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THE CONSTITUTIONALITY OF AN INTERNET EXECUTION: LAPPIN V. ENTERTAINMENT NETWORK, INC.

I. INTRODUCTION

Out of the night that covers me, black as the pit from pole to pole, I thank whatever gods may be for my unconquerable soul. In the fell clutch of circumstance, I have not winced nor cried aloud. Under the bludgeoning of chance, my head is bloody, but unbowed . . . It matters not how strait the gate, how charge with punishments the scroll. I am the master of my fate: I am the captain of my soul.1 -Invictus, William E. Henley

Although convicted Oklahoma City bomber, Timothy McVeigh, used this quotation to memorialize his last words, in reality he was neither “the master of his fate,” nor “the captain of his soul.”2 For if this had been his true fate, execution, would have been available to any morbidly curious individual via the Internet, pursuant to both his wishes and the aspirations of two Internet companies.3 The aforementioned quote is extrapolated from William Henley’s poem Invictus.4 Little did Henley realize at the time of its composition, that over a hundred years later his poem would be inextricably associated with one of the most nefarious convicted terrorists in American history.

In lieu of providing any last words before his execution,

2 Id.
3 See infra pp. 10-13.
4 See supra note 1 and accompanying text.
McVeigh’s agnosticism shone through as he offered a handwritten copy of Henley’s *Invictus*.\(^5\) It is most likely safe to assume that it was neither Henley’s eloquent verse, nor his master of literary technique, that attracted McVeigh to this poetry. Rather, McVeigh must have firmly believed in the powerful underlying message of Henley’s words. However if this assumption is correct, perhaps Timothy McVeigh should have chosen language more indicative of his imminent fate, and the final issue that would survive it. If McVeigh specifically wanted the cynical prose of an infamous Englishman to represent his last breath, perhaps he should have more correctly chosen the words of Charles Dickens. Dickens commented on criminal execution in his work, appropriately titled, *American Notes*:\(^6\)

> The prison. . . has been the scene of terrible performances. Into this narrow, grave-like place, men are brought out to die. . . . The law requires that there be present at this dismal spectacle, the judge, the jury, and citizens to the amount of twenty-five. From the community it is hidden. To the dissolute and bad, *the thing remains a frightful mystery*.\(^7\)

These words are much more characteristic of McVeigh’s fate, and of the final controversy that his name would ensue. Tales of public executions throughout history have neatly been manipulated into myths, tucked into history books, and portrayed as characteristic of the uncivilized cultures of antiquity. However, a well-documented tradition of public executions persists within the

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7 Id. (emphasis added).
histories of both Eastern and Western cultures.\textsuperscript{8} What significance, if any, does that hold for modern criminal justice systems? Specifically, what implications do seemingly archaic execution customs of the past hold in our own contemporary American society that boasts itself as progressive, capitalist and constitutionally uninhibited? Particularly American courts, which have faced questions over media access to prisons and executions in many jurisdictions, have chosen to maintain the executions, yet have in many cases decided to take the punishment out of the public forum.\textsuperscript{9} When making this decision, courts have employed 'balancing tests' that emphasize governmental interests, deference to prison officials and strict adherence to precedent.\textsuperscript{10} Modern courts have refused to deviate from the new "norm" of making these executions private, thereby finding that the government's interests outweigh First Amendment guarantees of free press and speech.\textsuperscript{11} Due to the proverbial slippery slope, the public's right to knowledge and information has also been impeded in these circumstances. Certainly antiquity recognized the public's right to view executions, to access information, and to base their societal conduct upon such information and observation. Why has modern jurisprudence seemed to limit it?

Recently two corporate entities, Entertainment Network Inc.\textsuperscript{12} and Liveontheweb.com Inc.\textsuperscript{13} attempted to redefine this precedent.\textsuperscript{14} Both Internet companies wanted to broadcast Timothy McVeigh's execution live; however, Warden Harley Lappin refused their request pursuant to federal prison board regulations.\textsuperscript{15} Litigation ensued and the District Court for the Southern District of Indiana in Entm't Network v. Lappin, \textsuperscript{16}

\textsuperscript{8} See infra pp. 5-8.
\textsuperscript{9} See infra pp. 15-27.
\textsuperscript{10} Id.
\textsuperscript{11} Id.
\textsuperscript{14} See infra pp. 8-13.
\textsuperscript{15} Id.
predictably, denied the media access to the execution.\textsuperscript{17} Although justifications exist for restricting First Amendment rights, none of these rudimentary justifications applied in \textit{Lappin}.\textsuperscript{18}

The purposes of this Note is not to argue that courts should begin to allow all executions to be aired over the Internet. The result of such a decision would likely be the capitalization over the death of another and a disregard for human life which could arguably transport criminal justice back to the standards of Nero’s Rome or the French Revolution. Nor will this Note attempt to confront the controversy surrounding the propriety and legality of the death penalty. Nevertheless this Note will examine the court’s decision in \textit{Lappin}, by comparing this case of first impression to analogous case law in order to demonstrate that the District Court’s theory was flawed.\textsuperscript{19}

Section II will provide essential background necessary to understand the constitutional quandary that was placed before the court in \textit{Lappin}.\textsuperscript{20} Specifically, this section will provide a brief illustration of the significance that public executions played during our country’s formative years and the significance of Timothy McVeigh’s execution. The third section will discuss both the facts and the rationale used by the court in \textit{Lappin}.\textsuperscript{21} Section IV will provide an analysis of that opinion.\textsuperscript{22} Because \textit{Lappin} is a case of first impression, the analysis will look to analogous case law, such as media access case law, access-to-prison case law, and Gulf War case law, in order to compare the respective jurisprudence and to the rationale used in \textit{Lappin}. Section V will discuss the future implications the \textit{Lappin} holding will have, and question this holding in light of public policy on execution broadcasting and the tragic events of September 11, 2001.\textsuperscript{23} Finally, Section V will conclude by calling for greater judicial activism when courts are

\begin{footnotes}
\footnote{\textit{Lappin}, 134 F. Supp.2d at 1019.}
\footnote{See infra Part III.}
\footnote{See infra pp. 5-42.}
\footnote{See infra pp. 5-9.}
\footnote{See infra pp. 9-13.}
\footnote{See infra pp. 14-30.}
\footnote{See infra pp. 31-42.}
\end{footnotes}
faced with extreme or unique issues, such as the ones presented in *Lappin*.24

II. BACKGROUND

The value system of contemporary “Americana” has traditionally shunned the concept of public executions, categorizing such behavior as characteristic of barbaric cultures of the past, or undemocratic governments of the present. However, historical record has revealed that public executions have performed a vital role throughout the development of societal control norms and the criminal justice systems of almost every modern community.25 Public executions can be traced back to before the days of Jesus Christ, where the fate of the incarcerated was inevitable doom as men were publicly pitted against savage beasts in the name of ‘justice.’26

Arguably, various forms of public execution have permeated the Twentieth Century with the Holocaust and the practice of Sati in India as just two examples.27 Most recently, the Taliban’s demoralizing “legal system,” which has reinstituted the stoning of

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24 See infra pp. 40-42.
25 See, Gil Santamarina, *The Case for Televised Executions*, 11 CARDOZO ARTS & ENT. L.J. 101, 102 (1992) (stating that the last two public executions in America were the hangings of Rainey Bethea in Kentucky in 1936 and Roscoe Jackson in Missouri in 1937); Phillip R. Wiese, *Popcorn and Primetime vs Protocol: An Examination of the Televised Execution Issue*, 23 OHIO N.U. L. REV. 257, 260 (1996); see also Bessler, *supra* note 6, at 359-67 (commenting on the scholarly disagreement over whether the 1936 Kentucky execution or the 1937 Missouri execution, can in fact, be considered the last public execution).
26 Wiese, *supra* note 25, at 259-60 (“Interest and attraction to the public administration of the death penalty is a phenomenon which no doubt pre-dates the era of television, radio and other contemporary tools of fast paced, media retrieval and reporting”).
27 Sati is a traditional Hindu ritual that occurred in certain areas of India where, once widowed, a woman burns herself alive at a stake, or a ‘pyre’, in a public venue. Although highly controversial and now illegal, one of the last reported instances of Sati occurred in 1987. For an account from eyewitnesses to this event see generally MARK TULLY, *NO FULL STOPS IN INDIA* 211-236 (1991).
women, serves as a poignant example of public executions. However, a tradition of public executions is not merely restricted to cultures of 'the Other,' that is cultures that many Americans would deem as undemocratic. Rather, despite its quintessential civility, Anglo-American jurisprudence also possesses a tradition marked by public executions that extends into the Twentieth Century. This section will briefly recap the development of public executions in the American criminal justice system in order to point out its significant place within American legal history.

History provides little documented insight into whether the Founding Fathers intended for the press to broadcast an execution, as indeed no one from the Eighteenth Century could have foreseen the technological advances that have made such broadcasting possible. However, their intent has been highly debated and an examination of history reveals that public executions were routine at the time contemporaneous to the framing of the Constitution. Nevertheless, one surety amid such debate is that the Framers did not explicitly prohibit public access to executions within the Constitution. Moreover, the Founding Fathers designed a very broad freedom of the press in the First Amendment. Therefore, if the Founding Fathers had no explicit problems with public executions and intended for a liberal press, then why is it absurd to imagine that in extreme circumstances they would have intended for media access to and subsequent broadcast of executions?

