

# NOTES

## DEATH TV: MEDIA ACCESS TO EXECUTIONS UNDER THE FIRST AMENDMENT

The debate over the media's right to televise executions has intensified in the past year. State legislators on both coasts of the United States have considered legislation which would enable television stations to broadcast executions.<sup>1</sup> Not only have articles on the issue appeared in newspapers and magazines all over the country,<sup>2</sup> but even a talk show host has discussed the subject with a panel of experts over the nation's airwaves.<sup>3</sup>

The nation's courts have also contributed to the debate. A federal district court in California recently prevented a television station from videotaping and broadcasting the execution of a convicted murderer in the gas chamber.<sup>4</sup> In *KQED v. Vasquez*,<sup>5</sup> the court held that the prohibition

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1. See *Florida House Considers Televising Executions*, Agence France Press, July 9, 1991, available in LEXIS, Nexis Library, Wires File. The Florida legislature polled law enforcement officers, prosecutors, public defenders, journalists and death row inmates about their opinions concerning televising executions. "[O]f [the] 16 surveys returned . . . five approved of televised executions, nine disapproved and two had no opinion." *Id.* See also *Florida Takes Poll*, USA TODAY, July 17, 1991, at A2.

See *KQED Won't Appeal Execution Ruling*, UPI, Sept. 4, 1991, available in LEXIS, Nexis Library, Wires File. The California Assembly defeated legislation that would have permitted the media to televise executions. Twenty-eight legislators voted for the bill; 40 opposed it. *Id.*

This Note does not address the constitutionality of legislation, such as those considered by the Florida and California legislatures, that would permit the media to televise executions. For a discussion of the legal issues relating to the constitutionality of this type of legislation, see *Chandler v. Florida*, 449 U.S. 560 (1981). In *Chandler*, the Court examined the validity of a program established by the Florida Supreme Court which permitted the media, notwithstanding the objection of the defendants, to televise a criminal trial for public broadcast. *Id.* at 564. Concluding that the program did not deny the defendant due process of law, the Court held "that the Constitution does not prohibit a state from experimenting with" televised trials. *Id.* at 583.

2. See *KQED Won't Appeal Execution Ruling*, *supra* note 1; Scott Armstrong, *California Public-TV Station Seeks 'Live' Coverage of Executions*, CHRISTIAN SCI. MONITOR, May 10, 1991, at 4; Jacob Weisberg, *This Is Your Death; Capital Punishment: What Really Happens*, NEW REPUBLIC, July 1, 1991, at 23; George F. Will, *Capital Punishment and Public Theater*, WASH. POST, May 12, 1991, at C7; Karl Olson & Erin Daily, *Death On Video: Should Executions Be on the Eleven O'Clock News*, MANHATTAN LAW., Apr., 1991, at 13; Ellen Goodman, *Public Killings*, WASH. POST, Mar. 20, 1984, at A23.

3. *The Phil Donahue Show* (NBC television broadcast, Dec. 30, 1991).

4. See *KQED v. Vasquez*, No. 90-CV-1383 (N.D. Cal. June 7, 1991).

5. *Id.*

of cameras at executions was a reasonable and lawful regulation.<sup>6</sup> This holding is consistent with the Fifth Circuit's decision in *Garrett v. Es-telle*.<sup>7</sup> In *Garrett*, the court denied a television reporter's request to televise Texas's first execution since 1964, and held that the media has no First Amendment right to televise an execution.<sup>8</sup>

The issue of media access to executions has complex and important political and legal dimensions.<sup>9</sup> Politically, the issue implicates the debate over capital punishment.<sup>10</sup> Legally, the issue raises questions concerning the media's First Amendment right to gather information.<sup>11</sup>

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6. Transcript of court's oral opinion, *KQED v. Vasquez*, No. 90-CV-1383, at 12 (N.D. Cal. June 7, 1991).

7. 556 F.2d 1274 (5th Cir. 1977), *cert. denied*, 483 U.S. 914 (1978).

8. *Id.* at 1276.

9. *See* Armstrong, *supra* note 2, at 4; *see also* Olson & Daily, *supra* note 2, at 13; Will, *supra* note 2, at C7.

10. *See* Will, *supra* note 2, at C7. The author stated that "[p]erhaps the unfiltered face of coolly inflicted death would annihilate public support for capital punishment. But perhaps society values capital punishment because of its horribleness, from which flows society's cathartic vengeance." *Id.* He further remarked that "[s]olemnity should surround any person's death, and televised deaths might further coarsen American life." *Id.* The author acknowledged that televising executions may desensitize Americans, but pointed to the number of deaths seen on American television. *Id.* "[W]ould tape of an execution [really] be more lacerating to the public's sensibilities than the tape of Los Angeles police beating a motorist nearly to death?" *Id.*

*See also* Goodman, *supra* note 2, at A23. "[S]ome who favor capital punishment as a deterrent to crime are convinced that watching an execution would scare criminals straight. Some who oppose capital punishment believe that the sight would enrage the public." *Id.* The author believed that televising executions would result in "numbness and tacit acceptance of violence." *Id.* However, she noted that no scientific method exists to determine in advance the ramifications a televised execution would have on crime. *Id.*

*See* Armstrong, *supra* note 2, at 4. Armstrong quoted Diann Rust-Tierney, the director of the capital punishment project of the American Civil Liberties Union, who stated that "[i]f the death penalty is such a high moral thing to do, then we should be able to look at it." *Id.* Gerald Uelmen, Dean of the Santa Clara University School of Law, stated "[t]he message [that televising executions] would send is that life is cheap and that this is entertainment." *Id.* The author also presented arguments by various authorities concerning the deterrent effects of televising executions. Concluding his article, he quoted Fred Friendly, Director of Columbia University's Seminars on Media and Society, who stated "I am not sure very many [television stations] would carry" a broadcast of an execution. *Id.*

*See also* Weisberg, *supra* note 2, at 23 (arguing that televising executions "is likely to accelerate the trend away from grisly methods and toward ever more hermetic ways of dispatching of wrongdoers").

*See* Olson & Daily, *supra* note 2, at 13. The authors, attorneys at a San Francisco law firm, argued for televising executions. "Journalists, not courts" should decide what appears on television. *Id.* Olson and Daily contended that "[t]he public is effectively denied access when a television camera is excluded." *Id.* They further argued that the public has had the historical right to view executions, and the courts should not abridge this right by refusing to provide press access. *Id.*

11. *See infra* text accompanying notes 141-78. The type of press access to executions, if any,

This Note attempts to preempt any political resolution of the issue by resolving it in a strictly legal arena. Part I examines the development of Supreme Court case law concerning the constitutional right to gather information and illustrates the method the Court has adopted in addressing questions concerning press access to government institutions and judicial proceedings.<sup>12</sup> Part II analyzes the historical development of the public's and the media's right of access to executions in England and the United States. Part III reviews the legal arguments presented by the two federal cases that address the issue of the media's right to televise executions. Part IV analyzes the issue within the proper legal framework and concludes that the press does not have a First Amendment right to attend or televise an execution.

### I. THE MEDIA'S FIRST AMENDMENT RIGHT TO GATHER INFORMATION

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom . . . of the press."<sup>13</sup> Generally, the Supreme Court has interpreted this constitutional clause to provide the press with the right against prior restraints<sup>14</sup> and against *post hoc* burdens on publication.<sup>15</sup> However, denying press access to a prison for the purposes of filming and broadcasting an execution relates most directly to the press's right to gather information.<sup>16</sup> Although the Press Clause of the First Amendment includes the right to gather information,<sup>17</sup> it may not extend far enough to provide television stations the right to witness and film executions.

The Court first recognized the news media's right to gather information in *Branzburg v. Hayes*.<sup>18</sup> In *Branzburg*, the Court held that requir-

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that the Constitution provides also raises equal protection concerns. The scope of this Note is limited to the First Amendment problems relating to the denial of press access to prisons for purposes of witnessing and filming executions. For a discussion of equal protection, see *infra* note 151.

12. See *infra* text accompanying notes 13-52.

13. U.S. CONST. amend. I.

14. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 567 (1976); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Near v. Minnesota*, 283 U.S. 697, 713 (1931).

15. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

16. See *Garrett v. Estelle*, 556 F.2d at 1277.

17. See *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972); *infra* notes 18-22 and accompanying text.

18. 408 U.S. 665 (1972). In *Branzburg*, the State of Kentucky attempted to compel a member of the press to testify before a grand jury concerning the identity of individuals about whom he had

ing news reporters to appear and testify before a grand jury does not violate their First Amendment rights.<sup>19</sup> The Court stated that failing to protect the newsgathering process could significantly endanger freedom of the press.<sup>20</sup> However, the Court concluded that refusing to afford a reporter a testimonial privilege under the First Amendment does not restrict the press' ability to gather and convey news.<sup>21</sup> Hence, the Court ruled that although the First Amendment protects newsgathering, the right to gather news does not equal the right to refuse to testify in front of a grand jury.<sup>22</sup>

In *Pell v. Procunier*, the Court restricted the right to gather information.<sup>23</sup> The Court held that prison regulations that prohibited reporters from interviewing prisoners did not violate the reporters' rights to gather news under the First Amendment.<sup>24</sup> The Court stated that although the

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written. The state wished to obtain the individuals' names because the articles and photographs depicted them transforming marijuana into hashish. Although the reporter appeared before the grand jury when subpoenaed by the state, he refused to testify with respect to the names of the individuals. *Id.* at 668.

