Televising California's Death Penalty: Is There a Constitutional Right to Broadcast Executions

Jeff Angeja
Notes

Televising California’s Death Penalty: Is There a Constitutional Right to Broadcast Executions?

by

JEFF ANGEJA*

Introduction

Imagine twenty-six people standing in silence, unable to remove their eyes from a person strapped into a chair inside an airtight chamber. Cyanide splashes into acid and shatters the silence of the death chamber as gas fills the air like thick fog. The condemned writhes in pain in her death throes. While twenty-six witnesses watch in silence, millions of television viewers watch with them in the privacy of their own homes. Does the broadcast media have the right to televise an execution? This Note argues that it does.

Whether the death penalty should be used as a means of punishing criminals presents one of the most hotly debated topics in our society. This Note does not attempt to resolve that controversial issue. However, television has thrust a new controversy into this arena of debate: Is there a constitutional right to televise executions? In the summer of 1991, San Francisco’s public television station, KQED, sought to televise the execution of Robert Alton Harris.1 The warden at San Quentin Prison,2

---

* Member, Third Year Class; B.A. 1990, University of California, Davis. The Author wishes to thank his parents for their support in all his endeavors. The Author also wishes to thank Professors Calvin Massey and Scott Sundby for their guidance in the process of writing this Note. Finally, the Author wishes to thank Michael F. Truskol, Attorney at Law, for his influence and inspiration in the Author’s life.


2. Courts that render the death sentence may designate the place of execution to be a state prison other than San Quentin. CAL. PENAL CODE § 3603 (West 1982). However, San
Daniel Vasquez, allowed neither electronic equipment nor writing implements into the execution chamber.\(^3\) KQED sued unsuccessfully in federal district court asserting a constitutional right to televise executions.\(^4\)

This Note assumes that the death penalty will be imposed with greater frequency in the future because a majority of states have recently enacted it.\(^5\) Moreover, a federal crime bill is pending that would significantly expand the use of the death penalty.\(^6\) If the frequency of the death penalty increases, then the issue of whether a right to televise executions exists will become more important in the future.

Focusing on California's execution procedure, this Note argues that there is a constitutional right to televise executions based on the First, Fourteenth, and Eighth Amendments. Part I of this Note analyzes the two criteria on which a First Amendment right of access must be based. It applies these criteria to the execution context, arguing that the broadcast media may successfully assert a right of access to the execution chamber. Part II argues that the electronic media may also prevail on a Fourteenth Amendment equal protection claim to gain access to the execution chamber. Finally, Part III posits a nexus between the First Amendment's guarantee of freedom of the press and the Eighth Amendment's prohibition of cruel and unusual punishment that further protects the broadcast media's right of access to the execution chamber by arguing that the use of the camera would promote the establishment of a societal standard of cruel and unusual punishment with respect to the mode of execution.

Quentin is the statutorily designated location for executions. See \textsuperscript{3} \textit{CAL. PENAL CODE} § 3600 (West 1982). Prior to a 1943 amendment, this statute required "delivery [of the prisoner] to the warden of the California State Prison at San Quentin." \textsuperscript{4} 1941 ch. 106, sec. 15, § 3600, 1941 Cal. Stat. 1080, 1117 (codified as amended at \textit{CAL. PENAL CODE} § 3600 (West 1982)).


Because a majority of states have recently enacted the death penalty following a period during which it was not used, this Note anticipates an increase in the frequency of the death penalty. \textit{See G. Mark Mamantov, Note, The Executioner's Song: Is There a Right to Listen?, 69 VA. L. REV.} 373, 373 (1983) ("[E]xecutions may occur at a rate of more than three per week within the next few years.").

I. The Television Media’s First Amendment Right of Access to the Execution Chamber

This Part first addresses the merits of the broadcast media’s claim to a First Amendment right of access to executions. The issue of whether a First Amendment right of access exists must be analyzed in terms of two criteria: 1) Whether a particular event to which one seeks access has been traditionally open to the public; and 2) whether the role of the press in a particular event is important to the functioning of a republican form of government. In applying these criteria to each of a series of cases, the Supreme Court found that a First Amendment right of access exists unless the particular restriction is narrowly tailored to further a compelling state interest. Moreover, in Chandler v. Florida the Court held that “the Constitution does not prohibit a state from experimenting with the program [of televising trials] authorized by [the canons of judicial ethics].” After analyzing these criteria, this Part will apply them to the execution context and argue that the television media has a right of access to the execution chamber based on the First Amendment.

A. The Historical Openness Criterion

The Court first faced the issue of the press’s right of access to a criminal trial in Richmond Newspapers v. Virginia. In holding that a First Amendment right of access to criminal trials exists, the Court reasoned that criminal trials traditionally have been open to the public, a tradition dating “back beyond reliable historical records.” The Court noted that “[w]hat is significant for present purposes is that throughout its evolution, the trial has been open to all who care to observe.” Writing for a plurality of the Court, Chief Justice Burger traced the openness of criminal trials to “the days before the Norman Conquest.” In explaining why criminal trials were open, he first stated that openness “gave assurance that the proceedings were conducted fairly to all concerned.” Later, Burger reasoned that this openness served a therapeutic...
tic purpose within the community: "people sensed from experience and observation that, especially in the administration of criminal justice, the means used to achieve justice must have support derived from public acceptance of both the process and its results." Burger explained that when a shocking crime occurs, the community is outraged, and subsequent open processes of justice

serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. . . . The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is "done in a corner [or] in any covert manner." . . .

People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case . . . .

Finally, Burger stated: "Instead 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." Burger's observations are significant in the execution context. Prophylactic or cathartic purposes are impeded if the execution is carried out covertly. If such purposes are to be achieved, they are best achieved by granting access to executions to the surrogate of the public—the press.

