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## **“FILM AT ELEVEN . . .”—DOES THE PRESS HAVE THE RIGHT TO ATTEND AND VIDEOTAPE EXECUTIONS?**

NEIL E. NUSSBAUM\*

*“A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”*

James Madison

*“Everything secret degenerates, even the administration of justice.”*

Lord Acton

### I. INTRODUCTION

On April 21, 1992, convicted murderer Robert Alton Harris was the first prisoner put to death by the state of California in twenty-five years.<sup>1</sup> California law permitted San Quentin warden Daniel Vasquez to allow a few members of the public and the media into the witness room to view the event;<sup>2</sup> pencils and pads were also issued to the viewing media, in accordance with prison regulations. However, Vasquez expressly prohibited the media from bringing a camera or recording device into the witness chamber.<sup>3</sup>

In May of 1990, San Francisco based public television station KQED sought to have the camera limitation removed. They brought a lawsuit

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1. Harris was convicted of kidnapping and shooting to death two teenage boys near San Diego in 1978. His execution took place in the early morning hours of April 21, 1992. Katherine Bishop, *After Night of Court Battles, a California Execution*, N.Y. TIMES, April 22, 1992, at A1.

2. The California Penal Code provides:

The warden of the State prison where the execution is to take place shall be present at the execution and must invite the presence of two physicians, the Attorney General of the State, and at least 12 reputable citizens, to be selected by him; and he or she shall at the request of the defendant, permit those ministers of the Gospel, not exceeding two, as the defendant may name, and any persons, relatives or friends, not to exceed five, to be present at the execution, together with such peace officers as he may think expedient, to witness the execution. But no other person than those mentioned in this section can be present at the execution, nor can any person under 18 years of age be allowed to witness the execution.

CAL. PENAL CODE § 3605 (West 1982 & Supp. 1991).

3. Karl Olsen & Erin Daily, *Death on Video: Should Executions be on the Eleven O'clock News?*, MANHATTAN LAW., Apr., 1991, at 13.

seeking to gain access to the Harris execution in order to videotape it.<sup>4</sup> Warden Vasquez increased the stakes of the lawsuit substantially when he categorically banned all media from future executions.<sup>5</sup> United States District Court Judge Robert Schnacke, in his decision in the case of *KQED, Inc. v. Vasquez*,<sup>6</sup> declared that the press, by the state's long custom and practice, must be allowed to attend any future executions, and that the press must additionally be permitted to use pads, pencils, and sketchbooks.<sup>7</sup> However, the judge upheld the restriction on all cameras and recording equipment.<sup>8</sup> KQED did not appeal the decision of the district court, so the decision to prohibit videotaping was not passed on by a higher court.<sup>9</sup>

This article describes the First Amendment framework behind Judge Schnacke's brief decision to require Vasquez to permit the press to attend future executions. It also uses this framework to suggest why the First Amendment might additionally require the removal of Vasquez's restriction on videotaping. Finally, it should be noted that although for the purposes of this article the death penalty is assumed to be a legitimate form of punishment, this article neither endorses nor condemns capital punishment, an issue that is beyond the scope of this article.<sup>10</sup>

## II. EXECUTIONS AND THE PUBLIC

The history of executions in this country and in Europe is a history of public access only recently curtailed by restrictive state statutes. In Fourteenth Century Europe, huge crowds of people enjoyed the spectacle of an execution in the town square.<sup>11</sup> Charles Dickens described a group of women knitting and watching stoically as heads rolled in Paris during the French Revolution.<sup>12</sup> And in the United States, convicts were hung in town centers so that hundreds (sometimes thousands) of people could

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

5. See *California Debate Grows Over Televising Executions*, Gannett News Service, June 7, 1991, available in LEXIS, Nexis Library, CRRNT File. Cf. Cal. PENAL CODE § 3605 (West 1982 & Supp. 1991).

6. 18 Media L. Rep. (BNA) 2323 (N.D. Cal. 1991).

7. *Id.* at 2324.

8. *Id.*

9. See *KQED Won't Appeal Execution Ruling*, S.F. CHRON., Sept. 6, 1991, at A22. In a last-minute twist, United States District Judge Marylin Hall Patel ordered Warden Vasquez to allow the American Civil Liberties Union to videotape the Harris execution as evidence for an independent suit brought by the ACLU in which it claimed that California's method of execution was violative of the Eighth Amendment. However, the ACLU's lawsuit did not advance any of the First Amendment issues raised in *Vasquez*.

10. Nor does the author suggest what effect the broadcasting of an execution might have on support for the death penalty.

11. BARBARA TUCHMAN, *A DISTANT MIRROR: THE CALAMITOUS 14TH CENTURY* 395 (1978).

12. CHARLES DICKENS, *A TALE OF TWO CITIES* 355-57 (Oxford University Press 1987) (1859).

watch "the ritual that began with the arrival of the condemned person in the custody of the sheriff and ended with the corpse being carted off to an ignominious burial in some potter's field."<sup>13</sup>

It was not until early in the nineteenth century that the states began to move American executions inside the prison.<sup>14</sup> In making the decision to conduct executions in private, many state legislatures were motivated by the fear that the absence of civility at most public executions would spur a growing movement for abolishing capital punishment.<sup>15</sup> California moved its executions into the prison confines in 1858.<sup>16</sup>

The United States Supreme Court recognized the ability of the states to execute a condemned within the confines of its prison walls in *Holden v. Minnesota*.<sup>17</sup> The condemned in that case challenged a number of provisions of the Minnesota Penal Code then in force.<sup>18</sup> Sections 3 and 5 of the Code, the principle sections of interest here, provided:

3. The warrant of execution shall be executed before the hour of sunrise of the day designated in the warrant and within the walls of the jail in all cases where the jail is so constructed that it can be conveniently done therein; but when the jail is not so constructed, the warrant shall be exercised within an enclosure which shall be higher than the gallows, and shall exclude the view of persons outside, and which shall be prepared for that purpose, under the direction of the sheriff, in the immediate vicinity of the jail, or, if there be no jail in the county, at some convenient place at the county-seat, to be selected by the sheriff.

. . . .

5. Besides the sheriff and his assistants, the following persons may be present at the execution, but none other: The clergyman or priest in attendance upon the prisoner and such other persons as the prisoner may designate, not exceeding three in number, a physician or surgeon, to be selected by the sheriff, and such other persons as the sheriff may designate, not exceeding six in number, *but no person so admitted shall be a newspaper reporter or representative. No account of the details of such execution, beyond the statement of the fact that such convict was on the day in question duly executed according to law, shall be published in any newspaper.*<sup>19</sup>

There were no media plaintiffs in *Holden* challenging the right of the state to limit their access to executions or their power to publish unrestricted accounts of executions. Nor did the condemned challenge the

13. HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA* 12 (3d ed. 1982).

14. *Id.* at 13.

