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## Press Clause Constructed in Context: The Journalists' Right of Access to Places, The

Tom A. Collins

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## **THE PRESS CLAUSE CONSTRUED IN CONTEXT: THE JOURNALISTS' RIGHT OF ACCESS TO PLACES**

Tom A. Collins\*

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## I. INTRODUCTION

Journalists often seek access to places (other than courtrooms) owned or controlled by the government or private parties. This access furthers the news-gathering enterprise.

Accordingly, the media often assert that the first amendment protects these efforts. When journalists enter such places, however, they invade the rights of the owners. Private parties' interests in privacy and property are violated. In addition, the government's responsibility to properly perform its function is hampered and governmental property interests infringed by such invasions. This conflict raises the issue of whether under the press clause of the first amendment<sup>1</sup> the media, as journalists and the employers of journalists, have a sufficiently strong interest in access to overcome the conflicting private and governmental interests. This Article explores the problem created by this conflict of asserted rights.

The Supreme Court has adumbrated the doctrine that the media has the same right under the press clause of the first amendment that the general public enjoys. This doctrine, however, has not been articulated in a way that totally precludes some special consideration for the media.<sup>2</sup> In *Branzburg v. Hayes*,<sup>3</sup> the Court held that reporters had no constitutional privilege to withhold from a grand jury information attained from confidential sources. The

1. The first amendment provides in pertinent part, "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I. This guarantee was first applied to the states as incorporated by the due process clause of the fourteenth amendment in *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

2. See Anderson, *The Origin of the Press Clause*, 30 UCLA L. REV. 455, 459-60 (1983).

3. 408 U.S. 665 (1972).

media was held to have no greater first amendment right than the public. In *Zurcher v. Stanford Daily*,<sup>4</sup> the Court held that the same standards apply for search warrants against the media as for those against the public. In three cases in which the media sought access to jails and prisons, *Pell v. Procunier*,<sup>5</sup> *Saxbe v. Washington Post Company*,<sup>6</sup> and *Houchins v. KQED, Inc.*,<sup>7</sup> the Court held that the media has no greater constitutional right of access to penal institutions than the public.<sup>8</sup> Thus explicated, the doctrine denies journalists any extensive right of access to places and essentially amalgamates all first amendment rights into a single unitary right.<sup>9</sup>

The Supreme Court decisions do not preclude conferring on the media a right sufficient to fulfill the media function. The Court in *Branzburg* recognized that its doctrine might not fully protect the media.<sup>10</sup> In his important concurring opinion, Justice Powell, who supplied the fifth vote for the majority, asserted that the doctrine would be subject to review if the media were unduly inhibited.<sup>11</sup> Properly understood, the prison access cases support the same view.<sup>12</sup> In *Houchins*, a badly fragmented Court did not render an opinion of the Court, failed to definitely address the right of the

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4. 436 U.S. 547 (1978).

5. 417 U.S. 817 (1974).

6. 417 U.S. 843 (1974).

7. 438 U.S. 1 (1978).

8. *Pell v. Procunier*, 417 U.S. 817, 833 (1974).

9. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 800 (1978) (Burger, C.J., concurring) asserting the press "merit[s] special mention simply because it [has] been more often the object of official restraint." Justice Burger noted that freedom of speech and freedom of the press were originally thought of as interchangeable. *Id.* at 799-800; *see also* L. LEVY, EMERGENCE OF A FREE PRESS (1985) (updating LEGACY OF SUPPRESSION (1960)). Other scholars agree with this view that the framers intended to create one unified right, the freedom of expression, encompassing both the freedom of speech and the freedom of the press. *See, e.g.*, Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 88-95 (1975); Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595, 599 (1979); Nimmer, *Introduction — Is Freedom of the Press a Redundancy; What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 641 (1975); *see also* Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 460 (1983); Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731, 782-83 (1977); Sack, *Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press*, 7 HOFSTRA L. REV. 629 (1979). At times this seems to argue for absolute protection of the media.

10. *Branzburg v. Hayes*, 408 U.S. 655, 706-08 (1972).

11. *Id.* at 709-10 (Powell, J., concurring).

12. *Compare* *Pell v. Procunier*, 417 U.S. 817 (1974) with *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978). Both cases are discussed *infra* at note 78 and accompanying text. The equality concept does allow a slight functional preference. The equality concept does not require the exact same treatment, but treatment that is equivalent. *See infra* note 52. This Article by, its emphasis makes it appear, at least in part, that these include many or mostly difficult situations. This is not so. Journalists routinely receive preference in press pools, news conferences, and reporters' galleries — all reflecting in practice this slight preference.

media, and, in concurring and dissenting opinions, provided support for a functional right for the media.

These opinions utilize arguments based on the constitutional principle of freedom to speak or publish without inhibitions as well as arguments based on constitutional policy which promote information gathering and transmitting functions of the media.<sup>13</sup> The policy argument turns on the premise that the government's right to limit people's access to government-owned or privately-owned and government-controlled places is circumscribed by its role as servant of the citizens. Restrictions can occur only to further the efficiency of government operations. Otherwise the public need for information requires access to government facilities. The media must be provided priority access when circumstances dictate the restriction of those wishing to enter a place, or else government operations will be unseen and unchecked. Careful scrutiny of justifications for exclusions must be given when the public and the media are excluded in order to assure the media is treated in such a way as to be able to do its job effectively. Essentially, the issue is whether the media can function as the media within the restrictions imposed.

General approaches to constitutional interpretation support this slight functional preference for the media. Beyond the first amendment principle of autonomy in speaking and publishing, the press clause provides a derivative policy-based right to gather information for dissemination.<sup>14</sup> Concepts of equality, both as a jurisprudential theory<sup>15</sup> and as developed in media cases,<sup>16</sup> further support a differential treatment. A theory follows that gives a substantially stronger rationale for this media preference than other theories.<sup>17</sup>

After developing this theory, the Article turns to the Supreme Court cases treating different media differently within a complete first amendment

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13. The idea of principle and policy follows Professor Ronald Dworkin's theories. See generally R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

14. See *infra* notes 18-29 and accompanying text.

15. See *infra* note 52 and accompanying text.

16. See *infra* notes 53-74 (differential treatment of various media) and note 51 (need for electronic media to use cameras), and accompanying text. Electronic journalists must have cameras and recording equipment in the same way that print journalists must have their notepads.

17. This application of the interpretation demonstrates the viability of the theory of slight media preference in access to places, but hardly in every conceivable situation. The argument of this Article does not diminish the value of free speech. Just as the media must be informed to fulfill its purposes, so must the citizen. A functional difference does exist, however. The media informs a wider spectrum of society than does the individual by speaking. This aspect of the media function furthers the citizen's fulfillment of his obligation, and privileges and rights. Accordingly, the first amendment, particularly its discrete speech and press clauses, fully supports a slight functional preference for the media right without denying the equal dignity of the public speech right.

right. These cases demonstrate that the Court's jurisprudence supports differential treatment. Next, cases involving access (both to gather and transmit information) to government facilities are considered. These are analyzed to clarify the right of government over its property. When considered within the interpretive theory of this Article, the cases support a doctrine which permits the media a functional preference. Finally, cases involving access to private property are considered. These cases demonstrate the viability of this Article's thesis in that context.

## II. CONSTITUTIONAL INTERPRETATION

### A. *General Theory*

An inquiry into the rights of the journalist requires that the press clause be construed and its relationship to other rights be considered. Such an effort requires consideration of a range of approaches to constitutional interpretation.<sup>18</sup> However, this Article focuses in particular on two basic theories of interpretation.

The language of the text is the basic source for interpreting our written Constitution.<sup>19</sup> It provides the understandings and meanings from which we begin and also confers (in our epoch and society) legitimacy to the Constitution and its interpretation. This legitimacy is essential to the Constitution and other law in our society. Of course, the text also carries uncertainty. It is interpreted by readers. The readers are bound by the text in a way that is determined by the ethos, practices and understanding of the reader's culture.<sup>20</sup> The meanings of its words vary with time. Nevertheless, it serves as a sort of constant and a guide, even though one of less than total stability or certainty.

Furthermore, the text is a framing device that provides a sort of negative guidance by establishing parameters of possible meaning, rather than a precise or exact meaning. "[W]e . . . do best to look at constitutional language

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18. An enormous outpouring of scholarly commentary has recently illuminated this concept of constitutional interpretation. It has been provoked in part by the poverty of text-bound and historic interpretation in difficult cases. The writers have used other scholarly disciplines to explain the Constitution as interpreted in the context of the total experience and understanding of the interpreter. One reads and understands based upon his experience. This function is central to interpretation. This Article views interpretive theory as essential to an understanding of media rights but merely surveys the range of approaches. The theory is not developed in a strong sense beyond that use.

19. Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797, 798-99 (1982).

20. See *infra* notes 42-44 and accompanying text.

as a frame without a picture, or, better yet, a blank canvas. We know when we have gone off the edge of the canvas even though the canvas itself gives us no guidance as to what to put on it."<sup>21</sup> Thus, the first amendment establishes an extremely strong and clear freedom to speak and publish. However, the text does not provide details of that freedom. In the instance of the press clause, the text permits the details to rattle about within the frame. Other interpretive devices must be deployed.

The text, in addition to establishing parameters, is a source of principles for interpretation.<sup>22</sup> Individual cases or problems must be approached by applying these principles even though exact or precise rules do not exist. In order to resolve issues in cases not fully addressed by principles, policy considerations must be developed and applied. The principle of the first amendment is that one may publish or say what he wishes without government hindrance before publication.<sup>23</sup> Both the press and the public have the

21. Schauer, *supra* note 19, at 828.

22. See R. DWORKIN, A MATTER OF PRINCIPLE (1985). Professor Dworkin states:

Justifications of principle argue that a particular rule is necessary in order to protect an individual right that some person (or perhaps group) has against other people, or against the society or government as a whole. Antidiscrimination laws, like the laws that prohibit prejudice in employment or housing, can be justified on arguments of principle: individuals do have a right not to suffer in the distribution of such important resources because others have contempt for their race.

Justifications of policy, on the other hand, argue that a particular rule is desirable because that rule will work in the general interest, that is, for the benefit of the society as a whole. Government subsidies to certain farmers, for example, may be justified, not on the ground that these farmers have any right to special treatment, but because it is thought that giving subsidies to them will improve the economic welfare of the community as a whole. Of course, a particular rule may be justified by both sorts of arguments. It may be true, for example, both that the very poor have a right to free medical treatment and that providing treatment for them will work for the general interest because it will provide a healthier labor force.

*Id.* at 375. See generally, R. DWORKIN, *supra* note 13. Consider Professor Dworkin's discussion of the famous *Riggs v. Palmer* case. *Id.* at 123. A court without a particular rule controlling the issue confronts the issue of whether a killer may inherit as a result of his homicide. The court applies the principle that one may not benefit from one's own wrong. It uses the policy analysis that permitting inheritance would frustrate the principle.

23. For a discussion of the first amendment, see R. DWORKIN, A MATTER OF PRINCIPLE 381-97 (1985). Professor Dworkin discusses the general problem addressed by this Article. *Id.* at 385-90. "[T]he historically central function of the First Amendment, . . . is simply to ensure that those who wish to speak on matters of political or social controversy are free to do so." *Id.* at 385. Professor Dworkin further states:

Theories concerned to protect the audience generally make what I have called an argument of policy for free speech and free press. They argue, that is, that a reporter must have certain powers, not because he or anyone else is

right to speak and to publish virtually without censorship. This principle constitutes the fundamental value of the first amendment, and informs our understanding of the first amendment.

In *Branzburg v. Hayes*,<sup>24</sup> the Court followed this approach in denying journalists greater constitutional immunity from grand jury inquiries than the general public. The Court observed that its holding did not restrict the right to publish. The opinion then considered and rejected the argument that the lack of privilege against testifying would inhibit news-gathering. Justice Powell in his concurrence developed a point made by the majority. He observed that the Court did “not hold that newsmen . . . are without constitutional rights with respect to the gathering of news,”<sup>25</sup> and that subpoenas without proper purpose which disrupted news-gathering should be quashed.

In *Branzburg* and elsewhere the Court recognized the relationship of the right to publish and the need for a right to gather information. The important information gathering right is derived by policy argument from the fundamental right to publish.<sup>26</sup> In order to publish, the media must gather information. The right to publish establishes the media’s additional function of transmitting information to the public. This information-gathering function derives from the first amendment right to publish and the broader ethos of American democracy. It fulfills the need for the dissemination of information to the citizenry which is essential to the American democratic understanding. Since access to places is essential to gathering information, this access must be afforded some protection. Beyond the need for an informed citizenry, the checking value also exists under the first amendment.<sup>27</sup> The checking value exists because “the abuse of official power is an especially serious evil”<sup>28</sup> which regards “the general populace [as the] ultimate judge of the behavior of public officials.”<sup>29</sup> Under this theory the citizen not only needs and uses information to act as an informed citizen in the political community, but also to effectively contain official misconduct.<sup>30</sup> Indeed, while the checking value analysis accommodates other first amendment values, it maintains that

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entitled to a special protection, but to secure some benefit to the community as a whole. . . .

*Id.* at 386 (footnote omitted); *see, e.g.,* *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943); *Lovell v. Griffin*, 303 U.S. 444, 450, 452 (1938).

24. 408 U.S. 665.

25. *Id.* at 709 (Powell, J., concurring).

26. *Id.* at 727 (Stewart, J., dissenting).

27. *See* Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521. The checking value is a complement of first amendment theory, “a possible supplement to, not a substitute for, the values that have been at the center of twentieth-century thinking about the First Amendment.” *Id.* at 528.

28. *Id.* at 538.

29. *Id.* at 542.

30. *See id.* at 538-44.



the evil of official misconduct is of a special order, antithetical to the American political arrangement. Its containment and prevention take precedence over "all other goals of the political system."<sup>31</sup>

Policy arguments must fill the lacunae of the first amendment. Within this principle the Court has found that the media and public have the same first amendment right. Policy considerations govern needs collateral to and furthering of the principal publication. Nevertheless, the same right does not mandate the same treatment, but rather equality of treatment.<sup>32</sup> This requires a consideration of the information-gathering aspect of the first amendment. A right to gather information makes the right to speak or publish more effective, it provides information about government and it serves a checking function on governmental misconduct.

## B. *Particular Approaches*

### 1. The Text

The text of the first amendment is a powerful statement of principle favoring unhindered speech and publication. This principle attaches especially to the media via the press clause. However, neither the amendment itself nor its content provides an unambiguous interpretation of the press clause. A reading of the amendment, the Bill of Rights, or the entire Constitution supports two conclusions: either the press clause is an emphasis (perhaps redundant) of the first amendment or the press clause states a separate right of some sort, a right for the media supplemental to the rights established by the speech clause.

### 2. Text and History

Our conventions of textual interpretation require that we accord great weight to the historic background of the text. History supports the view that the principle protecting publication centrally informs first amendment doctrine. Certainly the drafters of the amendment wanted to preserve the English protection against prior restraint. The language they chose accommodates this interpretive view, but it supports a broader construction based on policy considerations as well.<sup>33</sup>

The text strongly suggests and history supports the view that the drafters wrote the press clause consciously. The original draft of the first amendment

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31. *Id.* at 558 (footnote omitted).

32. *See infra* note 52 and accompanying text.

33. L. LEVY, *supra* note 9, at 276.

protected the press more explicitly than does the adopted text.<sup>34</sup> Contemporaneous state constitutions contained press clauses and sometimes omitted speech clauses.<sup>35</sup> While this knowledge does not reveal the precise or particular meaning of the clause or the related weight of the press and speech clauses, it suggests a somewhat different perception of the role of the media and speech by the public in society.

The textual-historic analysis propounds a position both profound and somewhat paradoxical and ambiguous. No matter where the analysis places the marker protecting the media against prior restraint or seditious libel, case law developing freedom-of-expression theory has passed beyond that mark. The press in England had been subject at the time of drafting to recent censorship and regulation. Political theory in Britain, which influenced the drafters of our Constitution, suggests a special concern for the press.<sup>36</sup> The history, however, gives no precise indication of the scope of that concern or how the media today is to be treated. While this suggests a special concern for the press, it is still quite consistent with that history to conclude that the press clause was written to emphasize that written words were to be protected to the same extent as oral speech.<sup>37</sup> History demonstrates only that a substantially serious regard for the press existed; its precise content is unclear.

The development of first amendment theory likewise demonstrates that history aids only in establishing a general principle. First amendment speech doctrine has developed in modern times largely as a unitary doctrine including the speech and press clauses, not separate theories for the two clauses. It has extended beyond any scope that can be ascribed with certainty to the first amendment's reach in 1791. The two clauses have come to have the same rather expansive meaning. Precise guidance to the meaning of the text cannot be educed from history, but only solicitude for unhindered publication and the media's role in doing so.

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34. Madison originally proposed the following amendment in 1789: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of press, as one of the great bulwarks of liberty, shall be inviolable." Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 478 (1983).

35. The original constitution in each of the following states contained a press clause: Delaware, Georgia, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, South Carolina, and Virginia. Only Pennsylvania included a speech clause in addition to the press clause. *Id.* at 464-65. For a discussion of these provisions in the state constitutions, see generally 1 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* (1971). The state constitutions asserted a balance between free press and the police power. The community interest or private interests would be protected.