19. *Id.* at 667. The reporter claimed that requiring him to reveal his sources pursuant to a grand jury investigation burdened his ability to gather news. He contended that his "informants will refuse . . . to furnish newsworthy information." *Id.* at 682. The Court only addressed the specific issue of whether or not the Constitution affords a news reporter with the limited privilege not to testify before a grand jury.

20. *Id.* at 681. The Court emphasized that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* The Court stressed that while journalists remain able to find news from any source within legal limits, it was not attempting to force the media to reveal its information source. *Id.* at 681-82.

21. *Id.* at 699. The Court noted that its holding "will not threaten [the confidentiality of sources] not involved with criminal conduct and without information relevant to grand jury investigations." *Id.* Between the two competing interests in the case, the Court concluded that the state's interest in enforcing the law was more compelling than the press's interest in maintaining the confidentiality of its sources. *Id.* at 692-93. "The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter" rather than an ordinary citizen. *Id.*

22. *Id.* at 707. The Court stated that "[f]rom the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished." *Id.* at 698-99. Limiting its holding, the Court mandated that the prosecutor must ask "material" and "relevant" questions during the grand jury investigation, and that the state must conduct the investigation in "good faith." *Id.* at 708. The Court subsequently ordered the reporter to appear and testify before the grand jury. *Id.* at 709. Concurring, Justice Powell reiterated that "[t]he Court does not hold that newsmen . . . are without constitutional rights with respect to the gathering of news . . ." *Id.* at 709 (Powell, J., concurring).

23. 417 U.S. 817 (1974).

24. *Id.* at 835. The California prison regulation prohibited the press from conducting interviews with individual prisoners. *Id.* at 819. Media members who wanted to interview certain prisoners incarcerated in California penal institutions challenged the regulation's constitutionality. *Id.* The prisoners, also named as plaintiffs in the suit, claimed that the regulations violated their First Amendment right to free speech. *Id.* at 816-17. Rejecting this argument, the Court held that the

government cannot interfere with the freedom of the press, it need not provide the press with information not available to the public generally.<sup>25</sup> Because the public did not possess the right to interview specific prisoners upon request, the Court concluded that denying this access to the media did not violate its right to gather news.<sup>26</sup> The Court ruled that the media has no constitutional right of access to prisons or prisoners greater than that accorded the general public.<sup>27</sup>

In *Richmond Newspapers v. Virginia*, the Court adopted a framework for determining whether the media has specific rights of access.<sup>28</sup> The Court concluded that “[a]bsent an overriding interest,” the press and the public must have access to criminal trials.<sup>29</sup> Writing for a plurality of the Court,<sup>30</sup> Chief Justice Burger examined the history of criminal trials in England and the United States; he found that throughout American history, criminal proceedings had been open to the public and the press.<sup>31</sup> The Chief Justice attributed this to the value the public places on the trial process as one of the most significant features of democratic government.<sup>32</sup> Although the First Amendment does not explicitly guarantee

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state’s interest in protecting society, as well as the alternative means of communication available to the prisoners, justified the regulation. *Id.* at 822-28.

25. *Id.* at 834.

26. *Id.* at 831. The Court stressed that the California Department of Corrections did not design the prohibition to “conceal the conditions in its prisons or to frustrate the press investigation and reporting of those conditions.” *Id.* at 830. Instead, the Department of Corrections enacted the regulation to solve the problems associated with the media providing special attention to specific prisoners. *Id.* at 832.

27. *Id.* at 835. Thus, the Court upheld the constitutionality of the rule. The press consequently could not gain access to the prison to interview the inmates. *Id.* The Court reaffirmed this holding in *Pell’s* companion case, *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974). The *Saxbe* Court considered the constitutionality of a Federal Bureau of Prisons regulation which prohibited the press from interviewing specific criminals. *Id.* at 844. The Court found that the *Saxbe* case was “constitutionally indistinguishable” from and completely governed by *Pell*. *Id.* at 850.

28. 448 U.S. 555 (1980). In *Richmond Newspapers*, the judge closed the trial of a criminal defendant to the press and the public at the defendant’s request, without objection from the prosecution. The judge did not require the defendant to demonstrate that the defendant’s right to a fair trial mandated closure. However, seeking to cover the trial, the media appealed the judge’s closure order to the Supreme Court. *Id.* at 559-62.

29. *Id.* at 581.

30. Justice White and Justice Stevens joined the Chief Justice in his opinion. Justice Rehnquist dissented, while Justices Brennan, Marshall, Stewart, and Blackmun concurred with Chief Justice Burger’s opinion. Justice Powell took no part in consideration of the case.

31. 448 U.S. at 564-69. Chief Justice Burger wrote that “a presumption of openness inheres in the very nature of a criminal trial under our system of justice.” *Id.* at 573. “[T]he historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both [in the United States] and in England had long been presumptively open.” *Id.* at 569.

32. *Id.* at 575.

the right to attend criminal trials, the plurality concluded that the First Amendment implies this right of access.<sup>33</sup> Thus, by tracing the historical development of the right of access to criminal trials, the Court established that the press and the general public have a constitutional right of access to criminal trials.<sup>34</sup>

The Court refined its method for addressing right of access questions in *Globe Newspaper v. Superior Court*.<sup>35</sup> The Court invalidated a Massachusetts statute that required the exclusion of the press and public from criminal trials during the testimony of a sex offense victim who was a minor.<sup>36</sup> The Court applied the *Richmond Newspapers* test for determining whether the First Amendment affords a particular right of access. First, the Court must determine whether the particular proceeding "has been open to the press and the general public."<sup>37</sup> Then the Court must consider whether "the right of access [to the specific proceeding] plays a particularly significant role in the functioning of the judicial process and the government as a whole."<sup>38</sup> Applying this test to the facts of *Globe Newspaper*, the Court reaffirmed that the First Amendment affords the press and public a right of access to criminal trials.<sup>39</sup> Although this right of access is not absolute, the "state's justification in denying access must be a weighty one."<sup>40</sup> The Court found that the state failed to demonstrate a compelling interest to justify the automatic ban.<sup>41</sup>

33. *Id.* at 580.

34. *Id.* at 581. Chief Justice Burger determined that the press and the public do not have an absolute right of access to a criminal trial. *Id.* at 581 n.18. Stating that although he had "no occasion here to define the circumstances in which all or parts of a criminal trial may be closed to the public, . . . a trial judge [may] in the interest of the fair administration of justice, impose reasonable limitations on access to a trial." *Id.* Concurring, Justice Brennan stated that "[w]hat countervailing interests might be sufficiently compelling to reverse this presumption of openness need not concern [the Court] now . . . [but], [f]or example, national security concerns . . . may sometimes warrant closures." *Id.* at 599 & n.24 (Brennan, J., concurring).

35. 457 U.S. 596 (1982).

36. *Id.*

37. *Id.* at 605.

38. *Id.* at 606. The Court explained that "[p]ublic scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact finding process . . . fosters an appearance of fairness . . . and . . . permits the public to participate in and serve as a check upon the judicial process." *Id.* (footnotes omitted).

39. *Id.* at 605. The Court emphasized that the presumption of openness with respect to criminal trials "has remained secure" throughout American history. *Id.*

40. *Id.* at 606. The Court will strictly scrutinize any state action that denies the public access by requiring the state to demonstrate "that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Id.* at 606-07.

41. *Id.* at 607-10. Although the Court agreed with the state that "safeguarding the physical

### A divided Court attempted to define the extent of constitutional pro-

and psychological well being of a minor" constitutes a compelling interest, the Court concluded that this interest "does not justify a *mandatory* closure rule." *Id.* at 608. The state's second interest in enacting the statute, "the encouragement of minor victims of sex crimes to come forward and provide accurate testimony," does not constitute a compelling interest. *Id.* at 609. The Court reasoned that this interest is not only "speculative in empirical terms, but it is also open to serious question as a matter of logic and common sense." *Id.* at 609-10. See also *Press-Enter. Co. v. Superior Court*, 464 U.S. 501 (1983) (*Press-Enterprise I*). In *Press-Enterprise I*, the Court held that the guarantees of open proceedings in criminal trials encompass conducting *voir dire* examinations for potential jurors. *Id.* at 503. The Court examined a judge's order which closed the jury selection proceedings in a criminal trial involving the rape and murder of a teenage girl. *Id.* After analyzing the right of access in Anglo-American history, the Court stated that "[t]he presumption of openness [in the jury selection process] may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 510. Although privacy interests supported a closed trial, the Court found that the trial court failed to analyze available alternatives for protecting the potential jurors. *Id.* at 511. Thus, the Court concluded that the Constitution requires that the press and the public have access to *voir dire* proceedings. *Id.* at 512-13.

