because members of the public are not entitled to enter the Texas state prison and film executions, the press may not either, for "the [F]irst [A]mendment does not accompany the press where the public may not go."[78] Further, the court of appeals stated that it found no "content" in the filming of an actual execution "beyond, for example, that possessed by a simulation of the execution."[79] Thus, the court ruled that television broadcasters could not broadcast executions, but instead were free "to make [their] report[s] by means of anchor desk or

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71 The relevant provision at the time the case was decided limited the number of witnesses at an execution to the executioner and his assistants, the Board of Directors of the Department of Corrections, two physicians, the condemned's spiritual advisor, chaplains of the Department of Corrections, the county judge and sheriff, and up to five family members and friends of the condemned. *Id.* at 469 (citing TEX. CODE CRIM. PROC. § 43.20 (1979)).

72 *Id.* at 471.

73 The district court found that *Pell* and *Saxbe* were not controlling because they concerned investigations of "day-to-day" prison operations while capital punishment was a much more important issue. *Id.* The court also noted that "in *Pell* and *Saxbe* there was evidence that the presence of news media representatives adversely affected rehabilitation. In [the capital punishment context], of course, 'death row' inmates are not there for rehabilitation." *Id.*

74 *Id.* at 472.

75 *Id.*

76 *See Garrett*, 556 F.2d at 1276.

77 *Id.* at 1278.

78 *Id.* at 1279.

79 *Id.* at 1278.

stand-up delivery on the TV screen."[80]

The most recent attempt to get a federal court to recognize a first amendment right to televise executions was made in the California case of *KQED v. Vasquez*.[81] In a judgment without written opinion, the district court for Northern California held that the warden of San Quentin Prison can exclude cameras from the execution witness area but must permit representatives of the media to witness and report on executions.[82]

In his oral opinion, Judge Robert H. Schnacke stated that "if cameras can be kept out of federal trials, which are public, then they can be kept out of executions, which are not."[83] Judge Schnacke also explained that the "ban on cameras is a reasonable regulation that protects the identity of participating prison staffers from exposure to angry prisoners or members of the public," and also prevents broadcasts of executions which have the potential of sparking a "severe prisoner reaction" that could jeopardize prison security.[84] Finally, the court bolstered the camera exclusion policy with its acceptance of the "suicidal cameraman" theory: that someone might throw heavy equipment through the thick glass enclosing the California gas chamber.[85]

In so ruling, the court seemed to subscribe to the position that the press's right to access an event does not translate into a corresponding right to choose the means of reporting that event to the public.[86] The court also found that the security interests involved outweighed any of the benefits that televising an execution would bring to the reporting of such an event. The opinion

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[80] *Id.* at 1279.

[81] No. 90-1383 (N.D. Cal. June 7, 1991).

[82] *Id. See also* Don J. DeBenedictis, *Cameras Banned, Pens Allowed*, 77 A.B.A. J. 16 (Aug. 1991) (reporting that while the opinion stated that the press's access to executions cannot be denied, "cameras and recorders—anything but pads, pencils and sketchbooks—can be kept out").

[83] DeBenedictis, *supra* note 82, at 16.

[84] *Id. See also* Jim Doyle, *San Quentin Warden Defends Ban on Televised Executions*, S. F. CHRON., March 28, 1991, at B10 (according to the prison warden, a televised execution may be "the spark that pushes (prison unrest) from a hunger strike or sit-down strike to violence"); Victoria Slind-Flor, *Film at 11? Lawyers Debate T.V. Executions*, NAT'L L.J., June 10, 1991, at 8 (noting that according to San Francisco Deputy Attorney General Karl S. Mayer, "most San Quentin inmates have television sets in their cells and can choose which programs they watch. Seeing the execution on television might inflame inmates to riot or retaliate against guards").

[85] Slind-Flor, *supra* note 84, at 16.

[86] This argument was made by the state as part of its defense. *See* Defendant's Trial Brief at 7, KQED, Inc. v. Vasquez, No. 90-1383 (N.D. Cal. June 7, 1991) [hereinafter Defendant's Trial Brief] (arguing that "[a]lthough the Constitution may not prohibit television coverage of a criminal trial, Chandler v. Florida, 449 U.S. 560, 582-83 (1981), the right to attend, observe and report on a criminal trial does not include a constitutional mandate for recording, photographing, videotaping or broadcasting the trial"). *Id.* at 8-9.

in *KQED* is justified in part by concerns for prison safety and security, which raises issues distinct from those expressed in earlier press access cases relying on "equal access" and the First Amendment. As a result, *KQED* will be considered separately.

C. *A Critique of the Press Access Cases and* Garrett v. Estelle

As far as *Pell* and *Saxbe* and the other press access cases apply to the televised execution question,[87] they may provide a loose framework for balancing and examining the competing interests involved in deciding whether to grant the press access to televise executions. They should not, however, be used as the court of appeals did in *Garrett* to deny members of the press the right to televise executions on the grounds that the general public is barred from attending and filming executions.[88] As will be demonstrated below, the concept of equal access has been misplaced and misapplied by courts, and it is insufficient in terms of resolving first amendment disputes involving the press. If courts were to abandon their reliance on equal access, the televising of executions could not be banned without first evaluating the competing interests involved. By evaluating the relevant issues, courts would be more likely to reach the conclusion that the first amendment interest involved in televising executions outweighs other competing interests.

In their analysis of the competing interests involved in televising executions, courts should consider the information sought by the public or the press and how, practically speaking, obtaining that information would affect security, confidentiality or other government interests.[89] Only after proper consideration is given to these matters may a court conclude that the press is not entitled to access information because the public is not granted

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87 *Pell* and *Saxbe* are only partially applicable to resolving the issue of televised executions because they only focus on the gathering of information for the purpose of publishing it; they do not address the issue of freedom to publish once information is obtained. *See supra* note 39 and accompanying text. However, since both *KQED* and the court of appeals in *Garrett* held that reporters are free to witness executions, but that their reporting, or "publishing," of the event may not include television footage of an execution, both of these issues should have been explored by the courts in deciding these cases. Limiting the manner in which news may be reported in the context of televised executions is an equally important issue that merits consideration, since access to news is relatively meaningless if the government is permitted to render ineffective the reporting of that news. *See* Branzburg v. Hayes, 408 U.S. 665, 729 (1971) (Stewart, J., dissenting).

88 *See Garrett*, 556 F.2d 1274. The opinion offers no explanation as to why the public is forbidden from filming executions. The court states repeatedly, however, that the press has no right of access to information not available to the public. *Id.* at 1279.

89 Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 583 (1980) (Brennan, J., concurring) (citations omitted).

similar access. The Supreme Court in *Pell* and *Saxbe* used this line of inquiry, yet it is not followed by the court of appeals in *Garrett*. The *Garrett* court ignored such relevant issues as why the public may not freely enter an execution chamber and film a person being executed by the state, or why executions must be performed in relative privacy, away from the scrutinizing eye of the public. These are some of the most critical questions in the debate over televised executions, yet they were not addressed by the court in *Garrett*.

Instead, according to its reading of *Pell* and *Saxbe*, the *Garrett* court concluded that no balancing was required of the state interests involved against the press's asserted right to film executions since the press may not raise any first amendment claim when seeking information not available to the public. This does little, if anything, to explain the real reason why the *Garrett* court denied the press's request to televise executions.[90]

The regulations in *Pell* and *Saxbe* were enacted by prison officials in response to specific problems allegedly caused by prior prison regulations.[91] In other words, in those cases there were demonstrable reasons why the public and press were restricted access to information. Before denying the asserted claims, the Court examined the legitimacy of the justifications given for curtailing the first amendment freedoms at issue. Even though the press was requesting "special access" to information denied to the public, this did not prevent the Court from examining and balancing the competing interests at stake.[92]

Similarly, in other cases standing for the proposition that the "First Amendment does not guarantee the press a constitutional right of special access to information not available to the public

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[90] Some argue that the court of appeals yielded to political pressure in rendering its opinion. *See* DEATH PENALTY, *supra* note 6, at 348 (noting that the Attorney Generals of 25 different states asked the Fifth Circuit to set aside the ruling of the district court that would have permitted executions in Texas to be televised). *See also id.* at 92 (stating that according to a Harris Survey, reported January 13, 1977, 86% of those polled opposed televising executions, while only 11% were in favor of them).

[91] *See Pell*, 417 U.S. at 831-32. Writing for the majority, Justice Stewart stated that the California prison regulation was enacted because the prior policy permitting the press to request and interview specific inmates "resulted in press attention being concentrated on a relatively small number of inmates who, as a result, became virtual 'public figures' within the prison society and gained a disproportionate degree of notoriety and influence among their fellow inmates . . . [and] often became the source of severe disciplinary problems." *Id.* In *Saxbe*, Justice Stewart wrote that "[a]s a result [of following the former policy], those inmates who are conspicuously publicized because of their repeated contacts with the press tend to become the source of substantial disciplinary problems that can engulf a large portion of the population at a prison." *Saxbe*, 417 U.S. at 848-49.