B. The Structural Criterion

In his concurring opinion in Richmond Newspapers, Justice Brennan expounded the second criterion on which a First Amendment right may be founded, stating that "the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sake; it has a structural role to play in securing and fostering our republican system of self-government." Justice Brennan described three structural roles played by the First Amendment freedom of the press. First, he asserted that a free press tends to make public debate more informed: "Implicit in this structural role is not only the principle that debate on public issues should be uninhibited, robust, and wide

---

16. Id. at 571 (emphasis added).
17. Id. at 571-72 (quoting THE 1677 CONCESSIONS AND AGREEMENTS OF WEST NEW JERSEY, reprinted in SOURCES OF OUR LIBERTIES 180, 188 (Richard L. Perry ed., 1959)) (alteration by court).
18. Id. at 572-73.
19. Richmond Newspapers did not address camera access. See id. On the contemporary power of the video medium, see infra text accompanying notes 79-86.
20. 448 U.S. at 587 (Brennan, J., concurring in judgment) (citations omitted) (emphasis in original).
open,' but also the antecedent assumption that valuable public debate . . . must be informed." 21

Second, Justice Brennan stated that a free press acts as a check on the criminal justice system: "[P]ublic access to court proceedings is one of the numerous 'checks and balances' of our system, because 'contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power . . . ." 22

Finally, Justice Brennan wrote that a trial must convey the appearance of fairness in order to be truly fair: "The trial is a means of meeting 'the notion, deeply rooted in the common law, that 'justice must satisfy the appearance of justice.'" 23 Brennan went on to explain that "[c]losed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for the law. Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice." 24

In *Globe Newspaper Co. v. Superior Court*, 25 these same criteria were used by the Court to prevent the closure of a sex crime trial during the testimony of the minor victim. Justice Brennan, writing for the majority, stated:

Two features of the criminal justice system, emphasized in the various opinions in *Richmond Newspapers*, together serve to explain why a right of access to criminal trials in particular is properly afforded protection by the First Amendment. First, the criminal trial has been historically open to the press and general public. . . .

Second, the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. 26

Although Justice Brennan acknowledged that the media's First Amendment right of access to criminal trials is not absolute, 27 he stated that it may only be infringed where the infringement is narrowly tailored to serve a compelling state interest. 28

Again, in *Press-Enterprise Co. v. Superior Court* 29 the Court applied these same criteria to allow press access to voir dire transcripts. 30 Chief Justice Burger, writing for the majority, reviewed the history of

22. Id. at 592 (quoting In Re Oliver, 333 U.S. 257, 270 (1948)).
23. Id. at 594 (quoting In Re Oliver, 333 U.S. 257, 270 (1948)).
24. Id. at 595.
26. Id. at 605-06.
27. Id. at 607 (citing Richmond Newspapers, 448 U.S. at 581 n.18 (plurality opinion of Burger, C.J.)).
28. Id. at 606-07.
30. Id. at 508-10, 513.
criminal trials and the jury selection process, and found that these proceedings had been open since "before the Norman Conquest." Burger echoed Justice Brennan's structural criterion when he asserted: "Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Like Justice Brennan, Chief Justice Burger also asserted that open trials serve a therapeutic purpose within the community. Finally, the Court held that the First Amendment right of access may only be overcome by a narrowly tailored, compelling state interest. In this particular case, the lower court closed the entire six week period of voir dire without considering less intrusive alternatives; absent such consideration, "the trial court could not constitutionally close the voir dire."

In the last of the Quartet cases, Press-Enterprise Co. v. Superior Court II, the Court applied the same criteria to a non-trial context, holding that the First Amendment right of access includes access to the transcript of a preliminary hearing despite the fact that the proceeding involved was not a trial. In an opinion by Chief Justice Burger, the Court held:

The considerations that led the Court to apply the First Amendment right of access to criminal trials in Richmond Newspapers and Globe and the selection of jurors in [Press I] lead us to conclude that the right of access applies to preliminary hearings . . . .

First, there has been a tradition of accessibility to preliminary hearings . . . .

The second question is whether public access to preliminary hearings . . . plays a particularly significant positive role in the actual functioning of the process.

The Court reiterated that the right may be overcome only by narrowly tailored means in service of a compelling state interest. Significantly, the state interest asserted was that of ensuring a fair trial. In response to this assertion, the Court stated:

[T]he preliminary hearing shall be closed only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that

31. Id. at 505.
32. Id. at 508 (citing Richmond Newspapers v. Virginia, 448 U.S. 555, 569-71 (1980) (plurality opinion of Burger, C.J.)).
33. Id. (citing Richmond Newspapers, 448 U.S. at 570).
34. Id. at 509-10.
35. Id. at 511.
37. Id. at 10.
38. Id. at 10-11.
39. Id. at 9.
closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights.\textsuperscript{40}

One must note that a defendant's interest in a fair trial is entirely absent from the execution context because by the date of the execution the trial is over and the appeal process has been exhausted. Moreover, there are alternatives other than an absolute ban on cameras. This point will be expanded later in this Note.\textsuperscript{41}

Finally, the Court in \textit{Chandler v. Florida} addressed the issue of whether "a state may provide for . . . television[] and still photographic coverage of a criminal trial for public broadcast, notwithstanding the objection of the accused."\textsuperscript{42} The Florida Supreme Court had adopted such a provision in Canon 3A(7) of its Code of Judicial Ethics.\textsuperscript{43} The United States Supreme Court held that "the Constitution does not prohibit a state from experimenting with the program authorized by revised Canon 3A(7)."\textsuperscript{44} Although the Court expressed no opinion regarding an access right for the press, the Florida Supreme Court, which had previously rendered an opinion in a related case, held that "on balance there is more to be gained than lost by permitting electronic media coverage of judicial proceedings subject to standards for such coverage."\textsuperscript{45} The Florida Supreme Court reasoned that "[i]t is essential that the populace have confidence in the process, for public acceptance of judicial judgments and decisions is manifestly necessary to their observance. Consequently, public understanding of the judicial system, as opposed to suspicion, is imperative."\textsuperscript{46}

The United States Supreme Court has upheld the broadcast media's right of access to voir dire and to trials.\textsuperscript{47} In each instance, the Court referred to two criteria: the historical openness of an event or practice and the structural role of the press, to determine whether the broadcast media has a First Amendment right of access to a particular stage in the judicial proceedings. If the electronic press can satisfy these criteria in

\textsuperscript{40} \textit{Id.} at 14 (emphasis added) (citing \textit{Press I}, 464 U.S. at 510 and Richmond Newspapers v. Virginia, 448 U.S. 555, 581 (1980) (plurality opinion of Burger, C.J.)).

\textsuperscript{41} See \textit{infra} text accompanying notes 166-169.

\textsuperscript{42} 449 U.S. 560, 562 (1981).

\textsuperscript{43} \textit{Id.} at 564-66. As quoted by the Court, this canon provided:

Subject at all times to the authority of the presiding judge to (i) control the conduct of proceedings before the court, (ii) ensure decorum and prevent distractions, and (iii) ensure the fair administration of justice in the pending cause, electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed . . . .

\textit{Id.} at 566.

\textsuperscript{44} \textit{Id.} at 583.

\textsuperscript{45} In \textit{re} Petition of Post-Newsweek Stations, 370 So.2d 764, 780 (Fla. 1979).

\textsuperscript{46} \textit{Id.} at 780-81 (citation omitted).