15. Olsen & Daily, *supra* note 3, at 13.

16. Don J. Benedictis, *Cameras Banned, Pens Allowed*, A.B.A. J., Aug., 1991, at 16.

17. 137 U.S. 483 (1890).

18. 1889 MINN. GEN. LAWS, ch. 20, §§ 1-5 (repealed 1922).

19. *Id.*, §§ 3, 5 (emphasis added).

statutes as violative of his constitutional rights.<sup>20</sup> Nonetheless, it is the brief dicta of the Court with respect to these issues that has made *Holden* most memorable. Writing for the majority, Justice Harlan first stated that section 3 of the penal code did not effect the "substantial rights" of the condemned.<sup>21</sup> He then went on to say:

The same observation may be made touching the restriction in section five as to the number and character of those who may witness the execution, and the exclusion altogether of reporters and representatives of newspapers. *These are regulations which the legislature, in its wisdom, and for the public good, could legally prescribe in respect to executions.*<sup>22</sup>

The Court, in this last short sentence, recognized the power of the states to exclude both the public and the press from executions, at least with respect to the "substantial rights" of the condemned.

Public executions continued well into the twentieth century. In 1936, thousands of spectators gathered in Owensboro, Kentucky, to witness a public hanging.<sup>23</sup> The next year in Galena, Missouri, in what was to be the last public execution in this country, approximately five hundred people watched as convicted murderer Roscoe Jackson was hung from the gallows.<sup>24</sup> Since then, all American executions have taken place on prison grounds.<sup>25</sup>

### III. PRESS ACCESS TO GOVERNMENT INFORMATION — HISTORICAL BACKGROUND

#### A. *Meiklejohn and the First Amendment*

It is impossible to understand the rationale of the line of cases leading to the District Court's opinion in *KQED, Inc. v. Vasquez* without first considering the First Amendment theory espoused by philosopher Alexander Meiklejohn. The First Amendment right of the press to access government information that was extended to executions in *Vasquez* is based largely upon Meiklejohn's interpretation of the First Amendment.

Professor Meiklejohn's First Amendment theory was founded in the

20. *Holden*, convicted on November 23, 1888 of committing murder, contended that the then active penal code, which had been enacted on April 24, 1889

would, if applied to previous offenses, be ex post fact in its nature, and therefore, was inconsistent with the prior law; and that, inasmuch as that act made no saving as to previous offenses, and repealed all acts and parts of acts inconsistent with its provisions, there was no statute in force, after the 24th of April, 1889, prescribing the punishment of death for murder in the first degree committed before that date.

*Holden*, 137 U.S. at 487. This argument was roundly rejected by the Court.

21. *Holden*, 137 U.S. at 491.

22. *Holden*, 137 U.S. at 491 (emphasis added).

23. Olsen & Daily, *supra* note 3, at 13.

24. David A. Kaplan & Nadine Joseph, "Live, from San Quentin . . .", NEWSWEEK, Apr. 1, 1991, at 61.

25. *Id.*

historical contrast between the United States and England that was written into the Constitution and the Bill of Rights.<sup>26</sup> Whereas in England all government is ultimately enacted by the king, who is the sovereign of the people, in the United States the Constitution was enacted by the citizens both as the governors, and on behalf of themselves as the people to be governed.<sup>27</sup> Thus, in the United States, the sovereign power to govern was itself vested in the people, and remains in the people; the "governors" elected by the people are merely servants of the will of the people, and are subordinate to this will.<sup>28</sup> Looking at the Constitution, Meiklejohn found support for this proposition in the Preamble, the Tenth Amendment, and Article I, Section 2.<sup>29</sup>

According to Professor Meiklejohn, the First Amendment is not necessary to protect the freedom of expression, since the Fifth Amendment's guarantee of Due Process provides adequate protection in that area.<sup>30</sup> Instead, the First Amendment preserves for the people the right to acquire the information necessary for them to fulfill their responsibilities as sovereign of the body politic.<sup>31</sup> It forbids the government from interfering with the communicative processes through which citizens exercise their right of self-government.<sup>32</sup> Meiklejohn reasoned that it is the protection of this interest that is at the heart of the First Amendment:

Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning, for the general good. It is to that mutilation of the thinking process of government against which the First Amendment is directed. The principle of freedom of speech springs from the necessities of the program of self-government.<sup>33</sup>

Given the importance of society's interest in maintaining an informed process of self-government, Meiklejohn believed that the First Amendment provided this interest with *absolute* protection against all countervailing interests.<sup>34</sup>

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26. See Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 Sup. Ct. Rev. 245, 264-65 [hereinafter *The First Amendment*]; ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) [hereinafter *FREE SPEECH*]; Edward Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and The Philosopher*, 28 RUTGERS L. REV. 41, 43-49 (1974) (explaining Meiklejohn's theory). See generally J. ELY, *DEMOCRACY AND DISTRUST* 73-104 (1980).

27. *The First Amendment*, *supra* note 26, at 253-57.

28. *Id.*

29. *Id.*

30. See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 115 (1960).

31. See *The First Amendment*, *supra* note 26, at 253.

32. *Id.*

33. *FREE SPEECH*, *supra* note 26, at 26.

34. See *The First Amendment*, *supra* note 26.

## B. *The Prison Cases*

In the early 1970s, a series of events, including the Attica State Prison uprising, focused an increased amount of the public's attention on the condition of American prisons.<sup>35</sup> As a result of this increased attention, members of the press began to request increased access to the prisons in order to report to the public on conditions within the prisons.<sup>36</sup> Three decisions by the United States Supreme Court in the mid-1970's established that the press has little, if any, right of access to prisons.

The first two of these decisions are the companion cases of *Pell v. Procunier*,<sup>37</sup> and *Saxbe v. Washington Post Co.*<sup>38</sup> In *Pell*, both prison inmates and journalists challenged the constitutionality of prison regulations under which media representatives were able to interview inmates, but were prohibited from selecting *particular* inmates.<sup>39</sup> In *Saxbe*, the challenged regulations similarly prohibited personal interviews between newsmen and individually designated inmates.<sup>40</sup> The majority in these cases relied heavily on the "equal access" doctrine: "[t]he Constitution does not . . . require government to accord the press special access to information not shared by members of the public generally."<sup>41</sup> Since the press, under the challenged regulations, already received greater access to the prison than that afforded to the public,<sup>42</sup> the challenged regulations were not violative of the First Amendment. It is significant to note that the majority made no reference in either case to whether a complete

35. See Warren E. Burger, *Our Options Are Limited*, 18 VILL. L. REV. 165 (1972).

36. *Id.* at 167 ("It is a melancholy truth that it has taken the tragic prison outbreaks of the past three years to focus widespread attention on the problem.")