See also *Press-Enter. Co. v. Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*). In *Press-Enterprise II*, a trial judge ordered closed preliminary hearings conducted before a criminal trial in order to protect the defendant's rights from the risks created by publicity associated with an open hearing. *Id.* at 4-5. After reviewing the history of the right at issue, the Court held that the press and the public have a First Amendment right of access to preliminary criminal hearings. *Id.* at 13. A trial judge cannot close the proceedings "unless findings are made demonstrating that 'closure is essential to preserve higher values and [the closure] is narrowly tailored to serve the interest.'" *Id.* at 13-14 (quoting *Press Enterprise I*, 464 U.S. at 510). The Court concluded that an open trial would not necessarily prejudice the defendant, and that the judge failed to consider alternatives to closure. *Id.* at 14. The Court ruled that "publicity" alone does not overcome the First Amendment right of access. *Id.* at 15. But see *Gannett v. DePasquale*, 443 U.S. 368 (1979). In *Gannett*, which was decided before *Richmond Newspapers*, the Court held that the public does not have a constitutional right of access to a pretrial proceeding if the defendant, the prosecutor and the trial judge all agree that the defendant's right to a fair trial necessitates the closure of the proceeding. *Id.* at 370-71. After examining the history of the Sixth Amendment's public trial guarantee, the Court determined that the Sixth Amendment's guarantee of a public trial is for the defendant's benefit. *Id.* at 381. The Sixth Amendment does not embody the public's right to attend trials. *Id.* at 387. The Court did not decide whether the First Amendment provided the public with the right to an open proceeding, which it addressed later in *Richmond Newspapers*. Rather, the Court held that even if the Constitution afforded the public such a right, the defendant possessed a superior right to a fair trial. *Id.* at 392-93.

See also *United States v. Hastings*, 695 F.2d 1278 (11th Cir.), *cert. denied*, 461 U.S. 931 (1983). The Eleventh Circuit held that "federal rules which prohibit televising, broadcasting, recording, and photographing" criminal trials do not violate the First Amendment. *Id.* at 1279. The court characterized the rule as a "time, place, and manner regulation." *Id.* at 1282 (citing *Richmond Newspapers*, 448 U.S. at 600 (Stewart, J., concurring)). The court applied a two-prong test to determine the constitutionality of the rule. *Id.* at 1282. A rule that prohibits televising or photographing criminal trials is constitutional if it "promotes 'significant governmental interests,' and if [it] does not 'unwarrantedly abridge . . . the opportunities for the communication of thought.'" *Id.* (quoting *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 63 n.18 (1976) and *Richmond Newspapers*, 448 U.S. at 581). Analyzing both the state's interest and the press' interest in televising trials, the Eleventh

tection of press access to government institutions in *Houchins v. KQED*.<sup>42</sup> Chief Justice Burger<sup>43</sup> stated that the First Amendment did not require prison officials to grant the media access to a prison or to allow reporters to use a camera or tape recorder when reporting on prison conditions.<sup>44</sup> The Court expressly limited its decision to whether the First Amendment afforded the press a "special" right of access.<sup>45</sup> Relying on *Pell*,<sup>46</sup> the Court reasoned that the First Amendment does not guarantee media access to government property or "sources of information within the government's control."<sup>47</sup> The Court concluded that absent a legislative decree to the contrary, the press does not have a more powerful right of access to a prison than the Constitution affords the

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Circuit found that "media access . . . would advance First Amendment concerns only to a minimal degree, [while] significant institutional interests" support the regulation at issue. *Id.* at 1284. The court upheld the rule, concluding that it did not violate the First Amendment. *Id.*

See also *United States v. Gurney*, 558 F.2d 1202 (5th Cir. 1977) (holding that a district judge's refusal to allow the press to view certain exhibits and transcripts, the jury list, and the judge's and jury's written communications did not violate First Amendment), *cert. denied*, 435 U.S. 968 (1978). See also *Connell v. Hudson*, 733 F. Supp. 465, 473 (D.N.H. 1990) (holding that police violated newspaper reporter's First Amendment rights when they prohibited him from photographing the scene of an automobile accident); *Cable News Network, Inc. v. American Broadcasting Co.*, 518 F. Supp. 1238, 1246 (N.D. Ga. 1981) (enjoining President Reagan's press secretary from limiting media access to certain White House events); *Philadelphia Newspapers, Inc. v. Jerome*, 387 A.2d 425, 428 (Pa. 1978) (holding that rules limiting public access to pretrial suppression hearings did not violate the First Amendment), *appeal dismissed*, 443 U.S. 913 (1979).

42. 438 U.S. 1 (1977) (4-3 decision). In *Houchins*, the Court reviewed the validity of an injunction issued by a district court. *Id.* at 3-7. The injunction ordered the county jail to grant access to the press for the purposes of using sound and camera equipment to conduct inmate interviews. *Id.*

43. Justice White and Justice Rehnquist joined Chief Justice Burger in his opinion. Justice Marshall and Justice Blackmun took no part in considering the case.

44. 438 U.S. at 15-16. Chief Justice Burger wrote that the public's interest in remaining informed about prison conditions "afford[s] no basis for reading into the Constitution a right of the public or the media to enter these institutions, with camera equipment, and take moving and still pictures of inmates for broadcast purposes." *Id.* at 9. The plurality found that public officials are better qualified than the press to assess issues such as poor prison conditions. *Id.* at 13-14. California law, for example, provides "for a Prison Board of Corrections that has the authority to inspect jails and prisons." *Id.* at 13. The statute also requires public officials to issue a "public report at regular intervals." *Id.*

45. *Id.* at 12. The Court explained that "[t]he right to receive ideas and information" was not in question in *Houchins*. *Id.* Instead, the issue was "a claimed special privilege of access which . . . is not essential to guarantee the freedom to communicate or publish." *Id.* (citations omitted). The Chief Justice further noted that the press has access to information concerning jail conditions through other means. For example, the press has the right to receive letters from inmates, or to interview inmates' attorneys, former inmates, public officials and prison personnel. *Id.* at 15.

46. *Pell*, 417 U.S. at 835.

47. The Court also rejected KQED's argument that the Fourteenth Amendment provides the media with a right of access to government institutions. *Id.* at 15-16.

public.<sup>48</sup>

In his concurrence, Justice Stewart agreed with the Chief Justice that the Constitution does not provide the media with a special right of access. However, Justice Stewart contended that when the government grants access, it must provide the press with effective access.<sup>49</sup> Effectively conveying the conditions of a prison to the public may involve some use of a reporter's video camera and tape recorder.<sup>50</sup> Justice Stewart concluded that the limitations on public access, when applied to the press, may serve to restrict the press from effectively conveying prison conditions to the public.<sup>51</sup> The Court did not reach consensus as to the extent of access the Constitution affords the press.<sup>52</sup>

## II. THE HISTORY OF PUBLIC AND PRIVATE EXECUTIONS IN ENGLAND AND THE UNITED STATES

On August 14, 1936, one of the last public executions in the United States<sup>53</sup> occurred in Owensboro, Kentucky.<sup>54</sup> Over 10,000 people<sup>55</sup> gathered to watch the execution of a twenty-two year old black man named Rainey Bethea.<sup>56</sup> He "knelt at the scaffold base . . . and mumbled an inaudible prayer"<sup>57</sup> while the crowd, "some jeering and some festive,"<sup>58</sup>

48. *Id.* at 16.

49. *Id.* at 17.

50. *Id.* "[I]f 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." *Id.*

51. *Id.* "[T]erms of access that are reasonably imposed on individual members of the public may . . . be unreasonable as applied to journalists who are there to convey to the general public what the visitors see." *Id.* (emphasis added). Justice Stewart argued that the "[d]istrict [c]ourt's preliminary injunction was over broad." *Id.* at 18. He stated that future decisions concerning press access to prisons "must be framed to accommodate equitably the constitutional role of the press and the institutional requirements of the jail." *Id.* at 18-19.

52. A majority of the justices agreed that the district court issued an overly broad injunction. *Id.* at 16. However, Justice Stewart believed that the television station was entitled to limited injunctive relief which would provide the station with "effective" access. *Id.* at 16-17.

53. The last public execution occurred in Galena, Missouri in 1937. See Armstrong, *supra* note 2, at 4. See also Will, *supra* note 2, at C7. The State of Missouri executed 36 year-old Roscoe Jackson for murdering a travelling salesman. A crowd of over 1500 witnessed the first—and last—public hanging in Stone County, Missouri. The crowd did not disperse until 10 minutes after the hanging, when a doctor pronounced that Jackson was dead. See *1500 at Galena, MO.*, See *Murderer Hanged*, ST. LOUIS POST DISPATCH, May 21, 1937, at 1.