\textsuperscript{47} See \textit{Chandler}, 449 U.S. at 567 (television camera recorded voir dire); \textit{id.} at 583 (Constitution does not prohibit state from televising criminal trial).
the context of an execution, which is merely another judicial proceeding, it may successfully assert a First Amendment right of access to the execution chamber.

C. Public Access and the Role of the Press in the Execution Chamber

The Quartet cases establish a First Amendment right of access to a particular process when: 1) that process has been traditionally open and 2) press access serves a positive structural role in the functioning of that process. When these criteria are satisfied, the right may be overcome only by an exclusion scheme narrowly tailored to serve a compelling state interest. If the execution process has traditionally been open, and if camera access plays a positive structural role in the execution process, then the broadcast media's First Amendment right of access should extend as far as the execution chamber.

(1) The History of Public Access to Executions

Executions were traditionally open in this country. At the "time of our earliest decisions upholding capital punishment, a substantial portion of California's residents had witnessed executions." Currently, however, California conducts executions within the walls of San Quentin Prison.

Although California's executions occur in San Quentin, which is generally closed to the public, the executions are still sufficiently open to the public to satisfy the first prong of the Court's test for establishing a First Amendment right of access. G. Mark Mamantov has noted that "historical momentum would appear to favor closing executions, rather than opening them to the press and public." Unlike courtrooms, which are open to the public, the execution chamber is closed to the public. Nevertheless, two arguments support the view that executions are sufficiently "open" to warrant a right of press access.

First, the warden is required to select twelve official witnesses and fourteen media witnesses to attend all executions. A process that includes members of the general public, even if limited in number, cannot be said to be completely closed. The only standard a witness must meet

48. See Mamantov, supra note 5, at 375-77.
50. Mamantov, supra note 5, at 388.
51. See supra text accompanying notes 11-14.
is that she be reputable.\textsuperscript{53} Presuming that the witness is reputable, the execution process is open to her\textsuperscript{54} and therefore not completely closed.

Second, consider the nature of a prison and the necessity of maintaining security within it. Consider the physical space limitations within an execution chamber.\textsuperscript{55} The "closed nature" of the execution process can be seen as a function of the physical limitations of both the execution chamber and the prison environment, which are designed to prohibit freedom of movement, rather than a policy judgment to close executions to the public.

These two arguments strongly support the notion that the fourteen media witnesses serve as surrogates for the public at large; the press provides the public with an eyewitness account of the execution.\textsuperscript{56} In fact, the current policy requires the media witnesses to "give their pool commentary and recounting [sic] to the other assembled media."\textsuperscript{57} Thus, the media witnesses act as surrogates for the non-witness media. The media witnesses simultaneously act as surrogates for the public in that part of the standard by which they are selected includes "the broadest cross-section of media format and greatest circulation/viewers."\textsuperscript{58} This selection criterion acknowledges the structural importance of the press as the eyes and ears of the public. As Chief Justice Burger stated in \textit{Richmond Newspapers v. Virginia}: "[P]eople now acquire [information about trials] chiefly through the print and electronic media. . . . This 'contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system . . . ."\textsuperscript{59}

Although the execution chamber may not be located in the center of the town square, this Note asserts that the chamber is as open as space and security limitations allow, and is open to the surrogates of the public. Thus, the execution process was traditionally open and remains sufficiently open to satisfy the first criterion of the \textit{Richmond Newspapers} test.

\textsuperscript{53} \textit{Cal. Penal Code} § 3605 (West Supp. 1992); Vasquez Deposition at 32, \textit{Vasquez} (No. C 90-1383 RHS) ("Q. What are the standards used in choosing the witnesses? A. First, that they be reputable . . . second, that they be stable, emotionally strong and physically strong too—I concern myself about the effect on them of witnessing such circumstances as an execution.").

\textsuperscript{54} Assuming the warden selects her. \textit{See supra} note 53.

\textsuperscript{55} The fire marshal has determined the capacity of the execution chamber to be 50 persons. \textit{See Execution Procedures, supra} note 3, at 15.

\textsuperscript{56} San Quentin Institution Procedure requires the media witnesses to an execution to relay what they saw to the media waiting outside. \textit{See Execution Procedures, supra} note 3, at 14.

\textsuperscript{57} \textit{Id.}


(2) The Structural Role of the Press in the Execution Process

Chief Justice Burger and Justice Brennan spelled out the positive structural roles that the press may play in securing and fostering a republican form of self-government.60 First, as Justice Brennan stated in his concurrence in the judgment of Richmond Newspapers, "Implicit in this structural role is not only 'the principle that debate on public issues should be uninhibited, robust, and wide open,' but also the antecedent proposition that valuable public debate . . . must be informed."61 Second, "public access to court proceedings is one of the numerous 'checks and balances' of our system, because 'contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.'"62 Third, the open process accords with the notion that "justice must satisfy the appearance of justice."63 Finally, an open process serves a therapeutic or cathartic purpose within the community:

Civilized societies withdraw from both the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the . . . urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is "done in a corner [or] in any covert manner."64

The camera is ideally suited to perform all four of these functions in the execution process. First, the death penalty is a hotly debated subject: both the public and the Court are divided regarding its constitutionality.65 According to the Court's theory of the structural role of the press in a republican system of government,66 such debate must be informed to be effective.67 Televising executions would not only provide a greater amount of accurate information,68 it would also spark renewed debate.

Second, television access would enable the entire nation to act as a check on the government.69 As it stands, it is difficult for anyone but the

---

60. Id. at 571-74 (plurality opinion of Burger, C.J.); id. at 587-97 (Brennan, J., concurring in judgment).
61. Id. at 587 (Brennan, J., concurring in judgment) (footnote omitted) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).
62. Id. at 592 (quoting In re Oliver, 333 U.S. 257, 270 (1948)).
65. For evidence of this, see the five separate opinions in Gregg v. Georgia, 428 U.S. 153 (1976).
66. See supra text accompanying note 17.
68. See infra text accompanying notes 79-80.
69. See Richmond Newspapers, 448 U.S. at 592 (Brennan, J., concurring in judgment).
selected fourteen witnesses to serve as "watchdog" over the state during its final act in the gravest of criminal proceedings. Indeed, the state must be watched most carefully in this lethal context. Television would serve this role better than the print media and thus should be granted access to the execution chamber.70

Third, television creates an open process and a respect for the judicial system in the spirit of the Court’s declaration that "justice must satisfy the appearance of justice."71 Satisfying the appearance of justice is especially important in the context of an execution, where error cannot be reversed.72 The criminal justice system faces more difficulty in maintaining the public’s respect for the legitimacy of the death penalty when executions remain hidden from public scrutiny than it would if the public were permitted to examine the process directly. As the Court observed, "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."73

Finally, television access to the execution chamber would foster the community catharsis of which Chief Justice Burger wrote.74 Burger asserted that the open process serves a prophylactic purpose by quelling society’s retributive urge.75 Insofar as the death penalty assuages the urge for both vigilante justice and retribution, this purpose would be further served by televising executions. The fourteen media witnesses76 in government that the state must not covertly undertake an act as controversial and severe as that of taking a person’s life. One need not stretch the imagination too far to envision a host of cruel and unusual punishments, such as "burning at the stake, crucifixion, [or] breaking on the wheel." Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 n.4 (1947) (quoting In re Kemmler, 136 U.S. 436, 446 (1890)).