29 See generally, EDWARD W. SAID, ORIENTALISM (Random House 1978). The term ‘the Other’ has been employed throughout academia, specifically by cultural theorists such as Edward Said, to construct critical theories about the Third World and the Western perception of it. Specifically ‘the Other’ refers to non-Western cultures, and a negative production of knowledge, before colonization imposed Western ideals upon these indigenous societies.
30 U.S. CONST. amend. 1 (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”).
A. The Tradition of Public Executions within American Jurisprudence

Although downplayed by American historiography, public executions were, in fact, legal in many jurisdictions, with the last documented instance occurring as recently as the late 1930s.\(^{31}\) Despite the utilitarian goals of the original colonists who fled from an oppressive monarchy, public executions were not uncommon in their newly established democracy.\(^{32}\) Rather, one commentator has stated that public executions were the “norm” in post-revolutionary America up until the early nineteenth century.\(^{33}\) The overriding policy supporting these public executions was the preservation of social order, believing that criminal activity would be deterred if capital punishment were made a public spectacle.\(^{34}\) However, this social order policy rationale becomes ironic when considering certain contemporary prison officials have cited the preservation of order as one of the reasons against media coverage of executions.\(^{35}\)

As American society continued to flourish, so did crime, and thus so did public executions. However, by the 1830s an increasingly strong backlash against public executions began to emerge.\(^{36}\) One scholar has suggested that “the move to exclude

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\(^{31}\) See Bessler, supra note 6, at 360-63.

\(^{32}\) Id. In using the term “utilitarian goal,” I am referring to the utilitarian school of thought that emerged in eighteenth century English academia, which was a product of the Enlightenment philosophy that promoted individual production of knowledge and scientific progression.

\(^{33}\) See Santamarina, supra note 25, at 101.

\(^{34}\) See Bessler, supra note 6, at 359, 360 (“Printed versions of the sermon and confession helped disseminate the execution day message throughout the crowd and across the region”).

\(^{35}\) See supra note 6 and accompanying text.

\(^{36}\) See Bessler, supra note 6, at 360-63 (discussing New York’s public execution abolition movement and New England’s private execution laws, which were some of the first enacted and that recognized a right to privacy for executions).
the public from executions was apparently motivated by a desire to make executions more civilized and by a fear that well-publicized executions would fan sentiment to abolish capital punishment altogether.\textsuperscript{37} For example, in 1830, Connecticut was the first state to promulgate legislation that required executions to be outside of the public view.\textsuperscript{38} The Supreme Court first spoke on this issue in its 1890 decision in \textit{Holden v. Minnesota}.\textsuperscript{39} In \textit{Holden} the Supreme Court gave deference to the state legislatures that enacted anti-public execution statutes, relied upon the legislatures’ good faith incentive to protect its citizens, and upheld Minnesota’s complete ban on media and public access to executions.\textsuperscript{40} Therefore, \textit{Holden} represents the beginning of the Supreme Court’s initial step away from the customary colonial practice of open executions and an indication of future courts’ treatment of access to executions.

Courts’ attitudes on access to executions have evolved since the days of \textit{Holden}, leading to the current limited media and public presence at executions as proscribed by federal statute.\textsuperscript{41} However, the process was as gradual as \textit{Holden} itself did not require the cessation of all public executions. Rather the tradition continued in certain areas, particularly the South, with the last two documented public executions occurring in 1936 and 1937, in Kentucky and Missouri respectively.\textsuperscript{42} Furthermore, public executions were not even nationally forbidden until the Supreme Court’s decision in \textit{Furman v. Georgia} in 1972.\textsuperscript{43} To this date, the

\textsuperscript{37} \textit{See id.} at 438 n.17 (citing Davis, \textit{The Movement to Abolish Capital Punishment in America, 1787-1861}, 63 AM. HIST. REV. 23, 33-34 (1957)).

\textsuperscript{38} \textit{See Wiese, supra} note 25, at 260, 261 (stating that New York, Massachusetts, Pennsylvania Alabama, Georgia, Virginia, and six Midwestern states followed with their own legislation shortly after Connecticut).

\textsuperscript{39} 137 U.S. 483 (1890).

\textsuperscript{40} \textit{id.}

\textsuperscript{41} \textit{See infra} pp. 14-30.

\textsuperscript{42} \textit{See Wiese, supra} note 25, at 261.

\textsuperscript{43} \textit{See Furman v. Georgia,} 408 U.S. 238 (1972) (holding that if a state imposes the death penalty in an “arbitrary or capricious” mode than it constitutes a constitutional violation and “cruel and unusual punishment” as forbidden by the Eighth and Fourteenth Amendments).
Supreme Court has still not extended the media’s right of access to executions past that of the public in general.  

**B. The Execution of Timothy McVeigh within American Jurisprudence**

On April 19, 1995, the Alfred P. Murrah federal building in Oklahoma City exploded killing 168 people, 19 of which were children. Apart from being an unimaginable travesty for the family and friends of the victims, the Oklahoma City bombing was a national tragedy. American and International commentators alike recognized the bombing as the most severe domestic terrorist act until the recent events of September 11th. For his responsibility in this tragedy, a jury convicted Timothy McVeigh of conspiracy to use weapons of mass destruction, use of weapons of mass destruction, destruction by explosives, first-degree murder. He was sentenced to death by the District Court for the District of Colorado.

McVeigh spent his entire incarceration imprisoned at the United States Penitentiary of Terre Haute. McVeigh’s original execution was scheduled for May 16, 2001. However, after the defense discovered 4,000 previously unrevealed FBI investigative documents, the court granted McVeigh a stay of execution. At that point, President Bush was the only force that could have prevented the execution through a grant of clemency. President Bush was petitioned by Pope John Paul II, death penalty opponents, and even a few bombing survivors to prevent the execution in order that McVeigh endure life imprisonment as opposed to being

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44 See infra pp. 14-30.
48 See Murray, supra note 45, at A1.
49 Id.
executed. However, these pleas were of no avail and McVeigh's stay was short lived.

Not surprisingly, considering his ardent support of the death penalty, President Bush did not grant clemency. On June 16, 2001 McVeigh was put to death by legal injection. However, the various ploys attempting to broadcast his execution assure that McVeigh's legacy will not solely be marked by the innumerable atrocities that he caused. McVeigh's execution will also be remembered for the unique legal question it presented - should First Amendment protection incorporate the broadcast of a federal execution via the Internet? The answer to that question, however, remains unclear.

III. ENTERTAINMENT NETWORK V. LAPPIN

This section will discuss the focus of this Note, Entm't Network v. Lappin, in great detail. Specifically, the section will examine the District Court's rationale in upholding the constitutionality of the federal regulation that barred Plaintiffs, Entertainment Network Inc. and Liveontheweb.com, from broadcasting McVeigh's execution on June 11, 2001.

A. Background Facts

Entertainment Network, Inc. ("ENI"), an Internet company that provides news, entertainment, and information, petitioned the Bureau of Prisons ("BOP") to be the media pool witness to

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50 Id.
51 Id.; President Bush oversaw 152 executions during his five years as governor of Texas granting him an international reputation as "Mr. Death Penalty." See Thomas Sancton, A Matter of Life or Death, The McVeigh Case Shows How Differently Europe and America View Capital Punishment, TIME, May 21, 2001, at 28.
52 Id.; see also supra note 1 (quoting President Bush's statement that McVeigh "... met the fate he chose for himself six years ago").
53 See supra note 1.
54 Lappin, 134 F. Supp.2d 1002.
55 Id. at 1007.
McVeigh's execution. In a letter dated March 20, 2001, ENI requested not only to represent the media at the execution, it also asked for permission to bring a small camera into the execution to record and broadcast the execution over the internet. ENI also asked the BOP for access to and permission to broadcast a live audiovisual version of the execution. On March 28, 2001, the BOP rejected ENI's request, justifying its decision on federal regulation 28 C.F.R. § 26.4(f) ("regulation"). This regulation prohibits the photography, recording, or broadcasting of a federal execution. Additionally, the BOP relied on various policy reasons for rejecting ENI's request to broadcast McVeigh's execution.

Subsequently ENI filed suit, joined shortly thereafter by Liveontheweb.com, Inc. as an intervening plaintiff (collectively "Plaintiffs"), against Harry Lappin, Warden of Terre Haute Penitentiary ("USPTH"), and other government officials (collectively "the government"). Plaintiffs based their constitutional claims specifically on First Amendment violations and sought declaratory and injunctive relief. The District Court for the Southern District of Indiana heard the matter on April 17, 2001 and upheld the constitutionality of the regulation in question, 28 C.F.R. § 26.4(f). Thus, the court entered judgment for Defendants, refusing to extend First Amendment protection. Plaintiffs did not appeal and at McVeigh's execution 24 witnesses were present, none of which possessed audio or recording

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56 Id.
57 Id. at 1008.
58 Id.
59 Lappin, 134 F. Supp.2d at 1008; 28 C.F.R. § 26.4(f) states in relevant part that "No photographic or visual or audio recording of the execution shall be permitted." 28 C.F.R. § 26.4(f) (2000).
61 See Lappin, 134 F. Supp.2d at 1017.
62 Id. at 1006. Collectively defendants consisted of Lappin, Kathleen Haw Sawyer, Director of the BOP, and John Ashcroft, U.S. Attorney General.
63 Id.
64 Id.
65 Id. at 1019.
B. The Court's Analysis

_Lappin_ presented a case of first impression for the District Court for the Southern District of Indiana. The issue before the court was a facial challenge to a regulation that prohibited broadcasting, filming or audio recording of a federal execution and that Plaintiffs claimed infringed upon their First Amendment media and free speech rights. Specifically, Plaintiffs argued that the regulation was content-based and consequently subject to strict scrutiny. Defendants, on the other hand, contended that regulation was necessary because of the need to (1) prevent the sensationalizing of executions, (2) preserve of the solemnity of executions, (3) maintenance of security and good order in the Federal Prison System, and (4) the protection of the privacy rights of the condemned, the victims and their families.