54. Goodman, *supra* note 2, at A23.

55. The entire crowd was white. See *10,000 See Hanging of Kentucky Negro*, N.Y. TIMES, Aug. 15, 1936, at 30.

56. *Id.*

57. *Id.*

58. *Id.*

awaited his execution. The night before the execution some of the spectators<sup>59</sup> had participated in "hanging house-parties" while others, earlier that day, had enjoyed "hanging breakfast[s]." <sup>60</sup> As the crowd cheered "take him up!" and "let's go,"<sup>61</sup> the executioner's assistant placed a black hood over Bethea's head, tied the "neck-breaking knot,"<sup>62</sup> and signaled to the executioner to open the trap. Sixteen minutes later, a doctor pronounced Bethea dead.<sup>63</sup> As the authorities lowered his body from the scaffolds, "souvenir hunters rushed forward . . . and tore the black hood of death off his head."<sup>64</sup> The crowd then "[s]lowly . . . straggled away."<sup>65</sup>

Centuries before the State of Kentucky hanged Rainey Bethea, similar hangings occurred throughout the American colonies.<sup>66</sup> However, public executions did not originate in America.<sup>67</sup> Historians trace the development of public executions in this country back to England.<sup>68</sup> Yet, the "ritual" served slightly different purposes in each nation.<sup>69</sup> In England, public executions accomplished the judicial goal of punishing the criminal and the political goal of avenging the sovereign.<sup>70</sup> When a criminal committed a crime, he not only harmed the victim but he also harmed the monarchy.<sup>71</sup> By executing a criminal in public, a sovereign reasserted his power over the subject and demonstrated the sovereign's strength to the masses.<sup>72</sup> Public executions in seventeenth and early eighteenth century England demonstrated the power of the sovereign by using the criminal's body as a vehicle.<sup>73</sup>

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59. Many of the spectators traveled from other states to view the execution. *Kentucky Aroused by Public Hanging*, N.Y. TIMES, Aug. 23, 1936, § 4, at 6.

60. *Id.*

61. *10,000 See Hanging of Kentucky Negro*, *supra* note 55.

62. *Id.*

63. *Id.*

64. *Kentucky Aroused by Public Hanging*, *supra* note 59.

65. *Crime: Party*, TIME, Aug. 24, 1936, at 16.

66. LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776-1865, 4-5 (1989).

67. *Id.* at 3-4.

68. *Id.* at 65.

69. See *infra* text accompanying notes 70, 82-83.

70. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 47 (A. Sheridan, trans., 1979).

71. *Id.* A crime in England "attack[ed] the sovereign . . . personally, since the law represent[ed] the will of the sovereign, [and also] attack[ed] him physically, since the force of the law [was] the force of the prince." *Id.*

72. *Id.* at 48-49.

73. *Id.* at 49.

Besides avenging the sovereign for his injury, the executions also played another important role in England.<sup>74</sup> At a time when death rates were high due to disease, famine, and rising child mortality rates, public executions facilitated the integration of death in a society increasingly familiar with the phenomenon.<sup>75</sup>

English judicial and political officials could not accomplish the goals of public execution without the presence of the people at the execution itself.<sup>76</sup> These officials intended public executions not only to deter the commission of further crimes by other persons, but also to create horror among spectators by demonstrating the violent power of the sovereign over the criminal.<sup>77</sup> The crowd acted not only as observers but also as participants in the ritual.<sup>78</sup> Spectators often attacked and insulted the criminal while officials carried him to the gallows.<sup>79</sup> Furthermore, the presence of the people demonstrated their desire for vengeance against the condemned man who had injured the sovereign.<sup>80</sup> It was essential that the masses aid the King in punishing the enemies of the monarchy.<sup>81</sup>

In America, however, the goals of public executions changed significantly over time. In the era of the American revolution, public executions, as in England, served two purposes.<sup>82</sup> At a time when the new republic stood on a fragile foundation, the executions demonstrated the consequences for committing a crime against the state.<sup>83</sup> Furthermore,

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74. See *supra* note 70 and accompanying text. Yet, the effects of the execution began to change in the late eighteenth and the early to mid-nineteenth century. FOUCAULT, *supra* note 70, at 63, 67. Because capital crimes included some petty offenses, instead of demonstrating the power of the sovereign, the executions began to create unity among the people and the "petty offender." *Id.* at 63. Therefore, it was the "solidarity of a whole section of the population with those . . . called petty offenders . . . much more than the sovereign power that was likely to emerge [from the execution] with redoubled strength." *Id.*

The public execution also often made a hero of the condemned man. *Id.* at 67. Literature advertising public hangings, along with the repentance offered by the criminal before the execution, "transformed [the condemned man] into a hero." *Id.*

75. *Id.* at 55.

76. *Id.* at 57-58. The presence of a crowd provides public executions with meaning. *Id.* The people had to be present in order to witness the display of the sovereign's power, see *infra* note 77 and accompanying text, and also to learn that in some contexts, death served a purpose, see *supra* note 75 and accompanying text.

77. FOUCAULT, *supra* note 70, at 58.

78. *Id.* at 58-59.

79. *Id.*

80. *Id.* at 59.

81. *Id.* This was especially true when those enemies existed within the crowd. *Id.*

82. See MASUR, *supra* note 66, at 5-6.

83. *Id.* at 6.

during a century when religious fervor reached its peak, public executions provided a means through which the criminal could repent and attain salvation.<sup>84</sup>

When the colonists broke away from the English monarchy and formed a new republic, executions increased order and encouraged citizens to abide by "social values."<sup>85</sup> The recent war and the subsequent creation of a new government heightened Americans' fear of social decay and disorder.<sup>86</sup> The public execution instructed Americans on the proper status of a citizen in a democratic society.<sup>87</sup> Thus, while in England executions reaffirmed the power of the sovereign,<sup>88</sup> American executions preserved and strengthened the republic.<sup>89</sup>

Besides playing an important civil role in the newly formed nation, public executions also served as a religious ritual.<sup>90</sup> In a civil sense, executions signified the end of the criminal's life on earth; whereas in a religious context, they concentrated on the "eternal life" of the criminal.<sup>91</sup> Ministers were constantly present at hangings.<sup>92</sup> The condemned man acted as a man seeking penitence and redemption, while the ministers pleaded with the spectators to seek penitence or meet the same end as the condemned prisoner.<sup>93</sup> Yet, in the religious context, executions

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84. *Id.*

85. *Id.* at 26. On the day of an execution "civil and clerical figures" proved that society functioned. *Id.*

86. *Id.* at 28-29.

87. *Id.* at 26. Executions taught "a stern lesson about civic responsibility and tr[ie]d to fashion a uniform model for republican behavior without suggesting that the community was eroding from within." *Id.* at 39.

88. See *supra* note 72 and accompanying text.

89. MASUR, *supra* note 66. People from outside the local community where the hanging occurred, minorities, and foreigners were most often the subjects of the executions. *Id.* at 38-39. Local juries had little compassion for these people; state officials felt no strong political pressure to commute them; and spectators had less remorse in seeing an "outsider" executed rather than one of their own. *Id.* at 39. Hence, the "assembled would unite against the condemned to defend social stability." *Id.*

90. *Id.* at 26. Yet, even in the religious context, executions served a civil function. *Id.* at 42. The religious purposes underlying executions (penitence and redemption) allowed the state to present itself "as both punitive and benevolent, strictly punishing for the immediate benefit of society and even the everlasting welfare of the prisoner." *Id.*

91. *Id.* at 42.

92. *Id.* The community held ministers in less esteem and offered less deference to their authority in the latter half of the eighteenth century. Executions provided the opportunity for ministers to improve their reputation as spiritual saviors and to increase their authority in society. *Id.* at 42-43. Ministers used the hanging day to remind the crowd of its own sins and to warn them "to alter their ways." *Id.* at 44.

93. *Id.* at 41, 43-44.

reaffirmed the authority of God rather than that of the state. Ministers and other religious officials in attendance at the execution emphasized that God provided the state with the authority to execute criminals.<sup>94</sup> Society provided a service to the soul of an executed man by offering him a means to repent for his crime and achieve salvation.<sup>95</sup>

As in England,<sup>96</sup> spectators played a critical role in public executions in eighteenth-century America.<sup>97</sup> Religious and civil authorities relied on the presence of an audience to convey their particular messages.<sup>98</sup> Yet, the actual effect of the executions on those in attendance is unknown.<sup>99</sup> The crowd never acted in a way to interfere with the execution itself or the peacefulness of the ceremony.<sup>100</sup> Early American history contains no records of spectators interfering with executions by refusing to abide by official rule or by attempting to save the prisoner from the state's action.<sup>101</sup> It is unclear whether the political and religious messages accomplished their desired goals, but no evidence exists that these messages offended the sensibilities of the crowd.<sup>102</sup> Apparently, Americans in the late eighteenth century favored public executions enough to cooperate during the ceremony.<sup>103</sup>

Yet, the attitudes of spectators significantly influenced the decline of public executions during the nineteenth century.<sup>104</sup> By 1845, states in the eastern and midwestern regions of the nation executed all of their criminals in private.<sup>105</sup> Changes in the beliefs of the upper and middle classes caused this drastic alteration in the form of criminal punishment.<sup>106</sup> Members of upper class society regarded executions as distaste-

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94. *Id.* at 44.

95. *Id.* at 33-44.

96. *See supra* notes 65-81 and accompanying text.

97. *See generally* MASUR, *supra* note 66, at 27-44.