In any event, the state legislature has at least implicitly acknowledged the need for a "watchdog" by requiring witnesses to be present at the execution. See CAL. PENAL CODE § 3605 (West Supp. 1992). Given the provision for a watchdog, this Note asserts that television cameras perform the watchdog function better than the twenty-six witnesses. See infra text accompanying notes 79-86.

70. See infra text accompanying notes 79-86.
72. Examples of such error might include cruelty in the application of the execution procedure, or an improper or unduly painful procedure, such as when the first application of the electric chair fails. Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 461 (1947). Public knowledge of these types of events would have some bearing on society's determination of whether the means of execution is cruel or unusual.
74. See Richmond Newspapers, 448 U.S. at 571 (plurality opinion of Burger, C.J.).
75. Id.; see supra text accompanying note 64.
76. These witnesses include all forms of media; however, cameras and other electronic devices are not allowed. See Execution Procedures, supra note 3, at 16.
the execution chamber perform, to the degree that they are able, the structural roles necessary to a republican form of government. But because the television camera performs these roles better than any other medium, the electronic media should have a right of access to the execution chamber.

The electronic media is superior to the print media both qualitatively and quantitatively. Qualitatively, the camera has several advantages over the newspaper. For example, the print media must filter the sights, sounds, and smells of the entire prison experience and execution process through the memory and notes of a writer. As such, the experience is subject to the writer's potential biases and faults. In contrast, the cliché "a picture is worth a thousand words" rings true in this setting. A television image can convey exactly what a spectator would see if she were present within the execution chamber. Justice Stewart acknowledged this crucial difference in his concurrence in the judgment of Houchins v. KQED: "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." Other courts have acknowledged the camera's superiority as well: "[V]isual impressions . . . add a material dimension to one's impression of particular news events. Television film coverage of the news provides a comprehensive visual element and an immediacy, or simultaneous aspect, not found in print media."

The electronic media can also claim a quantitative superiority over the print media. Sixty-five percent of all adults acquire most of their news from television. Newspapers finish second at forty-two percent, radio third at fourteen percent, and magazines fourth at four percent. Television has led all other media as the primary source of news since the early 1960s and has enjoyed at least a twenty point lead over newspapers.

77. By comparison with electronic media, the print media are qualitatively and quantitatively less effective. See infra text accompanying notes 79-86.
78. See Richmond Newspapers, 448 U.S. at 573 (plurality opinion of Burger, C.J.).
79. 438 U.S. 1, 17 (1978) (Stewart, J., concurring in judgment).
80. Cable News Network v. ABC, 518 F. Supp. 1238, 1245 (N.D. Ga. 1981). Justice Powell remarked that the public is "the loser" when news coverage is limited to "watered-down verbal reporting, perhaps with an occasional still picture. . . . This is hardly the kind of news reportage that the First Amendment is meant to foster." Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 581 (1977) (Powell, J., dissenting).
82. Id.
since 1980.83 "Whereas nearly all American homes have at least one television set which is on an average of seven hours each day, only about half of all Americans buy daily newspapers."84 Most striking of all is that only two percent of Americans derive their news from sources exclusive of television.85 By televising executions, the media would substantially increase the accuracy and availability of information and thereby foster public debate, thus contributing to the formation of a societal consensus regarding the standard for cruel and unusual punishment.86 For evidence of television's pervasive role in our society, one need only recall recent events such as the Gulf War, the confirmation hearings of Justice Clarence Thomas, and the Los Angeles riots, during which time most people were glued to their television sets. Given the vast superiority in terms of viewers of the electronic media, to deny electronic media coverage of executions is to unduly restrict the structural role that the public, through the surrogacy of the camera, must play in the legal process. The camera is best able to fulfill the role of the press contemplated in the First Amendment.

D. Argument from Analogy

Support for the electronic media's right of access to the execution chamber may be found by analogizing to the Supreme Court's reasoning in the Quartet of cases.87 Although these cases acknowledge that the right of access may be limited by the right to privacy and the fair trial interest of the accused, in each of the cases the media's right of access prevailed.88 This Note posits that as in the case of preliminary examinations, voir dire proceedings, and criminal trials, an execution is a compo-

83. Id.
85. TIO/ROPER REPORT, supra note 81, at 27; see also Cable News Network v. ABC, 518 F. Supp. 1238, 1245 (N.D. Ga. 1981) (noting the increasingly prominent role of television news "in informing the public at large of the workings of government").
86. See infra Part III.
nent of a criminal proceeding to which the electronic media should have a right of access. Camera access to an execution would not jeopardize the right to a fair trial since by the date of the execution the appeals process has been exhausted and all that remains is the execution of the sentence by the state.\textsuperscript{89} The analogy is made complete by reference to Chandler \textit{v.} Florida, which allowed the electronic media to televise trials.\textsuperscript{90} If the camera may gain entrance to judicial processes ranging from preliminary hearings and voir dire to actual trials, then there is no manifest reason to deny access to the execution chamber, which represents the last in a series of judicial processes.

E. Counterarguments

There are three plausible arguments against allowing the camera into the execution chamber. These arguments are based on: 1) case law; 2) prison regulations as time, place, and manner restrictions; and 3) the condemned’s right to privacy. This Note contends that none of these arguments outweighs the media’s right to televise executions.

\textbf{(1) Case Law}

The case law argument against camera access relies on four cases in which courts have denied the electronic media access in prison contexts: Pell \textit{v.} Procunier,\textsuperscript{91} Saxbe \textit{v.} Washington Post Co.,\textsuperscript{92} Houchins \textit{v.} KQED,\textsuperscript{93} and Garrett \textit{v.} Estelle.\textsuperscript{94} Upon close inspection, however, these cases do not foreclose the establishment of the broadcast media’s First Amendment right of access to the execution chamber. In fact, one can argue \textit{in favor} of press access based on these cases.