First, the court in _Lappin_ rejected the notion that the regulation was content based. Judge Tinder acknowledged that making the distinction between a content-neutral and a content-based regulation can sometimes become "onerous." However, he did not find the task of assessing this regulation, 28 C.F.R. § 26.4(f), to be a difficult one. Rather, quoting the Supreme Court, the _Lappin_ court reiterated that a regulation is content-based if it prohibits speech because of disfavored content. In light of this

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66 See supra note 1.
67 See generally Lappin, 134 F. Supp.2d 1002.
69 Lappin, 134 F. Supp.2d at 1015.
70 Id. at 1017.
71 Id. at 1014.
72 See Lappin, 134 F. Supp.2d at 1014.
73 Id.
74 Id. (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)) ("The principle inquiry in determining content neutrality... is whether the government has adopted a regulation of speech because of disagreement with the message it conveys") (quoting Turner Broad. Sys. Inc. v. F.C.C., 512 U.S. 622, 642-3 (1994), "Regulations that ‘by their terms distinguish favored speech from disfavored speech on the basis of ideas or view expressed are content based’").
rule, the court rejected Plaintiffs' argument which differentiated between the content portrayed by traditional written media and that conveyed by the Internet.\textsuperscript{75} It stated, "In short, as to this aspect of ENI's argument, the medium is not the message, and ENI, as to the would-be messenger, is not being discriminated against by the BOP's regulation because of the medium or means by which ENI seeks to broadcast the execution."\textsuperscript{76} Therefore, the court refused to apply strict scrutiny because it found that the BOP regulation was content-neutral and it did not prohibit the "free flow" of information.\textsuperscript{77}

The first justification was that the regulation was content-neutral.\textsuperscript{78} Where a regulation is content-based courts will apply strict scrutiny because the regulation in question most likely is related to the suppression of free speech, whereas when a regulation is content-neutral the courts will employ a more lucid standard of review.\textsuperscript{79} The \textit{Lappin} court's second reason for not applying strict scrutiny was because the content-neutral regulation was merely a "time, place and manner" restriction on speech, which was justified by "legitimate government interests."\textsuperscript{80}

ENI's claim was based on a right to access the execution because the regulation already provided limited media access.\textsuperscript{81} The Court engaged in an analysis of "right of access" jurisprudence in order to reaffirm common law notions of equal access for both the media and the public. It plainly relied upon the Supreme Court's promulgation that the media is not afforded greater access to information than that provided to the public in

\begin{footnotesize}
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    \item \textsuperscript{75} Id. at 1014 ("ENI's argument rests on the view that the "content" of an execution depicted through the form of written journals or verbal accounts is different than if depicted through the lens and tape of the audiovisual broadcast which ENI seeks to have authorized").
    \item \textsuperscript{76} Id. at 1015.
    \item \textsuperscript{77} \textit{Lappin}, 134 F. Supp.2d at 1015.
    \item \textsuperscript{78} Id.
    \item \textsuperscript{79} Id. at 1014; \textit{See also} Wiese, supra note 25 at 400-401.
    \item \textsuperscript{80} Id. at 1015 (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)).
    \item \textsuperscript{81} Id. at 1010 n.2 (quoting 28 C.F.R. § 540.64, which provides the procedure creating a media pool for a federal execution).
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general.82 Because this is a case of first impression, Judge Tinder rendered analogous arguments in order to demonstrate how courts have upheld other federal regulations, which deal with the media’s right to access judicial proceedings and prisons.83 Lappin looked to a variety of case law, none of which was binding upon itself, and engaged in case by case analysis from “similar areas” in order to justify the application of the precedent it upheld.84

IV. ANALYSIS

The First Amendment provides that Congress shall make no law that abridges the freedom of speech or the freedom of the press.85 Anglo-American jurisprudence contains an ongoing struggle between the press and speech clauses in an attempt to illustrate and define the limits and maxims of these freedoms. The following section will discuss case law that the Lappin court found as persuasive. However, unlike Lappin, this discussion will provide a critical viewpoint of the case law’s applicability to a media claim to access an execution where the Internet is the desired medium of communication. Moreover, many of these cases can actually be distinguished from Lappin because of its unique facts. Although the cases that Lappin discussed involved traditional First Amendment jurisprudence, perhaps the court should have acknowledged the distinction between those cases and the issues that were present in Lappin. The battle between the Free Speech Clause and the Free Press Clause is not a novel concept to the area of constitutional law. In the past, judicial review has led to the struggle of balancing the competing interests of what can sometimes be considered two contradictory First Amendment

82 Lappin, 134 F. Supp.2d at 1009-11 (quoting Estes v. Texas, 381 U.S. 532, 584 (1965) (Warren, J., concurring) (“When representatives of the communications media attend trials they have no greater rights than other members of the public”) (quoting Zemel v. Rusk, 381 U.S. 1, 17).
83 Id. at 1009-14.
84 See infra pp. 14-30.
85 U.S. CONST. amend. I.
guarantees.

This analysis will examine Lappin in light of a series of analogous constitutional quandaries, distinguishing this case law in order to question the findings of Lappin. This section will point out the contradiction of the Lappin holding in light of other situations, situations that are arguably as graphic as the one at issue, in which the government has not imposed restrictions. Moreover, the significance of the role of the Internet in Lappin will be discussed. Furthermore this section will suggest that in future situations as dramatic and unique as that illustrated by Lappin, future courts should not just follow precedent in order to deter controversy, in lieu of deviating from the norm. Rather, courts should engage in constructive criticism, where necessary, of that precedent established by other case law with divergent factual situations.

A. Media Access Jurisprudence

Although no court has ever adjudicated an issue point on provision with Lappin, the courts have dealt with the extent of the media's First Amendment protection in other contexts. The Lappin decision relied upon a variety of case law in order to uphold 28 C.F.R. § 26.4(f). Although the court considered these cases "analogous," it failed to recognize the inherent factual differences between the unique Lappin situation and the cases it discussed. Instead, the court in Lappin upheld the regulation on the basis that the common law has not afforded the media access to information greater than that of the public. However the court never once questioned whether the media should have greater access than the public generally in special circumstances.

86 See supra pp. 10-13.
1. The Accessibility of Information: The Evolution of the Right to Access Information

a. Zemel v. Rusk

The Supreme Court defined the parameters of the media's constitutional right to gather information in Zemel v. Rusk. In Zemel, the government denied the plaintiff a passport to Cuba when he wanted to satisfy his "curiosity about the state of affairs in Cuba..." which in his opinion was going to make him "a better, informed citizen." Chief Justice Warren disagreed and held that the "right to speak and publish does not carry with it unrestrained right to gather information." Therefore the Court rendered a broad interpretation of the First Amendment, but the majority refused to create a special privilege for the media.

In a formalistic dissent Justice Black noted that the Constitution states that only Congress should enact laws restricting individual liberty. He hinged his criticism on Constitutional intent, that the Constitution does not allow for laws dealing with rights so fundamental to be decided by a government official. Only Congress, according to Justice Black, via the Constitution, can promulgate regulations that may potentially impinge upon liberty. Although Justice Black would most likely have frowned upon an overly active judiciary who arbitrary overrules legislation, he also would have equally rejected the notion that a prison warden should be provided with the last word in circumstances as exceptional as those in Lappin. Justice Black's view of who

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87 381 U.S. 1 (1965).
88 Id. at 3-4.
89 Id. at 16.
90 Id. at 22 (Black, J., dissenting) ("Our Constitution has ordained that laws restricting the liberty of our people can be engaged by the Congress and by the Congress only. I do not think that our Constitution intended that this vital legislative function could be farmed out in large blocks to any governmental official, whoever he might be, or to any governmental department of bureau, whatever administrative expertise it might be thought to have").
91 Id.
decides liberty rights under the Due Process Clause of the 14th Amendment, should perhaps, be applicable to contemporaneous media access to executions, specifically in McVeigh's situation.

b. Branzberg v. Hayes

Subsequently, the Supreme Court was faced with the issue of whether the First Amendment protects the media from governmental inquiries. Does the government have access to a journalist's information and research in the context of a judicial proceeding? In Branzberg v. Hayes, defendant Branzberg was a reporter who had witnessed illegal drug transactions and had written about them in the newspaper. A Grand Jury subpoenaed him about this information and Branzberg refused to appear before it, claiming a violation of freedom of the press and the free flow of information. However, the Court disagreed with Branzberg and found that the media does not have a right over the public to evade Grand Juries. However, Justice White did acknowledge that "without some protection for seeking out the news, freedom of the press would be eviscerated." Furthermore, in dissent, Justice Stewart emphasized the "critical role" of an independent press and that the majority undermined this historic independence when it held that the media has no First Amendment right to protect its sources.