36. See, e.g., Rabban, *The Ahistorical Historian: Leonard Levy on Expression in Early American History*, 37 STAN. L. REV. 795, 821-34 (1985).

37. See Nimmer, *Introduction — Is Freedom of the Press A Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 640-41 (1975).

The lack of clear answers from text or history creates a problem and an opportunity. It challenges the legitimacies of judicial interpretations of the Constitution. It forces us to understand that our culture and its assumptions shape interpretation.

### 3. Our Cultural and Societal Frame

Cultural assumptions and understandings change constantly as political, social and technological expectations change. This understanding and limitation are vital. Certainly electronics, computers and such have changed the way we view the media under the first amendment. The increased number of women in the legal profession may modify the way laws and constitutions are interpreted because women view conflict resolution differently from men.<sup>38</sup> Our political culture's constant movement toward openness and communication contributes to society's expectation of being informed. The development of case law itself creates some constitutional protection. Analysis of legal theories supports other doctrines. Consideration of the various needs of beneficiaries of the press clause makes clear the need for still other rights for the media. Political, jurisprudential and other theories suggest even more.

The unique American insistence on openness of government likewise informs our view of the press clause. The freedom of information statutes and the government in the sunshine statutes both at the federal and state level articulate and emphasize our need, perhaps compulsion, for openness. This manifestation, however, is based on a broader understanding of the need for information. Information is needed for the citizen to participate in government, to check government, and for each individual to enjoy the self-fulfillment basic to human dignity. All are fundamental to the American understanding of democracy, and should—and do—inform our reading of the Constitution. These aspects of our society directly and indirectly influence constitutional interpretation and argue for a slight preference for the media. The need, the desire, and the demand of American democracy for effective communication of and access to information demand a slight preference for the media.

Judicial interpretation must have legitimacy.<sup>39</sup> Our society demands it. To function as a constitutional authority, or indeed a legal one, the courts

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38. Karst, *Women's Constitution*, 1984 DUKE L.J. 447.

39. See, e.g., M. PERRY, *THE COURT, THE CONSTITUTION AND HUMAN RIGHTS* ix-xi (1982) (the problem is briefly discussed as a central one); see also FISS, *Objectivity and Interpretation*, 34 STAN L. REV. 739, 749 (1982) (arguing that the effort for a legitimate approach "turns on objectivity rather than correctness").

This theory requires that the notion of correctness be subordinated to the notion of objectivity. The correct meaning of the Constitution cannot be ascertained. An

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and the Supreme Court must be perceived and regarded as legitimate.<sup>40</sup> Accordingly, judges interpret in a way that both they and society (or judges' perception of society) regard as legitimate. Since our society, and judges in our society, regard the language of the text as centrally important and the history of that text as substantially important (at least in the present epoch), they are touchstones of legitimacy.

The role of constitutional text as central to political life and of free speech as vital to democracy might have a different meaning in another society with our legal and political culture. This difference emphasizes the usefulness of policy considerations in interpreting language whose meaning may vary. Thus England, the primary source of our culture and of our legal and political institutions, takes a substantially different view of constitutional text and of freedom of speech and press than does America. Indeed, no constitutional text exists in Britain. Accordingly, the common law and tradition determine constitutional norms. They accommodate a different view of freedom of speech and of the press. Injunction against publications and extensive government secrecy are thought consistent with freedom of speech in England.<sup>41</sup> Consider the views of a contemporary British media critic:

Unfortunately, the idea that [governmental] authority is engaged in a conspiracy against the citizenry fits neatly into another ideology of our day, the doctrine of media triumphalism. The idea that the journalist is, or ought to be, a legally and morally privileged member of society and entitled to place himself above the law emanates from America. [I] heard one supporter of this new credo state, quite seriously, that a reporter would be justified in breaking into someone's house to obtain information which, in his opinion, the public had a right to know. I don't know whether our own media triumphalists would go so far but certainly they seem to be advancing the view that journalists, or at any rate editors, are better judges of what constitutes a legitimate state secret than a democratically-elected government. . . .

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objective one can.

Objectivity in the law connotes standards. It implies that an interpretation can be measured against a set of norms that transcend the particular vantage point of the person offering the interpretation. Objectivity implies that the interpretation can be judged by something other than one's own notions of correctness. It imparts a notion of impersonality. The idea of an objective interpretation does not require that the interpretation be wholly determined by some source external to the judge, but only that it be constrained.

*Id.* at 744. Professor Fiss states the basis of legitimacy which this Article attempts to implement in stating that objective, rational arguments could flow from the language of the text.

40. See R. DWORKIN, *LAW'S EMPIRE* 190-92 (1986).

41. See, e.g., *British Steel Corp. v. Granada*, 3 W.L.R. 774 (1980) (state-owned British Steel Corporation sought to enjoin the showing of a critical television program based on illicitly obtained material).

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Having worked with journalists all my adult life I would hate to live in a country where they were accorded, de jure or even de facto, privileged status. The doctrine of media triumphalism is, in my view, a much greater practical threat to the liberties of ordinary folk in this country than anything a parliamentary government is likely to cook up. Media people attribute to themselves all kinds of altruistic motives, and often claim to be more trustworthy custodians of the national interest than the government elected to preserve it. But then so do go-getting businessmen who evade Board of Trade regulations. The truth is, the media are motivated chiefly by the pursuit of circulations and ratings, and those who serve this by the desire to acquire money, fame and power. They are entitled to their self-esteem, even their self-complacency. What they are not entitled to do is to break the law of the land.<sup>42</sup>

However, neither the English nor I hesitate in asserting that freedom of speech and press flourish as fundamental English liberties. The concept of freedom of speech and press, if no less real, is different in its meaning in England. This analysis has its limits. It describes how decision-making is affected by factors beyond formally articulated ones. It does not predict exactly how the factors will function or offer rules of interpretation that establish a particular conclusion. Nevertheless, what has been offered surfaces factors that do influence interpretation and offer means of approach. Indeed, the most important contribution of this scholarship is demonstrating that multiple approaches to interpretation exist and that these approaches to interpretation are permissible.<sup>43</sup> Within this context, policy arguments must determine a doctrine for the first amendment. An argument that takes account of the entire ethos that supports our judicial and political understanding must be deployed.

#### 4. The Particular Influences of Technology and Language Change on the Interpretation of the Press Clause

Change in the meanings of words and in technology have had a particularly profound effect. Both the interpretation of a text and the use of history are constrained by language. Language changes. The Constitution's meaning cannot be constant and precise when the meanings of its words

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42. Johnson, *Beware Media Triumphalism*, 258 THE SPECTATOR 21 (1987) (regular press commentary).

43. This understanding does not assume or assert any particular mode of interpretation; rather the effort leads to the conclusion that one must utilize many approaches and not an overriding method or (narrow) theory of interpretation. This effort requires consideration of the literal text and history, but more importantly, presents a larger argument based on case law, political and jurisprudential theory and other factors analyzed through an informed (legal, philosophical, etc.) judgment.

change. Consequently, the meaning expressed by the words varies extremely.<sup>44</sup> Newspapers, which are essentially printed from computer input of journalists, and television, an electronic press, are profoundly different from the press of 1789.<sup>45</sup> The word press encompasses these and much more. This broadening of the concept of the press must be directly confronted in interpreting the press clause.

The word *media* rather than *press* is used in this Article when referring to the press clause's beneficiary. This usage reflects the change in the meaning of the word *press*.<sup>46</sup> *Media* also captures more vividly the diversity and richness of those who today stand in the position occupied by the press in 1791.<sup>47</sup>

*Media* must be defined to further the interpretation of the press clause effort. A broad definition best describes what constitutes the modern media. *Media* includes essentially all who communicate to the public in accordance with the concept of the core publication function protected by the first amendment.<sup>48</sup> This definition includes the pamphleteer<sup>49</sup> and the scholar in

44. See P. BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 14-19 (1982) (discussing W. CORBET, *POLITICS AND THE CONSTITUTION*, and providing a vivid demonstration of the problem of changing language).

45. Moreover, the way technology and words have changed has modified how we look at things generally, and contributes to uncertainty of interpretation based on text and history. People who knew manual presses in a world of horses and buggies think differently about the word *press* and the phrase *freedom of the press* than do people who use word processors, look at and rely on television, and fly across the seas. The two words of 1789 and 1987 are different in ways which cannot be explicitly expressed in terms of constitutional interpretation.