[92] *See supra* text accompanying note 43.

generally,"[93] the Court still balanced the competing interests involved before denying the claim at issue. For example, in *Zemel*, the Court declined to validate appellant's passport for travel to Cuba without implicating the First Amendment at all.[94] Rather, the visa was denied "because of foreign policy considerations affecting all citizens."[95] In *Branzburg*, the Court balanced First Amendment interests, which the press claimed were implicated when they were forced to reveal their sources during grand jury investigations, against the public's interest in law enforcement. Only after finding the burdens imposed on the press to be "uncertain" and the interests in law enforcement to be significant enough to "override" those first amendment interests, did the Court conclude that members of the press, like other citizens, must respond to questions posed to them by grand juries.[96]

Therefore, it was improper for the court of appeals in *Garrett* to hold that members of the press can be denied access to film executions because the public is not granted similar access, without first examining and balancing the competing interests involved.[97] The court's reasoning is also circular, for it fails to explain why members of the public were not granted access to film executions in the first place.

The most practical solution to the misapplication of this Supreme Court doctrine would be for the Supreme Court to abandon equal access; to treat the press's right of access to information as being distinct from that of the public. For one, this would prevent courts from evading the issue of why access is being denied in the first place, as the court of appeals did in *Garrett*. Asserting that the press is not entitled to special access to newsworthy information because the public cannot obtain the same information fails to answer the fundamental question of why ac-

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93 Branzburg v. Hayes, 408 U.S. 665, 684 (1972) (citing Zemel v. Rusk, 381 U.S. 1, 16-17 (1964)). *See also* Houchins v. KQED, Inc., 438 U.S. 1 (1978) (participating Justices agreed that members of the press are not entitled to a special right of access to government information).

94 *See Zemel*, 381 U.S. at 16-17.

95 *Id.* at 13.

96 *See Branzburg*, 408 U.S. at 690-91.

97 *See Garrett*, 556 F.2d at 1276 (holding that "the protection which the [F]irst [A]mendment provides to the news gathering process does not extend to matters not accessible to the public generally, such as filming of executions in Texas state prison, and therefore that Garrett has no such right"). The *Garrett* court later stated that it was relying on *Pell* and *Saxbe* to hold that no first amendment right exists to film executions. *See id.* at 1277-80. *See also* Kearns-Tribune v. Utah Bd. of Corrections, 2 Media L. Rep. (BNA) 1353, 1354 (D. Utah 1977) (relying on *Pell* and *Saxbe* to prohibit members of the press from witnessing and reporting an execution, the court stated that the plaintiffs failed to raise a viable first amendment claim that would merit strictly scrutinizing the legislation which prevented them from witnessing the execution).

cess was initially denied to the public. Further, this "bright-line" application of equal access wrongly permits courts to avoid weighing the competing interests involved in each case. Following the Supreme Court's analysis in *Zemel*, *Branzburg*, *Pell* and *Saxbe*, the equal access issue should be decided only after addressing the competing interests involved in a particular dispute.[98] Therefore, the equal access proposition is at best an endpoint that the Court reaches after first addressing the competing interests involved in a particular dispute. As such, it serves as a poor framework to resolve cases, because it does not affect the primary outcome of the case: either the information sought is public (for both the press and the public), or the competing interests of the government are sufficiently compelling to justify withholding the information.[99]

Another reason for the courts to abandon equal access is that it ignores the practical distinctions that exist between the press and the average citizen. For instance, while one camera man can film an execution and then televise it to millions of people, it is physically impossible for millions of people to be present at and witness a single execution. As Justice Powell noted in his dissent to *Saxbe*, "[n]o individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities. For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic."[100] Therefore, the general public has little alternative but to rely on the press to obtain and report information to it.[101]

This view makes sense if one considers that it is simply not feasible for an individual to seek out news on his own. He has neither the time, resources, nor physical capacity to adequately observe news for his own information or to report it to others. A large news organization, however, can be in many places simultaneously. Furthermore, given the nature of modern communica-

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98 *See supra* notes 27-44 and accompanying text.

99 For an example of how the Court found the press to have a right of access without ever considering whether the press was seeking "special access," see Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

100 *Saxbe*, 417 U.S. at 863 (Powell, J., dissenting).

101 *See Richmond Newspapers*, 448 U.S. at 572-73 (noting that "[i]nstead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public."). *See also* Cable News Network v. American Broadcasting Cos., 518 F. Supp. 1238, 1245 (N.D. Ga. 1981) (stating that "it cannot be denied that television news coverage plays an increasingly prominent part in informing the public at large of the workings of government. Many citizens likely rely on television as their sole source of news").

tions, news can be transmitted to the public almost instantaneously. Therefore, in many cases the line between the occurrence of the actual event and the reporting of it becomes increasingly blurred, making the press a surrogate eye of the public.

For these reasons, courts should consider the important role the press serves in society,[102] and accommodate the practical distinctions which exist between the public and the press in determining the issue of a right of access to information. That it is not feasible or desirable to open an execution chamber's door to the public at large is no reason to deny entry to the press; the press is in the best position to relay to the largest audience what is inside.

Justice Stewart's concurring opinion in *Houchins v. KQED, Inc.*[103] considers the distinctions which exist between the press and the public. His opinion follows a more realistic approach in considering the right of the press to obtain information than that taken by the Court in *Pell* and *Saxbe*, which failed to consider these distinctions between the press and the public, and by the court of appeals in *Garrett*, which found the issue of equal access to be determinative. While accepting the concept of equal access espoused by the Supreme Court in *Pell* and *Saxbe* and the balancing of competing interests employed in those decisions, Justice Stewart states "that the concept of equal access must be accorded more flexibility in order to accommodate the practical distinctions between the press and the general public."[104] He notes that what may be an acceptable form of access for an individual member of the public may not be acceptable for a member of the press, whose job it is to convey what he observes and hears to as many people as possible in the most accurate manner.[105] For example, a member of the public granted access to witness an event such as an execution has no need for a camera or audio device because he has his own eyes and ears, and needs no more. A

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102 The important service that the press provides the public, as well as its need to be free from restraint, has been recognized by the courts. As Justice Black wrote in his concurrence to New York Times Co. v. United States, 403 U.S. 713 (1971) (Black, J., concurring),

> [b]oth the history and the language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints. . . . The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.

Id. at 717.

103 438 U.S. 1, 16 (1978). For a discussion of Justice Stewart's opinion, see *supra* text accompanying notes 49-52.

104 *Id.*

105 *Id.* at 17.

television reporter, however, whose job it "is to convey the . . . sights and sounds to those who cannot personally visit the place [or event] . . . must use cameras and sound equipment."[106] This difference between the press and the public is significant and should be considered in determining what type of access is granted and to whom.

Applying Stewart's analysis to the context of televised executions, it follows that courts should recognize that the press, "as the 'agent' of interested citizens,"[107] must have "effective access" to aspects of the criminal justice system in which the public presumably has an interest. As noted previously, it is not practical or desirable to have thousands of people attending an execution. Nonetheless, it is important that the public be kept informed about this ultimate sanction of the state. As a compromise between the state's interest in security and its interest in maintaining a level of dignity at executions on the one hand, and the public's right to be informed on the other, the press must be present at executions and report what they observe to the public to the best of their ability. Television is the most accurate and thorough means of reporting an execution to the public,[108] and if not supported by compelling governmental interests, the camera restriction must fail.

D. *A Critique of* KQED, Inc. v. Vasquez

The case of *KQED, Inc. v. Vasquez*[109] merits separate treatment because the California district court that decided the case took a different approach in denying television reporters the right to televise executions. While the case held that a right of access to executions does not equal a right to televise them, it further concluded that the camera ban was a valid security measure and an appropriate means of preserving dignity at an execution.

Since there was no written opinion in *KQED*, it is difficult to ascertain what led the district court to its holding. It does ap-

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106 *Id.*

107 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 586 n.2 (1980) (Brennan, J., concurring) (stating that "[a]s a practical matter . . . the institutional press is the likely, and fitting, chief beneficiary of a right of access because it serves as the 'agent' of interested citizens, and funnels information . . . to a large number of individuals").

108 *See* Michael Schwarz, Current Affairs Director of the California Public Television Station KQED, in *MacNeil/Lehrer*, *supra* note 16, at 9 (stating that "[t]he camera can come closer to any other tool of reporting to showing our audience exactly what the witnesses to the execution, itself, would see").