98. *Id.* at 41-43.

99. *Id.* at 45.

100. *Id.* at 46.

101. *Id.*

102. *Id.* Although authorities expected some resistance at public executions, little occurred. *Id.*

103. *Id.* The cultural, ethnic, racial or geographic background of the condemned man best explains the lack of public interference and opposition to executions. *Id.* Spectators felt no "social ties" to the criminal because he was typically an outsider. *Id.* Thus, the crowd contained "no obvious constituency to challenge the probity of the hanging." *Id.*

104. *Id.* at 95-116.

105. *Id.* at 94. The privatization of other forms of discipline occurred in the eighteenth century. *Id.* at 95.

106. *Id.* at 96.

ful and refused to associate themselves with the ritual.<sup>107</sup> Unwilling to completely abolish capital punishment, legislators chose a middle-ground approach and enacted laws which brought executions within the prison walls.<sup>108</sup> Nineteenth-century Americans cherished privacy and despised the lack of social sophistication pervasive at public hangings.<sup>109</sup> As a result, the attitudes of the middle and upper classes concerning death changed from favoring public death to embracing private executions.<sup>110</sup>

In addition to changes in class attitudes, other factors contributed to the demise of public executions. Authorities began to fear the ramifications of assembling a large group of people for an emotional event such as an execution.<sup>111</sup> People in various types of professions believed that public crowds "threatened person, property and profit."<sup>112</sup> Responding to this fear, authorities conducted executions within prisons where potentially destructive crowds could not congregate to watch the event.<sup>113</sup>

Furthermore, the public's preference for substance over appearance eliminated the religious value of executions.<sup>114</sup> Society no longer trusted the authenticity of the prisoner's conversion during the public execution.<sup>115</sup> The public believed that during the execution the religious authorities forced the condemned man to repent and seek redemption, and thus, concluded that private executions may cause the prisoner to actually convert.<sup>116</sup>

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107. *Id.* The middle and upper classes believed that women and children should not be exposed to death under such violent conditions. *Id.* at 110.

108. *Id.* at 96.

109. *Id.* at 103. The middle and upper classes welcomed institutions such as schools and revivals that symbolized order. Society desired these "new forms of order . . . because they promoted precisely those values and characteristics public executions seemed to undermine: restraint, discipline, control and order." *Id.* at 110.

110. *Id.* at 103. The lower class also favored private executions because they then did not have to watch "the execution of someone most probably like them." *Id.* at 110.

111. *Id.* at 100-01. In the late eighteenth century, "crowds were tolerated as a legitimate, popular forum for the achievement of political and social objectives." *Id.* at 100. *See also* WILLIAM J. BOWERS, EXECUTIONS IN AMERICA 43 (1984). Last minute reprieves often angered crowds beyond control and forced officials to move public executions "within the confines of the county jails." *Id.*

112. *See* MASUR, *supra* note 66, at 102.

113. *Id.* at 110. However, this caused officials to exclude "the community at large" from viewing executions. Instead, officials invited only "elite men" to witness the punishment. *Id.* at 111. With fewer people viewing an execution, the argument that capital punishment served as a deterrent became weaker. *Id.* at 112.

114. *Id.* at 108-09.

115. *Id.* at 108.

116. *Id.* at 109. Society based this viewpoint on the notion that prisons turned to private punishment in an effort to better facilitate the reform of the prisoner. *Id.*

Opponents of capital punishment welcomed the change from public to private executions.<sup>117</sup> They contended that eliminating public executions would end capital punishment in the United States.<sup>118</sup> Proponents of capital punishment shared this viewpoint.<sup>119</sup> Capital punishment, however, did not disappear. Privatizing executions served to “neutralize” the argument that capital punishment and the accompanying ritual caused social chaos.<sup>120</sup> Instead, private executions remained as a form of punishment in America.<sup>121</sup>

However, journalists prevented private executions from becoming completely private.<sup>122</sup> Before the abolition of public executions, newspapers devoted little attention to a hanging.<sup>123</sup> This changed significantly in the nineteenth century when the media reported the final moments of a condemned man’s life in full detail.<sup>124</sup> The objective reporting reflected in a newspaper article prohibited a private execution from accomplishing the civil and religious goals underlying public executions.<sup>125</sup> Thus, through the newspaper, nineteenth century society formed a personal rather than an “official interpretation” of executions.<sup>126</sup>

Twentieth-century America witnessed further privatization of executions. The means of executions changed drastically with the development of the electric chair, the gas chamber, and lethal injections “to make the execution swift and painless, further insulating observers from the event by requiring it to be conducted behind glass and within airtight enclosures.”<sup>127</sup> Five different methods of execution still exist in the

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117. *Id.* at 113.

118. *Id.*

119. *Id.* at 95. Some opponents contended that eliminating public executions would necessarily encourage the complete abolition of capital punishment. *Id.* at 112.

120. *Id.* at 113.

121. *Id.* The Supreme Court held that capital punishment violated the Eighth Amendment in *Furman v. Georgia*, 408 U.S. 238 (1972). Four years later in *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court reversed itself.

122. MASUR, *supra* note 66, at 114.

123. *Id.* The literature of the time, *see supra* note 93, referred only to the condemned man’s admission of guilt and his desire for penitence; scholarly material did not mention details of the execution or circumstances surrounding the hanging. *Id.*

124. *Id.* In the nineteenth century, “newspapers reported the criminal’s final actions regardless of the moral implications.” *Id.* Decreases in the cost of production permitted newspaper editors to print numerous copies on fairly short notice. The press informed the public of a hanging at precisely the times when their readers craved detailed accounts. *Id.*

125. *Id.* at 115. “By instituting private executions, legislators eliminated an occasion for public gathering . . . and precluded the open expression of certain passions and emotions.” *Id.*

126. *Id.*

127. BOWERS, *supra* note 111, at 29. *See also* MASUR, *supra* note 66, at 162-63.

United States.<sup>128</sup> Only Delaware, Montana, and Washington still hang<sup>129</sup> their prisoners.<sup>130</sup> States seldom use the firing squad as a method of execution.<sup>131</sup> Most states execute their criminals in the electric chair.<sup>132</sup> These states have electrocuted more than eighty people since the Supreme Court reinstated the death penalty in 1976.<sup>133</sup> Seven states, including California, use the gas chamber to execute prisoners,<sup>134</sup> while other states are rapidly beginning to use lethal injections<sup>135</sup> to effect a quick and painless death.<sup>136</sup>

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128. See Weisberg, *supra* note 2, at 23.

129. *Id.* Although hanging results in death by causing "strangulation or suffocation," it does not cause "instantaneous death." *Id.* Most likely, the prisoner feels severe pain before death ensues. Those who have witnessed hangings report that the hanged often defecates or urinates on himself immediately after the hanging occurs. *Id.*

130. *Id.*

131. *Id.* The State of Utah last used the firing squad when it executed Gary Gilmore in 1977. *Id.* When a firing squad executes a person, the members of the squad usually aim at a "circular white cloth target" located directly over the heart. A person executed by firing squad "dies as a result of blood loss caused by rupture of the heart or a large blood vessel, or tearing of the lungs." *Id.* Gilmore died within approximately two minutes of the gunshot. However, the gunmen occasionally miss the target, forcing the criminal to slowly bleed to death. *Id.*

132. *Id.* New York introduced execution by the electric chair in 1890. *Id.* The electric chair kills a prisoner by causing respiratory paralysis and cardiac arrest. *Id.* Yet, weak currents or malfunctioning old equipment cause improper electrocution. In 1990, the use of the wrong type of equipment resulted in a reduced flow of voltage that tortured the criminal to death. *Id.*

133. Justice Brennan, dissenting on a Court order denying certiorari to *Glass v. Louisiana*, provided the following detailed description of an electrocution:

The force of the electric current is so powerful that the prisoner's eyeballs sometimes pop out and rest on his cheeks. The prisoner often defecates, urinates, and vomits blood and drool. The body turns bright red as its temperature rises, and the prisoner's flesh swells and his skin stretches to the point of breaking . . . . Witnesses hear a loud and sustained sound like bacon frying, and the sickly sweet smell of burning flesh permeates the chamber . . . . The body frequently is badly burned and disfigured.

*Glass v. Louisiana*, 471 U.S. 1080, 1087-88 (1985) (citations and footnotes omitted), *quoted in* Weisberg, *supra* note 2, at 13.