46. *Press* means something different today than it did in 1791. Indeed, it was only referred to as the press in 1791. *Press* alluded directly to the printing press and its function. It had similarities to our press and media, and the roots of our media can be traced to the era of constitutional creation. Still, the eighteenth-century press and contemporary media differ profoundly. Today press alludes to both a broad, complex institution and to isolated individuals. Large, geographically dispersed press organizations had not developed in 1791 and television and other electronic media that did not exist in 1791 are the entities that often concern us now. While the press of 1791 was more than pamphleteers, it was less (physically and otherwise) or, more accurately, very different than today. The changes in the meaning of *press* and the nature of media profoundly effect the interpretive effort. Accordingly, this Article uses the word *media* rather than *press*.

47. See, e.g., Z. CHAFEE, *GOVERNMENT AND MASS COMMUNICATIONS* 35 (1947) (a relatively early recognition of the need for an expanded understanding of the press clause).

48. See Abrams, *The Press is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 *HOFSTRA L. REV.* 563, 581-83 (1979). The press would include free-lance writers, radio and television stations, magazines, academics and any other person in connection with dissemination to the public of a newspaper, book, broadcast or other form of communications. *Id.* at 581-82 (citing Office of Media Liaison, White House Press Office, Carter Administration, Stanford Daily Announcement 3-4 (Dec. 13, 1978)). Mr. Abrams would, apparently, exclude pam-

addition to the broadcast and print media. This definition makes a slight functional preference for the media under the first amendment press clause more compelling. It clearly protects a class, the pamphleteer, who benefited from the press clause in the 18th century but might not under a narrow definition of the press as the institutional press. The definition also disperses the right existing under the press clause among those who have use for the right. This expansive view of the media is in greater accord with the Supreme Court doctrine of equal treatment of the public and the media. The idea that the media should receive a functional preference is thus more acceptable.

Nevertheless, some limit must be placed on press clause protection. The various media members are included only in their communication function.<sup>50</sup> A person or entity is within the meaning of *media* under the press clause only when it publishes with the intent to communicate. For journalists, this is most of the time; scholars, much; the operator of a computer bulletin board, arguably less; and pamphleteer on a single issue, rather little. Under this definition, the press clause protects a broader and more diverse range of people. This attenuation and its attendant expansion of protection support the weak preference for the media along lines suggested by this Article. The definition also will require careful distinctions both between media and non-media functions and among media within the scope of the press clause.

This Article, however, realistically rejects broad views of media privilege in excess of that of the public. Certainly it rejects broad views of the media as *the* agent of the people or the essence of democracy. The journalists and their companies are not "best qualified" at anything save being journalists and media businesses. Journalists write and speak when they report by paper or electronically. They convey information via their companies as a primary task of reporting; they also editorialize and comment and some of this no doubt merges into the reporting of news. These things are protected by the first amendment. But journalists do more. They earn a living, and their companies reap profits. They no doubt edify themselves to some degree, and enjoy a psychic income. These very important aspects of being a journalist, or a company, are not protected (directly) by the first amendment. The

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pamphleteers. *Id.* at 581-82. This Article would include these when they communicate to the public. See *infra* note 49.

49. See *Lovell v. Griffin*, 303 U.S. 444 (1937), wherein the court stated: The liberty of the press is not confined to newspapers and periodicals. It necessarily includes pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.

*Id.* at 452; see also *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

50. See, e.g., *Abrams*, *supra* note 48, at 581-83.

amendment does protect the right to speak or to publish. Journalists primarily communicate information. The recipient of the information, the public, attaches what importance it chooses to that information. The citizenry then determines whether malfeasance, for example, or some other circumstance exists and what political action will follow. The media facilitates and perhaps focuses that action by the transmission of information. No doubt the media discovers and develops information. It is a vital participant, but it does not determine what the public should do with the information.

## 5. Conclusion—Interpretation and the Press Clause

The text of the first amendment, by treating the press or media in a separate clause, clearly supports a slight preference for the media. History buttresses this view. The state constitutions of the era are focused on press protection. Seditious libel strongly implicated the press, and political theory was aware of and very favorably inclined toward greater press protection. Our contemporary society and culture and the evolution of the press into present-day media support a slight preference for the media. Methods of constitutional interpretation enhance this view by clearly demonstrating the propriety, the legitimacy and the need for granting the media a slight preference under the press clause of the first amendment. This Article further develops the rationale of that conclusion and its application to actual situations.

Once this is fully understood and properly taken account of, the Court should grant a functional preference to the media over the public for access to places.

## III. THE RATIONALE FOR DIFFERENT TREATMENT

### A. Introduction

First amendment doctrine recognizes that the various media must be treated somewhat differently under the first amendment. This doctrine remains a constant despite Supreme Court decisions mandating the same or equal treatment for the media and the public under the first amendment without regard to the separate speech and press clauses. The two branches of the doctrine are consistent because equality of treatment need not mean the same treatment. Justice Stewart's *Houchins* concurrence provocatively explicates the issue of the appropriate treatment of KQED. How can a television station exercise first amendment rights equal to those of the print



media without using cameras?<sup>51</sup> That it cannot is apparent (although the Court does not embrace or discuss this view).

The public and the press enjoy first amendment protection. However, this means that courts should treat them as distinct individuals or entities with distinct needs. This is equality of treatment.<sup>52</sup> Identical treatment denies the distinct needs of the public and the media, and of each medium, and effectively limits the first amendment rights of the media. For the media to be treated as equals, they must be afforded the ability to participate and contribute to the "uninhibited, robust, and wide open" debate required by the first amendment.<sup>53</sup> Such a grant of rights is consistent with equality of the media and the public under the first amendment. Other approaches, including the current Supreme Court doctrine, effectively render the media nonfunctional, do not treat them equally, and do not actually grace them with equal first amendment rights. In order to fulfill the promise of the press clause, the media must be granted the particular rights sufficient to perform their function. Policy arguments must fashion the first amendment protection of the public and the media, and of each medium, according to the nature and the extent of their needs. The media must have the use of the tools of its trade. Camera, pens, pencils and paper are required in order for the media to publish. Beyond its ability to publish, the media has its information and checking functions. It must gather and report information to perform these functions. To do so it must have both the use of its tools and access to information. Just as the media can and will be permitted to use cameras when the public may not, the media must have access to places when the public does not. The first amendment requires this sort of differential treat-

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51. See *Houchins v. KQED, Inc.*, 438 U.S. 1, 17 (1978) (Stewart, J., concurring) ("[I]f a television reporter is to convey the jail's sights and sounds to those who cannot personally visit the place, he must use cameras and sound equipment.").

52. Consider the problem of equality of treatment articulated by Ronald Dworkin when discussing affirmative action:

There are two different sorts of rights they may be said to have. The first is the right to equal treatment, which is the right to an equal distribution of some opportunity or resource or burden. Every citizen, for example, has a right to an equal vote in a democracy; that is the nerve of the Supreme Court's decision that one person must have one vote even if a different and more complex arrangement would better secure the collective welfare. The second is the right to treatment as an equal, . . . or benefit, but to be treated with the same respect and concern as anyone else. If I have two children, and one is dying from a disease that is making the other uncomfortable, I do not show equal concern if I flip a coin to decide which should have the remaining dose of a drug. This example shows that the right to treatment as an equal is fundamental, and the right to equal treatment, derivative. In some circumstances the right to treatment as an equal will entail a right to equal treatment, but not, by any means, in all circumstances.

R. DWORKIN, *supra* note 13, at 227.

53. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

ment of the media, not a formalistic equal treatment which effectively would deny first amendment rights.

### B. *Different Treatment of Different Media*

The Supreme Court has clearly enunciated that all media are protected by the first amendment, but that each medium is subject to appropriate regulation arising from its unique nature.<sup>54</sup> This doctrine regards each medium as a unique beneficiary of the first amendment. Exactly the same treatment of all media is not consistent with a proper understanding of equality under the first amendment. Treatment with equal dignity is consistent with the first amendment and is required.

The Court held in *Kovacs v. Cooper*<sup>55</sup> that a sound truck may be regulated for sound level but may not be prohibited. Justice Jackson, concurring in *Kovacs*, articulated the view that each medium should be regulated according to its nature.<sup>56</sup> While sound trucks expanded the ability of the disadvantaged to communicate,<sup>57</sup> their noise level required special rules. A regulatory scheme that did not accommodate both the need to communicate and the tranquility of the community was not acceptable. The Court required that such a scheme prevail.

In *Joseph Burstyn, Inc. v. Wilson*,<sup>58</sup> the Court protected films by striking down a New York blasphemy statute. The Court adopted the doctrine urged by Justice Jackson in *Kovacs*:

To hold that liberty of expression by means of motion pictures is guaranteed by the First [Amendment] . . . is not the end of our problem. . . . [It] does [not] follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own particular problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary.<sup>59</sup>

The Court applied this same holding in *Freedman v. Maryland*.<sup>60</sup> Because of their pictorial nature, films may be censored if protective procedures are carefully followed.<sup>61</sup>

Applying the scarcity rationale to the unique technology of broadcasting, the Court in *Red Lion Broadcasting Co. v. FCC*,<sup>62</sup> upheld Federal Com-

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54. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952).