109 No. 90-1383 (N.D. Cal. June 7, 1991).

pear; however, that the judge was influenced by the concept of equal access and, in particular, by the trial access cases.[110]

Although it is true, as the judge concluded, that the press's right to attend trials which are "open" to the public does not include also a constitutional right to film them,[111] the recitation of Supreme Court decisions that have barred cameras from courtrooms ignores the reasoning behind those cases.[112] More important, it does not support the court's conclusion that executions may not be filmed because they are not "open" to the general public.

First, unlike a trial where a written report will frequently suffice,[113] an execution cannot be accurately described by words alone.[114] Further, executions are unlike any other government proceeding in that they are the ultimate sanction that the government can impose on a citizen; because of the important eighth amendment issues involved,[115] they must be filmed and televised for people to be properly informed of how this government procedure operates.

Second, none of the factors barring cameras in the courtroom are present in the execution context. In *Estes*, while holding that televising a trial deprived a defendant of his due process rights,[116] the Supreme Court did not rely on the concept of equal access to decide the case. Instead, the Court focused on the evils that television cameras would bring to the entire trial process. The Court found that "[t]elevision in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused."[117] It also detailed those areas of the

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110 *See supra* notes 83-86 and accompanying text.

111 *See supra* notes 83-86 and accompanying text.

112 *See supra* notes 63-65 and accompanying text. *See also* Nixon v. Warner Communications, Inc., 435 U.S. 589, 609 (1978) (holding that the "First Amendment generally grants the press no right to information about a trial superior to that of the general public").

113 *See* Estes v. Texas, 381 U.S. 532, 541-42 (1965) (concluding that written accounts of trials would be sufficient to keep the press and public adequately informed). *See also* JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 897 (3rd ed. 1986) (stating that the *Estes* Court found that television's benefits over print coverage of trials were "negligible").

114 *See* Anthony Lewis, *Their Brutal Mirth*, N.Y. TIMES, May 20, 1991, at A15, where the columnist recalls: "I was present at an electrocution, many years ago in the District of Columbia, and I agree that words cannot really convey what I experienced: the sight, the sound, the smell of burnt flesh."

115 The Eighth Amendment prohibits the infliction of "cruel and unusual punishment." U.S. CONST. amend. VIII.

116 *See Estes*, 381 U.S. at 551-52. The Court limited its holding to "the facts as they are presented today," and noted that "ever-advancing techniques of public communication and the adjustment of the public to its presence may bring about a change in the effect of telecasting upon the fairness of criminal trials." *Id.*

117 *Id.* at 544.

trial proceedings which it felt television specifically harmed, and concluded that those disadvantages outweighed any of the benefits which televised reporting of a trial would bring.[118]

Therefore, it is incorrect to conclude as the *KQED* court did that since cameras may be barred from courtroom proceedings if they are found to infringe upon the rights of the accused, they may also be barred from an execution. As has been demonstrated above, the fact that trials are open to the general public and executions are more restricted[119] has no relevance to the issue of whether cameras may be barred from a particular proceeding. Rather, in answering the question of whether to allow televised reporting of an execution, a court should first determine whether television is necessary to accurately report executions to the public. Next, a court should ascertain whether cameras will have a negative impact on carrying out an execution. For instance, in *Chandler v. Florida*, the Court held that cameras do not per se violate the due process rights of an accused in a criminal trial.[120] Following its analysis in *Estes*,[121] the *Chandler* Court focused on the purported harms television would cause to the proceeding in question; only after concluding that the evidence failed "to establish that the mere presence of the broadcast media inherently has an adverse effect on [the judicial] process," did it hold that cameras do not invariably prejudice the rights of an accused in a criminal trial.[122] Thus, it follows that cameras may be barred from executions only upon a showing that their presence would be disruptive to the process.

Applying this analysis to the circumstances present at an execution, it is apparent that the district court in *KQED* incorrectly held that the rights of a condemned prisoner would be offended by the presence of television cameras[123] and that cameras would

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118 *Id.* at 544-50.

119 Although executions are not "public" in the way that criminal trials are, they are not entirely "private" either. Of the 38 states which have death penalty statutes, only two of them explicitly limit witnesses at an execution to family and friends of the condemned. *See* TENN. CODE ANN. § 40-23-116 (1990); WYO. STAT. § 7-13-908 (1987). The constitutionality of a private execution, which bars members of the press from attending, has never been directly addressed by the Supreme Court. *See supra* note 24 and accompanying text.

120 Chandler v. Florida, 449 U.S. 560 (1981).

121 For a discussion of the Court's analysis in *Estes* and *Chandler*, see *supra* notes 62-65.

122 *Chandler*, 449 U.S. at 578-79.

123 In KQED, the plaintiffs sought to televise the execution of a consenting prisoner and therefore the privacy rights of the condemned were not an issue in that case. *See* Defendant's Trial Brief, *supra* note 86, at 1. Additionally, prisoners only retain those rights which are consistent with their prisoner status or the legitimate penal objectives of the corrections system. *See* Pell v. Procunier, 417 U.S. 817, 822 (1974). It could therefore be argued that in certain respects prisoners forfeit their right to privacy.

interfere with carrying out an execution. In *Estes* and *Chandler*, the Supreme Court sought to determine whether television would interfere with the courtroom proceeding, thereby depriving an accused the right to a fair trial. At an execution, the accused presumably has already had a fair trial and, therefore, the two situations should be distinguished. As the district court wrote in *Garrett*,

> [a]n execution, however, is an entirely mechanical process carried out only after all deliberative proceedings have been completed. It is not seriously contended that a single television reporter, carrying a compact, quiet, portable film camera requiring no special lighting, can in any way disrupt or interfere with this state proceeding.[124]

As far as the security issues present at the execution itself are concerned, it is extremely difficult to understand how the court could seriously accept the "suicidal cameraman theory,"[125] and use it to buttress its conclusion that a television camera would interfere with the execution process.[126] Even if this unlikely event were to occur, it could be easily managed. Surely, if attending armed prison personnel can lead a person to his or her death, there should be no question of their ability to keep a cameraman in line.[127] Further, two simple measures can eliminate the "suicidal cameraman" problem in its entirety. First, not all cameras are very heavy; some are not much larger or heavier than a reporter's notebook. Just as prison security dictates what may enter a prison in other contexts,[128] prison officials could specify the maximum permissible weight of a camera used to film an exe-

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[124] Garrett v. Estelle, 424 F. Supp. 468, 472 (N.D. Tex.), *rev'd*, 556 F.2d 1274 (5th Cir.), *cert. denied*, 438 U.S. 914 (1978).

[125] In *KQED*, there was a fear that a cameraman would throw his camera at the glass surrounding California's gas chamber, thereby allowing the poisonous gas to escape, killing everyone present. *See supra* text accompanying note 84.

[126] *See MacNeil/Lehrer*, *supra* note 16, at 8.

[127] Leading a person to their death is no easy chore; frequently the condemned go kicking and screaming. *See, e.g.*, DEATH PENALTY, *supra* note 6, at 367. *See also* FOUCAULT, *supra* note 5, at 65 (describing an execution in Paris in 1775 that required the presence of a double row of soldiers to safeguard the proceedings from members of the public as the prisoners "cried out all the way [to the gallows]"). In France, towards the latter part of the seventeenth century and early eighteenth century, "a whole military machine surrounded the scaffold" in part to keep the public from interfering with an execution. *Id.* at 50, 63-64.

In contrast, when only a limited number of witnesses are present at an execution, a "whole military machine" is not necessary to prevent a cameraman or anyone else present from interfering with the proceedings. Instead, a few prison attendants can insure that the executions are carried out without disruption.

[128] *See, e.g.*, Bell v. Wolfish, 441 U.S. 520 (1979) (barring prisoners from receiving hardcover books not sent directly from publishers or bookstores).

cution. Second, prison authorities could insist on having unmanned cameras film the execution.[129] These simple security precautions would guard against any potential kamikazes.

Next, the court in *KQED* justified the camera ban as a reasonable security measure aimed at concealing the identities of execution witnesses and prison staff members carrying out the execution. It was feared that these people might become victims of violent acts of retribution.[130] In so ruling, however, the court failed to consider several electronic masking techniques that are currently available to members of the media and could be used to block out the identities of those accidentally caught on film.[131] After all, if witnesses testifying under the Federal Witness Protection Program can be filmed and their faces electronically masked, surely the same could be done for those accidentally filmed carrying out or witnessing an execution. Also, the possibility of someone being identified through the filming of an execution and subsequently harmed by someone who viewed the execution on television is simply too remote a possibility to justify a total camera ban.[132] Barring cameras from the proceedings is therefore

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[129] For a recent account of how an unmanned camera was used to film a news event, see *infra* note 137.

If prison officials insisted on the use of unmanned cameras to film executions, the rights of the press would not be infringed. The filming of the execution would be limited to the area immediately surrounding the area where the execution is performed; any filming of witnesses or prison personnel would be prohibited for security reasons to prevent possible acts of retribution. *See infra* notes 130-33, 139 and accompanying text. Thus, an unmanned camera would not interfere or hinder with what the press may film and the public may receive.