37. 417 U.S. 817 (1974).

38. 417 U.S. 843 (1974).

39. *Pell*, 417 U.S. at 819-20.

40. *Saxbe*, 417 U.S. at 844.

41. *Pell*, 417 U.S. at 834. See also *Branzburg v. Hayes*, 408 U.S. 665 (1972) (grand jury could compel a reporter to disclose his sources without violating the First or Fourteenth Amendments); *Zemel v. Rusk*, 381 U.S. 1 (1965) (no First Amendment right to visit Cuba in order to inform oneself of the conditions there). The *Branzburg* Court stated:

It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. . . . Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathering in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded.

*Branzburg*, 408 U.S. at 684-85. The *Zemel* Court expressed wariness about the potential scope of a right of access:

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

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

42. *Pell*, 417 U.S. at 831-32; *Saxbe*, 417 U.S. at 847.

closing of the prisons to both the press and the public would violate the First Amendment rights of either party.

Four justices dissented in both *Pell* and *Saxbe*.<sup>43</sup> Justice Powell, in his dissent in *Saxbe*, quoted Professor Meiklejohn in support of the proposition that the public is afforded a right of access under the First Amendment.<sup>44</sup> He then concluded:

For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government. By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment.<sup>45</sup>

In *Houchins v. KQED, Inc.*,<sup>46</sup> KQED was refused permission to inspect Little Greystone, a portion of the Alameda County Jail where an inmate had recently committed suicide.<sup>47</sup> Also, although they were able to sign up for one of a limited number of tours of the jail, KQED's reporters were prohibited from using any cameras or sound recording equipment on the tour, and they were not permitted to interview any of the inmates.<sup>48</sup> In addition, the inmates were generally removed from view.<sup>49</sup> The station challenged these restrictions as a violation of 42 U.S.C. § 1983.<sup>50</sup> They sued to enjoin the county sheriff from restricting their access to the prisoners, and from restricting their ability to use cameras and sound recording equipment.<sup>51</sup> The District Court granted KQED a preliminary injunction,<sup>52</sup> which Sheriff Houchins appealed, first to the Court of Appeals for the Ninth Circuit,<sup>53</sup> and then to the Supreme Court.

Seven Justices participated in the decision in *Houchins*.<sup>54</sup> Of those seven, three relied again on the "equal access" doctrine and reaffirmed

43. The dissenting Justices were Justices Douglas, Brennan, Marshall, and Powell. Justice Powell concurred in part in *Pell* only to the extent that the lawsuit involved the rights asserted by the *prison inmates*, since Justice Powell agreed with the majority that prisoners had no personal constitutional right to demand interviews with willing reporters. *Pell*, 417 U.S. at 835-36 (Powell, J., concurring in part and dissenting in part).

44. *Saxbe*, 417 U.S. at 862 & n.8 (Powell, J., dissenting).

45. *Id.* at 863.

46. 438 U.S. 1 (1978) (plurality opinion).

47. *Id.* at 3-4.

48. *Id.* at 4-5.

49. *Id.*

50. 42 U.S.C. § 1983 (1988).

51. *Houchins*, 438 U.S. at 3-4.

52. *See id.* at 6-7.

53. *KQED, Inc. v. Houchins*, 546 F.2d 284 (9th Cir. 1976), *rev'd*, 438 U.S. 1 (1978).

54. Justices Marshall and Blackmun did not participate in the decision.



the general principles of *Pell* and *Saxbe*.<sup>55</sup> Another three sought to grant the requested injunctive relief based on the reasoning enunciated by Justice Powell in his *Saxbe* dissent.<sup>56</sup> Justice Stewart's opinion thus became pivotal.

While agreeing in general with the "equal access" doctrine, Stewart concluded in his opinion that since in visiting the jails the press and the public were different entities serving different functions, different levels of access might be necessary in order to keep the access equally *effective*:

A person touring Santa Rita jail can grasp its reality with his own eyes and ears. But if a television reporter is to convey the jail's sights and sounds to those who cannot personally visit the place, he must use cameras and sound equipment. In short, terms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see.<sup>57</sup>

Thus, Stewart would have granted KQED injunctive relief so that they could use their cameras and recording equipment, and so that they could be allowed access to the jail at reasonable times.<sup>58</sup> However, since the injunctive relief granted by the district court in this case took the further step of permitting KQED to tour Little Greystone and to interview randomly encountered inmates, Stewart found that he could not uphold the injunctive relief granted by the district court.<sup>59</sup> Therefore, a plurality of the Court in *Houchins* reversed the district court's grant of injunctive relief, and left the law of media access to prisons in a state of flux.

While the issue of prison conditions led some members of the press to seek entrance into a number of prisons in the early 1970's, it was a different issue, namely the death penalty, that prompted one reporter in 1976 to seek entrance to the prison's execution chamber for the specific purpose of videotaping the execution for a later broadcast. In December of 1976, as the state of Texas prepared to execute the first death row inmate since 1964,<sup>60</sup> television reporter Tony Garrett petitioned the United States District Court for the Northern District of Texas to allow him to tape the execution for a possible later showing on the television news. In *Garrett v. Estelle*,<sup>61</sup> the district court granted Garrett a preliminary in-

55. The three Justices joining in the *Houchins* plurality were Chief Justice Burger, Justice White, and Justice Rehnquist.

56. The three dissenting Justices were Justice Brennan, Justice Powell, and Justice Stevens.

57. *Houchins*, 438 U.S. at 17 (Stewart, J., concurring in judgment).

58. *Id.* at 18.

59. *Id.*

60. The Texas death penalty statute was held unconstitutional in the case of *Furman v. Georgia*, 408 U.S. 238 (1972). The statute was then amended by the Texas legislature. The amended statute was held constitutional in *Jurek v. Texas*, 428 U.S. 262 (1976).