In both Pell and Saxbe, prison regulations prevented media interviews with specific inmates.\textsuperscript{95} The issue in each case was whether the prohibition of interviews violated the freedom of the press guaranteed by the First Amendment.\textsuperscript{96} In upholding the prison regulations in both instances, the Court held that the media has no constitutional right of access \textit{beyond that afforded to the general public}.\textsuperscript{97} An opponent of electronic media access might argue that since the general public does not have access to the execution chamber, Pell and Saxbe should be read to deny the broadcast media a right of access to executions since granting such a right would extend the media’s constitutional right beyond that

\begin{itemize}
  \item \textsuperscript{89} The right to privacy is discussed \textit{infra} at Part I.E.3.
  \item \textsuperscript{90} 449 U.S. 560, 583 (1981).
  \item \textsuperscript{91} 417 U.S. 817 (1974).
  \item \textsuperscript{92} 417 U.S. 843 (1974).
  \item \textsuperscript{93} 438 U.S. 1 (1978).
  \item \textsuperscript{94} 556 F.2d 1274 (5th Cir. 1977), \textit{cert. denied}, 438 U.S. 914 (1978).
  \item \textsuperscript{95} Pell, 417 U.S. at 819; Saxbe, 417 U.S. at 844.
  \item \textsuperscript{96} Pell, 417 U.S. at 829; Saxbe, 417 U.S. at 844-45.
  \item \textsuperscript{97} Pell, 417 U.S. at 834; Saxbe, 417 U.S. at 850.
\end{itemize}
afforded the general public. However, this argument ignores the fact that fourteen media witnesses are allowed to be present at executions in addition to the twelve reputable citizens required to be present by law. In light of these statutory provisions, these cases may actually support granting members of the broadcast media in California a right of access to executions, because in California the public already has access to the chamber in a representative capacity. Far from denying access, these two cases affirm the broadcast media’s rights, because the media’s rights must be commensurate with the rights of the public.

Similarly, in Houchins v. KQED the issue was “whether the news media have a constitutional right of access to a county jail, over and above that of other persons, to interview inmates and make sound recordings, films, and photographs for publication and broadcasting by newspapers, radio, and television.” In voting to uphold a jail regulation denying such access, Chief Justice Burger wrote: “Under our holdings in Pell v. Procunier and Saxbe v. Washington Post Co. . . . the media have no special right of access to the Alameda County Jail different from or greater than that accorded to the public generally.” However, as noted above, in California the public has access to executions in a representative capacity; thus, while the media’s right of access cannot exceed that of the public, surely it must be equal to it. Hence, Houchins also supports the electronic media’s right of access to the execution chamber.

In California, media representatives are invited to attend executions, but their cameras must be left behind. This does not comport with Justice Stewart’s concurring opinion in Houchins. Since Justice Stewart’s opinion is the “least common denominator” of the Court’s decision, it must govern; “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’ ” Three Justices voted to reverse a preliminary injunction that allowed KQED access to the jail, and three Justices voted to affirm. Justice Stewart’s opinion argued that although the press may not have greater rights of access than the public, “the First and Fourteenth Amendments required

98. See supra notes 52-53, 57-58 and accompanying text.
100. Id. at 15-16 (citations omitted).
101. See Execution Procedures, supra note 3, at 16.
102. See 438 U.S. at 16-19 (Stewart, J., concurring in judgment).
that the Sheriff give members of the press effective access to the same areas." Stewart stated that the 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 what the visitors see.

If the state deprives members of the electronic media of the use of their equipment, in doing so it is depriving them of their First Amendment right of access.

In addition, Houchins preceded the Quartet cases and Chandler, and the Court's opinion today might more closely resemble Justice Stewart's concurring opinion. In any event, the analysis is markedly different in the Quartet cases. For example, in Richmond Newspapers Justice Stevens observed in his concurring opinion, "This is a watershed case. . . . Today . . . for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press protected by the First Amendment." Finally, opponents of television access might rely on Garrett v. Estelle, which denied camera access to the execution chamber. The Fifth Circuit faced the issue of "whether a news cameraman can require the [state] to permit him to film executions in state prison for showing on television." The court held that "the protection which the first amendment 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 [the cameraman] has no such right."

Several flaws in this opinion render it logically unsound. Furthermore, it is inapplicable to executions as they are carried out in California.

First, the Garrett court held that the press has no greater right of access . . . than does the public at large . . . . This principle marks a limit to the first amendment protection of the press' right to gather news. Applying this principle to the present case, we hold that the first amendment does not invalidate nondiscriminatory prison access regulations.

Such reasoning is logically unsound because it applies too broadly: the government might take any action beyond the reach of public scrutiny

---

104. Houchins, 438 U.S. at 17 (Stewart, J., concurring in judgment) (emphasis in original).
105. Id. at 16-17 (emphasis added).
108. Id. at 1275.
109. Id. at 1276.
110. Id. at 1278 (emphasis added).
and justify it merely by enacting a "nondiscriminatory" access regulation. It makes no sense to deny the press the freedom to gather and disseminate information on the grounds that this freedom is also denied to the public. If it is constitutionally questionable to deny this freedom to the press, it should be no more constitutional to deny it to both the public and the press. The Garrett opinion suggests that an otherwise questionable practice of denying press access to information is made legitimate by denying access to everyone equally. This ruling sets a dangerous precedent: it is both contrary to the principles of a republican form of government and logically unsound.

Second, the Garrett precedent is inapplicable to executions in California. The Garrett court relied heavily on Pell and Saxbe in holding that "the press has no greater right of access . . . than does the public at large." Since Texas allowed pool reporters to witness executions but denied such access to witnesses from the general public, press access was already "well beyond that afforded the public generally." The Garrett court concluded that the "first amendment does not accompany the press where the public may not go." However, in California, twelve members of the general public and fourteen members of the press are present by law. Thus, according to Houchins the First Amendment should be interpreted to permit the press to enter the execution chamber on an equal basis with the public. Since the public has access to the execution chamber by virtue of the required presence of reputable witnesses, Houchins suggests that the electronic media should also have access to the execution chamber.

Third, Garrett preceded both the Quartet cases and Chandler v. Florida. In light of these five cases, Garrett would have a different outcome if it came before the Court today.

Finally, the Supreme Court merely denied certiorari in the Garrett case. A denial of certiorari may not be cited in support of any proposition of law, and merely indicates that "less than four members of the Court believed that the petition should be granted." Although no
Supreme Court decision has acknowledged a First Amendment right of the electronic media to gain access to the execution chamber, Garrett does not support the proposition that the Court has rejected such a right.