[130] *See supra* text accompanying note 84.

[131] *See MacNeil/Lehrer*, *supra* note 16, at 8, Interview with Michael Schwarz, Current Affairs Director of KQED (stating that the television station has available to it "a number of electronic masking techniques" which they could use if necessary). *See also Don't Name Rape Victims*, USA TODAY, Dec. 23, 1991, at A12 (citing the use of the "blue-dot" in the William Kennedy Smith rape trial to conceal the identity of the alleged rape victim).

[132] The plaintiff, KQED, hypothesized that in order for a prison staff member or witness to the execution to be harmed, all of the following would have to occur:

> (1) despite directions to the contrary, a camera would capture the face or features of an identifiable witness or officer; (2) despite the availability of electronic masking and directions to the contrary, the person's face or features would remain in the tape as broadcast; (3) the identity of the person would not be known to the potential attacker but for the broadcast and would be known simply from his physical appearance; (4) the potential attacker would be so inflamed by the fact that the witness or officer attended the execution that he or she would be induced to try to harm the witness or officer; (5) the attacker would successfully track down and locate the witness or officer wherever he or she might be; and (6) the attacker would criminally harm the officer or witness.

Plaintiff's Trial Brief, *supra* note 16, at 19-20.

See also Thomas v. Collins, 323 U.S. 516, 530 (1945) (holding that "any attempt to restrict [speech or personal liberty] must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger").

not the least restrictive means of protecting witnesses and participating prison officials at an execution from subsequent identification when the execution is rebroadcast.[133] The ban is thus overbroad and, as such, violates Supreme Court first amendment precedent.[134]

The court in *KQED* also justified its ban on cameras at executions as a means of preserving dignity and order at the execution. The warden of San Quentin testified at the trial that allowing television coverage of a prisoner's execution in the gas chamber would turn the event into an "undignified spectacle."[135] The state undoubtedly has an interest in maintaining dignity at governmental proceedings;[136] however, if proper precautions are taken, any "undignified exploitation" of the execution could only occur *after* the event, when the execution is rebroadcast to the public. If the television filming is done by means of one unmanned camera, or if the filming is limited to one unobtrusive camera with a single operator, it is difficult to imagine how the execution itself could be turned into a "spectacle."[137] There is

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133 The plaintiff, KQED, proposes less restrictive alternatives:

> (1) instructing the camera operator not to take pictures of identifiable witnesses or officers; (2) instructing the camera operator not to turn the camera on until the condemned person has been strapped into the gas chamber chair and the officers are out of sight; (3) using the venetian blinds already in place to conceal the executioner staff; (4) electronically masking the identity of anyone accidentally captured on videotape; (5) reviewing the film before broadcast or publication to make sure no witness or officer is identifiable; and (6) retaining or destroying the original or master videotape so that no unmasked copies can be made.

Plaintiff's Trial Brief, *supra* note 16, at 21.

134 *See* Branzburg v. Hayes, 408 U.S. 665, 717-18 (1972) (Douglas, J., dissenting) (noting that "[i]n recent years we have said over and over again that where [f]irst [a]mendment rights are concerned any regulation 'narrowly drawn,' must be 'compelling' and not merely 'rational' as is the case where other activities [affecting only economic interests] are concerned"). *See also*, Philadelphia Newspapers v. Hepps, 475 U.S. 767, 777 (1986) (stating that the government may not restrict protected speech "without bearing the burden of showing that its restriction is justified"); United States v. Grace, 461 U.S. 171, 177 (1983) (holding that "an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest"); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 540 (1980) (noting that restrictions on speech must be "a precisely drawn means of serving a compelling state interest"); United States v. O'Brien, 391 U.S. 367, 377 (holding that a restriction on first amendment freedoms is valid if it is "no greater than is essential" to further the government's interest), *reh'g denied*, 393 U.S. 900 (1968); Daily Herald Co. v. Munro, 838 F.2d 380, 385 (9th Cir. 1988) (striking down a state statute barring the media from interviewing voters leaving the polls on an election day because the statute was "not narrowly tailored to advance [the state's] interest" and because it was "not the least restrictive means of advancing the state's interest").

135 Doyle, *supra* note 84, at B10.

136 *See* Note, *The Executioner's Song: Is There A Right To Listen?*, 69 VA. L. REV. 373, 400 (1983).

137 Limiting the filming of an execution to one camera with a single operator leads to the question of who that cameraman would be. This would not pose a problem, how-

always a chance that the cameraman won't conduct himself with the requisite decorum, but that is also true of the execution witnesses, as well as the prison staff members assisting in carrying out the execution.

Thus, by following the Supreme Court's analysis in *Estes* and *Chandler* and focusing on the purported harm the presence of cameras would cause to the proceeding in question, one must conclude that cameras would not interfere in any way with the carrying out of executions. If cameras are to be barred from executions, there has to be some other compelling reason.

E. *A Proposal to Accommodate the Public's First Amendment Interests While Preserving Prison Security (How to Avoid Roasting a Pig)*

In *KQED*, the court also justified the camera ban on the grounds that televising an execution might spark a "severe prisoner reaction" which would be dangerous for both inmates and prison personnel.[138] For example, last year, "a huge, instantaneous cheer" erupted among the prison population at San Quentin when a death row inmate's last minute stay of execution was reported on the evening news.[139] However, according to KQED's counsel William Bennet Turner, the tension in a prison is always high when one of the inmates is executed, and this would be true whether or not the actual execution was broadcast on television.[140]

Regardless of whether or not prisoners would react violently to a televised execution, by holding that executions may not be filmed for broadcast on television because those inside a prison

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ever, because in other contexts members of the news media frequently obtain film footage by having multiple networks feed into one camera. Further, it is not even necessary to have a cameraman present during the actual filming of an event. For example, the news media obtained footage of President George Bush's fainting and vomiting during an official dinner in Japan on January 8, 1992 by way of an unmanned camera: the footage of the dinner was filmed by NHK, a publicly owned Japanese media company that fed the live video signal from an unmanned camera to six other foreign stations. *See* B. Palmer, *Putting a Bag On It: Why No One Will Ever See The Complete Bush Vomit Tape*, VILLAGE VOICE, Feb. 11, 1992 at 29. Thus, only one camera, with or without a cameraman, would be necessary to film an execution and the various television networks could feed into that one camera.

138 *See* DeBenedictis, *supra* note 82, at 16.

139 *See* Slind-Flor, *supra* note 84, at 8 (quoting Karl S. Mayer, the Deputy Attorney General who represented the state in *KQED*). Apparently the judge in *KQED* was also persuaded by testimony from prison officials that the television broadcast of an execution, even some time after the actual event, would pose security problems to the prison. In response, KQED asserted that it "would never broadcast an execution live, and it would use the footage only in the context of a larger program covering the entire [capital punishment] process." *Id.*

140 Howard Minz, *San Quentin Warden Defensive About KQED Suit*, THE RECORDER, March 28, 1991, at 3.

may react adversely to it, the court in *KQED* prevented the public at large from watching them as well. In effect, this reduces the public to the level of prisoners and is the equivalent of "burn[ing] the house to roast the pig."[141] According to first amendment jurisprudence in other contexts pertaining to broadcasts, it is unconstitutional to ban an entire medium, forum, or particular subject matter in order to prevent that material from reaching a few members of the public.

For instance, an analogy can be drawn between banning broadcasts of executions to guard against prison unrest and suppressing non-obscene material to keep children from seeing it. The Supreme Court has long held that non-obscene material that is protected by the First Amendment cannot be suppressed to protect juveniles from corrupting influences.[142] Therefore, it follows that the general public cannot be prevented from viewing broadcasts that prisoners, arguably for good reason, should be prevented from seeing or hearing.

If prison officials are concerned that prisoners viewing the execution of a fellow inmate on television will be roused to violence, then one solution is to prevent prisoners from watching television when an execution is being broadcast, or, if that is not feasible, to keep prisoners from watching any television at all.[143] This would prevent the anticipated prison violence while protecting the right of the public at large to be properly informed.

On numerous occasions, the Supreme Court has stated that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."[144] Watching

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141 *See* Butler v. Michigan, 352 U.S. 380, 383 (1957).

142 *See id.* In *Butler*, a Michigan statute that made it an offense to sell books found to have a deleterious influence upon youth was struck down. The Court rejected the state's defense of the statute, stating that "by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare." *Id. See also* Erznoznik v. Jacksonville, 422 U.S. 205, 214 (1975) (asserting that "[i]n most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors.") (footnote omitted).

Although the government may not entirely ban broadcasts which are indecent but non-obscene, they may regulate the time the broadcast can be aired. *See, e.g.*, Action For Children's Television v. FCC, 852 F.2d 1332, 1340 (D.C. Cir. 1988), *reh'g en banc denied*, 1991 U.S. App. Lexis 25425, *cert. denied* 112 S. Ct. 1281 (1992).