134. Weisberg, *supra* note 2, at 13. An army medical corps officer invented the gas chamber after World War I. Originally, states intended to "surprise the prisoner by gassing him in his cell without prior warning." *Id.* This proved impractical, and states retaining this form of punishment now strap the prisoner in a chair located in the gas chamber. *Id.* The gas chamber causes death by emitting cyanide gas which results in hypoxia (cessation of oxygen to the brain). *Id.* After experiencing spasms and an epileptic seizure, the prisoner first loses consciousness and dies approximately 10 to 12 minutes later. *Id.*

135. A doctor from Oklahoma University Medical School invented lethal injections in 1977. Eighteen states now utilize death by lethal injection either as the exclusive method of execution or as an option among other choices. *Id.*

136. *Id.* States administer a combination of drugs including anesthetics and muscle relaxants, when executing a prisoner by lethal injection. The drugs literally stop the heart. The prisoner only feels a needle prick if the technicians administer the injection properly. *Id.* Yet, if the technician

The purposes behind the execution of a criminal also have changed dramatically during the twentieth century. While seventeenth-century Americans embraced capital punishment for its underlying social and religious messages, modern society views retribution and deterrence as the principle goals of capital punishment.<sup>137</sup>

Even though the purposes and the means of executing a criminal have changed, the process of execution remains the same.<sup>138</sup> Although the criminal "no longer faces the procession to the gallows . . . [he] is still wrapped in a ritual last meal, last words, last prayers."<sup>139</sup> On a typical execution day in the twentieth century, the state permits approximately twelve witnesses to enter the room adjoining the execution chamber. Meanwhile, supporters of the execution gather outside the prison walls, and "opponents of the death penalty pass the night in candle-lit vigil."<sup>140</sup>

### III. *GARRETT V. ESTELLE* AND *KQED V. VASQUEZ*: THE RIGHT TO VIDEOTAPE AND BROADCAST EXECUTIONS

The Fifth Circuit attempted to resolve the issue of a newscamera operator's right to televise executions in *Garrett v. Estelle*.<sup>141</sup> The court held that the right to gather news does not provide television stations with the right to attend or televise an execution.<sup>142</sup> In *Garrett*, a television reporter challenged the constitutionality of a Texas statute which prohibited filming executions.<sup>143</sup> The Fifth Circuit first observed that the First Amendment protects the right to gather news.<sup>144</sup> Relying on *Pell*, the Fifth Circuit noted that the Constitution does not afford the press a greater right of access than that provided to the general public.<sup>145</sup> The

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improperly pricks a muscle rather than a vein, or if the needle is clogged, the prisoner may undergo intense suffering. *Id.*

137. BOWERS, *supra* note 111, at xxi. See also MASUR, *supra* note 66, at 162.

138. MASUR, *supra* note 66, at 162-63.

139. *Id.* at 162.

140. *Id.*

141. 556 F.2d 1274 (5th Cir. 1977).

142. *Garrett*, 556 F.2d at 1276.

143. *Id.* See TEX. CRIM. PROC. CODE ANN. § 43.17 (West 1978). The statute also prohibited the press from witnessing executions. *Id.* at 1276. The United States District Court for the Northern District of Texas found the law unconstitutional and issued a preliminary injunction ordering prison officials to allow the reporter to film future executions. *Id.* at 1277. The judge also ordered prison officials to permit reporters to interview death row inmates. *Id.* The state only appealed the portion of the judge's decision that ordered the state to permit the reporter to film executions. *Id.*

144. *Garrett*, 556 F.2d at 1277 (citing *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)).

145. *Id.* at 1278.

court held that the Texas legislation did not violate the media's right to gather information because the state statute did not regulate the *content* of media reports.<sup>146</sup> The press could still "fully" inform the public of the details of an execution even though the execution itself could not appear on television.<sup>147</sup> Moreover, while the Fifth Circuit noted that capital punishment is an important issue, it concluded that "the protections of the [F]irst [A]mendment [do not] depend upon the notoriety of an issue."<sup>148</sup> Finally, the court held that the state need not demonstrate a compelling interest<sup>149</sup> to prohibit the filming of executions. Such a showing is necessary only when the state violates an individual's constitutional right.<sup>150</sup> Therefore, a reporter has no First Amendment right to film an execution.<sup>151</sup>

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146. *Id.* The court stated that a film of an actual execution contains no greater substantive value than that of a simulated execution. *Id.*

147. *Id.* In addition, the Court noted that the prison officials afford the press "substantial access" to executions by allowing some press witnesses in the execution chamber and permitting others to view the execution via closed circuit television. *Id.* at 1279.

148. *Id.*

149. See *United States v. Grace*, 461 U.S. 171 (1983). In *Grace*, the Court allowed the government to establish and govern "reasonable time, place, and manner regulations" to restrict expressive conduct in public places, provided that the rules "are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.* at 177. (quoting *Perry Educators' Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). The Court added that courts should allow other, additionally restrictive regulations on a specific mode of expression "only if narrowly tailored to accomplish a *compelling government interest.*" *Id.* (emphasis added).

150. *Garrett*, 556 F.2d at 1279. The state did not violate the reporter's constitutional right because it afforded him the same access as that it provided to the public. *Id.*

151. *Id.* In addition, the reporter argued that the legislation denied him equal protection of the laws because "other members of the press are allowed free use of their reporting tools," but he could not use his television camera. *Id.* The court quickly rejected this claim, stating that the Texas statute also prohibits print reporters from using cameras and radio reporters from taping the sounds of the execution. *Id.*

The reporter also advanced a prior restraint argument. He contended that because the government provided access to information via closed circuit television that the government was precluded from imposing constraints on reporter's use of the information, such as filming. *Id.* Rejecting this argument, the court determined that prison officials never granted access by close circuit television for the purpose of filming executions. Further, the First Amendment does not mandate that officials provide such access. *Id.* at 1279-80.

For an excellent discussion and criticism of *Garrett*, see Katherine A. Mobley, Comment, *Fifth Circuit Court of Appeals Denies Texas Reporter's First Amendment Claim of Right to Film Prison Execution-Garrett v. Estelle*, 11 CREIGHTON L. REV. 1031 (1978). Relying heavily on the opinion of the district court in *Garrett*, 424 F. Supp. 468 (N.D. Tex. 1977), the author offered several criticisms of the appellate court's decision. She criticized the Fifth Circuit's failure to provide the public with the kinds of information about prisons which the public is entitled to receive. Mobley, *supra* at 1047. Furthermore, by limiting press access to prisons, prison conditions may worsen once beyond

A federal district court in California recently considered whether the media has the right to televise executions in *KQED v. Vasquez*.<sup>152</sup> In *KQED*, a public television station brought suit challenging the constitutionality of a California state prison policy which prohibited stations from videotaping executions.<sup>153</sup> The station claimed that the policy violated the First Amendment because it unjustifiably prohibited the media from effectively reporting the events at an execution.<sup>154</sup> Citing Justice Stewart's concurrence in *Houchins v. KQED*,<sup>155</sup> the station contended that when the government provides access to public institutions, the government must provide "effective" access.<sup>156</sup>

The station argued that the very reason the state provided press access to executions was so that the press could relate the details of an execution to the public.<sup>157</sup> After contending that the media needs to utilize the

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public scrutiny. *Id.* at 1047-49. The author concluded that the Fifth Circuit inappropriately granted prison officials too much discretion to determine proper "modes of disseminating information to the public." *Id.* at 1048. The author also argued that previous judicial opinions demonstrate that the state cannot limit press access to government institutions without showing a "compelling necessity for such a limitation." *Id.* at 1049.

The author's statements concerning the prisoner's right to privacy best supports the court's holding in *Garrett*. The author stated that a prisoner retains some privacy rights when incarcerated, and such rights may prohibit the press from filming executions. *Id.* at 1050 (citing *Tribune Review Publishing Co. v. Thomas*, 254 F.2d 883, 885 (3d Cir. 1958)). The court did not address the issue. For another, more complex, criticism of the *Garrett* decision, see Comment, *Broadcasters' News-Gathering Rights Under the First Amendment: Garrett v. Estelle*, 63 IOWA L. REV. 724 (1978). The author argued that the court failed to consider the relevant state interest in limiting the television press' First Amendment constitutional rights. *Id.* at 749. The author also contended that the Fifth Circuit did not adequately address important equal protection, content regulation and prior restraint issues. *Id.* The author concluded that if the court properly decided the case, the reporter, not the prison, would have been successful in the action. *Id.*

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

153. Defendant's Trial Brief at 1, *KQED v. Vasquez*, No. 90-CV-1383 (N.D. Cal. June 7, 1991). The station sought to film the execution of Robert Alton Harris, whom the state planned to execute in the gas chamber. See Olson & Daily, *supra* note 2, at 13. The pending Harris execution was "newsworthy" because California had not executed a prisoner since 1967. *Id.* The station also attempted to enjoin the prison warden Daniel Vasquez, from preventing the press from attending executions. Defendant's Brief at 1-2, *KQED* (No. 90-CV-1383). However, the warden later decided not to litigate this issue.

154. Plaintiff's Trial Brief at 8, *KQED v. Vasquez* (No. 90-CV-1383).

155. 438 U.S. 1, 16-19 (1978) (Stewart, J., concurring).

156. Plaintiff's Brief at 9, *KQED* (No. 90-CV-1383). The station claimed that California law grants limited public access to executions. The California Penal Code provides, in relevant part: "The warden of the State prison where the execution is to take place . . . must invite . . . at least 12 reputable citizens." CA. PENAL CODE § 3704.5 (West Supp. 1991).