61. 424 F. Supp. 468 (N.D. Tex. 1977), *rev'd*, 556 F.2d 1274 (5th Cir. 1977), *cert. denied*, 438 U.S. 914 (1978). Note that the facts of this case are virtually identical to the facts in *Vasquez*.

junction ordering that he be admitted to the upcoming execution for the purpose of videotaping the execution. United States District Court Judge William M. Taylor, Jr. first distinguished the case from *Pell* and *Saxbe*: "In *Pell* and *Saxbe* the object of the news media was to report the day-to-day operations of the prisons. Here, the news media is seeking to report on one of the most important and controversial issues of the day: Capital punishment."<sup>62</sup> Judge Taylor then turned his attention to past distinctions made between print and electronic news media. He found that these distinctions were inapplicable in the execution chamber.<sup>63</sup> Unable to find a justifiable reason for the ban, Judge Taylor issued a preliminary injunction declaring the ban violative of the First Amendment.<sup>64</sup>

Commissioner Estelle of the Texas Department of Corrections appealed the order of the district court to the Court of Appeals for the Fifth Circuit.<sup>65</sup> That court held that the issue was controlled by *Pell* and *Saxbe*, notwithstanding the distinctions recognized by the lower court.<sup>66</sup> It concluded that since the Texas regulations did not permit the general public to record executions, they need not allow television reporters to do so either.<sup>67</sup> Garrett appealed the case to the United States Supreme Court, but his petition for a writ of certiorari was denied.<sup>68</sup>

### C. Richmond Newspapers, Inc. and the Presumption of Openness

Although the issue was not specifically decided in *Pell* and *Saxbe*, it appeared at one time that the "equal access" doctrine, if taken to its extreme, would have permitted the government to completely close off a governmental operation to the press, provided that the general public was similarly excluded. However, the court rejected this position with respect to criminal trials in the case of *Richmond Newspapers, Inc. v. Virginia*,<sup>69</sup> the first case in which the Court recognized a First Amendment right of press access to information controlled by the government.

The case centered on the fourth trial of one Stevenson, indicted for the murder of a hotel manager who had been found stabbed to death on December 2, 1975.<sup>70</sup> The first trial, which ended in a conviction, was

62. 424 F. Supp. at 471.

63. 424 F. Supp. at 472-73.

64. 424 F. Supp. at 473.

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

66. 556 F.2d at 1277-79.

67. 556 F.2d at 1279. It should be noted that the Court of Appeals decided *Garrett* before the issue of video camera access was passed on by the United States Supreme Court in *Houchins*.

68. 438 U.S. 914 (1978). It is interesting to note that the Supreme Court denied certiorari in *Garrett* in the same Term that they decided *Houchins*.

69. 448 U.S. 555 (1980).

70. *Id.* at 559.

reversed on the grounds of improperly admitted evidence.<sup>71</sup> The second trial ended in a mistrial when a juror asked to be excused and no alternate was available.<sup>72</sup> The third trial also ended in a mistrial, apparently because the jury pool became informed of Stevenson's previous two trials.<sup>73</sup> At the start of the fourth trial, Stevenson's counsel moved to have the trial closed. The prosecution had no objection, and the judge ordered the courtroom closed to the press and public.<sup>74</sup> Plaintiff Richmond Newspapers intervened, seeking to have the trial open to the public. It petitioned the Virginia Supreme Court for writs of mandamus and prohibition and filed an appeal of the trial court's closure order.<sup>75</sup> The Virginia Supreme Court dismissed the mandamus and prohibition petitions and, finding no reversible error, denied the petition for appeal.<sup>76</sup> The case came to the United States Supreme Court on writ of certiorari.<sup>77</sup>

Although the vote of the Supreme Court was 7-1,<sup>78</sup> there was no majority opinion. Chief Justice Burger, writing for a plurality of the Justices, traced the evolution of the criminal trial and concluded that it had a strong tradition of openness.<sup>79</sup> He also recognized that the public had a First Amendment right to discuss the criminal justice system, and that this discussion provided a therapeutic "community catharsis," while instilling a sense of confidence in the criminal justice system.<sup>80</sup> He therefore concluded that there was, by virtue of the First Amendment, a presumption of openness at criminal trials which could not be overcome "absent an overriding interest articulated in the findings."<sup>81</sup>

Justice Brennan wrote an eloquent concurring opinion which was joined by Justice Marshall.<sup>82</sup> Brennan had long before recognized the merit of Meiklejohn's First Amendment theory<sup>83</sup> (as modified by Professor Zechariah Chafee<sup>84</sup>). In his concurrence, Justice Brennan stated his

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 559-61.

75. *Id.* at 562.

76. *Id.*

77. Richmond Newspapers sought review by the Supreme Court invoking the Court's appellate jurisdiction, 28 U.S.C. § 1257(2) (1988), and the Court's certiorari jurisdiction, 28 U.S.C. § 1257(3) (1988). The Court concluded that jurisdiction by appeal did not lie; however, it treated the filed papers as a petition for a writ of certiorari, and granted the petition. *Richmond Newspapers*, 448 U.S. at 562-63.

78. Justice Powell did not participate in the decision of the case. *Richmond Newspapers*, 448 U.S. at 581. However, his dissents in *Pell*, *Saxbe*, and *Houchins* suggest that he would have voted with the majority in *Richmond Newspapers*.

79. *Richmond Newspapers*, 448 U.S. at 564-69 (plurality opinion).

80. *Id.* at 569-73.

81. *Id.* at 581.

82. *Id.* at 584-98 (Brennan, J., concurring in judgment).

83. See William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

84. Professor Chafee, a contemporary of Meiklejohn, shared Meiklejohn's view of the First

belief that the First Amendment served two distinct functions, one dealing with expression (which he termed the "speech component"), and the other dealing with the acquisition of information for a reasoned process of self-government (called the "structural component" by Justice Brennan).<sup>85</sup> Justice Brennan recognized that it was this latter component, which was based on Meiklejohn's First Amendment theory, that was implicated in cases involving access to information.<sup>86</sup> Justice Brennan was not willing to adopt the absolutist approach espoused by Meiklejohn, however. He instead provided two "helpful principles" in determining whether government conduct violates a First Amendment access right: (1) "the case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information,"<sup>87</sup> and (2) "what is crucial in individual cases is whether access to a particular government process is important in terms of that very process."<sup>88</sup> However, given the absence of any rationale in the record for closing the trial, Brennan found it unnecessary to discuss "[w]hat countervailing interests might be sufficiently compelling to reverse this presumption of openness,"<sup>89</sup> and thus left it open to future debate.