143 *See* Slind-Flor, *supra* note 84 (noting that, according to statements made by the state, "most San Quentin inmates have television sets in their cells and can choose which programs they watch"). *Id.* at 8.

144 Price v. Johnston, 334 U.S. 266, 285 (1948). *See also* Bell v. Wolfish, 441 U.S. 520, 545 (1979) (stating that "simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations").

television is just such a right which, if necessary, must yield to the judgment of corrections officials, because granting these officials "some latitude in anticipating the probable consequences of allowing certain speech in a prison environment is essential."[145] While denying prisoners total or partial access to television implicates certain first amendment interests, the Supreme Court has held that "[t]he fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the first amendment, which are implicit in incarceration."[146]

The standard of review for prisoner's rights cases as set forth in *Turner v. Safley*[147] indicates that the restriction or prohibition of television viewing in prison is not likely to be held unconstitutional. In *Turner*, the Court held that "when a prison regulation impinges on inmates' Constitutional rights, the regulation is valid if it is *reasonably related* to legitimate penological interests."[148] In determining if a prison restriction, such as a restriction on television viewing is "reasonable," the Court undergoes a four-part analysis. First, "there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it."[149] Next, the Court looks at "whether there are alternative means of exercising the right that remain open to prison inmates."[150] "A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of

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[145] Procunier v. Martinez, 416 U.S. 396, 414 (1974). *See also* Thornburgh v. Abbott, 490 U.S. 401 (1989); Turner v. Safley, 482 U.S. 78 (1987); Hudson v. Palmer 468 U.S. 517, 524 (1984) (holding that "[t]he curtailment of certain rights is necessary, as a practical matter, to accommodate a myriad of 'institutional needs and objectives' of prison facilities chief among which is internal security.") (citations omitted).

[146] Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 125 (1977). *See also* Pell v. Procunier, 417 U.S. 817, 822 (1974)(stating that a prisoner "retains those [f]irst [a]mendment rights that are not inconsistent with his status as a prisoner"). In Meachum v. Fano, 427 U.S. 215, *reh'g denied*, 429 U.S. 873 (1976), the Court refused to hold that "*any* substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause [because that] would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts." *Id.* at 225.

[147] 482 U.S. 78 (1987).

[148] *Id.* at 89 (emphasis added). *See* O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987). Explaining the reasoning behind the *Turner* "reasonableness" test of prison regulations, the Court wrote that in order "[t]o ensure that courts afford appropriate deference to prison officials, we have determined that prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights." *Id.* at 349 (citation omitted).

[149] *Turner*, 482 U.S. at 89 (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)).

[150] *Id.* at 90.

prison resources generally."[151] "Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation."[152]

Applying the *Turner* test to the issue of restricting television viewing in prison,[153] it seems likely that such a regulation would pass muster.[154] First, keeping prisoners from watching an execution on television is "rationally connected" to prison security because of the possibility that prisoners may react violently to viewing an execution on television.[155] Second, to the extent that prisoners have a right to be informed about executions,[156] newspaper accounts would provide an alternative means of exercising that right. Although a newspaper account may not be as informative nor as descriptive as a televised account of an execution, it would also not be as inflammatory. Further, if we accept the warden's assertion that viewing a televised execution would incite prisoners, allowing the prisoners to watch an execution would have a tremendously adverse "impact . . . on guards and other inmates, and on the allocation of prison resources generally."[157] Finally, if no regulation is imposed, the only alternative to preventing prisoners from watching televised executions is to prevent the general public from watching them as well. This re-

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151 *Id.*

152 *Id.*

153 *See* Thornburgh v. Abbott, 490 U.S. 401 (1989). In *Thornburgh*, the Court upheld a regulation that granted the prison warden discretion to prohibit publications from entering the prison only if he felt they would be "detrimental to the security, good order, or discipline of the institution, or if [he thought that] it might facilitate criminal activity." *Id.* at 404. The Court applied the *Turner* test in upholding the restriction. *Id.* at 414.

154 This conclusion is supported by *O'Lone* where the Court took the "opportunity to reaffirm [their] refusal, even where claims are made under the First Amendment, to 'substitute [their] judgment on . . . difficult and sensitive matters of institutional administration' for the determinations of those charged with the formidable task of running a prison." *O'Lone*, 482 U.S. at 353 (citation omitted). *See also* Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119,126 (1977) (holding that "[b]ecause the realities of running a penal institution are complex and difficult, we have . . . recognized the wide-ranging deference to be accorded the decisions of prison administrators").

155 *See* Doyle, *supra* note 84 (quoting Warden Vasquez of San Quentin, defendant in *KQED*). *See* Bell v. Wolfish, 441 U.S. 520 (1979). Writing for the majority, Justice Rehnquist explained that:

> judicial deference [to prison administrators] is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial.

Id. at 548 (citations omitted).

156 *See Bell*, 441 U.S. at 572-73 (Marshall, J., dissenting). As Justice Marshall states in his dissent, "[t]hat individuals have a fundamental [f]irst [a]mendment right to receive information and ideas is beyond dispute."

157 *See supra* text accompanying note 151.

sponse, however, is needlessly overbroad.[158] Thus, because it is feasible to impose a regulation to prevent prisoners from viewing executions, security concerns do not provide a reasonable or compelling justification to ban televised executions.

Following *KQED*, it still remains unsettled whether the press has a first amendment right to film executions. How the Supreme Court views the First Amendment and "the role of capital punishment in our society"[159] will determine whether such a right exists.

III. Barring Reporters from Using Their Cameras in the Context of an Execution Is a Content-Based Restriction

Whether or not the Supreme Court agrees that the press should be granted a constitutional right of access to film executions, there are a number of states which already expressly provide for members of the press and media to witness executions.[160] In those states, at least,[161] any attempts to keep reporters from using their cameras must be considered content-based restrictions, and therefore contrary to the First Amendment. As a content-based measure, a ban on the presence of cameras in an execution chamber is not a valid time, place, and manner restriction.[162]

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158 *See supra* note 140 and accompanying text.

159 G. Mark Mamantou, Note, *The Executioner's Song: Is There A Right To Listen?*, 69 Va. L. Rev. 373, 396 (1983).

160 There are currently eleven such states. Seven of them make no mention of audio or visual recording devices in their statutes. *See* Ala. Code § 15-18-83 (1982); Conn. Gen. Stat. Ann. § 54-100 (West 1985); Fla. Stat. Ann. § 922.11 (1985); Ohio Rev. Code Ann. § 2949.25 (1985); Okla. Stat. tit. 22, § 1015 (West 1986); Pa. Stat. Ann. tit. 61, § 2125 (Supp. 1991); S.D. Codified Laws Ann. § 23A-27A-34 (1988). Four states, although providing for media presence at executions, do not permit audio or visual recording of the event. *See* Ky. Rev. Stat. Ann. § 431.250 (Michie/Bobbs-Merrill 1990); Miss. Code Ann. § 99-19-55 (1989); S.C. Code Ann. § 24-3-550 (Law. Co-op. & Supp. 1990); Utah Code Ann. § 77-19-11 (1990).

161 Some states do not mention the press at all in their statutes specifying who may witness an execution. *See, e.g.*, Cal. Penal Code § 3605 (West Supp. 1991); Tex. Crim. Proc. Code Ann. § 43.20 (West 1979). Yet in *KQED* for instance, the court held that the press had to be allowed to view and report on the execution because press access to witness and report on executions is custom and practice in California. *See* DeBenedictis, *supra* note 82, at 16. Similarly, in Garrett v. Estelle, 556 F.2d 1274, 1277 (5th Cir. 1977), *cert. denied*, 438 U.S. 914 (1978), the court of appeals upheld that portion of the district court's judgment which provided for the media's presence at executions in Texas. Thus according to *KQED* and *Garrett*, even states which make no reference to the press may be required by general custom to have members of the press present at executions.

162 A television ban is also illegal as a time, place and manner restriction because it is unreasonable. The alternative means of coverage, print or verbal description, are not "viable alternatives." They lack television's sense of reality, emotion and drama, which can more fully convey the event. It is precisely this gripping realism that was the basis for Texas' attempted ban.

A. *Why a Ban on Televising Executions Is Content-Based*

A content-based restriction focuses primarily on the content of the speech at issue. For example, the district court's opinion in *Garrett v. Estelle* held that the state's justification for the camera ban was based on the content of the broadcast.[163] The government argued that "broadcasts [of an execution] would be an 'offense to human dignity,' 'distasteful,' [and] 'shocking.'"[164] However, according to a line of cases beginning with *Young v. American Mini Theaters,*[165] such justifications for excluding cameras from filming executions must be viewed as being based on the content of what is being shown in the broadcasts, contrary to Supreme Court jurisprudence.[166]

Although the concept of content-based restrictions appears straightforward, its application is frequently much more complicated because justifications other than the content of the targeted speech are often given to restrict that speech. These justifications may only be tangentially related to the restricted speech. A court must therefore properly ascertain whether a given restriction is constitutionally valid, or merely a guise for the suppression of speech.