In Lappin, Judge Tinder relied upon Justice White's now celebrated quote that is provided in the above paragraph. In doing so, he acknowledged constitutional protection of the press but quickly qualified this protection as limited in certain

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92 U.S. CONST. amend. XIV.
93 408 U.S. 665 (1972).
94 Id. at 669.
95 Id. Branzburg had sought legal protection through prohibition and mandamus to protect his confidential information.
96 Id. at 681.
97 Id. at 726.
98 Branzberg, 408 U.S. at 675 (Stewart, J., dissenting) ("The reporter's constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of information to the public").
circumstances.\textsuperscript{99} Further, the court in \textit{Lappin} interpreted ENI's claim narrowly based on the fact that they were not one of the media bodies chosen to witness the execution, as opposed to one based on the constitutionality of the federal regulation in question.

c. \textit{Richmond Newspapers v. Virginia}

Although the Supreme Court has refused to recognize special access rights for the media with executions, it has extended the press and public's equal access rights to observe certain governmental proceedings.\textsuperscript{100} In the seminal decision in \textit{Richmond Newspapers v. Virginia},\textsuperscript{101} the Court relied in part on \textit{Branzberg} in order to extend a general right of access to criminal trials.\textsuperscript{102} Chief Justice Burger's majority consisted of seven.\textsuperscript{103} Each engaged in a historical explanation of the open criminal tradition in Anglo-American jurisprudence.\textsuperscript{104} Justice Burger found that the right to criminal trials is one embedded in the free speech clause, as is the right to engage in government-oriented speech, and for one of the first times recognized the courtroom as an open forum.\textsuperscript{105} However, the Chief Justice was reluctant to allow for an overly broad First Amendment interpretation. Moreover, he set out two factors that limit the First Amendment right to access criminal

\textsuperscript{99} \textit{Lappin}, 134 F. Supp.2d at 1009 ("Although substantial, the protection is not without limits").
\textsuperscript{101} 448 U.S 555 (1980).
\textsuperscript{102} \textit{Id}.
\textsuperscript{103} \textit{Id}. at 555-59 (composing a majority of seven, and out of the seven justices, six came to the same conclusion based on totally separate rationales).
\textsuperscript{104} \textit{Id}.
\textsuperscript{105} \textit{Id}. at 575-77.
trials. These factors are (1) that the right of access should only have "special force" when the government has already been open, and (2) that the presence of the press should relate to the underlying purposes of the proceeding. This test is disjunctive, thus, if a media representative does not satisfy either of these factors, then the media will not gain access to a criminal proceeding.

Justice Stevens, a frequent champion of extending broad First Amendment rights to the media, delivered a powerful concurrence that recognized this case as a "watershed case." Stevens stated, "until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever." Stevens saw no reason to justify the closure order at issue in this case and commented upon the full rights of access that the media should be accorded. The court in Lappin noted that Richmond Newspapers rejected absolute First Amendment rights to the public and press and emphasized the court’s contention that a trial judge may impose reasonable restrictions on access to a criminal trial. However, Lappin failed to note that the court was equating media access to a criminal trial with that of the public, and thus, emphasizing the media’s First Amendment rights.

Lappin stated that "the First Amendment right to gather news has been defined in terms of information available to the public generally." In Lappin, a select portion of the media and the public was allowed to listen to McVeigh’s execution. According

\[106\] Richmond Newspapers, 448 U.S. at 589, 593-97.
\[107\] Id.
\[108\] Id. at 582.
\[109\] Id.
\[110\] See Lappin, 134 F. Supp.2d at 1016 (quoting Richmond Newspapers "Just as a government may impose reasonable time, place, and manner restrictions upon the use of its stresses in the interest of such objectives as the free flow of traffic, so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial").
\[111\] See id.
\[112\] Id. at 1010.
to federal BOP regulations certain members of the public are allowed to watch an execution, and this right includes both listening and seeing the execution live from an observation area. At McVeigh's execution 24 members of the public and press were in attendance, all of whom got to see and listen to the execution. There seems to be an underlying double standard, a discriminatory angle perhaps, for a regulation that allows certain members of the public and media to attend the execution, but not all members of the public. The media is the tool that would truly allow all members of the public and press to have the same access, to see and listen to an execution. In this situation, the rights of the press and public did not seem to apply coextensively, specifically when considering the government’s response to the McVeigh situation.

As a result of the horrific circumstances of McVeigh's crime, Attorney General John Ashcroft deviated from the standard regulation that limits the amount of execution eyewitnesses. The Attorney General allowed 250 people, all family members and friends of bombing victims, to watch the execution in Oklahoma City off of a live satellite feed from USTPH. By doing so he violated his own regulation, the one at issue in Lappin, which states in relevant part that "no photographic or visual or audio recording of the execution shall be permitted." That is, Ashcroft violated his own regulation because in order to air the execution

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113 28 C.F.R. § 26.4(c) (2000) (stating that in addition to a federal Marshal and the prison warden the following can be present for an execution: (1) necessary personnel appointed by the Marshal and Warden; (2) attorneys for the Department of Justice designated by the Attorney General; (3) persons selected by the prisoner including (i) one spiritual adviser; (ii) two defense attorneys; (iii) three adult friends/relatives; and (4) persons selected by the Warden including: (i) eight citizens, and (ii) ten press representatives).

114 See supra note 1.

115 See 18 U.S.C. § 4001(b)(1) ("The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof.

116 Mike Dorning, Hundreds will watch McVeigh die; Ashcroft Approves Closed-Circuit TV, CHICAGO TRIBUNE, April 13, 2001, at 1.

live in Oklahoma City, he had to use the most sophisticated recording equipment to ensure the security of the broadcast.\textsuperscript{118} It was, in fact, the largest execution audience since the early twentieth century when public executions were legal.

Without undermining either the pain of the bombing victims' families and loved ones, or their specific vested interest in McVeigh's fate, it seems hypocritical that a select portion of them were allowed to witness McVeigh's last moments while the rest of the public was not. It especially seems hypocritical when, according to the affidavit of an ENI attorney, Ashcroft himself admitted publicly that all Americans were victims of McVeigh's crime. Why then were only a select group of victims allowed to view the execution? The Attorney General's policy of allowing a selective group, randomly chosen through lottery, to view the execution violated the federal regulation in question in \textit{Lappin}. Considering these inconsistencies perhaps the \textit{Lappin} court upheld the regulation unconstitutionally, or at least too hastily applied a lucid standard of review, when its application excluded certain members of the public due to the "Ashcroft exception." Allowing Plaintiffs the ability to air the execution over the Internet may have counteracted this inconsistency and compensated for the seeming inconsistency between government policy and government practice by providing the rest of the public with equal access to this information.

Instead the court relied upon a proxy argument in order apply precedent, circumvent a holding that may disturb the government, and consequently cater to governmental discrimination about a highly sensitive topic. \textit{Lappin} emphasized that any witnesses to McVeigh's execution were not allowed to record the execution, therefore the media should not be allowed to.\textsuperscript{119} Furthermore, the "public" as a whole was going to be represented by proxy through members of the public in attendance.\textsuperscript{120} The court reasoned that the public had access vicariously through the witnesses present, the media had access, and therefore there was no constitutional

\textsuperscript{118} Doming, \textit{supra} note 116, at 1.
\textsuperscript{119} \textit{Lappin}, 134 F. Supp.2d at 1010.
\textsuperscript{120} \textit{Id.}
violation of First Amendment equal access jurisprudence. However, the written stipulation at trial acknowledged the Attorney General’s deviation and stated that “survivors and victims” of bombings would be allowed to view the execution. According to Richmond Newspapers the government cannot arbitrarily close the doors on criminal trials, because they had a tradition of being open when the First Amendment speech and press clauses were created. Why should this standard not apply to an execution as significant as McVeigh’s, especially when John Ashcroft himself has recognized that the McVeigh case presented a “unique set of circumstances?”

The cases discussed in this section demonstrate an initial glimpse at the courts growing tendency to provide the media with informational access since the days of Holden. Justice Stevens, undoubtedly, had the most progressive outlook for the time. Lappin applies the series of general right to access in its decision but fails to consider creative judicial ideology such as the rationale of Justice Stevens. Rather, the Lappin court overlooked judicial activism, failed to question any precedent, or at least distinguish that precedent from the unique issue that was before the court. It follows then, perhaps, that the Lappin court ignored the extreme significance of First Amendment rights in order to pacify the governmental desire not to broadcast McVeigh’s execution.

2. Media Access to Prisons: The Prison Cases

The Supreme Court has also spoke on media access to prisons generally. Lappin relied on these prison access cases, but again, these cases are distinguishable from the unique issue presented

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121 Id.
122 Id. at 1008.
123 See Richmond, 448 U.S. at 575-76.
124 See Doming, supra note 117 at 1 (quoting Ashcroft as stating that “This case has many unique elements and it is a unique set of circumstances that confront us. . .the Oklahoma City survivors may be the largest group of crime victims in our history”).
125 See generally Richmond Newspapers, 448 U.S. 555 (1980).
before the court in *Lappin*.