55. 336 U.S. 77 (1949).

56. *Id.* at 97 (Jackson, J., concurring).

57. *Id.* at 88-89.

58. 343 U.S. 495 (1952).

59. *Id.* at 502.

60. 380 U.S. 51 (1965).

61. *Id.* at 58.

62. 395 U.S. 367 (1969).

munications Commission rules requiring, under the fairness doctrine, a right of reply to personal attacks:

When two people converse face to face, both should not speak at once if either is to be clearly understood. But the range of the human voice is so limited that there could be meaningful communications if half the people in the United States were talking and the other half listening. Just as clearly, half the people might publish and the other half read. But the reach of radio signals is incomparably greater than the range of the human voice and the problem of interference is a massive reality. . . . [O]nly a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligent communications is to be had. . . .<sup>63</sup>

Accordingly, the right of the general public was favored over the privileged license.

In *FCC v. Pacifica Foundation*,<sup>64</sup> the Court looked to the intrusive nature of radio to justify regulations of offensive, but not obscene, speech. The Court observed:

[T]he broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual right to be left alone plainly outweighs the First Amendment rights of an intruder.<sup>65</sup>

On the basis of this special context the Court accepted a policy and regulation that amount to self-censorship.

Certainly the holdings in *Freedman*, *Red Lion*, and *Pacifica* have not been and would not be applied to newspapers. Indeed, *Miami Herald Publishing Co. v. Tornillo*<sup>66</sup> specifically rejected a *Red Lion*-type regulation for newspapers (without citing *Red Lion*).<sup>67</sup> Yet in these cases as well as *Burstyn* and *Kovacs*, the Court held that that medium has particular first amendment protection. The Court did not enunciate a partial protection, but insisted that full first amendment protection attach.<sup>68</sup> That protection, however, was structured to each unique medium. First amendment policy determines the particular treatment of each medium. Just as different media require dis-

63. *Id.* at 387-88.

64. 438 U.S. 726 (1978).

65. *Id.* at 748.

66. 418 U.S. 241 (1974).

67. The Florida Supreme Court did cite *Red Lion* in *Tornillo v. Miami Herald Publishing Co.*, 287 So. 2d 78, 83-84 (Fla. 1973).

68. 343 U.S. 495, 503 (1952). "Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary." *Id.*

parate treatment following first amendment policy, so does the press generally require different treatment from the public as a whole.<sup>69</sup>

### C. Choosing Among the Media

Substantial uncertainty will exist about how various segments of the media should be treated and, at times, about who are the media and who are not. A daily newspaper, a television station, a scholar, a pamphleteer and a computer bulletin board operator do not need and should not receive exactly the same treatment. In *First National Bank of Boston v. Bellotti*,<sup>70</sup> where a banking corporation was forbidden by state law to publish, the question should not have been whether the media had a special protection vis-a-vis First National Bank of Boston.<sup>71</sup> Rather, the issue should have been what protection First National Bank of Boston, at least as a pamphleteer, had as a part of the media when it communicated to the public. The same issue would control cases like *Los Angeles Free Press, Inc. v. City of Los Angeles*,<sup>72</sup> where an underground newspaper without police press passes was forbidden to cross police lines at a fire, and *Consumer's Union v. Periodical Correspondents Ass'n*,<sup>73</sup> where a non-general magazine was denied access to special facilities provided by Congress for general circulation; neither received the treatment afforded to establishment members of the media.

In *Houchins v. KQED*,<sup>74</sup> the question was not only the status of KQED, but also of the National Association for the Advancement of Colored People

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69. The differential treatment cases illustrate an aspect of the interpretive effort. The people who drafted the first amendment did not know of still photography, motion pictures, radio, television, or computers as word processors, and could not devise a precise regime of law to govern them. If we are fortunate, they created a system of broad principles and concepts which we can utilize as essential and fundamental but not exclusive elements in constituting the governance of our society. The impact of television and radio is significant. The scarcity rationale drove the drafters of the Radio Act, however wrong they may have been. The current result of this drive is a radio and television industry with government-granted power and wealth. This grant may be consistent with the public interest and with the citizenry's good. It may be this way only with government regulation, but not extensive regulation. The Communication Act, and the Radio Act before it, forbade censorship, as no doubt the Court would if the act did not.

70. 435 U.S. 765 (1978).

71. *Id.* at 796-98 (Burger, C.J., concurring) (comparing the first amendment rights of media and non-media corporations).

72. 9 Cal. App. 3d 448, 88 Cal. Rptr. 605 (1970), *cert. denied*, 401 U.S. 982 (1971).

73. 365 F. Supp. 18 (D.D.C. 1973), *rev'd as nonjusticiable*, 515 F.2d 1341 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976).

74. 438 U.S. 1 (1978).

(NAACP), a rather forgotten plaintiff in the district court.<sup>75</sup> One could easily view the NAACP as a part of the media, a result which should follow under my proposed analysis. The NAACP is not only a pamphleteer and a newspaper publisher, but also serves as a special social advocate. Thus, there is a powerful argument that it occupies a position superior to the institutional press. Decisions concerning equality of access must consider the different requirements and contributions of the various members of the media and of the public. Television journalists will require different treatment from print journalists. At times pools representing the media must be created. The freelance writer or scholar will require different treatment from a reporter for a daily newspaper. These distinctions must be based on an articulated reasonable standard.

Two federal courts have spoken on the problem of choosing which members from among the media will be admitted. A district court would have admitted Consumers Union to the Periodical Gallery of the House of Representatives,<sup>76</sup> but did not clearly establish who else might be admitted. In another case, the Eleventh Circuit applied an equal protection analysis and opted for a rational basis review of the defendant's conduct.<sup>77</sup> The court denied a freelance journalist the same access to prisons as the establishment media. There was no indication as to who else, if anyone, might gain access.

The two cases are broadly instructive. A strong concept of equality will resolve nothing, and will result in a grant of access to all or none. This is unworkable. The rational basis approach permits defendants an extremely broad latitude of conduct which will effectively escape questioning. Although pragmatic from the government view, this approach will result in substantial and perhaps capricious denial of access.

The answer to this dilemma is found in administrative law. A prison administrator, the police and fire departments, public health departments, and even the agents of the United States House of Representatives are administrative agencies for the purpose of deciding who shall have access to physical places. They establish and implement policies which control access.

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75. Both KQED and the NAACP alleged violations of their first amendment rights. The NAACP claimed that access to the jails was essential in order for NAACP members to participate knowledgeably in public debate on local jail conditions. *Id.* at 4. The district court, in granting KQED access to the jail, discussed the television station's right of access as a member of the media. *Id.* at 6-7. Equally interesting, however, is the question of whether, as non-media but special advocates among the public, the NAACP should have a superior position to the media.

76. See, e.g., *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977); *Consumers Union of United States, Inc. v. Periodical Correspondents' Assoc.*, 365 F. Supp. 18 (D.D.C. 1973), *rev'd as nonjusticiable*, 515 F.2d 1341 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976); see also *Borreca v. Fasi*, 369 F. Supp. 906 (D. Haw. 1974) (reporter was denied access to a mayor's office).

77. *Jersawitz v. Hanberry*, 783 F.2d 1532 (11th Cir. 1986), *cert denied*, 107 S. Ct. 272 (1986).

The policies may be in written rules, in general policy statements or in unwritten but understood agency practice. They may also be made by the decision maker on the spot (although probably subject to his understanding of the limits on his agency's discretion). Thus in *Pell v. Procunier*<sup>78</sup> and *Saxbe v. Washington Post Publishing Co.*,<sup>79</sup> prison administrators applied rules to control access to prisons, and in *Jersawitz v. Hanberry*,<sup>80</sup> to establish which media would have access. In *Los Angeles Free Press, Inc. v. City of Los Angeles*,<sup>81</sup> the Los Angeles Police established media classifications for purposes of granting access, and in *Consumers Union v. Periodical Correspondents Ass'n*,<sup>82</sup> the Periodical Association, acting as a delegate of Congress, made decisions concerning access among media members. The government entity which controls the place must be given the discretion, subject to judicial control, to limit access.<sup>83</sup> Such an entity will best understand the problems it confronts. It must have controlled discretion to establish practices which will enable it to fulfill its responsibilities, and which will also respect the autonomy and concerns of those affected.