Both *Young* and the later case of *Renton v. Playtime Theaters, Inc.*[167] involved similar zoning ordinances restricting the placement of "adult" movie theaters. The Supreme Court upheld the restrictions only after finding that they were not based on the content of the movies being shown.[168] Instead, the challenged regulations were found to be aimed at avoiding the "secondary effects"[169] of the movies shown, or speech articulated, in this

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[163] Garrett v. Estelle, 424 F. Supp. 468 (N.D. Tex.), *rev'd*, 556 F.2d 1274 (5th Cir. 1977), *cert. denied*, 438 U.S. 914 (1978).

[164] *Id.* at 472.

[165] 427 U.S. 50 (1976).

[166] As a rule, "one must begin with the premise that government may not justify the suppression of speech because its content or mode of expression is offensive to some members of the audience." LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 852 (2nd ed. 1988) (citing Street v. New York, 394 U.S. 576, 592 (1969)).

[167] 475 U.S. 41 (1986).

[168] In *Young*, Justice Stevens stated that a rule prohibiting restrictions of speech "based on the content of protected communication. . . . [requires] absolute neutrality by the government; its regulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator." *Young*, 427 U.S. at 67. In *Renton*, the ordinance at issue was also not considered content-based because it was "designed to prevent crime . . . [and] not to suppress the expression of unpopular views." *Renton*, 475 U.S. at 48.

[169] The "secondary effect" of speech has been defined to include such things as the "congestion" that would be created in a particular forum, how the speech interferes with "ingress or egress" into or out of a particular locale, the "visual clutter" associated with the speech, and "security" problems that the speech may create. Boos v. Barry, 485 U.S. 312, 321 (1988).

type of establishment.[170]

Although both of these cases distinguished content-based restrictions from those which regulate the secondary effects of speech, the Court did not articulate a bright-line standard or test to apply until *Boos v. Barry*.[171] Writing for a plurality in *Boos*, Justice O'Connor explained that "[t]he emotive impact of speech on its audience is not a 'secondary effect.' "[172] Rather, when government attempts to "regulate[] speech due to its potential primary impact . . . it must be considered content-based."[173] For example, if the ordinance in *Renton* restricting the location of adult movie theaters were "justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies," it would be appropriate for a court to consider that ordinance content-based.[174]

Following the Court's decision in *Boos*, the government may not restrict speech because of its communicative impact—a fear of how people will react to it. Any measure that attempts to restrict speech in this manner will be considered either content-based on its face or in application, thereby subject to strict scrutiny.[175] As such, the restriction will likely fail because content-based restrictions of protected expression[176] have survived strict scrutiny only in the most extraordinary circumstances.[177]

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170 *See Young*, 427 U.S. at 71 n.34; *Renton*, 475 U.S. at 47.

171 485 U.S. at 315-17 (declaring unconstitutional a law which prohibited the display of any sign within 500 feet of a foreign embassy, if that sign tended to bring that foreign government into "public odium" or "public disrepute").

172 *Id.* at 321.

173 *Id.*

174 *Id. Compare* Texas v. Johnson, 491 U.S. 397 (1989) (holding that defendant's act of burning the American flag constituted expressive conduct under protection of the First Amendment).

175 Geoffery R. Stone, *Content Regulation And The First Amendment*, 25 WM. & MARY L. REV. 189, 207-08 (1983). The author explains that:

> Any law that substantially prevents the communication of a particular idea, viewpoint, or item of information violates the [F]irst [A]mendment except, perhaps, in the most extraordinary of circumstances. This is so, not because such a law restricts "a lot" of speech, but because by effectively excising a specific message from public debate, it mutilates "the thinking process of the community" and is thus incompatible with the central precepts of the [F]irst [A]mendment.

Id. at 198.

176 In Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), the Supreme Court defined what is not "protected" expression, holding that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . . ." *Id.* at 571-72 (citation omitted).

177 Geoffery R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 81-84 (1978). In the 25 years preceding the publication date of this article, "the Court has actually upheld such restrictions in only a

After the Court's analysis in *Boos*, the justifications provided by the government in *Garrett* for banning televised executions appear content-based.[178] Just as the Supreme Court in *Boos* found that a restriction on political placards which "tend to bring . . . 'public odium' or 'disrepute' "[179] was content-based because it was aimed at the primary impact of the speech on viewers, so too will the Court likely find a camera restriction that focuses on the "offensiveness" of broadcasting executions, to be content-based.[180]

Therefore a restriction on the reporting of executions limiting journalists to the printed media is a content-based restriction of the broadcast. Cases such as *Estes v. Texas*[181] and *Chandler v. Florida*[182] have held that certain restrictions on news reporting may be made for compelling reasons. Yet arguing that some people may be offended, shocked, or even angered by televised executions is not a demonstrated "compelling reason" for barring them.[183] Keeping reporters from televising an execution is effectively barring the public from access to the necessary information needed to resolve the capital punishment issue in their own minds. Indeed, as the Court noted in *Erznoznik v. Jacksonville*,[184] "[m]uch that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection

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handful of decisions." *Id.* at 83 n.6. Examples of such cases upholding content-based restrictions include: Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) (holding that a television station had to pay an artist damages for an unauthorized television broadcast of his entire act); Jones v. North Carolina Prisoner's Labor Union, 433 U.S. 119 (1977) (upholding a prison regulation barring prisoners from soliciting other inmates to join a union and receive mailings from the union from outside sources); Parker v. Levy, 417 U.S. 733 (1974) (upholding a court-martial of an officer for urging black enlisted men not to go to Vietnam). *See also* JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 970 (3d ed. 1986) (noting that restrictions based on the content of speech will be upheld only if the Court finds that the content is unprotected by the First Amendment); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (stating that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas . . . or its content").

178 Garrett v. Estelle, 424 F. Supp. 468 (N.D. Tex.), *rev'd*, 556 F.2d 1274 (5th Cir. 1977), *cert. denied*, 438 U.S. 914 (1978).

179 *See supra* note 171.

180 *Id.* at 472.

181 381 U.S. 532 (1965).

182 449 U.S. 560 (1981).

183 *See* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537 (1980) (holding that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic").

184 422 U.S. 205 (1975).

for the unwilling listener or viewer."[185]

B. *Barring Cameras from Executions Is Not a Valid Time, Place, and Manner Restriction of Speech*

Unlike the district court in *Garrett*, the government in *KQED v. Vasquez* did not explicitly justify its ban on the presence of cameras at executions on the grounds that broadcasts of an execution would shock or offend people.[186] Rather, it argued that the camera ban was a reasonable "time, place, and manner" restriction that left the press completely free to report on executions, provided they did not seek to televise the event.[187] The Supreme Court has long upheld restrictions on the time, place, or manner of speech, so long as certain constitutional safeguards are employed. First, the restriction must be "content-neutral"[188] and "genuinely concerned"[189] with where, when, or how the speech is delivered. A court will look to see if the restriction is, in reality, a guise for the suppression of a particular kind of speech. Next, the regulation must be "reasonable"[190] and promote "significant government interests."[191] Finally, the restriction must leave open "ample alternative channels for communication."[192]

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185 *Id.* at 210. *See also* Texas v. Johnson, 491 U.S. 397, 408-09 (1989) (recognizing that a " 'function of free speech . . . is to invite dispute. . . . [and] may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger' ") (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).

186 KQED v. Vasquez, No. 90-1383 (N.D. Cal. June 7, 1991).

187 *See* Defendant's Trial Brief, *supra* note 86, at 13.

188 *See, e.g.*, Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (holding that "[t]he State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication"). Time, place and manner restrictions are valid only if they are content-neutral.

189 *See* Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85, 93 (1977) (holding that since the restriction on the time, place or manner of speech was "not genuinely concerned with the place of the speech ... . or the manner of the speech[,]" it could not be upheld). In *Linmark*, the Court invalidated a township ordinance prohibiting the posting of real estate "For Sale" and "Sold" signs in front of residential houses. The ordinance, neutral on its face, was actually found to be a measure taken to keep white homeowners from moving out of an integrated community.

190 *See, e.g.*, Richmond Newspapers v. Virginia, 448 U.S. 555, 600 (1980) (stating that a legislature may impose reasonable time, place, and manner restrictions on first amendment exercise).

191 *See, e.g.*, Young v. American Mini Theatres, 427 U.S. 50, 63 n.18 (1976) (holding that "[r]easonable regulations of the time, place, and manner of protected speech" are constitutionally permissible if necessary to further a significant government interest).