157. Plaintiff's Brief at 10, *KQED* (No. 90-CV-1383).

tools of their trade to accomplish this purpose,<sup>158</sup> KQED claimed that the Supreme Court's rulings in the right to access cases supported its arguments.<sup>159</sup> Applying the test articulated in *Globe Newspaper*,<sup>160</sup> the station asserted that the history of public executions, combined with the importance of "[a]ccurate citizen awareness" in a democratic society, creates a "presumption of openness" guaranteed by the Constitution.<sup>161</sup> KQED contended that because the state lacked a compelling interest to defeat this presumption,<sup>162</sup> the First Amendment prohibited the state from precluding the media from televising an execution.<sup>163</sup>

In contrast, the prison warden argued that the regulation prohibiting the media from filming executions did not violate the Constitution.<sup>164</sup> Relying on *Pell v. Procunier*,<sup>165</sup> the defendant contended that the media has no right of access to an execution because the state does not afford the *public* the right to witness an execution.<sup>166</sup> In addition, the warden strongly suggested that the two factors articulated by the Court in *Globe*

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158. *Id.* The plaintiff stated "[f]or television reporters, this means a camera and a recorder." *Id.* (footnote omitted). The plaintiff further argued that "[t]elevision is indispensable in allowing the public to see and hear, for *themselves*, what a witness [to the execution] sees and hears. . . ." *Id.*

159. *Id.* at 11. The plaintiff cited and discussed *Press-Enterprise I*, 464 U.S. 501 (1984), *Press-Enterprise II*, 478 U.S. 1 (1986), *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1980), and *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980). Plaintiff's Brief at 12-15, *KQED* (No. 90-CV-1383). For a summary of the holdings of these cases, see *supra* notes 28-41 and accompanying text.

160. *Globe Newspaper*, 457 U.S. at 605-06. See *supra* notes 35-41 and accompanying text.

161. Plaintiff's Brief at 15-17, *KQED* (No. 90-CV-1383). The station claimed that the press, citizens and certain public representatives historically attended executions. *Id.* at 15. The station further argued that deterrence and retribution "are enhanced . . . by the most accurate and complete coverage of the culmination of the most serious and notorious criminal cases." *Id.* at 17.

162. The Supreme Court stated that the strict scrutiny test applies to state action that denies access where the Court finds a "presumption of openness." See *Globe Newspaper*, 457 U.S. at 605. According to the station, the state can defeat the presumption only by demonstrating "an overriding interest based on findings that closure is essential to preserve high values and is narrowly tailored to serve that interest." Plaintiff's Brief at 19, *KQED* (No. 90-CV-1383) (quoting *Press-Enterprise I*, 464 U.S. at 824).

163. Plaintiff's Brief at 19, *KQED* (No. 90-CV-1383). The warden prohibited broadcasting executions because he feared viewers of the executions may try to harm the witnesses to the execution. *Id.* at 19-20. KQED stated that the possibility of this type of scenario occurring is "so remote . . . as to be entirely speculative." *Id.* at 19. The station further argued that the warden could have pursued other, less restrictive options that would have protected the witnesses. *Id.* KQED suggested that the warden could have taken measures to guarantee that the witnesses' faces remained off-camera. *Id.* at 21.

164. Defendant's Brief at 1-2, *KQED* (No. 90-CV-1383).

165. 417 U.S. 817, 835 (1974). See *supra* notes 23-27 and accompanying text.

166. Defendant's Brief at 3, *KQED* (No. 90-CV-1383). The defendant stated that the California statute at issue "is not an invitation to the general public." Because the general public has no right

*Newspaper* for determining questions of media access<sup>167</sup> do not create a "presumption of openness" with respect to executions.<sup>168</sup> The defendant concluded that if the public does not have the right to film an execution, then neither does the media.<sup>169</sup> The state need demonstrate only that the regulation is "reasonable," because the restriction on filming executions "is only a 'time, place and manner' restriction."<sup>170</sup> Thus, the defendant contended that the First Amendment does not provide the media with the right to film executions.<sup>171</sup>

In a convoluted oral opinion,<sup>172</sup> the court stated that the First Amendment does not provide the press with an absolute right to gather news.<sup>173</sup> Concluding that the press has no special right of access beyond that afforded to the public generally,<sup>174</sup> the Court emphasized that the state does not hold its executions open to the public.<sup>175</sup> Nevertheless, the

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to watch an execution at San Quentin, the media also does not possess any constitutional right to watch executions at San Quentin. *Id.* at 4.

167. See *supra* notes 35-41 and accompanying text. By the time the Court issued its ruling in the case, the defendant no longer sought to exclude the press from attending executions in a limited role. See *infra* note 176.

168. Defendant's Brief at 4-5, *KQED* (No. 90-CV-1383). The defendant argued that because no historical records of public executions even remotely similar to the lengthy history of public judicial proceedings exist, the station was precluded from proving "historical openness of executions." *Id.* at 5-6. Defendant further claimed that granting public access to an execution does not significantly impact the execution process. *Id.* at 7. The warden also argued that reporting the execution in official records provides public awareness that "the criminal justice system is functioning" and grants an avenue for "reactions and emotions." *Id.* (quoting *Press-Enterprise I*, 464 U.S. 501, 509 (1984)).

169. Defendant's Brief at 9, *KQED* (No. 90-CV-1383) (stating that "[m]edia witnesses may attend and observe an execution and later report their observations without government interference"). *Id.*

170. *Id.* at 13. See *supra* note 40 and accompanying text. The defendant contended that because the policy avoids the strict scrutiny test articulated in *Globe Newspaper*, he need not prove that the regulation "was narrowly tailored to serve a compelling governmental interest." *Id.* at 12-13 (citing *Globe Newspaper*, 457 U.S. at 606 n.17). The defendant urged the court to conclude that the prohibition on cameras and recorders was a "reasonable time, place and manner restriction" on the media's right of access to San Quentin executions. *Id.* at 13.

171. *Id.*

172. The district court judge issued neither a written opinion nor an order in the case.

173. Transcript of court's oral opinion, *KQED v. Vasquez*, No. 90-CV-1383, at 7 (N.D. Cal. June 7, 1991).

174. *Id.*

175. *Id.* The courts noted that the statute did not afford the general public a right to attend executions. *Id.* The court concluded that the warden is responsible under the California statutes to operate and govern the prison, as well as oversee executions. *Id.* at 8. Noting that such duties necessitate a high level of expertise and training, the court held that executions are not "a place for intrusion by well-meaning amateurs." *Id.* at 8. The court noted that this history of executions

Court refused to permit the prison to completely bar the press from attending executions. Although the court refused to arbitrarily exclude the press from attending executions,<sup>176</sup> it held that prison officials can limit the degree of access afforded to the media.<sup>177</sup> The court ruled that the policy was "valid and necessary" to guarantee the safety of prison personnel involved in the execution.<sup>178</sup>

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demonstrated that when the public had a right to attend executions "the press has always been there." *Id.* at 4.

176. *Id.* at 8. By the time the court issued its rule, the defendant had indicated that he no longer sought to deny the press access to executions. *Id.* at 3. The defendant only wished to prevent the press from videotaping and broadcasting an execution. *Id.* at 3. The Court held that "if the issue[] of exclusion of all the . . . media representatives [is] still before the court, . . . [the] practice [is] unreasonable." *Id.* at 12-13.

177. *Id.* at 8. The court expressly presumed that the press has more right to witness an execution than an ordinary citizen because of the custom and usage the media has historically enjoyed. *Id.* at 12. The court did note, however, that the "assumption may be open to serious dispute." *Id.*

178. *Id.* The court discussed three justifications that support the regulation. First, the court acknowledged that permitting the media to televise executions may place prison personnel at risk. The court stated that if television cameras revealed the identity of prison officials participating in the execution prisoners, their associates, gangs or other groups fanatically opposed to the execution may attempt to harm them or their families in retaliation for the execution. *Id.* at 9.

Second, the court agreed with the defendant that the presence of cameras alone presents a risk to the execution process. Since California uses the gas chamber to execute its criminals, a possibility of cameras striking the glass enclosing the chamber and causing the lethal gas to leak into the witness area exists. *Id.* at 10. Third, the court emphasized that televising executions within the prison creates the potential of igniting extreme reaction from prisoners, threatening the safety of prison personnel. *Id.* at 11.