Unfortunately, the entity will be inclined to protect its self-interest and may act without considering such factors. The agency's actions must be guided by standards that assure full consideration of the interests of the government entity, the media and the public. Accordingly, the government entity making the initial decision must focus on two broad factors. First, it must carefully evaluate the facts of the situation at hand,<sup>84</sup> and second, it must apply the appropriate policy consideration to the situation.<sup>85</sup> Thus, in the access-to-places cases the agency must ask two general questions: Whether granting access will unduly disrupt the governmental function of the agency and whether the media entity under consideration can effectively communicate to the public. In addition, when there are multiple candidates for access and not all can be accommodated, the agency must decide which is the best suited to communicate to the public.

These seem to be extremely serious questions to commit to government discretion. Indeed they are. Nevertheless, in reality, agencies continually make

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78. 417 U.S. 817 (1974). This is what distinguished *Pell v. Procunier*, 417 U.S. 817 (1974) from *Houchins v. KQED*, 438 U.S. 1 (1978), discussed *infra* notes 113-27 and surrounding text. In *Pell* discretion was properly exercised. This did not occur in *Houchins*.

79. 417 U.S. 843 (1974).

80. 783 F.2d 1532 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 272 (1986).

81. 9 Cal App. 3d 448, 88 Cal. Rptr. 605 (1970).

82. 365 F. Supp. 18 (D.D.C. 1979), *rev'd as nonjusticiable*, 515 F.2d 1341 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976).

83. See generally Koch, *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469 (1986).

84. *Id.* at 471-78 (discussing individualized decisions).

85. *Id.* at 483-91.

such decisions. When the Los Angeles police, in *Los Angeles Free Press*, issued press credentials only to media representatives who regularly covered police activities,<sup>86</sup> they made a choice of this complexity and magnitude. The police applied a policy of permitting an appropriate group of the media to cover its activities<sup>87</sup>—those who regularly covered police activity—and decided that the Free Press did not meet the criteria.<sup>88</sup> This is an example of the routine exercise of the substantial discretion to choose among the media. Such discretion must be limited by the principle of equality for media access to places.<sup>89</sup> The requirement that the government entity articulate reasons for its action addresses the problem in a general way; when reasons are articulated, they are better understood and the agency itself may be better able to recognize whether it is acting in an even-handed way.

The above analysis is effectively implemented by the hard-look doctrine.<sup>90</sup> Under this doctrine the judiciary assures that the agency has carefully performed its duty by articulating a policy and applying it in a reasoned manner to the decision at hand.<sup>91</sup> The doctrine has four goals: (1) it requires a reasoned explanation; (2) it requires adequate consideration; (3) it requires consistency; and (4) it prohibits arbitrariness.<sup>92</sup> The model of administrative

86. *Los Angeles Free Press, Inc. v. City of Los Angeles*, 9 Cal. App. 3d 448, 452, 88 Cal. Rptr. 605, 608 (1970).

87. *Id.*

88. *Id.*

89. See Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 28 (1975).

90. See *Greater Boston Tel. Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

91. *Id.* at 850-53.

92. Sunstein, *In Defense of the Hard Look: Judicial Activism and Administrative Law*, 7 HARV. J.L. & PUB. POL'Y 51, 52 (1984); see also *Greater Boston*, 444 F.2d 841. In *Greater Boston* the court stated:

Assuming consistency with law and the legislative mandate, the agency has latitude not merely to find facts and make judgments, but also to select the policies deemed in the public interest. The function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues. This calls for insistence that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts, a course that tends to assure that the agency's policies effectuate general standards, applied without unreasonable discrimination. . . .

Its supervisory function calls on the court to intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a "hard look" at the salient problems, and has not genuinely engaged in reasoned decision-making. If the agency has not shirked this fundamental task, however, the court exercises restraint and affirms the agency's action even though the court would on its own account have made different findings or adopted different standards. Nor will the court upset a decision because

discretion controlled by judicial review is more useful than an equal protection analysis. A careful, individualized consideration of the issues by the initial decisionmaker is assured. A balanced result of admission of appropriate media entities will follow, rather than the surfeit or scarcity of media representatives which flow from the equal protection approach. It is a vastly superior methodology, and is the appropriate way to approach this problem.

#### D. Conclusion

As the Court observed in *Red Lion*, "The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others."<sup>93</sup> Likewise, the concept of equality of right of the public and the media under the first amendment may not snuff out the effective exercise of the media right. A slight preference for the media over the public is compatible with a concept of equality of media and public under the first amendment and furthers first amendment policy. To function effectively, the media must receive differential treatment from the public, just as sound trucks, films, radio, television and newspapers receive differential treatment from one another.

### IV. ACCESS TO GOVERNMENT CONTROLLED PLACES AND PRIVATE PLACES

#### A. Introduction

This section considers the media's right of access to government-owned places and to privately-owned places controlled by the government. The two are distinct in some senses, but they share a salient characteristic. When the media decries lack of access to either public or private places, it perceives that something is occurring in those places that interests people. On public property, and often when private property is subject to extensive and substantial governmental control, that interest is great and bona fide. The situation which causes the government to act, as well as the government act itself, are likely to be of public concern. The public has a need for information about this conduct to perform its self-governing function. In addition, the media often has the ability to check government abuses. Governmental activity and the public interest in that activity justify entry to public property and to private property when it is under government control.

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of errors that are not material, there being room for the doctrine of harmless error.

*Id.* at 851 (footnotes omitted).

93. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 387 (1969).



Interestingly, the media has seldom litigated the question of access to government-owned places. Aside from the accreditation and prison cases,<sup>94</sup> the media has apparently had little problem. These important instances illuminate the right of access to both government owned and controlled places and clarify any functionally different treatment the media might enjoy.

The media has had substantial difficulty with access to privately-owned places.<sup>95</sup> The common law (and constitutional) basis of the property owner's right of exclusion must be analyzed and juxtaposed against the first amendment right of the media before a conclusion regarding their proper relationship can be reached. I will suggest that the crucial distinction in cases involving access to private property as opposed to government property is based upon the right to privacy,<sup>96</sup> not trespass. When government action effectively takes control of a place and destroys privacy, the media ought to have access. Otherwise, the media is in no better situation than the public. From these general observations, consideration of the particular problem of access to government owned and privately owned places must follow.

### B. *Access to Government-Controlled Places*

To exclude any person, the government must have a good reason outweighing the person's reason for seeking admission.<sup>97</sup> The government process for reaching this conclusion, appropriately exercised, must be informed by the role of the government as public servant. A democratic government has no function other than to further the welfare of its citizenry and their community.<sup>98</sup> The decision to exclude must be reasoned, fully articulated, fairly reached, unencumbered by excessive process, and enforced in an evenhanded manner. It is the courts' responsibility to assure these results.

Some general guides can be drawn from cases in which access was sought in order to speak or to publicize an issue, rather than to gather information. The two situations are strongly analogous. These cases recognize the government interest in being free of disruption in its undertakings. Courts must consider the same factors when the media seeks access for the purpose of gathering information. In *Lehman v. City of Shaker Heights*,<sup>99</sup> the plaintiff

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94. See *infra* notes 129-79 and accompanying text.

95. See *infra* notes 183-258 and accompanying text, for a discussion of the problem.

96. See *infra* notes 203-09 and accompanying text.

97. See *infra* notes 210-16 and accompanying text.

98. This includes furthering the welfare of all or some citizens, or of the entire community. It does not mean simply furthering the welfare of individuals, or aggregates of individuals, but it does include this. The exact means that are employed to further the welfare of the citizens are not discussed here in any detail. The means chosen will, of course, affect the appropriate scope of governmental action and concern.

99. 418 U.S. 298 (1974).

sought to post political advertisements on municipally owned buses. The plurality of the Court asserted that “[b]ecause state action exists . . . the policies and practices governing access must not be arbitrary, capricious, or invidious.”<sup>100</sup> The Court found the advertisements could be barred from the buses because of potential disruption. In dictum the Court suggested that public hospitals, libraries, office buildings, military compounds and other facilities likewise could be protected from disruption by pamphleteers.<sup>101</sup> People may generally be excluded from a government work place where the presence of people will interfere with the functions carried on in that place. Exclusion is otherwise improper. People may not be excluded from public places designed for public access.<sup>102</sup> More important, they may not be excluded from a work place if no interference results. The government has the right to exclude only when necessary to its function.

In this regard, the government should have no right closely analogous to a private right against trespass, even though the government owns property and has the power to enforce the trespass laws.<sup>103</sup> Its right to enforce these laws lacks the force of the individual right of property owners to exclude from property at will or without reason. The government has no individual interest to be vindicated, nor does it have a privacy right closely analogous to that of private individuals. The right of government to exclude is not an individual right to be let alone, or to be free from unpleasant publicity. Its only interest in exclusions is the proper function of government in its citizens’ interest.