192 *See, e.g.*, Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 535 (1980) (upholding "the validity of reasonable time, place, or manner regulations" if they are necessary to further a significant governmental interest and if "ample alternative channels for communication" are available). *See also* City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984) (holding that a restriction on expressive activity may be constitutionally "invalid if the remaining modes of communication are inadequate").

Applying the above analysis to the facts of *KQED*, it seems that the camera ban is not a valid time, place, and manner restriction. First, because the communicative impact of viewing a televised execution is "substantively different" from reading a printed account of one,[193] the camera restriction amounts to a restriction on the substance or content of the broadcast and is therefore not content-neutral. Next, banning televised executions because of the government's "significant interest" in ensuring that members of the prison population will not react adversely to them is an "unreasonable," overbroad measure.[194] Finally, and most importantly, confining reports of executions to televised news reports or printed newspaper accounts is not a suitable alternative to the actual broadcast of an execution.

In order to determine whether alternate modes of communication are adequate, a court should look to see if the particular mode of speech restricted by the regulation is "a uniquely valuable or important mode of communication" whose restriction effectively silences the speaker, or has the effect of significantly reducing the speaker's impact on the audience.[195] In the capital punishment context, television is a "uniquely valuable or important mode of communication." As will be discussed below, print is not an equivalent, nor even an appropriate alternative, to television.

C. *A First Amendment Justification for Televising Executions*

There are a number of compelling first amendment justifications for televising executions. First, the public has a right to be completely informed about how their elected officials conduct

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193 Comment, *Broadcasters' News-Gathering Rights Under the First Amendment*: Garrett v. Estelle, 63 IOWA L. REV. 724, 746 (1978) (stating that "[t]he content of the message conveyed by television is substantively different from that conveyed by newspapers precisely because television's visual impact is substantively different from a newspaper picture's visual impact").

194 *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (stating that valid time, place, or manner restrictions must be "narrowly tailored"); Daily Herald Co. v. Munro, 838 F.2d 380, 385 (9th Cir. 1988) (striking down a Washington statute barring interviews of voters exiting polls on election day because it was not "the *least restrictive means of advancing the state's interest" in maintaining order and decorum* at the polls).

195 *Vincent*, 466 U.S. at 812. *See* Stone, *supra* note 177, at 107-11. Subject-matter restrictions that appear viewpoint-neutral on their face may in practice "disadvantage one 'side' of an issue more than the other, depending upon which 'side' is more likely to be affected by the restriction." *Id.* at 110. The same may apply to time, place, and manner restrictions in the context of televised executions. Those who want to dramatize what they view as the "inhumanity" of capital punishment will be effectively barred from doing so if executions cannot be televised.

the nation's criminal justice system.[196] Second, without televised executions, the public and the courts have an incomplete understanding of how the death penalty is administered and whether it is a "cruel and unusual" form of punishment.

If televising executions is found to be the most effective and accurate means of informing the interested public, then reporters must be permitted to do so. Televising executions would provide a reality and immediacy that would permit the viewer to experience the event for himself and draw his own conclusions as to whether the death penalty is "cruel and unusual." Therefore, it follows that absent some compelling government interest, televised executions should be allowed.

Since the question of capital punishment is left to state legislatures, the ultimate arbiter of capital punishment's continued use is the voting public. The public must be properly informed in order to properly discharge this important duty. The First Amendment is particularly directed against such misinformed voting or public sanctioning of a particular issue.[197]

The First Amendment also "forbids Congress to abridge the freedom of a citizen's speech [or] press . . . whenever those activi-

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[196] In Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 492 (1985), the author states that "[i]t would be anomalous for a constitutional regime founded on the principle of limited government not to impose some fundamental restrictions on the power of officials to keep citizens ignorant of how the authority of the state is being exercised." If the general public is given more of an opportunity to "scrutinize official conduct," the likelihood of constitutional violations by any part of the government would become more unlikely. *Id.* at 494. *See* New York Times Co. v. United States, 403 U.S. 713, 716 (1971) (Black, J., concurring) (stating that the Bill of Rights was "offered to *curtail* and *restrict* the general powers granted to the Executive, Legislative, and Judicial Branches") (emphasis in original). *See also supra* text accompanying notes 54-55.

[197] *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNANCE IN POLITICAL FREEDOM 26 (1960).

> Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning, for the general good. *It is that mutilation* of the thinking process of the community against which the First Amendment to the Constitution is directed. The principle of the freedom of speech springs from the necessities of the program of self-government.

Id. As one commentator noted, in order for the democratic process to function, the First Amendment ensures that

> [t]he public, as sovereign, must have all information available in order to instruct its servants, the government. As a general proposition, if democracy is to work, there can be no holding back of information; otherwise ultimate decision making by the people, to whom that function is committed, becomes impossible. Whether or not such a guarantee of the right to know is the sole purpose of the [F]irst [A]mendment, it is surely a main element of that provision and should be recognized as such.

Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1, 14 (1976).

ties are utilized for the governing of the nation."[198] Televising executions would assist the process of "governing," by providing all of the relevant information to members of the public about capital punishment, so that they may properly discharge their electoral duties.

Televising executions, because of its realism and potential impact on viewers, is the most accurate and effective means of informing members of the public and enabling them to intelligently discharge their democratic duties.[199] The Supreme Court has long conceded that what is said is not always as important as how it is said, and that in certain cases, it is not valid to favor one form of expression over another if the alternative mode of expression is not as effective.[200] For instance, in *Cohen v. California*[201] the Court recognized that in certain instances, the way a particular message is conveyed may be equally, if not more significant than the message itself. Writing for the majority, Justice Harlan explained that:

> [W]e cannot overlook the fact . . . that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. . . . We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.[202]

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198 Alexander Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 256 (1961). The author maintains that "[p]ublic discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them." *Id.* at 257.

199 *See infra* note 206 and accompanying text.

200 *See* Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 193 (1973) (Brennan, J., dissenting).

> [F]reedom of speech does not exist in the abstract. On the contrary, the right to speak can flourish only if it is allowed to operate in an effective forum—whether it be a public park, a schoolroom, a town meeting hall, a soapbox, or a radio and television frequency. For in the absence of an effective means of communication, the right to speak would ring hollow indeed. And, in recognition of these principles, we have consistently held that the First Amendment embodies, not only the abstract right to be free from censorship, but also the right of an individual to utilize an appropriate and effective medium for the expression of his views.

Id.

201 403 U.S. 15 (1971). In this case, the Court reversed the conviction of a man who wore a jacket with the words "Fuck the Draft" printed on it, in a municipal courthouse.

202 *Id.* at 25-26. Although the holding of this case refers to "linguistic expression," it clearly applies to visual images and visual impact too. After all, the dispute in *Cohen* was not about words on a page, but about the visual impact produced by the words printed

Televised executions offer another example of how expression serves a "dual communicative function." Television "provides a comprehensive visual element and an immediacy . . . not found in print media."[203] The image of "[a] television picture affects a gestalt of human senses in a unique and somewhat unexplainable way that differs from the effect of words printed on a page."[204] These images and expressions can be far more communicative and powerful than still pictures or words alone.[205] Watching the visual expression of a person before, during and after his or her execution conveys a more powerful image than would a newspaper account or a televised news report. If the image of a person being executed were broadcast, the printed or spoken words describing it would become almost irrelevant.[206] In addition, television is accessible to a greater number of people and is capable of reaching a wider audience than a book or newspaper.[207]

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on a person's jacket which was worn in a courthouse. *See* Franklyn S. Haiman, *Speech v. Privacy: Is There A Right Not To Be Spoken To?*, 67 NW. U. L. REV. 153, 189 (1972) (noting that "phrases like 'Repeal the Draft' and 'Resist the Draft,' do not convey the same message as 'Fuck the Draft' ").

[203] Cable News Network, Inc. v. American Broadcasting, 518 F. Supp. 1238, 1245 (N.D. Ga. 1981).

[204] *Broadcasters' News-Gathering Rights Under the First Amendment*, *supra* note 193, at 732.

[205] In one study of non-verbal behavior, the anthropologist Albert Mehrabian determined that "more than 90% of the meaning of a message is derived from expressions rather than 'communications.' " JOSHUA MEYROWITZ, NO SENSE OF PLACE: THE IMPACT OF ELECTRONIC MEDIA ON SOCIAL BEHAVIOR 100 (1985).

[206] It is precisely because expressions and images count more than words that politicians have lately made a point of mastering them. For example, during the 1988 presidential campaign, there was a very successful speech, parts of which were broadcast on television, given by George Bush in front of a flag factory, and a very unsuccessful television commercial featuring Michael Dukakis riding around in a tank. Today, many people remember the respective images, but does anybody actually remember what was said on those two occasions? *See* MEYROWITZ, *supra* note 205, at 100 (providing similar examples of people remembering images of political candidates in particular settings without being able to recall what the politicians were actually saying at the time).