(2) Time, Place, and Manner Restrictions

The opponents of televised executions might characterize the ban on cameras in the courtroom as a time, place, or manner restriction. However, this attempt to exclude cameras from the courtroom must fail because the Supreme Court has ruled that time, place, or manner restrictions may not be based on the content or subject matter of the restricted communication.121 A ban on cameras in the execution chamber is inherently based on the content and subject matter of the visual presentation, and is therefore unconstitutional.

In Regan v. Time, Inc., the Court ruled that in order to be constitutional, a time, place, or manner regulation must meet three requirements: "First, it 'may not be based upon either the content or subject matter of speech' ");122 second, "it must 'serve a significant governmental interest' ");123 and "third, it must 'leave open ample alternative channels for communication of the information.' "124 The Court held that "[r]egulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."125

The same analysis may be applied to the restriction on cameras in the execution chamber. Since cameras are allowed into prisons to televise other events,126 only the content of televised broadcasts of executions differentiates regulations concerning this particular use of the camera. Hence, the absolute ban on cameras violates the Court's prohibition against content-based regulations, rendering such a ban unconstitutional as a time, place, or manner restriction.127

124. Id. (quoting Consolidated Edison, 447 U.S. at 536, and Heffron, 452 U.S. at 643 (quoting Virginia Pharmacy, 425 U.S. at 771))).
125. Id. at 648-49 (citing Carey v. Brown, 447 U.S. 455, 463 (1980), and Police Dep't v. Mosley, 408 U.S. 92, 95-96 (1972)).
126. See infra text accompanying note 169.
127. See Regan, 468 U.S. at 648.
This complete ban also fails with respect to the third criterion established by the Court; it fails to "leave open ample alternative channels for communication of the information."\(^{128}\) As noted below, more narrowly tailored alternatives exist that would qualify as valid time, place, or manner restrictions which are not based on the content of the speech.\(^ {129}\) Such restrictions would "not prevent [the media] from expressing any view on any subject .... More importantly, the Government does not need to evaluate the nature of the message being imparted in order to enforce the [restrictions]."\(^ {130}\) Such restrictions would also serve the state's interest in protecting the identity of guards and witnesses. In sum, even if one concedes that the regulation comports with the Court's second criterion, a compelling governmental interest, the regulation would still fail to comply with the first and third criteria.

The warden's complete ban cannot pass constitutional muster as a time, place, or manner restriction under the \textit{Regan} test. Moreover, the state cannot argue that the same message could be expressed through the print media because "a statute that substantially abridges a uniquely valuable form of expression ... cannot be defended on [this ground]."\(^ {131}\)

\textbf{(3) The Condemned's Right to Privacy}

Finally, the condemned herself may assert a right to privacy in opposition to the media's right to televise her execution. Although her privacy claim is based on both case law\(^ {132}\) and the California Constitution,\(^ {133}\) it may not be sufficient to overcome the media's First Amendment right to broadcast her execution. The California Constitution provides: "All people are by nature free and independent and have inalienable rights. Among these are ... privacy."\(^ {134}\) Furthermore, the Court remarked in \textit{Pell v. Procunier} that the prisoner "retains those First Amendment rights that are not inconsistent with [his] status as a prisoner."\(^ {135}\) Although \textit{Pell} concerned the First Amendment rights of prisoners and the press, an opponent of televised executions might argue that a prisoner's retained rights include the right to privacy; such a claim would be markedly enhanced by the California Constitution's explicit

\(^{128}\) \textit{Id.}
\(^{129}\) See supra text accompanying notes 166-170.
\(^{130}\) \textit{Regan}, 468 U.S. at 656.
\(^{131}\) Id. at 678 (Brennan, J., concurring in part and dissenting in part). See also supra text accompanying notes 79-86.
\(^{133}\) \textit{CAL. CONST.} art. I, § 1. This Note presumes that the condemned will not waive her right to privacy, because such a waiver would arguably eliminate her right as a barrier to televising the execution.
\(^{134}\) Id.
guarantee of this right. However, the media is not defenseless against this claim.

First, David Kuriyama has addressed this issue in the context of televised trials,136 noting that the “constitutional right of privacy [includes] ‘freedom from public disclosure of private information,’ ”137 and that the right “comes into conflict with the first amendment’s free press guarantee.”138 Kuriyama suggests that a criminal defendant may have a relatively weaker privacy interest because the criminal has been arrested, indicted, and tried, during which time “much of a defendant’s private life [is] publicly exposed and dissected.”139 Kuriyama then makes an argument that is readily applicable to the execution context, given the potential increase in the frequency and public scrutiny of executions: “It could be argued, then, that criminal defendants are ‘public figures’ with respect to their particular charged crime, even though they do not voluntarily seek the public spotlight. And it is well-established law that the privacy right of public figures is considerably weaker than that of ‘private’ individuals.”140 Thus, one may view a condemned inmate as a public figure with a diminished expectation of privacy—an expectation over which the First Amendment should prevail.

Furthermore, current prison regulations strip the condemned of her privacy rights and give the press’s right of access de facto superiority over her privacy interests.141 California law requires the presence of twelve reputable witnesses, with no mention of the condemned’s privacy right.142 Warden Vasquez of San Quentin Prison put it bluntly when he stated that the witnesses would attend the execution “regardless of what the condemned man’s wishes are”143 and that the “inmate doesn’t have any say so.”144 Although such a pronouncement does not carry the imprimatur of the Supreme Court, at a minimum it demonstrates that the privacy interests of the condemned are insufficient to prevent the presence of the witnesses.145

137. Id. at 119 (quoting Plante v. Gonzalez, 575 F.2d 1119, 1132 (5th Cir. 1978)).
138. Id.
139. Id. at 127-28.
140. Id. at 127 n.206 (citations omitted).
141. See supra notes 52-53 and accompanying text.
144. Id.
145. KQED would not have televised the execution over the privacy objection of Robert Alton Harris. Transcript of Proceedings, Vasquez (No. C 90-1383 RHS). KQED assumed the issue of whether privacy interests would prevail over the rights of the broadcast media would require litigation, which KQED wished to avoid. Id.
The press has yet another weapon in its arsenal against the condemned's privacy right. In *Cox Broadcasting Corp. v. Cohn*, the Court faced the issue of whether the press infringed a father's right of privacy "by broadcasting to the world the fact that his daughter was a rape victim." Reasoning that the press functions as a surrogate for the public, the Court held that "the First and Fourteenth Amendments command nothing less than that the states may not impose sanctions on the publication of truthful information contained in official court records open to public inspection." The reasoning employed by the *Cox* Court echoes much of the reasoning used in the Quartet cases:

Without the information provided by the press most of us... would be unable to vote intelligently or to register [our] opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.