Three leading demonstration-access cases illuminate the point. *Brown v. Louisiana*<sup>104</sup> reversed the conviction for disturbing the peace of five black demonstrators who had requested service in a segregated library. Thereafter, they stood silently in the adult reading room until the sheriff, apparently not at the library staff’s request,<sup>105</sup> arrived and arrested them. They did not interfere with the library’s operation and no disruption occurred. The arrest was made for refusing to leave a public building. The plurality opinion states that the arrests occurred “solely to terminate the reasonable, orderly, and limited exercise of the right to protest unconstitutional segregation of a public facility.”<sup>106</sup> The plurality then observed that the state could regulate libraries, but not “as a pretext for pursuing those engaged in lawful, constitutionally protected exercise of their fundamental rights.”<sup>107</sup>

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100. *Id.* at 303.

101. *Id.* at 304.

102. *See, e.g., Perry Educ. Ass’n v. Perry Local Educ. Ass’n*, 460 U.S. 37, 55 (1983) (quoted *infra* in text accompanying note 124).

103. *See, e.g., Adderley v. Florida*, 385 U.S. 39 (1966).

104. 383 U.S. 131 (1966).

105. *Id.* at 137.

106. *Id.* at 142.

107. *Id.* at 143.

In *Adderley v. Florida*,<sup>108</sup> demonstrators were arrested for trespass while on a driveway beside a jail where other previously arrested civil rights demonstrators were confined. The *Adderley* Court distinguished the jail grounds from the state capitol grounds of *Edwards v. South Carolina*.<sup>109</sup> A driveway used for jail purposes only, at a place where security was required, was the place of demonstrations in *Adderley*, while the statehouse grounds were used in *Edwards*.<sup>110</sup> The Court noted that the "large crowd" in *Adderley* was a problem,<sup>111</sup> and that the demonstrations occurred "on that part of the jail ground reserved for jail uses."<sup>112</sup> In this context, the Court stated, "The State, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated."<sup>113</sup>

*Brown* and *Adderley* can be reconciled on the basis of a straightforward distinction. The *Brown* appellants did not interfere with the use of the library, while the *Adderley* appellants threatened disruption of the jail. The *Adderley* Court's emphasis on the size of the crowd, the location at a place reserved for jail use, and the threat to the jail's use for its lawfully dedicated purpose establishes this difference. Thus, the two cases are best understood as permitting the restraint of people who threaten governmental functions, but also as recognizing those people's right to be present at places where they do not pose such a threat.<sup>114</sup>

The third case, *Grayned v. City of Rockford*,<sup>115</sup> upheld the application of an anti-noise ordinance against demonstrators arrested outside a school. The Court clearly followed the *Brown* and *Adderley* analysis urged above. The validity of time, place and manner regulations governing peaceful demonstrations depends on the nature of the place. "One issue must be addressed. . . . The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place. . . ."<sup>116</sup> If the activity is not incompatible, it should be permitted. All public places should be available for exercise of first amendment rights; any restrictions should be based not on common law tradition, but rather on the nature and function of the public place.<sup>117</sup>

108. 385 U.S. 39 (1966).

109. 372 U.S. 229 (1963).

110. *Id.*

111. *Adderley*, 385 U.S. at 47.

112. *Id.*

113. *Id.*

114. See Note, *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 110, 138-41 (1967). The Note suggests the function analysis as a second, less likely, alternative to total exclusion from sensitive places. *Id.* at 139-40; see also Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 STAN. L. REV. 117 (1975) (arguing for a minimum access approach).

115. 408 U.S. 104 (1972).

116. *Id.* at 115-16.

117. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 251-52.

*Brown*, *Adderley* and *Grayned* also illuminate the problem of the exercise of discretion. In *Brown*, the action of the sheriff—without request by the library staff—was clearly discriminatory.<sup>118</sup> In *Adderley*, the size of the crowd and its location convinced the Court that no discrimination had occurred. In *Grayned*, the Court observed that the statute, in context, guided police discretion.<sup>119</sup> Given the lack of disruption in *Brown* and the perceived danger in *Adderley*, the Court properly reacted to the exercise of discretion in each case. The Court has, since *Grayned*, inclined towards an approach drawn from *Adderley*. Property is categorized as dedicated to; (1) public use, (2) limited access for speech, or (3) particular matters for a government function without public access.<sup>120</sup> The cases, however, have not repudiated the analysis of the earlier cases urged by this Article,<sup>121</sup> and have purported to follow it.<sup>122</sup> Indeed, in the important *Perry Education Association v. Perry Local Educator's Association*<sup>123</sup> decision, in an assertion of law essential to the result, the Court stated, "When speakers and subjects are similar situated, the State may not pick and choose. Conversely, on government property that has not been made a public forum, not all speakers are equally situated and the State may draw distinctions which relate to the special purposes for which the property is used."<sup>124</sup> Thus the government and first amendment purpose must be considered at least to some degree. The recent decisions have been criticized within the Court<sup>125</sup> and by the commentators<sup>126</sup> as categorizing which avoids careful consideration of first amendment and other interests. While the analysis in some opinions may have been superficial, the Court never-

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118. *Brown v. Louisiana*, 383 U.S. 131, 151 (1966). Justice White concurred in the result and wrote separately to emphasize this point. In *Adderley*, Justice White, without opinion, joined the majority of five in the absence of a showing of unequal treatment. *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966).

119. *Grayned*, 408 U.S. at 114.

120. See Dienes, *The Trashing of the Public Forum Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109 (1987).

121. *Id.*

122. In *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981), the court held that regulations on distribution of religious literature at the Minnesota State Fair could be restricted to a booth because of a concern with congestion of walkways at the fair. Whatever doubts exist about the result in *Heffron* (mine are substantial) — a proper doctrinal approach was utilized. In *United States v. Grace*, 461 U.S. 471 (1965), where limits on leafleting on sidewalks outside the Supreme Court were overturned, assertedly to protect the sidewalks from congestion, a similar approach was followed.

123. 460 U.S. 37 (1983). The *Perry* Court explained at length that only access for the bargaining agent of the school employees and not a rival employee organization is required. This analysis is necessary under the textual quote from *Perry* and this Article's thesis.

124. *Id.* at 55.

125. *Cornelius v. NAACP Legal Defense Fund & Educ. Fund*, 473 U.S. 788 (1985).

126. Dienes, *supra* note 120.

theless asserts it is using this approach. The Court's hesitance to embrace an analytical approach has not resulted in a rejection of *Grayned*, *Brown* and *Adderley*, but rather a shortcut to a result. The promise of careful analysis of competitive values of these cases should be fulfilled.

Under the reasoning of these cases the media ought to be readily granted access to government work places. This is because the media and the public may be excluded from such places only if their presence would interfere with the governmental functions to which those work places are dedicated.<sup>127</sup>

The presence of media observers in the government work place will likely be less disruptive than demonstrations or even demonstrators. The media may receive preferred access over the public since a small number of persons is less disruptive than a large group. As a practical matter, problems seldom arise. Not many members of the public desire access to most facilities, and popular facilities are likely to arrange for public tours. Nevertheless, I do not doubt the propriety of excluding people from, for example, the Government Printing Office or the Library of Congress if one of them suddenly becomes a focus of great attention and mass congestion threatened to interfere with its function.

Total exclusion, however, would rarely be appropriate. Rather, rules such as those implemented in *Pell v. Procunier* are required.<sup>128</sup> The rules

127. Blasi, *supra* note 27, at 609-10. Consider Professor Blasi's discussion of the failure of government to permit access to sources under the government's control: [S]ince under the checking value the dissemination of information about the behavior of government officials is the paradigm First Amendment activity, policies and practices that reduce the amount and quality of information disseminated to the public should not be upheld simply because they serve the convenience, or embody traditional prerogatives, of the government. At a minimum, restrictions on press coverage of official activities should be upheld only if it can be shown that the restrictions substantially promote an important government objective that cannot be promoted sufficiently by alternative policies having a less restrictive impact on what interested outsiders can learn about official conduct. For example, under this standard all journalists could not be excluded from a police inspection of the scene of a recent crime if a single pool reporter and/or photographer could be admitted without disrupting the investigation.

Second, under the checking value, the interest of the press (and ultimately the public) in learning certain information relevant to the abuse of official power would sometimes take precedence over perfectly legitimate and substantial government interests such as efficiency and confidentiality. . . . In short, a proponent of the checking value should treat requests by journalists to view government activities and inspect official records as embodying First Amendment interests of the highest order.