**a. Companion Cases: Pell and Saxbe**

In companion cases, *Pell v. Procunier*,¹²⁶ and *Saxbe v. Washington Post Co.*,¹²⁷ the Court was faced with the media’s right to access interviews with federal prisoners. Justice Stewart delivered both majority opinions. The issue in both cases was the constitutionality of regulations that prohibited face-to-face interviews between a media representative and specific types of prisoners.¹²⁸ Furthermore, Stewart stated that while the First Amendment does prohibit the government from interfering with free press, it does not mandate the “... government to accord the press special access to information not shared by members of the public generally.”¹²⁹ The prison regulations in question prevented interviews with specific prison inmates,¹³⁰ and the Supreme Court upheld these regulations, again, on the equal access principle.¹³¹

However in dissent to *Saxbe* Justice Powell, with whom Justices Brennan and Marshall joined, shunned the majority for its limited First Amendment interpretation in light of the necessity, in certain circumstances, for the press to gather and have access to information.¹³² Furthermore, Justice Powell found Plaintiff’s

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¹²⁹ *Saxbe*, 417 U.S. 843.
¹³⁰ See *Pell*, 417 U.S. at 819; see also *Saxbe*, 417 U.S. at 844.
¹³¹ See *Pell*, 417 U.S. at 829-30 ("Plaintiffs... rely on their right to gather news without governmental interference, which media plaintiffs assert includes a right to access to the sources of what is regarded as newsworthy information"); see also *Saxbe*, 417 U.S. at 844-45 ("An informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities").
¹³² *Saxbe*, 417 U.S. at 856-64 (Powell, J., dissenting) ("From all that appears in the Court’s opinion, one would think that any governmental restriction on access to information, no matter how severe, would be constitutionally acceptable to the majority so long as it does not single out the media for special disabilities not applicable to the public at large... I cannot follow the Court in
request for face-to-face interviews as one that is "essential to
effective reporting in the prison context." Although Justice
Powell did not recognize media rights as superior to the public,
he did explicate the imperative role of the freedom of the press, as
well as the public's right to be informed.

b. Houchins v. KQED, Inc.

Additionally, the Supreme Court was presented with the issue of
media access to prisons again in Houchins v. KQED, Inc. Houchins
involved a radio station's right to use a camera, record,
film, and make sound recordings in certain areas of a prison, all to
be published by either newspapers, television or radio. The
Houchins court followed Pell and Saxbe in finding that the
media's right to access is coextensive with that of the public in
general. Chief Justice Burger stated that "(u)nder 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, in a powerful dissent Justice Stevens condemned the
court for applying Pell and Saxbe as authoritative precedent
because Appellee's KQED, Inc., claim did not rest on the fact that
the press should have had greater access than the public. Justice
Stevens commented on the public's right to be informed of prison
conditions, which could only be disseminated through the media,

concluding that any governmental restriction on press access to information, so
long as it is nondiscriminatory, falls outside the purview of First Amendment
concern". (emphasis added).

133 Id. at 861.
134 Id. at 857.
136 Id.
137 Id.
138 Id. at 15-16.
139 Id. at 25.
thus placing emphasis on the First Amendment. 140 Furthermore, he stated that “without some protection for the acquisition of information about the operation of public institutions at large, the process of self-governance contemplated by the Framers would be stripped of its substance.” 141

c. Garrett v. Estelle

Various circuits have dealt with media access to government information in general. The most salient example was heard in the Fifth Circuit, which was the first federal circuit to adjudicate the question of whether a state can enjoin the media from filming an execution. 142 In Garrett v. Estelle 143 the media was allowed access to an execution, however, they were prohibited from recording the execution once present in the witness chambers. 144 Garrett involved a challenge to a Texas regulation that prohibited television filming of state executions and the Court of Appeals for the Fifth Circuit, reversing the District Court, upheld Texas law. It relied upon the principle of equal access, stating that since selective media members were allowed to witness the execution the public and the media had indeed been extended equal access. 145

This Fifth Circuit decision has been quoted frequently, specifically when the media’s right to televise executions has been an issue. The court in Lappin applied it as if the decision was directly on point. Lappin is highly distinguishable from Garrett in two ways: its content and its controversy. The Garrett court held that the Texas regulation was constitutional because the public has no right to broadcast the execution, either should the media. 146 Lappin relied upon an almost identical proposition but failed to

140 Houchins, 438 U.S. at 30-1 (Stevens, J., dissenting) (“In addition to safeguarding the right of one individual to receive what another elects to communicate, the First Amendment serves as an essential societal function”).
141 Id. at 32.
142 See Bessler, supra note 6, at 7-8 and accompanying text.
143 556 F.2d 1274 (5th Cir. 1977).
144 Id. at 1278.
145 Id.
146 Id. at 1279.
distinguish Garrett from its issue. In Garrett, Plaintiffs argued that the government must show a “compelling state interest” before First Amendment rights can be eroded.\textsuperscript{147} The court’s response was that “balancing a public interest against an individual’s constitutional right has been used when the two are found to be inconsistent.”\textsuperscript{148} Thus, this is one major distinguishing factor between Garrett and Lappin. Whereas in Garrett the court found that there was no inconsistency that would prompt a balancing test, the facts of Lappin did present an inconsistency when a certain class of the public were allowed live access to McVeigh’s execution and the remaining members of the public were denied access.

In the alternative, all of the aforementioned cases can be read to distinguish the unique issue in Lappin. First Pell, Saxbe, and Houchins involved routine media prison investigations, including interviews and photographs, while Lappin involved a much more serious issue of significant public interest. Secondly, these prison access cases can be read to allow for Plaintiffs’ request in Lappin.\textsuperscript{149} These cases rely upon equal access to press and public. Nevertheless, equal access was denied when the Lappin court denied Plaintiffs’ request to air McVeigh’s execution over the Internet. The Internet is a medium that would have allowed the public at large to view the execution, just as the witnesses in the execution chamber and those in Oklahoma City were able to. In light of the series of cases just discussed, it may seem that the Lappin decision was either incorrect, inevitable, or both. However, Lappin should not be dismissed so easily, not only

\begin{itemize}
\item \textsuperscript{147} Id.
\item \textsuperscript{148} Garrett, 556 F.2d at 1279.
\item \textsuperscript{149} See Jeff Angeja, Televising California’s Death Penalty: Is There a Constitutional Right to Broadcast Executions?, 43 HASTINGS L.J. 1489, 1505 (1992) (“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 set a dangerous precedent...”).
\end{itemize}
because of its controversial subject matter, but also because of its potential future influence.

3. The Media's Right of Access Under Exceptional Circumstances:

   a. The Gulf War Litigation

   Times of warfare have created political, and socio-economic exceptions to societal norms and comforts. Specifically, the Supreme Court has recognized an exception to First Amendment protection in order to preserve national security in times of conflict.\textsuperscript{150} According to common law jurisprudence, national security is an exception to First Amendment freedom.\textsuperscript{151} Restrictive media coverage during the Gulf War was a salient example of government regulation of the media's First Amendment right to access information.

   The court in \textit{Lappin}, analogized its restriction of media access to that imposed by the government during the Gulf War. Two specific causes of action evolved out the Gulf War that dealt with the media's right to access information in light of government regulation.\textsuperscript{152} \textit{Lappin} relied upon \textit{J-P Pictures, Inc. v. Dept. of Defense}\textsuperscript{153} as an analogous case to its issue. \textit{Lappin} quoted the \textit{JP Pictures} proposition that "First Amendment rights to 'freedom of speech' [and] of the press' do not create any per se right of access to government property or activities simply because such access..."
might lead to more thorough or better reporting.\(^{154}\)

However, the court was incorrect in drawing this analogy. First, government intervention during wartime is its own distinguishable situation, as unique and un\(^{155}\)related to the issues presented in \textit{Lappin}. During a time of war, the media serves as the window for the American perception of military activity and thus the gage of American political status overseas. Therefore, the media serves as a significant bastion of knowledge and thus as a check on public perception of governmental foreign activity. However, in doing so, there are legitimate points where government regulation of this media coverage is necessary to preserve national security.\(^{155}\)

Secondly, the \textit{Lappin} court itself acknowledged that cases such as \textit{JP Pictures, Inc.} were not relevant to the issues that were before it, but still relied upon media access cases in different contexts.\(^{156}\)

At issue in \textit{JP Pictures}, was the constitutionality of a Department of Defense (DOD) policy adopted during the Gulf War that restricted the media and public from viewing the return of deceased soldiers to Dover Air Force Base.\(^{157}\) Plaintiffs argued that the Dover access policy was discriminatory, or constituted “viewpoint discrimination” because the government did not want any type of anti-war images broadcast to the public.\(^{158}\) However, the Court of Appeals for the District of Columbia found no merits in the discrimination claim because the Dover access policy was applied equally to the media as well as the public.\(^{159}\)

Alternatively, in \textit{Lappin} national security was not a risk for the government. Nevertheless, the court considered \textit{JP Pictures}, which mandates for the restriction of First Amendment press protection during war, pursuant to the specific DOD regulations at issue. In \textit{Lappin}, the government’s argument against allowing

\(^{154}\) See \textit{Lappin}, 134 F. Supp.2d at 1012.