Only two other courts have addressed this issue. In *Kearns-Tribune v. Utah Bd. of Corrections*, 2 Med. L. Rptr. (BNA) 1353 (D. Utah 1977), representatives from the media challenged the constitutionality of a state statute which prohibited the press from attending an execution. *Id.* at 1353. The media sought to enjoin enforcement of this statute in order to cover the execution of Gary Mark Gilmore. *Id.* The statute also denied the public access, permitting only those invited by the condemned man to attend the execution. *Id.* Citing *Pell* and *Saxbe*, the court concluded that because the public does not have access to the execution, the Constitution does not require that the state provide access to the media. *Id.* at 1353-54. The media also argued that because the statute allows the condemned man to choose witnesses, the law violated the media's equal protection as a group "unreasonably excluded." *Id.* at 1354. The court rejected this argument, holding that the state's desire to avoid "sensationalizing" the execution, to maintain prison discipline and security, and to respect the "privacy of a condemned man," all constituted a rational basis for the enactment of the statute. *Id.*

In *Halquist v. Department of Corrections*, 783 P.2d 1065 (Wash. 1989), the Washington Supreme Court held that members of the media possess no special right of access to videotape an execution. *Id.* at 1066. A producer of documentaries wanted to gain access to a state penitentiary to film the execution of Charles Campbell. *Id.* at 1065. The producer asserted that he had a constitutional right to both attend and videotape the execution. *Id.* at 1066. The court held that the right to attend an execution is not the "type of fundamental, inalienable [right] under the laws of God and nature which is protected" under the Constitution. *Id.* (quoting *State v. Clark*, 71 P.2d (Wash. 1902)). The court also dismissed the plaintiff's argument that the statute acted as a restraint, stating

#### IV. PROPOSAL FOR A MORE APPROPRIATE LEGAL FRAMEWORK FOR JUDICIALLY RESOLVING THE ISSUE OF MEDIA ACCESS TO EXECUTIONS

None of the courts that have addressed the issue of whether the First Amendment grants the media the right to videotape and broadcast an execution analyzed the question within the correct legal framework.<sup>179</sup> Focusing only on whether state law provided the general public with the right to attend executions, these courts failed to decide if the Constitution guarantees the public such a right. The Supreme Court provided the proper framework for addressing the media's constitutional right to access in *Globe Newspaper*.<sup>180</sup> Analysis of the issue within this framework reveals that the First Amendment does not provide the press with the right to attend or televise executions.

Courts considering the issue first should have resolved whether executions "historically ha[ve] been open to the press and general public."<sup>181</sup> An examination of the history of public executions in both England and America illustrates that the public and the press initially had the right to attend executions.<sup>182</sup> However, due to changes in sociopolitical attitudes, they lost this right.<sup>183</sup> For all practical purposes, public executions ceased in America in the latter part of the nineteenth century.<sup>184</sup> Therefore, in contrast to the public's right of access to criminal trials,<sup>185</sup> history does not demonstrate an unbroken tradition of press and public access to executions. In *Globe Newspaper*, the Court stressed that the right of access to a criminal trial "remained secure" throughout American history.<sup>186</sup> Conversely, legislators over a century ago abolished the public's right to attend executions.<sup>187</sup> The conclusion that the right has

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that "the right to publish applies only to those who have previously and lawfully obtained the information." *Id.* at 1067. The court also held that the state did not have to demonstrate a compelling state interest because the regulation did not infringe on any constitutional right of access. *Id.* (citing *Garret*, 556 F.2d at 1279). Thus, the court upheld the regulation because the producer failed to prove that the regulation restricted access rather than dissemination. *Id.* at 1068.

179. See discussion *supra* part III.

180. *Globe Newspaper v. Superior Court*, 457 U.S. 596, 605-06 (1981).

181. *Id.* at 605.

182. See *supra* part II.

183. See *supra* notes 104-16 and accompanying text.

184. See *supra* note 105 and accompanying text.

185. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 581 (1980); *Globe Newspaper*, 457 U.S. at 606.

186. *Globe Newspaper*, 457 U.S. at 605.

187. See *supra* note 108 and accompanying text.

not “remained secure” precludes a finding that executions “historically ha[ve] been open to the press and general public.”<sup>188</sup>

The courts that addressed the issue of televising executions also should have analyzed whether “the right of access to [public executions] plays a particularly significant role in the functioning of the judicial process and the government as a whole.”<sup>189</sup> An examination of American history illustrates that *public* executions served a very specific function in the United States.<sup>190</sup> Generally, public executions reinforced the power of a new republic and provided a means for the condemned person to repent for his crime and seek salvation.<sup>191</sup> Public executions served significant judicial and governmental functions for two reasons. First, they demonstrated that the new republic would not tolerate unlawful action by its citizens.<sup>192</sup> Second, through the ritual of the prisoner seeking repentance, public executions demonstrated that the republic also possessed the capacity to forgive those who broke its laws and threatened its power.<sup>193</sup> Therefore, the sociopolitical climate in the nation allowed public access to executions to serve important purposes during an early period in American history.

However, as the republic strengthened and society started to embrace privacy and disfavor public disorder, state legislatures throughout the country privatized executions.<sup>194</sup> Consequently, the role that executions played in “the judicial process and the government as a whole” changed.<sup>195</sup> Society executed its prisoners to achieve goals of deterrence and retribution, rather than to convey outdated civic and religious messages.<sup>196</sup> Therefore, the presence of the public was no longer necessary to facilitate the role that executions played earlier “in the functioning of the judicial process and the government as a whole.”<sup>197</sup>

Accordingly, because executions historically have not been open,<sup>198</sup> and because *public* executions ceased contributing significantly to demo-

188. *Globe Newspaper*, 457 U.S. at 605.

189. *Id.* at 606.

190. *See supra* notes 82-84 and accompanying text.

191. *See supra* notes 82-84 and accompanying text.

192. *See supra* note 87 and accompanying text.

193. *See supra* text accompanying note 95.

194. *See supra* text accompanying notes 105, 108.

195. *Globe Newspaper*, 457 U.S. at 606.

196. *See supra* text accompanying note 137.

197. *Globe Newspaper*, 457 U.S. at 606.

198. *Id.* at 605.

cratic society, the Constitution does not contain a "presumption of openness" with respect to executions.<sup>199</sup> Since the First Amendment only affords the press the same rights of access as those afforded to the public, the media has no constitutional right to attend executions.<sup>200</sup>

Yet the question remains whether the press has the right to film executions if the state provides the public, and consequently, the press, with access to executions. In *Houchins v. KQED*, the court emphasized that the Constitution only requires the state to provide the same *type* of access to the media that it affords the public.<sup>201</sup> Thus, if the state forbids the public from filming executions, then the Constitution does not require the state to allow the media access to film executions.<sup>202</sup>

Justice Stewart's concurrence in *Houchins v. KQED* stressed that the state must provide the press with effective access.<sup>203</sup> Even under this formulation, however, the state still need not allow the press to film executions. Denying the media the right to film an execution does not deny the press effective access to the execution.<sup>204</sup> The press can continue to effectively transmit the happenings of an execution through written text.<sup>205</sup> The press can effectively report the details of any deviation from proper execution procedure in a newspaper or magazine article.<sup>206</sup> Allowing the media to televise executions will not further the purpose of increasing the effectiveness of the media's reporting to an appreciable extent.<sup>207</sup> Rather, a videotaped execution will most likely only sensationalize the death of a criminal.<sup>208</sup>

More importantly, televising executions will transform private execu-

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199. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980).

200. *Pell v. Procunier*, 417 U.S. 817, 835 (1974). Therefore, states that ban the press from attending executions do not have to demonstrate a compelling interest to justify their actions. See *supra* note 150 and accompanying text.

201. *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978).

202. *Id.*

203. *Id.* at 17 (Stewart, J., concurring).

204. *Garrett v. Estelle*, 556 F.2d 1274, 1278 (5th Cir. 1977).

205. Justice Brennan's description of an execution, *supra* note 133, demonstrates the power of written word with respect to describing executions.

206. For an example of a recent newspaper article detailing a "bungled" execution, see Charles Bremner, *Murderer Given Double Dose in Electric Chair*, THE TIMES, Aug. 24, 1991, available in LEXIS, Nexis Library, Papers File (describing the electric chair execution of Derrick Peterson, in which Virginia prison officials had to electrocute Peterson twice because after receiving the first dose of over 1,700 volts for a period of 10 seconds, his heart remained beating).

207. *Garrett*, 556 F.2d at 1278.

208. See *Armstrong*, *supra* note 2, at 4; *Will*, *supra* note 2, at C7; *Weisberg*, *supra* note 2, at 13; *Goodman*, *supra* note 2, at A23.

tions back into public executions.<sup>209</sup> The decisional law relating to press access and the right to gather information illustrates that courts cannot make this transformation under the guise of providing for effective reporting without stretching the First Amendment beyond its appropriate scope.<sup>210</sup> Only state legislatures, motivated by public opinion, have the power to catapult executions back into the public arena.<sup>211</sup> Because an execution is not dignified or aesthetically pleasing,<sup>212</sup> legislators ultimately will have to decide whether they want this type of "program" to appear on American television.

## V. CONCLUSION

This Note demonstrated that although each court which addressed the issue of media access to executions incorrectly analyzed the subject, all of the tribunals arrived at the correct conclusion. Although the press has a constitutional right to gather information, this right does not extend into the execution chamber. Neither opponents nor proponents of capital punishment should exploit the deaths of condemned criminals in order to wage their battles concerning the death penalty. The press adequately informs the public about the details of executions through the nation's newspapers and magazines. State legislators, not the courts, should decide whether the public can view executions on television.

*Dane A. Drobny*

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209. See Weisberg, *supra* note 2, at 13.

210. See *supra* part I.

211. See *supra* note 1 and accompanying text.

212. See *supra* notes 129-36. "[T]elevised executions will reverse the process . . . whereby executions have been removed further and further from the community that compels them." Weisberg, *supra* note 2, at 13.