Two elements were critical to the Court's reasoning. First, "The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions... are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government." Second, "There is no liability when the [press] merely gives further publicity to information about the plaintiff which is already public."

Though the facts of *Cox* are not on point, the Court's reasoning is nonetheless applicable to the context of executions. First, the names of all witnesses to an execution are reported in the public record, and there can be no liability for the broadcasting of that which is in the public record. Second, the event of the execution itself is the ultimate act of the state against the individual—one which many citizens believe is unconstitutional. The public can best scrutinize the constitutionality of executions through the surrogacy of the press. The Court in *Cox* stated

---

146. 420 U.S. 469 (1975).
147. Id. at 492.
148. Id. at 491-92 (The individual "relies necessarily upon the press to bring to him in convenient form the facts of [the operations of his government]. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations.").
149. Id. at 495.
150. Id. at 492 (emphasis added).
151. Id.
153. See Cox, 420 U.S. at 494.
154. See supra text accompanying notes 79-86; infra Part III (cameras will help in determination of contemporary societal standard).
that judicial proceedings are "without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government." An execution is the final event in a series of judicial proceedings to which the television media should have access. In Cox, the First Amendment freedom of the press prevailed over an individual's right of privacy. Similarly, the broadcast media's First Amendment right of access should prevail over the condemned's right of privacy.

F. The State Interest Must Be Compelling and Served by Narrowly Tailored Means

Once the First Amendment is found to protect the electronic media's right of access to the execution chamber, this right can only be overcome by a restriction that is narrowly tailored to serve a compelling state interest. Because the state has intruded upon a fundamental interest, the court must apply strict scrutiny: the state interest must be compelling and the intrusion narrowly tailored to vindicate it in order to overcome that fundamental interest. As will be shown, the state interest is insufficiently compelling, and the means chosen to promote it—total exclusion of cameras—are not sufficiently narrowly tailored.

What interests did the state assert in KQED v. Vasquez? The goal of promoting a fair trial is irrelevant at the execution stage. Moreover, even the fair trial interest did not overcome the broadcast media's right of access in the Quartet cases. So what reason did the state offer for abridging the media's First Amendment interests? The primary reason given by defendant Vasquez for denying reporters the use of their cameras was the protection of the identity of the official witnesses and correctional officers present at the execution. This interest is insufficiently compelling because the identities of the witnesses are immediately dis-
closed and made a matter of public record upon the warden's return of the death warrant. Moreover, the officers on duty at the execution cannot be required to attend; they must volunteer.

In *Globe*, the state's interest in protecting a minor victim of a sex crime was insufficiently compelling to justify mandatory closure of the trial, in part because the names of the minor victims were already in the public record. This suggests that the state's interest in protecting identities already in the public record is not compelling. Moreover, in *Press I*, while acknowledging that the fair trial and juror privacy interests may be compelling, the Court held that "[a]bsent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire*." These cases demonstrate that the state's interest in protecting identity is insufficiently compelling to overcome the media's First Amendment right to televise executions, and that even if a compelling state interest were found, a complete ban on cameras would be too broad, because more narrowly tailored alternatives are available.

For example, the identity of guards and witnesses can be protected by means of prescribed camera angles, screens that block them from view, or electronic masking of faces and voices. These types of regulations were implemented in *Chandler* and would accommodate both the need to protect witness and officer identity and the electronic media's First Amendment right of access to the execution chamber.

Another interest asserted by the state in *KQED v. Vasquez* was the prison's need for security. However, prison officials' current practice of searching cameras provides a more narrowly tailored alternative that would accommodate both security and First Amendment interests. Moreover, cameras are currently allowed into parole hearings, clemency hearings, and news conferences with the condemned prior to execution. Cameras may be brought to many events within the prison despite potential security risks. In fact, on the order of United States District Judge Marilyn Hall Patel, a video camera recorded Robert Alton Harris's last moments in San Quentin's gas chamber. The pres-

163. Vasquez Deposition at 17, 32, *Vasquez* (No. C 90-1383 RHS).
167. *See* Vasquez Deposition at 20, 32, *Vasquez* (No. C 90-1383 RHS) (mentioning danger of cameras breaking glass in execution chamber); *id.* at 55 (mentioning security risks in the form of contraband being hidden inside camera).
168. *Id.* at 32, 55.
ence of a video camera at an execution appears by itself to prove that the security risks posed by a video camera are minimal. Not only is it feasible for a camera to record an execution, but it has now been accomplished! In light of the camera's presence at these other events, including Harris's execution, it is unlikely that the state could demonstrate security risks that would warrant denying the broadcast media access to the execution chamber. Thus, the state interest is not sufficiently compelling, and the policy of total exclusion is not sufficiently narrowly tailored to justify abridging the electronic media's First Amendment right of access to the execution chamber.

II. Equal Protection Support for the Right of Access

Under the Equal Protection Clause of the Fourteenth Amendment, a state may not treat similarly situated individuals differently. By allowing members of the print media to have access to the execution chamber with the tools of their trade, but denying members of the electronic media access to the execution chamber with the tools of their trade, the state arguably violates the Equal Protection Clause.

In Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, Minnesota imposed a use tax on paper and ink products consumed in the production of a publication. This special tax only burdened a few major newspapers. In holding that the use tax violated the First Amendment, the Court reasoned that "[a] tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action."

Similarly, in Smith v. Daily Mail Publishing Co., a West Virginia statute made it "a crime for a newspaper to publish, without the written approval of the juvenile court, the name of any youth charged as a juvenile offender." The statute did not restrict the electronic media or any form of publication except newspapers. "In this very case, three radio stations announced the alleged assailant's name before the Daily Mail decided to publish it." The Court held that the magnitude of the state's interest in protecting juveniles was insufficient to justify application of a criminal penalty to newspapers alone.

174. Id. at 576.
175. Id. at 592-93.
177. Id. at 98 (citing W. Va. Code §§ 49-7-3, 49-7-20 (1976)).
178. Id. at 104-05.
179. Id. at 105.
180. Id. at 106; see also id. at 110 (Rehnquist, J., concurring in judgment) (suggesting that
Finally, in *Florida Star v. B.J.F.*, a Florida statute had made it unlawful to publish the name of a victim of a sexual offense in any instrument of mass communication. The Court noted that the statute does not prohibit the spread by other means of the identities of victims of sexual offenses. An individual who maliciously spreads word of the identity of a rape victim is thus not covered, despite the fact that the communication of such information to persons who live near, or work with, the victim may have consequences as devastating as the exposure of her name to large numbers of strangers.

The Court expressly limited its holding: “[W]here a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order.” The Court’s reasoning is instructive: “When a state attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly, to the smalltime disseminator as well as the media giant.”