\(^{155}\) See \textit{Steger}, supra note 150 and accompanying text.

\(^{156}\) \textit{Lappin}, 134 F. Supp.2d at 1012 ("Although no direct comparison can be made between the atmosphere of prison, \textit{specifically execution chambers}, and any other part of the world at large. . . ").

\(^{157}\) \textit{JP Pictures Inc.}, 86 F.3d at 236.

\(^{158}\) \textit{Id.} at 239.

\(^{159}\) \textit{Id.} at 240.
Plaintiffs to air the execution was the maintenance of prison security. However, the risk to prison security that McVeigh’s Internet execution would have posed is not even comparable to the level of risk being discussed in *JP Pictures*. The court in *Lappin* did rely upon one similar proposition as used in *JP Pictures*, an “overriding government interest, to deny the media the right to access the respective information.” The *JP Pictures* court stated that broadcasting war causalities would increase anti-war sentiment, whereas broadcasting soldiers going off to war would increase war support amongst the public. On a policy level the court was concerned with maintaining public support for the war.

Similarly, in *Lappin* the court cited a governmental interest for barring the broadcast of McVeigh’s execution. It stated that in the “special environment of a prison” a regulation is valid regardless of whether it infringes upon a prisoner’s First Amendment rights, so long as it is “related to legitimate penological interests.” The government stated that these penological interests included maintaining order and safety within the prison. However, similar to the policy which undermined media access in *JP Pictures*, the penological interests of *Lappin* were tied to a governmental incentive. The government’s argument in *JP Pictures* was more legitimate than that in *Lappin*, as it was tied to the preservation of national unity, confidential military strategy and national security during a time of war.

The level of risk that the governmental incentive was protecting in *Lappin* was much less severe than that posed in *JP Pictures*. For instance, the prisoners of USPTH would not have had immediate access to the Internet to view the actual execution, whereas in *JP Pictures* the issue was based on the public’s ability to view casualties of war on the television. It is most likely accurate to assume that most federal prisoners in maximum-
security prisons do not have Internet hook-ups within their cells. Considering this reality, how could prison security have been disturbed by an Internet broadcast of McVeigh's execution? Albeit prisoners would have been aware of the airing, they most likely would not have had access to it.

When Judge Tinder looked to other media access cases that he felt could have "no direct comparison" to the issue before him, he failed to look at the other piece of Gulf War litigation that also dealt with media access in the wake of a potential national security problem. In *Nation Magazine v. Dept. of Defense*, the District Court for the Southern District of New York emphasized the importance of First Amendment guarantees and consequently refused to "define the outer constitutional boundaries of access." At issue in *Nation Magazine* were Department of Defense regulations which were promulgated when the United States sent troops to the Middle East in 1990. The effect of these regulations was to restrict media access and coverage of events during the Gulf War, and the means to achieve this goal was through the establishment of media pools. Although this court established a clear ruling on such an "abstract" constitutional question, its rationale clearly distinguished between different forums in which the media has traditionally sought access. It stated that "...military operations are not closely akin to a building such as a prison, nor to a park or a courtroom."

Nevertheless, it is most likely accurate to state that the "overriding government interest" in *JP Pictures* was not comparable to that in *Lappin*. Further, in light of a discussion of *JP Pictures*, it would have been prudent for the court in *Lappin* to discuss *Nation Magazine*, and its important factual distinctions as well. In the interest of equity and time, a court should not just

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166 *Lappin*, 134 F. Supp.2d at 1011.
168 *Nation Magazine, supra* note 167, at 1572.
169 *Id.* at 1563.
170 *Id.*
171 *Id.*
172 *Id.*
arbitrarily attempt to compare a first impression issue to non-binding case law that is not comparable in order to further an argument that just follows other precedent. Therefore, the Lappin court erred when it relied upon authority with such a far-reaching analogous reach.

B. A First Impression Forum: The Distinct Nature of the Internet

There is no doubt that our society has become dependent upon various luxuries the Internet has to offer, such as its interactive capabilities. However, the interactive nature of the Internet is what has also presented a problem in dealing with its status within the legal sphere. Should the Internet receive the same First Amendment protection that other, more traditional, forms of media do? Specifically, should the unique characteristics of the Internet allow for a broader First Amendment protection?

These questions are growing in relevancy, as legal questions concerning the Internet continue to develop in contemporaneous courts. Congress has even promulgated legislation in order to provide structure in this formerly gray Constitutional area. ¹⁷³ However, what is acceptable in cyberspace sometimes remains unclear. ¹⁷⁴ In rendering its decision, Lappin erroneously failed to acknowledge the special role of the Internet. In fact, the court barely mentioned it. ¹⁷⁵ This section will propose that not only did Lappin overlook a 1997 landmark Supreme Court decision which involves Internet constitutionality, but it also overlooked a less restrictive alternative as provided by the court in Sable

¹⁷³ One major example of governmental Internet regulation is the Communication Decency Act of 1996, passed by Bill Clinton in order to control the amount of obscene, indecent and patently offensive material available in cyberspace. See generally Elaine M. Spiliopoulos, The Communications Decency Act of 1996, 7 DEPAUL-LCA J. ART & ENT. L. & POL’Y 336 (1997).
¹⁷⁴ See Spiliopoulos, supra note 173, at 359 (“Because of the problems of defining speaker and listener on the Internet, the traditional notions of constitutionality—protected “speech” must be re-worked to encompass this inter-active medium. The legal standards that govern the Internet much also change to reflect that progress”).
¹⁷⁵ See Lappin, 134 F. Supp.2d at 1019.
Communications v. F.C.C.\textsuperscript{176}

1. Should the Internet Serve as a Communication Vehicle for Capital Punishment?

In 1997, the Supreme Court faced the question of defining the parameters of what is adequate Internet communication in \textit{Reno v. ACLU}.\textsuperscript{177} At issue in \textit{Reno} was the constitutionality of the Communications Decency Act ("CDA") of 1996 when Plaintiff ACLU alleged that it violated the First Amendment.\textsuperscript{178} The Court noted that each medium of expression will present its own constitutional problems,\textsuperscript{179} and that the Internet is not as invasive as other forms of communication, like radio or television.\textsuperscript{180} Furthermore, it found that the CDA was a content-based regulation which improperly restricted speech.\textsuperscript{181}

The Court analyzed the distinguishable characteristics of the Internet, and Justice Stevens described it as "this dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video and still images, as well as interactive, real-time dialogue."\textsuperscript{182} It was also noted that the Internet is not a "scarce" tool, but rather a ubiquitous form of communication that is inexpensive and relatively unlimited.\textsuperscript{183} Therefore, Justice Stevens placed the Internet in its own constitutional category and rejected any analogy between the Internet and broadcast medium.\textsuperscript{184}

\textsuperscript{176} 492 U.S. 115 (1989).
\textsuperscript{177} 521 U.S. 844 (1997).
\textsuperscript{178} Id.
\textsuperscript{179} Id. at 868 (quoting Southeastern Promotions Ltd. V. Conrad, 420 U.S. 546 (1975)).
\textsuperscript{180} Id. at 869 (using language from Pacifica Foundation v. FCC, 438 U.S. 726 (1978)).
\textsuperscript{181} Id. at 868.
\textsuperscript{182} Reno, 521 U.S. at 870.
\textsuperscript{183} Id.
\textsuperscript{184} Justice Stevens rejected previous Supreme Court decisions made in Red Lion v. FCC, 395 U.S. 367 (1969), and Pacifica v. FCC, 438 U.S. 726 (1978). See generally Id.
Lappin failed to discuss, unlike Reno, the unique status of the Internet as an information vehicle and its ubiquitous nature as a source for information and media tool. Rather Judge Tinder quoted Marshall McLuhan’s 1960s exclamation the “medium is the message,” but never discussed the medium at all.\textsuperscript{185} Access to the World Wide Web, as a constant and universal information pool, should be distinguished from other forms of media, such as print media and traditional commercial media.\textsuperscript{186} Should courts give Internet media a higher level of First Amendment protection, because of the very nature of the information source? Lappin certainly did not, and this essay is proposing that it should have. Lappin erred when it did not use the Internet standard as articulated by Reno.\textsuperscript{187}

Like the contested regulation in Reno, the regulation in Lappin involved a piece of federal legislation that restricted communication where the Internet was the medium. Also similar to Reno, Lappin should have applied stricter scrutiny because the Internet and First Amendment allegations were concerned. The Supreme Court has stated that deference to Congress cannot limit judicial inquiry where First Amendment rights are involved. Therefore, Lappin erred when it relied upon the media access cases, but failed to distinguish the medium at issue in both. Furthermore, it also erred when it did not apply Reno and its progeny.

2. Less Restrictive Alternative?: The Sable Balancing Test

The Supreme Court has not merely looked at the modes of communication when discussing “right to access” but, in a balancing test, have also found First Amendment rights to free speech inherently more significant that in protecting certain interest groups. In Sable Communications v. F.C.C.,\textsuperscript{188} Justice White held that a “dial-a-porn” service was acceptable speech

\begin{footnotes}
\footnotetext[185]{See Lappin, 134 F. Supp.2d at 1006.}
\footnotetext[186]{See generally Id.}
\footnotetext[187]{See Reno, 521 U.S. 844.}
\footnotetext[188]{492 U.S. 115 (1989).}
\end{footnotes}
under the First Amendment. Although obscene, the court determined that this pornography phone service did not reach the obscenity level required for government regulation of First Amendment protection. The Court noted the special protection extended to children. In balancing the potential danger to children against the burden that would be imposed on First Amendment rights, the Court decided that the need to protect the freedom of speech and press was more significant. The rationale behind this decision was based primarily on the fact that adult-to-adult communication should not be inhibited when children’s access to the pornography porn service can be controlled.