In the eleven years since *Richmond Newspapers*, the Supreme Court has considered the issue of press access to government controlled information three times; on all three occasions it has recognized the existence of the right, and on all three occasions it has found the countervailing interests of the government insufficient to overcome the presumption of openness. In *Globe Newspaper Co. v. Superior Court*,<sup>90</sup> the Court considered the validity of a Massachusetts statute requiring the mandatory closure of trials involving sexual offenses committed against a minor, during the minor victim's testimony. After finding that there was a First Amendment presumption of openness to trials such as the one in question, the Court stated that in order to overcome the presumption "it must be shown that the denial is necessitated by a compelling govern-

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Amendment's function in the process of self-government. However, his interpretation of the First Amendment differed from Meiklejohn's in that Chafee felt that the freedom of expression was also implied in the First Amendment, and not in the Fifth Amendment:

The First Amendment protects . . . an individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way.

ZECARIAH CHAFEE, *FREE SPEECH IN THE UNITED STATES* 33 (1946).

85. *Richmond Newspapers*, 448 U.S. at 585-89 (Brennan, J., concurring in judgment).

86. *Id.* at 587-88.

87. *Id.* at 589. It should be noted that both Professor Meiklejohn and Professor Chafee would have rejected this dependence on a tradition of openness; their interpretations of the First Amendment focused solely on the necessity of the information to the process of self-government. See *FREE SPEECH*, *supra* note 27; *CHAFEE*, *supra* note 84.

88. *Richmond Newspapers*, 448 U.S. at 589.

89. *Id.* at 598.

90. 457 U.S. 596 (1982).

mental interest, and is narrowly tailored to serve that interest.”<sup>91</sup> The Court then concluded that given the mandatory nature of the statute, it could not be narrowly tailored.<sup>92</sup>

The First Amendment presumption of openness was extended to the voir dire questioning of prospective jurors in criminal trials in *Press-Enterprise Co. v. Superior Court*<sup>93</sup> (*Press-Enterprise I*). The rationale given by the trial judge for closing the voir dire to the public was that prospective jurors for an upcoming rape trial might be less candid about their own personal experiences.<sup>94</sup> The Court again set forth a strict scrutiny standard that was at least as stringent as the test set forth in *Globe Newspaper Co.*<sup>95</sup> Applying the test to the facts of the case, the Court found that the trial judge had failed to consider any alternatives to complete closure (such as informing the jury pool that they would be permitted to discuss any sensitive matters in camera),<sup>96</sup> and that his closure of the voir dire had therefore failed to overcome the presumption of openness.<sup>97</sup>

Finally, in *Press-Enterprise Co. v. Superior Court*<sup>98</sup> (*Press-Enterprise II*), the Court reviewed a California statute which required a preliminary hearing to be closed to the public if it was found that there was a “reasonable likelihood” that access to the public would deprive the defendant of a fair trial.<sup>99</sup> The Court held that the First Amendment right of access applied to preliminary hearings.<sup>100</sup> It held further that preliminary hearings could not be closed to the public unless it was shown that there was a “substantial probability that the defendant’s right to a fair trial will be prejudiced by publicity that closure would prevent.”<sup>101</sup> Here, the “reasonable likelihood” test of the statute placed a lesser burden on the defendant court than the “substantial probability” test required by the First Amendment,<sup>102</sup> and the statute was therefore held unconstitutional.

91. *Id.* at 606-07.

92. *Id.* at 607-09.

93. 464 U.S. 501 (1984).

94. *Id.* at 503-05.

95. The *Press-Enterprise I* Court offered the following measure of scrutiny:

The presumption of openness 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. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

*Id.* at 510.

96. *Id.* at 510-13.

97. *Id.*

98. 478 U.S. 1 (1986).

99. CAL. PENAL CODE § 868 (West 1982). The “reasonable likelihood” test was a judicial construction of § 868. See *Press-Enterprise II*, 478 U.S. at 6.

100. *Press-Enterprise II*, 478 U.S. at 10-13.

101. *Id.* at 14.

102. *Id.* at 14-15.

## D. KQED, Inc. v. Vasquez

### 1. The Contentions of the Parties

In its lawsuit, KQED alleged two causes of action: (1) that the media had a First Amendment right to videotape the execution; and (2) that by not being allowed to bring in a video camera, the KQED reporter was being prohibited from using the "tools of his trade," in violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>103</sup> While the outright ban on all reporters appeared to Judge Schnacke to have been something that Warden Vasquez never took seriously,<sup>104</sup> it did result in a flood of amicus briefs submitted to the court demonstrating the long history of public executions in this country and in England, and the importance of keeping executions non-secretive.<sup>105</sup>

Vasquez offered little to rationalize his outright ban on reporters from the execution witness chamber, other than to suggest that they simply had no right to be there. "San Quentin is not required to permit the press to watch executions," he stated.<sup>106</sup> In response to KQED's alleged First Amendment right to videotape the executions, Vasquez alleged three primary justifications for the ban.<sup>107</sup> First, the ban on cameras was necessary to protect the identity of participating prison employees from exposure to angry prisoners and members of the public.<sup>108</sup> Second, the broadcast of an execution could spark a severe prison reaction that could be dangerous to the prison personnel.<sup>109</sup> And thirdly, Vasquez posited what came to be known as the "suicidal cameraman" theory: it was possible that some action of the cameraman might cause the heavy video camera to break through the glass that shielded the witness chamber from the gas chamber.<sup>110</sup>

### 2. The Decision

In his June seventh decision, United States District Judge Schnacke called Warden Vasquez's outright ban on the media "more emotional than rational."<sup>111</sup> In response to this ban, Judge Schnacke said, "[i]t does appear that where there is a long custom and practice of accommodating the press, and where that has not caused any intrusion of any sort . . . it is probably irrational, unreasonable, and capricious to bar the press

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103. KQED's Equal Protection Clause argument is beyond the scope of this comment.

104. KQED, Inc. v. Vasquez, 18 Media L. Rep. (BNA) 2323, 2324 (N.D. Cal. 1991).

105. *Final Hearing in KQED's Historic First Amendment Case*, Business Wire, June 6, 1991, available in LEXIS, Nexis Library, CRRNT File.

106. *California Debate Grows Over Televising Executions*, *supra* note 5.