According to these cases, the electronic media may assert that the state violates the Equal Protection Clause of the Fourteenth Amendment when it allows the print media the use of the tools of its trade in the execution chamber but denies the broadcast media access on similar terms. Such a regulation bans the electronic instruments but not print instruments. Such a regulation is not an even-handed prohibition.

Although *Garrett v. Estelle* rejected a similar equal protection claim by the television media, the *Garrett* court did not engage in a proper equal protection analysis. The court merely reasoned:

The Texas media regulation denies Garrett the use of his [video] camera, and it also denies the print reporter the use of his [still] camera, and the radio reporter the use of his tape recorder. Garrett is free to make his report by means of anchor desk or stand-up delivery on the TV screen, or even by simulation. There is no denial of equal protection.

The court not only failed to apply the minimal “rational basis” test, but it also failed even to acknowledge the First Amendment freedom of the press upon which the Texas regulation infringed. It is fallacious to hold

---

"a generally effective ban on publication that applied to all forms of communication, electronic and print media alike, would be constitutional.")

182. Id. at 526 (citing FLA. STAT. ANN. § 794.03 (West 1987)).
183. Id. at 540.
184. Id. at 541.
185. Id. at 540 (emphasis added).
188. 556 F.2d 1274, 1279 (5th Cir. 1979), cert. denied, 438 U.S. 914 (1978).
that to deny all media the use of the electronic tools peculiar to the television media is equal protection. In order to be "equal," a regulation that bans the use of the camera by the television media should then ban the use of pencils and note pads by the print media. A ban that prevents the print media from using electronic audio-visual equipment is no ban at all.

San Quentin's execution procedures actually deny all reporters the use of the tools of their trades, and therefore do not violate the Equal protection Clause on their face. However, the court in *KQED v. Vasquez* held that the warden could not prohibit the tools of the print media. By denying similar access to the electronic media, San Quentin's practice would deny equal protection.

**III. The Right of Access and the Meaning of the Eighth Amendment**

In addition to protection under the First and Fourteenth Amendments, the television media's right of access to the execution chamber derives additional support from a nexus with the Eighth Amendment. This Part assumes that death as a punishment for certain crimes comports with the Eighth Amendment's prohibition of cruel and unusual punishment, and focuses instead on the constitutionality of the mode of execution. The Court has ruled that the meaning of cruel and unusual punishment must be determined by reference to contemporary community standards. An examination of the multitude of factors that enter into a societal determination of the criteria for cruel and unusual punishment is beyond the scope of this Note. But regardless of the substance of the debate, it is clear that without complete and accurate information informing the discussion, a contemporary societal standard of cruel and unusual punishment with regard to the mode of execution will neither fully evolve nor accurately reflect the judgment society might

---

189. See Execution Procedures, *supra* note 3, at 16 (banning electronic equipment, still cameras, and even writing implements and paper from the execution chamber).


193. For example, one may support or oppose using animals for scientific and medical research for a multitude of valid reasons. Within that plethora of factors, the manner in which the animals are treated would certainly have some influence upon one's opinion. The most ardent supporter of such research might hesitate if she knew the animals suffered tremendously and unnecessarily. Similarly, one may generally support or oppose the death penalty for a host of valid reasons, but perhaps fewer would support unnecessarily cruel means, such as the rack and screw. Cf. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 461 (1947) (repeated electrocution not unconstitutional).

194. *Gregg*, 428 U.S. at 173 (plurality opinion of Stewart, J.); *id.* at 227 (Brennan, J., dissenting).
render if it were allowed to witness live executions through the medium of television. Complete and accurate information facilitates the evolution and formation of any consensus. Televised executions would provide complete and accurate information in a medium superior to any other in terms of its ability to convey an image of the execution to the public.\textsuperscript{195} Thus, the availability of the most complete and accurate information through televised broadcasts of executions would promote the development of a contemporary community standard of cruel and unusual punishment against which particular modes of execution might be judged. This nexus between the First Amendment's guarantee of freedom of the press and the Eighth Amendment's prohibition of cruel and unusual punishment validates the structural role of the press in the execution process\textsuperscript{196} and bolsters the constitutional protection of the broadcast media's right of access to the execution chamber.

In \textit{Gregg v. Georgia}, the Court held that

the Eighth Amendment has not been regarded as a static concept ... “[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment.\textsuperscript{197}

Moreover, both the majority and the dissenting Justices agreed that contemporary societal standards of decency must be the standards by which punishments are judged.\textsuperscript{198} Justice Brennan, in dissent, agreed that “[t]he Cruel and Unusual Punishments clause ‘must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.’ ”\textsuperscript{199} Justice Marshall not only agreed with this thesis, but also addressed the lack of information surrounding the death penalty and concluded that if Americans were fully informed they would consider the death penalty to be a cruel and unusual punishment:

[I]f the constitutionality of the death penalty turns ... on the opinion of an informed citizenry, then even the enactment of new death statutes cannot be viewed as conclusive. ... A recent study, conducted after the enactment of the post-Furman statutes, has confirmed that the American people know little about the death penalty, and that the opinions of an informed public would differ significantly from those of

\textsuperscript{195} See supra text accompanying notes 79-86.

\textsuperscript{196} See supra text accompanying notes 65-78.


\textsuperscript{198} See id. at 173 (plurality opinion of Stewart, J.); id. at 227 (Brennan, J., dissenting); id. at 231 (Marshall, J., dissenting).

\textsuperscript{199} Id. at 227 (Brennan, J., dissenting) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion of Warren, C.J.)).
a public unaware of the consequences and effects of the death penalty. 200

The best decision is an informed decision. Through television, the electronic media can provide the most accurate information to the American citizenry, save for those few citizens who witness the execution in person. 201 As a result, televised access to the execution chamber would both allow the public to arrive at an informed determination of the social acceptability of the death penalty, and facilitate the evolution of a fully informed contemporary societal standard of decency with regard to the mode of execution.

Conclusion

In conclusion, the television media may assert a First Amendment right of access to the execution chamber based on the historical and structural criteria established in Richmond Newspapers and reaffirmed in the other Quartet cases. This right of access is further supported by the Fourteenth Amendment's Equal Protection Clause. Finally, the television media may invoke additional protection by positing a nexus between its First Amendment freedoms and the Eighth Amendment's prohibition of cruel and unusual punishment. The inescapable conclusion is that KQED v. Vasquez was wrongly decided; the media should have a Constitutional right to televise executions.

200. Id. at 232 (Marshall, J., dissenting) (emphasis in original).
201. See supra notes 52-53 and accompanying text.