The court in *Lappin* could have used an end-means balancing test like *Sable*, instead of relying on minimally analogous case law. First, similar to the “dial-a-porn” in *Sable*, which was not readily available to any one user, the broadcast of McVeigh’s execution in *Lappin* would have been controlled because the medium would have been the Internet. In both of these instances, the user needed to take affirmative steps to access the desired information. Neither phones nor Internet sites are as accessible as television and print medium. Secondly, in *Sable*, the court was willing to overlook the traditionally strong policy interests in protecting children in order to uphold First Amendment principles. The court in *Lappin* could have upheld First Amendment principles.

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189 *Id.* at 131.
190 *Id.*
191 *Id.*
192 *Id.* at 126 (“The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if is chooses the least restrictive means to further the articulated interest... it is not enough to show that the Government’s ends are compelling; the means must be carefully tailored to achieve these ends”).
193 See *Sable*, 492 U.S. at 131 (“Under our precedents, § 223(b) Is not a narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages... § 223(b) ... has the invalid effect of limiting the content of adult conversations to that which is suitable for children to hear”).
194 *Id.* at 126 (“We have recognized that there sis a compelling interest in protecting the physical and psychological well-being of minors. This interest

https://via.library.depaul.edu/jatip/vol12/iss1/11
Amendment rights of the press and public by applying a Sable ends-means balancing test. If the Supreme Court was willing to overlook the interest of children in the name of freedom of expression, than the District Court in Lappin surely could have chose to champion First Amendment principles also.

V. IMPACT

Within the past decade, where violent crime and terrorism remain a reality, the effect has been the continued use of capital punishment. Consequently it can safely be assumed, that the death penalty will remain a reality within our criminal justice system. Simultaneously, modern technology has perpetuated a growing dependency upon the Internet within our society. The Internet now performs many functions within the lives of everyday Americans, as a form of communication, entertainment source, educational tool and business resource.

In the future, the first impression issue adjudicated in Lappin will most likely find itself before the courts more frequently as communication and media technology become more sophisticated. Contemporary society has witnessed an increase in the amount of death penalty executions, simultaneously, amongst a populace who feeds off a growing dependence on the Internet.

A. The Benefits and Detriments of Allowing An "Internet" Execution

In the aftermath of the enormous domestic and international attention that Lappin attracted, it is clear that the dividing lines were drawn over its holding. These lines were drawn between the

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extends to shielding minors form the influence of literature that I is not obscene by adult standards").

195 Death Penalty Information Center, at http://www.deathpenaltyinfo.org/ (providing various death penalty statistics in different jurisdictions; stating that executions have increased dramatically since 1976).

196 See generally Reno, 521 U.S. 844.
majority, supporting Lappin who found the thought of an aired McVeigh execution as repulsive, inhumane or undemocratic, and the minority who disagreed with Lappin recognizing that there would have been various benefits in allowing Plaintiffs' controversial request.

B. Would the Benefits of Allowing an Internet Execution Outweigh the Detriments?

Generally speaking, critics of ENI's request to broadcast the McVeigh execution have based their disapproval upon various moral foundations.\(^{197}\) However, where really did the scruples lie in this situation? Definitely not with Timothy McVeigh, the unrepentant vigilante who was convicted for the death of 168 people in the name of retribution against the government for their handling of the Waco, Texas, and Ruby Ridge, Idaho, situations.\(^{198}\)

Some critics, stemming from domestic and international circles, have cited common decency and respect for human life as the basis of their opposition. "To take satisfaction from watching another human being die, even on who is an enemy, is to diminish, pervert, our own humanity. And it no more purges our grief than a raging scream drains off our anger."\(^{199}\)

Others pronounced a fear that airing McVeigh's execution would have rendered him a martyr, and thus undermine the mass loss of life that was the consequence of his criminal activity.\(^{200}\)

For instance in a condemnation of the death penalty in general, the London newspaper The Independent stated that American media has been turning murderers into celebrities for a long time.\(^{201}\) Furthermore, in a flamboyantly anti-American

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\(^{197}\) See Infra notes 199 and 201.  
\(^{198}\) See Murray, supra note 45, at A1.  
\(^{200}\) Id.  
\(^{201}\) Natasha Walter, The US should execute people in Public, THE INDEPENDENT (London), May 5, 2001, at 5 ("People who watched laughing, drinking beer, cheering. This would be horrible, but at least then the United States would be revealed in its true colours (sic)-not as the decent, humane society that it likes to
commentary it stated that "... if the United States decided to make every execution public, by televising it, there would be people who watched out of pure voyeurism." Nevertheless, the law does not preclude or punish voyeurism. Furthermore, voyeurism may not be ethical but it certainly does not bar First Amendment freedom of press or speech. Whether one would have viewed McVeigh's execution based on voyeurism, a perverse curiosity or just plain vengeance, the democratic principles that our Nation is founded on allow for all of these reasons, and for the person to express freely their intentions to do so. As Z. Chafee has stated "there is an individual interest, the need of many men to express their opinions on matters vital to them . . . 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."

Some advocates and critics of the death penalty alike, have expressed a desire for broadcast executions, for their own respective reasons. Some death penalty supporters feel that criminal punishment should be aired. Anti-death penalty groups also feel that airing an execution such as McVeigh's via the Internet may be beneficial, the rationale being that it may have a counter-effect on general death penalty sentiment. That is, exposing the public to the intricacies of death penalty procedure may so abhor the public that the effect would be an increase the anti-death penalty movement. Why exactly is the government unwilling to expose the public to the graphic details of an execution if it is willing to use it as a means of punishment?

In Lappin, the government based its objection to ENI's request on four alleged overriding governmental interests, including "(i) the preservation of the sensationalizing of executions (ii) the preservation of the solemnity of executions (iii) the maintenance of security and good order in the Federal Prison System, and (iv) sell itself as, but as the barbaric country that it is, a country that kills and kills again, in the fact of all international condemnation".

202 Id.

203 See Saxbe, 417 U.S. at 862 (Powell, J., dissenting) (quoting Z. Chafee, FREE SPEECH IN THE UNITED STATES 33 (1954)).
protection of the privacy rights of a condemned individual, the
victims, their families and those who participate in carrying out the
execution." The court in Lappin was persuaded by these
arguments, and erred when it neither questioned nor critically
analyzed the government's contentions. Instead of recognizing
these arguments as recycled excuses for government censorship
and manipulation of the media, it avoided taking a progressive
step, maintained the status quo and routinely applied stare
decisions.

Possibly the most legitimate government argument was to avoid
eventualizing the execution. "No restrictions whatsoever are
placed on how the media representatives report ... they seek not
just to view the execution-they seek to film it and broadcast it
simultaneously over the Internet so that anyone willing to pay a fee
for viewing this event can do so." However, the government
aired the execution itself in Oklahoma City, the only difference is
that they did not charge the victims a fee. It was argued Plaintiffs'
proposal to make the broadcast a 'pay-per-view' would have
eventualized it. The fact that was not highly publicized was
that the fee was only $1.95 and that the funds raised were intended
on going to charities established for the 168 victims of the
Oklahoma-city bombing.

Nevertheless, the government stated that it wanted to preserve
the 'solemnity' of executions, however, on the day of execution it
did not ban the public outside from selling tee shirts or the media
circus surrounding the prison outside. The third policy
consideration was for the maintenance of safety within prisons,
although as already discussed, it is highly unlikely that if
McVeigh's execution had been broadcast that prison safety would

204 See Lappin, 134 F. Supp.2d at 1017-18.
205 Id.
206 Id. at 1006.
207 Id.
208 Rex W. Huppke, Webcast of McVeigh Execution Sought; Internet Firm Ties
209 See Walter, supra, note 201 and accompanying text.
210 See supra pp.27-28.
have been at high risk. The final "overriding interest" of the government in *Lappin*, protection of the privacy rights of a condemned individual, the victims, their families, is quite interesting considering two factors.