107. KQED v. Vasquez, 18 Media L. Rep. 2323, 2326 (N.D. Cal. 1991).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 2325.

at this point.”<sup>112</sup>

With respect to the ban on videotaping, however, Judge Schnacke ruled in favor of the warden, calling his actions “reasonable and lawful.”<sup>113</sup> He made reference to each of the three major concerns mentioned by Vasquez. The judge noted that prison personnel “might well be disclosed, their identities revealed by a camera in the area at the time of an execution, and no rational way appears to prevent cameras that are there from getting either intentionally or inadvertently photographs of the prison personnel.”<sup>114</sup> He referred to Vasquez’s fear of prison unrest:

Some of the [testifying] wardens had a real fear they expressed that the circulation of a photograph of an execution within the prison even after the time of the execution, and more seriously the display on television of a live broadcast of the event within the prison, could spark severe prisoner reaction that might be dangerous to the safety of prison personnel.<sup>115</sup>

And with respect to the “suicidal cameraman” theory, Judge Schnacke said “[t]he warden is really not required to trust anybody. It’s no answer to say that press representatives are all nice people and that they never can do anything irregular or irrational.”<sup>116</sup> Finally, the judge reasoned, if cameras can be kept out of federal trials, which are public, then they can be kept out of executions, which are not public.<sup>117</sup>

#### IV. THE RIGHT TO ATTEND EXECUTIONS

Judge Schnacke’s reference in *Vasquez* to the “long custom and practice of accommodating the press” in overturning Warden Vasquez’s ban on the media suggests a reliance on *Richmond Newspapers* and its progeny for the proposition that executions should not be closed to the media. However, *Richmond Newspapers* was not the only authority on which the judge could have based his decision to overturn Vasquez’s ban on the media; the judge could have also overturned the media ban as a violation of the “equal access” doctrine of *Pell* and *Saxbe*.

The California Penal Code provides: “The warden of the State prison where the execution is to take place shall be present at the execution and must invite the presence of two physicians, the Attorney General of the State, and at least 12 reputable citizens, to be selected by him. . . .”<sup>118</sup> In requiring the warden to admit a specified number of *citizens* to the execution, the statute mandates a minimum level of public access to which the

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112. *Id.*

113. *Id.* at 2327.

114. *Id.* at 2326.

115. *Id.*

116. *Id.*

117. *Id.* at 2325.

118. CAL. PENAL CODE § 3605 (West 1982 & Supp. 1991).

warden must adhere. Given this statutorily mandated public access, the "equal access" doctrine prohibits the warden from imposing a total ban on media access, since such a ban would tip the balance of access in favor of the public.

A more complicated and illuminating situation is one in which: (1) no mandatory requirement of public access exists; and (2) the execution is ordered closed to both the press and the public (thus making it a secret execution). In such a situation, a party challenging such a closure would not be able to rely on the "equal access" doctrine. In order to have such a ban overturned as unconstitutional, a challenger would have to demonstrate that *Richmond Newspapers* (and not the "equal access" doctrine) controlled, requiring the execution to be presumptively open. In addition, the challenger would have to demonstrate that no countervailing government interests were sufficient to overcome this presumption of openness.<sup>119</sup>

A secret execution would be factually distinguishable from *Pell* and *Saxbe*. In neither *Pell* nor *Saxbe* did the Court have before it a situation in which the government had completely closed off all access. Indeed, the Court expressly recognized that ample access to information about prison conditions was still available from alternative sources, such as letters to and from prisoners, and interviews with ex-prisoners and with prisoners' families.<sup>120</sup> In a closed execution, however, no such alternative source of information would be available, since "dead men tell no tales." Also, the *Pell* and *Saxbe* Court emphasized the valid motives behind the restrictions, thus suggesting (notwithstanding the limitation of the "equal access" doctrine) its recognition that the rights of the press had been implicated, since if no right existed, then no motive or explanation of the other party's conduct would have been necessary.<sup>121</sup> A court might thus find a complete lack of motive relevant.

One commentator distinguished *Pell* and *Saxbe* from *Richmond Newspapers* by noting that while *Pell* and *Saxbe* involved questions of access to legitimately closed government business (i.e., day-to-day prison activities), *Richmond Newspapers* involved a proceeding that is part of the administration of justice, the criminal trial.<sup>122</sup> Applying this distinction to secret executions would require that secret executions be analyzed under *Richmond Newspapers*, and not under the *Pell* and *Saxbe* "equal access" doctrine. Although an argument could be made that *Holden v. Minne-*

119. See discussion *infra* part VII.

120. *Pell v. Procunier*, 417 U.S. 817, 823-28 (1974).

121. *Cf. Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) (without determining whether the press had a First Amendment right to attend pretrial proceedings, the Court concluded that if such a right existed, it was outweighed by the defendant's right to a fair trial).

122. *The Supreme Court, 1979 Term - Leading Cases*, 94 HARV. L. REV. 77, 155-56 (1980).



*sota*<sup>123</sup> permits an execution to be legitimately closed by the government, such an argument should ultimately fail. *Holden* involved a condemned's own challenge to the statutory execution procedure. There was no media plaintiff in *Holden*; and although the *Holden* Court said that the Minnesota restrictions on press access were "regulations which the legislature, in its wisdom, and for the public good, could legally prescribe,"<sup>124</sup> the Court was considering the rights of the *condemned*, not the rights of the *press*. An execution is therefore not a legitimately closed government proceeding, but a proceeding that is instead part of the administration of justice. Indeed, an execution is the most severe and intrusive action taken by the state as the administrator of justice, namely, the taking of a life.<sup>125</sup> An execution would therefore be controlled by *Richmond Newspapers*, and not by the "equal access" doctrine of *Pell* and *Saxbe*.

Although no definitive test came out of the numerous opinions written in *Richmond Newspapers*, three factors have held special significance for the courts that have subsequently construed the decision:

- (1) The requirement of a "tradition of openness," a factor mentioned by both Chief Justice Burger in the plurality opinion,<sup>126</sup> and by Justice Brennan in his concurrence;<sup>127</sup>
- (2) Whether access would provide the therapeutic "community catharsis" and confidence in the criminal justice system described by Chief Justice Burger;<sup>128</sup> and
- (3) Whether the access to information about a particular governmental process is important in terms of that very process, the second principle offered by Justice Brennan.<sup>129</sup>

In determining whether executions have had a tradition of openness, a court will look to whether a tradition of openness existed at the time of the enactment of the Constitution and the Bill of Rights.<sup>130</sup> This is significant, for although today executions are not conducted in public, at the time the Constitution and the Bill of Rights were enacted, there had

123. 137 U.S. 483 (1890). The case is discussed earlier. See *supra* part II.

124. *Id.* at 491.

125. See *Garrett*, 424 F. Supp. at 471 (N.D. Tex. 1977) ("The carrying out of the death penalty is an act of the state. It is the ultimate act of the state. A state execution is an act of the collective wills of all the people.")

126. *Richmond Newspapers*, 448 U.S. at 564-69 (plurality opinion).

127. *Id.* at 589 (Brennan, J., concurring in judgment).

128. *Id.* at 569-73.

129. *Id.* at 589.