Although some politicians cynically exploit this power of television and the impact of imagery to avoid substantive commentary, this is distinct from the impact of imagery in the context of televised executions; it is the image that is informative and the words which are muddling. Imagine, for instance, seeing a person hanged before your very eyes. The image is likely to be disturbing and perhaps even offensive to many people. Yet, it is an image that will register in a person's mind to a degree unmatched by a reporter's written or spoken accounts of the event. Although statistical arguments about the effectiveness of capital punishment are a relevant part of the debate over its administration, whether or not capital punishment violates the Eighth Amendment, depends on "standards of decency" rather than dispassionate statistical or intellectual analysis. *See infra* note 218 and accompanying text. Thus, in determining the Eighth Amendment's application to capital punishment, a person's emotive reaction to seeing the imposition of the death penalty is most important, and it is only television which can effectively elicit such an emotionally strong response.

[207] MEYROWITZ, *supra* note 205, at 78-86. The author argues that the print media separate consumers—young and old, educated and uneducated, etc. Television, in contrast, "offers its content to all members of the population." *Id.* at 80.

It is, in part, because of the recognized effectiveness of the broadcast media that the law tolerates restrictions on radio and television that it would not tolerate with regard to print.[208] For instance, cigarette advertisements are not permitted on radio or television, yet they are tolerated in printed material.[209] Another example of this more restrictive control of radio and television is the so-called "fairness doctrine," which requires broadcasters to fairly present both sides of public issues discussed or presented in a particular broadcast.[210] This has been upheld as applied to radio[211] and television,[212] but has been held unconstitutional as applied to the print media.[213]

Television is essential to the capital punishment question because it would allow a person to witness the application of this method of punishment first-hand without relying on the perceptions of the reporter. This is especially important since executions have been described as being indescribable.[214] Although it is true, as the state argued in *KQED, Inc. v. Vasquez*, that disclosing the identity of a condemned person, in addition to reporting the time and method of his death, would serve the basic function of informing the public that "the ultimate punishment [has been imposed],"[215] this would do little to further the public's understanding of exactly what it is that they are sanctioning when they vote, literally or figuratively, in favor of capital punishment.

Furthermore, although it may be true that the First Amend-

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208 *See* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978). In this case, the Supreme Court stated that "of all forms of communication, it is broadcasting that has received the most limited [f]irst [a]mendment protection." *Id.* at 748. One of the several justifications given by the Court was that "the broadcast media" are "uniquely pervasive." *Id. See also* Glen O. Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 154 (1967-68) (stating that one of the justifications for regulating broadcasting is that it is "uniquely influential and powerful as a medium of communication"); John W. Keker & William L. Want, Note, *Offensive Speech and the FCC*, 79 YALE L.J. 1343, 1350 (1970) (stating that one of the justifications given for regulating television and radio is that they are "so uniquely powerful").

209 *See, e.g.*, Banzhaf v. FCC, 405 F.2d 1082 (1968), *cert. denied*, 396 U.S. 842 (1969). In this case, the Court upheld a ban on radio cigarette advertising, noting that "[w]ritten messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are 'in the air.'" *Id.* at 1100.

210 Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 369 (1969).

211 *See id.* at 375 (upholding the "fairness doctrine" as it applies to radio).

212 *See, e.g.*, 47 C.F.R. § 76.209 (1990) (requiring that "cable television system operator[s] . . . afford reasonable opportunity for the discussion of conflicting views on issues of public importance" and allow people or groups a chance to defend themselves if an attack is aired on them).

213 *See, e.g.*, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (striking down a right of reply requirement and fairness standard when applied to a newspaper).

214 *See* Lewis, *supra* note 114 (explaining that words could not describe what he experienced when witnessing an execution).

215 Defendant's Trial Brief, *supra* note 86, at 6-7.

ment's protection does not vary with the degree of public interest regarding a particular issue,[216] one of its purposes is to keep government from interfering with the flow of information relating to public issues left to the voting electorate to decide. Capital punishment is one such issue, and absent any compelling reasons to the contrary, the government should not prevent people from being informed through the most accurate and effective means possible. For instance, a state could not forbid a newspaper reporter from describing an execution on the grounds that his or her description is too graphic, too compelling, or too real. Therefore, it is difficult to see how the state can be permitted to ban televised executions on these same grounds.

Televising executions is also important because the question of whether the infliction of a particular punishment violates the Eighth Amendment depends "on whether people who were *fully informed* as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable."[217] People cannot be shocked by the death penalty if their exposure to the subject is limited to printed or spoken accounts, which are simply not realistic enough to shock. Reading about a person choking to death, for instance, does not produce the same effect as actually seeing that person dangling at the end of a rope. The two are simply incomparable.

In the same vein, since "the Eighth Amendment has not been regarded as a static concept. . . . an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment."[218] Of course, these "contemporary values" cannot be properly gauged if the public does not have the pertinent facts and issues to react to, one way or another. If, for instance, after seeing the first execution broadcast on television, tremendous demonstrations

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[216] In Garrett v. Estelle, 556 F.2d 1274, 1279 (5th Cir. 1977), the court of appeals stated that while they agreed "that the death penalty is a matter of wide public interest," they refused to hold that "the protections of the [F]irst [A]amendment depend upon the notoriety of an issue." In support of their holding, the court cited the Supreme Court's decisions in Pell v. Procunier, 417 U.S. 817 (1974) and Saxbe v. Washington Post Co., 417 U.S. 843 (1974), and concluded that barring the press access to a prison on the grounds that the public has no similar right of access was "not predicated upon the importance or degree of interest in the matter reported." *Id.*

[217] Furman v. Georgia, 408 U.S. 238, 361 (1972) (Marshall, J., concurring) (emphasis added). In his concurrence, Justice Marshall states his belief that "[a]ssuming knowledge of all the facts presently available regarding capital punishment, the average citizen would . . . find it shocking to his conscience and sense of justice." *Id.* at 369.

[218] Gregg v. Georgia, 428 U.S. 153, 172-73 (1976). *See also* Trop v. Dulles, 356 U.S. 86, 101 (1958) (stating that "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society").

erupted all over this country's streets protesting the death penalty's cruelty, the Court would then have a more realistic sense of what society's "contemporary values" are than it has today, in terms of applying the Eighth Amendment to the death penalty. Similarly, people's lack of reaction to a televised execution would also be a useful indication of society's current standards of decency for eighth amendment purposes.

Therefore, it is simply inadequate to assert as the court of appeals does in *Garrett v. Estelle* and the district court implicitly does in *KQED*, that a reporter covering an execution "is free to make his report by means of anchor desk or stand-up delivery on the TV screen, or even by simulation."[219] Neither case provides a convincing showing of any competing government interests that are sufficiently compelling to outweigh the public's first amendment right to be properly informed of this governmental operation. And when, for no legitimate reason, a broadcast is "confine[d] . . . to a watered-down verbal reporting, perhaps with an occasional still picture. The public is then the loser. This is hardly the kind of news reportage that the First Amendment is meant to foster."[220]

IV. Conclusion

The concept of equal access should be abandoned or applied more flexibly, as Justice Stewart recommended in his concurrence to *KQED, Inc. v. Houchins*.[221] The press and the public *are* different, and in certain instances, the law should recognize and account for those differences. The most important issue in determining whether information should be revealed or withheld should be whether the government has compelling reasons to withhold the information. The issue of whether the press is requesting "special access" to information should have no bearing on that question. As this Note has demonstrated, the Supreme Court's current approach of focusing on equal access allows lower courts, such as the court of appeals in *Garrett*, to skirt the ultimate balancing of government interests and competing constitutional claims.

The presumption in an open and democratic society should be in favor of disclosing government operations. Without a dem-

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219 556 F.2d 1274, 1279 (5th Cir. 1977).

220 Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 581 (1977) (Powell, J., dissenting).

221 438 U.S. 1, 16 (1978) (Stewart, J., concurring). For a discussion of Justice Stewart's concurrence, see *supra* notes 49-52 and accompanying text.

onstration of compelling reasons to the contrary, courts should not deny members of the media the right to do their jobs as completely, thoroughly and accurately as possible. In all of the Supreme Court's cases in which the use of cameras has been denied, the bans have been meticulously and compellingly justified. No such credible and specific justifications have yet been offered to explain why the media may not televise executions.

Televising executions would serve two functions. First, to the degree that retention of capital punishment is a legislative decision, it would allow the voting public to have a more realistic sense about what this ultimate sanction is and how it operates. Second, to the degree that capital punishment must be measured against the Eighth Amendment, it would assist the Court in ascertaining what society's current "standards of decency" are, since the Court has recognized that these values change as society progresses.

Finally, if the people of this country believe that capital punishment is desirable or necessary, then they should have the fortitude to see it applied. If people find this idea too repulsive to contemplate, then perhaps they ought to reassess their stance on the capital punishment issue.

Gil Santamarina