First, McVeigh wanted his execution to be broadcast, therefore it could have been presumed that his privacy concerns were nonexistent. Moreover, the victims of the Oklahoma bombings were not provided their privacy during the on-going media coverage of the bombing aftermath. Therefore, privacy concerns could not have been substantially overriding. Secondly, the government has not prohibited Internet cameras currently placed within a prison in Maricopa County, Arizona, by Sheriff Joe Arpaio. Arpaio has gained a reputation as being the "America's toughest sheriff," and has waged a personal war on all prison inmates within his county in order to deter crime. Presently, on http://www.crime.com, 'Jailcam' images are accessible 24 hours a day. These Jailcams cover live feed from four different web cameras, which convey anything from a sleeping inmate, to an

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211 See *Lappin*, 134 F. Supp.2d 1002.
212 See supra, note 1.
213 Joe Arpaio is an infamous figure in Arizona. As both a potential gubernatorial candidate, highly recognized political figure, and Sheriff of Maricopa County, Arpaio has taken a hard-line approach to crime. For instance, coffee, cigarettes and pornography are all prohibited in Maricopa County's Jail. Inmates are forced to wear pink underwear, eat green bologna, put on chain gangs and to dig human graves. Amnesty International has declared him a human rights violator, whereas back in Arizona he covets an eighty-five percent approval rating. Although he is highly supported in his home state, Arpaio has not gone without high levels of controversy. The government has not yet intervened in Arpaio's Internet Jailcams, not surprisingly since Arpaio also donated major contributions to the Bush campaign last year. For an entire discussion on Arpaio's background, politics, and controversy see generally Barry Graham, *Star of Justice*, HARPER'S MAGAZINE, April 1, 2001, at 59.; For information on the pending class action that Arpaio is defending against several inmates, who have pressed suit based on the unconstitutionality of the Internet Jailcams, see also Maricopa County Seeks Dismissal of $1.4 Billion Jailcam Suit, July 17, 2001, at 11; To visit the Internet Jailcams go to, http://www.crime.com.
214 See generally Graham, supra note 213.
215 See supra, note 213 and accompanying text.
inmate undressing, and other imaginable daily prison-cell occurrences.\textsuperscript{216} This Internet feed has ended up being highly popular, since the continuing local, popular figure created them. Could it not be stated that this instance is an overriding disrespect to the privacy issues within prisons that the government cited in \textit{Lappin}? 

Although the government did have an interest in McVeigh's execution, it cannot be said that that interest was overriding enough to suppress First Amendment press and speech clauses. The Framers of the Constitution unambiguously incorporated both of these guarantees into the language of the First Amendment, thus, they intended for a very free press. Additionally, they used this language to ensure a check on the government, and any attempt by the government to suppress free speech. When \textit{Lappin} denied Plaintiffs the access desired based on the aforementioned policies, it rendered these guarantees as superfluous and irrelevant.

\textbf{C. Will Lappin Have a Direct Future Impact?}

Thus, our society remains a puzzling one. Our government must have suddenly developed a sense of selective ethics by the time of \textit{Lappin}, based on the public policy concerns they cited as their basis for prohibiting the broadcast of McVeigh's execution.\textsuperscript{217} Our major networks have the First Amendment right to broadcast our president speak of his sexually explicit endeavors, air "reality" television programs that promote sexual exploitation and infidelity, and perpetuate a Jerry Springer culture, notwithstanding, our public retains the First Amendment right to receive that information. Moreover, a New York public radio station and ABC-TV's Nightline both aired live tape-recorded portions of certain Georgia executions.\textsuperscript{218} Furthermore, an Arizona sheriff has

\textsuperscript{216} \textit{Id.}

\textsuperscript{217} \textit{See Lappin,} 134 F. Supp.2d 1002.

\textsuperscript{218} Twenty-three executions performed in Georgia from 1983-1998 were tape-recorded by the prison in order to insulate itself against any potential litigation according to the Department of Correction. Although executions in Georgia are no longer tape-recorded, the ones that have been have broadcast on both radio
been allowed to place Internet cameras within prison cells that provide live feed of various questionable prison activities to any inquisitive web surfer. Yet the government, using its regulation, forbade the press access to broadcast an event, albeit an unpleasant one, may have helped provide closure to a tragedy that transcended every Americans’ life.

Although a sad state of affairs, the examples stated above help illustrate how American ‘pop culture’ maintains itself on many facets of voyeurism. Whether this characteristic is an ethical one is questionable, but one certainty is that it is legal. Nothing in our Constitution, even from a contextual perspective, outlaws morbid curiosity or political controversy. In fact, it was drafted to allow its citizenry the right to express either of these impulses. Rather, what the Constitution does require is for the freedom of the press and freedom of speech. From a legal standpoint, and without taking away from the horrific magnitude of the Oklahoma bombing, it is hard to reconcile this contradiction as it erodes First Amendment rights of the public and the press alike.

With a record as notorious as his execution, until recently, Timothy McVeigh was probably the most hated and boggling criminal figure in recent American history. In the past few months, however, another has filled his shoes. It can safely be assumed that Osama Bin Laden is presently the most disgusted and wanted man in the world. The national tragedy of September 11th has left a permanent impression upon our population on many levels, psychologically, economically, and politically. Moreover, the legal system has not gone untainted. American constitutional liberties are being redefined and partially restricted every day. Anti-terrorism legislation has been passed which has placed

and television. A New York public radio station, WNYC, broadcast the tapes nationally. ABC-TV’s Nightline had also planned on broadcasting portions of the tape-recorded executions as of earlier this year. Additionally at this time, complete recordings of nineteen of these executions, including two situations where the convicted needed second bursts of electricity to die, were to be posted on the internet. See Larry McShane, ‘I Heard a Pop’: Radio Show Airs Tapes From Executions, CHICAGO TRIBUNE, May 3, 2001, at 8.

219 See supra note 213.

220 Id.
constitutional restraints upon every American’s lifestyle. Specifically, for instance, this new legislation allows for the detention of suspected terrorists for an unspecified amount of time, without any formal charge.

These constitutional restrictions are just one of many changes that our society has begun to see in the aftermath of September 11th. The media, as well as the government, has a vested interest in the alteration of constitutional privileges. Currently the manhunt for Bin Laden, and anyone remotely related to him, is the focus of domestic and international media attention. Domestic coverage of the ‘war of terrorism’ has been relatively uninhibited as far as the public is concerned. The government’s use of the media as a political tool and has not only served as a forum to condemn terrorism, but also to increase patriotism and support for their efforts in Afghanistan. Perhaps that is what our public needs, moreover wants in the present confusing and fearful time.

The government is allowing the public to watch a bloody manhunt for the world’s most wanted man, but it wouldn’t let the media to air the execution of America’s former number one criminal. Hopefully Bin Laden and those responsible for the terrorist attacks will be apprehended. When this happens, will the government allow their execution over the Internet? Will the public want to see it, moreover, will the public push for live retribution so badly that the government will have to bow to their concerns? These questions are highly sensitive and cannot be answered immediately. In the event that they arise however Lappin will undoubtedly resurface.

VI. CONCLUSION

At the time of controversy even Fox Broadcasting, probably an enclave of the media most notorious for extending extreme First

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221 The Thomas Library of Congress web cite, at http://www.thomas.loc.gov. This web cite provides a detailed list of the new anti-terrorism legislation proposed by President Bush immediately after the terrorist attacks of September 11, 2001.

222 Id.
Amendment rights, shunned the notion of broadcasting McVeigh’s execution. Had ENI beat Fox at its own game? Without attempting to engage in unnecessary speculation, it is quite possible that if Fox had thought of the idea before ENI, or had technological capability to do so, it may not have been so critical of the idea. When dealing with such a highly sensitive issue, no news station or Internet company would want to be the first entity to attempt to air such controversial subject matter.

Plaintiffs ENI and Liveontheweb.com broke that mold, and decided to be the first until they were enjoined by the court. Subsequently, CBS admitted that it would have possibly aired a clip of the execution if it were allowed to, while C-SPAN embraced the notion of televised executions and felt that the government should allow some form of media access. After the onset of the highly controversial litigation that Lappin brought, many major networks publicly deemed the notion of an Internet execution as morally repugnant. However, a week before McVeigh’s first scheduled execution 1,400 journalists amassed outside Terre Haute’s federal prison like a group of school children, vying for “front row seats,” or any other contact from within.

The Lappin court refused to even acknowledge, much less discuss, the wide First Amendment freedoms allotted to the media and entertainment industry as a whole in regard to entertainment or information. Perhaps had this not been a facial challenge, but instead as-applied, the court would have been more willing to circumvent its application of the execution regulation in this specific instance. The goal of this Note was not to endorse the Internet broadcast of all executions to the point, for instance,
where children or other special interest groups could access them. There is a real danger that in that instance, that the memorable slippery slope would emerge, making live executions a mainstream, Friday night, popcorn-filled event. However the proposed broadcast of the execution of Timothy McVeigh was a unique event of its own, especially considering the Internet was the proposed medium.

Although case law has stated that the press gets no special access rights above the public generally, the issue presented to the court in Lappin was indeed unprecedented. Therefore, the court erred in refusing to acknowledge the many unique circumstances of the situation before it. Instead, it relied on recycled policy notions and case law that was not necessarily applicable to the issue at bar. In doing so the Lappin decision undermined the First Amendment guarantees of freedom of speech and press. This issue, however, is not a dead one. Rather, the constitutional boundaries of what the press can and cannot access have been forever changed with the invention of the Internet. The death penalty will most likely also not evaporate from our criminal justice system. In situations like Lappin, when the two become inextricably intertwined, it will be up to the courts to decide where to draw the line.

The recent horrific events of September 11th have created a broadcast war, on both the television and the Internet; therefore, the Lappin issue will most likely surface before the judiciary again. What will happen if Osama Bin Laden, or other parties responsible for September 11th, is captured? Surely many members of the public and press, including perhaps the government, will relish at the possibility of watching his execution on the Internet. The Lappin decision, however, will not allow that until the government can materialize an "overriding government concern" for doing so, or inversely until the judiciary finds that the government has no "overriding government concern" to prevent it.

Kristen Frost