130. See *Richmond Newspapers*, 448 U.S. at 569 ("[T]he historical evidence demonstrates conclusively that at the time our organic laws were adopted, criminal trials both here and in England had long been presumptively open.") (emphasis added); *Press-Enterprise I*, 464 U.S. at 508 ("Public jury selection thus was the common practice in America when the Constitution was adopted.") (emphasis added); *Press-Enterprise II*, 478 U.S. at 22 (Stevens, J., dissenting) ("In this case, however, it is uncontroverted that a common-law right of access did not inhere at the time the First Amendment was adopted.") (emphasis added).

been a long tradition of open, public executions both in England and in the United States.<sup>131</sup> An execution thus satisfies the "tradition of openness" prong of the *Richmond Newspapers* test.

Given the heinous crimes committed by those on death row, the pain that the commission of these crimes brings to the community, and the significant role which capital punishment plays in the administration of criminal justice, press access to executions provides the type of "therapeutic community catharsis" mentioned by Chief Justice Burger. A secret execution, on the other hand, raises questions of doubt and uncertainty in the minds of the public regarding the judicial process, while providing little in terms of relief for the suffering community.

Access to executions has specific structural, or social, significance. It provides the information with which members of society can share in the conviction that the criminal justice system is administered humanely and in accordance with our wishes; it also provides for an informed dialectic about a hotly debated issue. This access is especially important when a state performs its first execution in a number of years, since an execution after a substantial hiatus is a "significant change in state policy" which "should be accompanied in a democratic society by the widest possible public knowledge and information."<sup>132</sup> In addition, access assures that the condemned will be put to death in a manner that is neither cruel nor unusual. Access to executions is thus important in terms of the very process of the administration of capital punishment, thereby conforming with the second "helpful principle" enunciated by Justice Brennan in his concurrence in *Richmond Newspapers*.

## V. THE RIGHT TO VIDEOTAPE

Since Judge Schnacke found it necessary to discuss the validity of the reasons for the camera ban set forth by Warden Vasquez, the judge must have found that some First Amendment interest had been implicated in the ban on videotaping. What was the nature of this interest?

The *Vasquez* decision offers little in terms of an answer. However, as was the case with the general media ban, Judge Schnacke need not have been relying on the presumption of openness, since a First Amendment right to videotape would have also been implicated under the "equal access" doctrine, as modified by Justice Stewart's concurrence in *Houchins*.<sup>133</sup> Since a right of media access to the execution witness chamber attaches under the "equal access" doctrine (or by virtue of the *Richmond Newspapers* presumption of openness), and since KQED further "required cameras . . . for effective presentation to the viewing pub-

131. See *supra* part II.

132. *Garrett*, 424 F. Supp. at 471.

133. See *supra* part III.B.

lic of the conditions at the [execution],”<sup>134</sup> KQED possessed a First Amendment right to videotape the execution under Justice Stewart’s “effective access” doctrine.

The issue of whether a presumption of openness exists with respect to videotaping executions uses the same analytical structure as that used above for the question of secret executions. First, one asserting this right would have to convince the court that the “equal access” doctrine does not function as a bar. Since, as described in the previous paragraph, a First Amendment right to videotape is in fact *implied* under the “equal access” doctrine (as modified by *Houchins*), this doctrine will not prevent a court from finding a right to videotape, at least not without ignoring the reasoning of *Houchins*. Second, the party asserting the right to videotape would have to prove that the videotaping of executions falls within *Richmond Newspapers*, and is therefore presumptively required.

Before determining whether a tradition of openness existed, a court would have to decide whether for the purposes of this prong of the test the touchstone is access to *attend* executions, or access specifically to *videotape* executions. If the court looks to the former, then it would find that a tradition of openness existed at the time that the Constitution was enacted. If it looks to the latter, however, then it would find that no tradition of access for the purpose of videotaping executions existed at the time that the Constitution was enacted. Two reasons support the former inquiry. First, the Supreme Court has repeatedly looked to the general process at issue, and not to a portion of that process, when applying the “tradition of openness” test.<sup>135</sup> Second, it would not make sense for a court to ask whether a tradition of videotaping executions at the time that our organic laws were adopted, since video technology was not yet even developed at that time. The absurdity of the inquiry warrants its avoidance.<sup>136</sup>

Applying the other components of the *Richmond Newspapers* “test,” a videotape of an execution would provide an additional source of relief to a community hurt by a crime, and the security of witnessing an open and effective criminal justice system in action. A videotape of an execution would thus provide a therapeutic “community catharsis,” and would enhance the community’s sense of confidence in the criminal justice system.

134. *Houchins*, 438 U.S. at 17 (Stewart, J., concurring in judgment).

135. See, e.g., *Press-Enterprise II*, 478 U.S. 1 (1986) (Court looked at the tradition of access to preliminary hearings, and not at the tradition of access to preliminary hearing transcripts); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (Court looked at access to criminal trials, and not at access to that portion of a criminal trial for sexual assault against a minor during which the minor victim testifies).

136. The peculiarity of this inquiry underscores the rigidity of the “tradition of openness” test. Note that Justice Brennan, in his concurrence in *Richmond Newspapers*, asserted only that the “right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information.” 448 U.S. at 589 (emphasis added).

Finally, the information provided in a videotaped execution would be important in terms of the very process of administering capital punishment, since it would enlighten the general debate about the death penalty, and would assist citizen-governors in determining whether the method of capital punishment used by the government is sufficiently humane.<sup>137</sup>

## VI. SCRUTINIZING THE GOVERNMENT'S RESTRICTIONS

Despite the absolutist theory espoused by Professor Meiklejohn and by others, the Supreme Court has never recognized an absolute First Amendment right. The right must instead always give way to certain contravening rights and interests. The level of the interest necessary to outweigh the right depends on the nature of the right itself.<sup>138</sup>

The First Amendment right of press access to government information is still relatively new, and there are still only a handful of cases in which the Supreme Court has recognized this right. The Court has thus had little opportunity to describe the level of scrutiny against which this right is to be balanced. One commentator has suggested:

When a right of access is found to exist, impingements on that right should be evaluated under the familiar standards applicable to governmental restrictions on speech. Plainly, as with other first amendment freedoms, no right of access is absolute. Where access to an institution has been recognized generally, courts should require denials of access based on the sensitivity of particular information to be justified by compelling governmental interests, in line with the standard analysis of "content-based" restrictions on speech and expression. Where access is selectively restricted on the basis of factors besides content, government should be put to the burden imposed on similar restrictions on speech. Finally, where access is only limited during certain hours or due to space constraints, the minimal scrutiny applied to "time, place, or manner" regulations of speech is appropriate.<sup>139</sup>

With respect to the press right to attend executions, given the past general recognition of press access, a denial of access should only be sustained if the denial is narrowly drawn to further a compelling governmental interest. Since Warden Vasquez never asserted any interests that were impinged on by the press' asserted right, the right of access asserted by KQED in *Vasquez* was not overcome.

What type of balancing test did Judge Schnacke use with respect to

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137. A record of an execution is especially important when the execution in question is the first one performed in long time. See *supra* text accompanying note 132.

138. For a general discussion of the appropriate standards against which the various First Amendment rights are scrutinized, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* ch. 12 (2d ed. 1988).

139. *The Supreme Court, 1979 Term - Leading Cases*, *supra* note 122, at 158.

KQED's right to videotape executions? His use of the terms "reasonable and lawful" suggests that he was using the "rational relation" test, the standard usually used when: (1) the restriction on expression is content-neutral (e.g., time, place, or manner restrictions); (2) there is a private forum; and (3) alternative channels of communication are available.<sup>140</sup> Did Judge Schnacke apply the correct level of scrutiny? The answer to that question depends on whether KQED's right to videotape executions is being restricted on the basis of the content of the information sought, or if it is being restricted on some other basis (such as a content-neutral restriction on the manner of access). Put in other terms, the proper level of scrutiny to apply depends on whether videotaping is construed as a mere *manner* of obtaining information about an execution, or as a form of information that has its own unique *content*. At first glance, this inquiry seems simple to answer: a restriction on the right to videotape an execution is merely a restriction on the type (or manner) of access being allowed. Such a conclusion should not be reached too hastily, however. If a videotaped execution possesses a discernible, unique quality that significantly separates it from other means of reporting on an execution, then a restriction on videotaping is a regulation based on the content of the information sought. The only two courts passing on this issue have reached opposite conclusions.<sup>141</sup>

If the videotaping restriction is based on the content of the information sought, then a court should apply the strict scrutiny standard, as was done in *Globe Newspaper* and *Press-Enterprise I*.<sup>142</sup> Applying this standard to the facts of *Vasquez*, Warden Vasquez offered the compelling state interests of keeping order at the prison, protecting the prison staff, and providing for the success of the execution process. However, the restriction on videotaping can hardly be said to be narrowly drawn to protect these interests, an argument made by KQED's attorney, William Bennett Turner.<sup>143</sup> The concern that a broadcast of an execution could spark an inmate reaction is an issue that is properly dealt with at the broadcasting stage, and not at the videotaping stage. A restraint on access based on a broadcasting concern is tantamount to a prior restraint against the organized press, a violation of core First Amendment values.<sup>144</sup> In addition, the identity of participating prison staff can be easily

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140. See *TRIBE*, *supra* note 138.

141. Compare *Halquist v. Dept. of Corrections*, 783 P.2d 1065, 1067 (Wash. 1989) ("[C]ommon experience suggests that a videotape of an execution is information that is qualitatively different from a mere verbal report about an execution.") with *Garrett*, 556 F.2d at 1278 ("In order to sustain Garrett's argument we would have to find that the moving picture of an actual execution possessed some quality giving it 'content' beyond, for example, that possessed by a simulation of an execution. We discern no such quality from the record or from inferences therein.").

142. See *supra* text accompanying notes 90-97.

143. Jay Mathews, *TV Barred From Filming Executions*, WASH. POST, June 8, 1991, at A10.

144. See *Near v. Minnesota*, 283 U.S. 697 (1931).

concealed using current technology. The concern about the "suicidal cameraman" can be alleviated by securing the camera to the floor or a wall. Finally, cameras in the courtroom are not analogous to cameras in the execution chamber. As the Supreme Court pointed out in *Estes v. Texas*,<sup>145</sup> cameras are excluded from trials because they disrupt the proceedings. However, whereas a trial is a *deliberative* proceeding, an execution is an entirely mechanical process carried out only after all deliberative proceedings have ended.<sup>146</sup> Thus, in an execution there are no substantial deliberative processes that might be disrupted by the presence of a camera.<sup>147</sup>

If, on the other hand, the videotaping restriction is not based on the content of the information sought, but is instead construed as merely a restriction on the manner of access, then given that an execution site is not a public forum (although two-hundred years ago it probably was), and an alternate channel for communication is available, Judge Schnacke properly applied the "rational relation" standard.<sup>148</sup> Since Vasquez presented legitimate state concerns to the court, which were alleviated by the ban on videotaping, then under the "rational relation" test, KQED's First Amendment right to videotape was superseded by the interests of the state.

## VII. CONCLUSION

As United States District Court Judge William M. Taylor, Jr. noted in *Garrett v. Estelle*, the real concern with videotaping executions is not with the videotaping itself, but with the broadcasting of possibly offensive footage. The government's argument, in effect, is that "we, the government, have determined that the governmental activity in this instance is not fit to be seen by the people on television news."<sup>149</sup> This position was properly rejected by Judge Taylor in *Garrett*:

In addition to being ironic, such a position is dangerous. If government officials can prevent the public from witnessing films of government proceedings solely because the government subjectively decides that it is not fit for public viewing, then news cameras might be barred from other public facilities where public officials are involved in illegal, immoral, or other improper activities that might be "offensive," "shocking," "distasteful" or otherwise disturbing to viewers of television news.<sup>150</sup>

145. 381 U.S. 532 (1965).

146. See *Garrett*, 424 F. Supp. at 472.

147. *Id.* ("It is not seriously contended that a single television reporter, carrying a compact, quiet, portable film camera requiring no special lighting, can in any way disrupt or interfere with this state proceeding.")

148. See *TRIBE*, *supra* note 138.

149. *Garrett*, 424 F. Supp. at 472-73.

150. *Garrett*, 424 F. Supp. at 473.

Although the broadcasting of an execution involves First Amendment interests and concerns, such interests and concerns are separate and distinct from the interests implicated at the acquisition stage. The concerns at this earlier stage are not about “taste” or “offense;” they are instead about our role as citizens in a self-governing society, and our responsibility to make informed decisions about the conduct of those acting as our servants. In this age of talk-show politics and televised town hall meetings, the lens and the microphone have become the eyes and ears of America. The public is thus denied effective access to an event when television cameras are excluded therefrom. As the author Hugo Adam Bedau explained, “[t]he relative privacy of executions nowadays . . . means that the average American literally does not know what is being done when the government, in his name and presumably on his behalf, executes a criminal.”<sup>151</sup> An execution might not be pretty, and it might not be entertaining, but it is our undertaking, and our responsibility. The First Amendment should serve to ensure that all of our undertakings are carried out with our knowledge, and with our blessing.

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151. BEDAU, *supra* note 13, at 14.