*Id.*

128. The regulation in *Pell*, section 415.071 of the California Department of Corrections Manual, prohibited media interviews with inmates specifically chosen by the media. *Pell v. Procunier*, 417 U.S. 817, 819 (1974). The prison did have a policy of conducting public tours through the prison in which both the press and the public might participate. *Id.* at 830.

should set forth standards for controlling access rights. For the public at large, access might be limited even though access would be granted to the media. The controlling factor in determining a different treatment of media and public should be the degree of access appropriate for the media to fulfill its function. In some situations, press galleries or press rooms will be required. Indeed, legislative bodies often accommodate the media in special galleries; the courts accommodate the media in special sections, and executive and administrative offices often have press rooms or offices. The public is relegated to tours and limited visits. Constitutional policy arguments favor this preference for the media. The media needs better access and facilities if it is to perform its reporting job properly. Policy arguments support a weak constitutional preference for access to government facilities for the media under the press clause.

### 1. The Prison Access Cases

This section considers the prison access cases. How these cases are analyzed determines to a substantial degree how journalists will be treated in other situations. Given that the media and the public have the same first amendment right, the issue is whether the media is to be treated precisely the same as the public. If so, the issue is largely closed. If, for any reason, the press is to be accorded the same general rights accommodated in a somewhat different way, the issue is substantial.

*Pell v. Procunier*<sup>129</sup> and *Saxbe v. Washington Post Co.*<sup>130</sup> held that, beyond that granted by prison regulation, journalists have no greater right to access than the public. In fact, prison rules in those cases granted to the media somewhat greater access than the media needed to perform its function. Although *Houchins v. KQED, Inc.*<sup>131</sup> reached much the same result, the fractured Court<sup>132</sup> produced no majority opinion and the minority opinions are inadequate.<sup>133</sup> In addition, none of the opinions supporting equal treatment which result in exclusion adequately distinguished the drastic difference between the facts in *Pell* and those in *Houchins*. Properly understood, the cases establish a basis for appropriate differential treatment of the public and the media under the first amendment.

129. 417 U.S. 817 (1974).

130. 417 U.S. 843 (1974).

131. 438 U.S. 1 (1978).

132. The plurality opinion of Chief Justice Burger was joined by Justices White and Rehnquist. Justice Stewart filed a concurring opinion. Justice Stevens dissented and was joined by Justices Brennan and Powell, while Justices Marshall and Blackmun took no part in the decision of the case. *Houchins*, 438 U.S. at 2 (1978).

133. The opinion in *Houchins* failed to note that a jail is used to house presumably innocent individuals prior to their trials. The court also failed to justify the total lack of access for the press to the facility until after the suit was filed, at which time limited access became available. *Id.* at 4.

In *Pell*, visitation of prisoners was permitted on a regular basis,<sup>134</sup> and the media, like the public, could sit in on prison programs.<sup>135</sup> In addition, the media was permitted to interview randomly selected prisoners.<sup>136</sup> But the media complained of restraints on interviewing particular inmates.<sup>137</sup> The prison authorities articulated a justification for this restraint: the media selection of prisoners for interviews created celebrity prisoners.<sup>138</sup> Such prisoners were accorded special status by their fellows, which created problems of prison management,<sup>139</sup> debilitating the prison's function. These rules had been properly adopted by the California Department of Corrections.<sup>140</sup> The limitations on the media were supported by a reasoned analysis which rationally led to the particular limitations imposed on the media.<sup>141</sup>

The result in *Pell* is consistent with a theory that while the public and the media share the same general first amendment rights, their precise treatment need not be the same. *Pell* permitted accommodation of special media needs. The Court may speak of the public and the media enjoying the same first amendment rights, but nevertheless, in *Pell* the Court emphatically and clearly accepted a situation where the media were permitted the greater access necessary to perform their function while being denied access which would hamper the function of the prison. This result is fully consistent with general equality among the media and between the media and public. Properly understood, the *Pell* holding supports a constitutional policy providing the media a functional preference within equal treatment of media and public.

The *Houchins* facts render media exclusion problematic. No regular general access was accorded to either the public or the media at the time the suit was filed.<sup>142</sup> Tours were conducted monthly on a first come, first served basis.<sup>143</sup> These tours, however, did not include the Greystone section, where torture, gang rape and attendant suicide allegedly had occurred.<sup>144</sup> Contact with inmates was not permitted during the tours,<sup>145</sup> nor was any special contact for the media (such as the random selection method of *Pell*) permitted at any other time.<sup>146</sup> Rules promulgated later did not hold their own justification, nor was any justification offered.<sup>147</sup>

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134. 417 U.S. 817, 821 (1974). The visitation rights in *Saxbe* were substantially similar. *Saxbe*, 417 U.S. at 846.

135. *Pell*, 417 U.S. at 830.

136. *Id.*

137. *Id.* at 831.

138. *Id.* at 832.

139. *Id.*

140. *Id.* at 819.

141. *Id.* at 831.

142. *Houchins v. KQED, Inc.*, 438 U.S. 1, 4 (1978).

143. *Id.*

144. *Id.* at 5.

145. *Id.*

146. *Id.*

147. *Id.* at 3.

This broad exclusion of the public and the media was accepted by the Court. Support for this conclusion is weak. The plurality urged that a pot-pourri of governmental and quasi-governmental oversight informed the public and provided adequate<sup>148</sup> information to the public and the media.<sup>149</sup> Thus, the government watched itself. This is a dubious proposition at best, and is the antithesis of our democratic theory. An informed public exercising its right to evaluate and to check its government must have access to the places where necessary information can be acquired. A contrary practice is especially unjustified when a grossly disadvantaged class,<sup>150</sup> such as prisoners, is involved. Here, the tendency of people to inflict harm and indignity under the cloak of government authority<sup>151</sup> is especially pronounced. A checking function is particularly needed under these circumstances. Further, the public requires knowledge of prisons and jails if it is to properly discharge its governing function. KQED, a television station, cannot inform the public unless it can function as a television station. To do so KQED must have the use of its camera.<sup>152</sup> Television, like any medium, becomes less than its full self when denied the use of its technology. It can report facts about jails, but it cannot convey as complete an understanding of them as would be possible with pictures. Although cognitive material in the form of compiled intellectual data must be transmitted, a fuller appreciation of a situation may be conveyed by the psychological and emotional content of pictures and sounds. These, like rhetoric, can arouse citizens to the action required in self-government and in check-government.

Justice Stewart, concurring, urged that this particular need of KQED must be met.<sup>153</sup> The sheriff had an obligation under the first amendment to

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148. *Id.* at 12-13.

149. *Id.* at 13.

150. *See* M. PERRY, *supra* note 39, at 148-54.

151. Blasi, *supra* note 27, at 541.

152. *Houchins v. KQED, Inc.*, 438 U.S. 1, 18 (1978).

153. *Id.* at 17 (Stewart, J., concurring). The need is evident. For television, access to places must be allowed with their (appropriate) equipment. Without it they may not cease to be journalists, but they cease to be effective electronic journalists. Information conveyed by print or an announcer on television serves a vital purpose. Understanding degradation and violence is more than intellectual data. The psychological force of those circumstances when seen substantially transcends possessing information. That measure of psychological force is required for full and effective comprehension.

Consider *Cohen v. California*, 403 U.S. 15 (1971). A tee-shirt printed "I DETEST THE DRAFT" does not communicate as well, even in a jaded 1987, as one printed "Fuck the Draft." The Court said:

[W]e cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotion as their cognitive force. We cannot



accommodate the television station by permitting it to use a camera. Anything less would fall short of first amendment requirements. Television stations are simply different from the print media or the public. They present different circumstances that require different responses. Not only must the media be treated differently from the public, but each medium must also be treated differently and appropriately under the first amendment.

Rather than decide what particular treatment is required (or desirable), the *Houchins* decision rejects a broad demand of access. KQED sought a "special right of access"<sup>154</sup> as a media entity, and petitioned for injunctive relief forbidding the Alameda County government from "excluding KQED news personnel from the Greystone cells and Santa Rita facilities and generally preventing full and accurate news coverage of the conditions prevailing

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sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

*Id.* at 25-26.

Television employs emotion better than do tee-shirts, and to deny that power to television would render it a second-class first amendment actor. More than "precise, detracted explication" is required to understand our world, or check our government. Here, I would go beyond the "intermediate weight" Professor Blasi would accord vivid transmission of information.

A third general observation concerns the distinction between press claims of access to official information that otherwise would be confidential and claims relating to more vivid coverage — televising, tape recording, photographing — of events that are already open to descriptive reporting. Although vivid transmission can serve the checking value by capturing the attention of a public that might not respond to mere descriptions of abuse, the key stage of the checking process is the initial acquisition of information. When journalists actually secure evidence of serious official wrongdoing, they seldom lack for ways to dramatize what they have learned. Also, the checking process does not always depend on widespread public outrage, even though popular indignation can sometimes help to bolster the resolve of specialized actors in the checking process, such as prosecutors, judges, grand jurors, and legislative investigators. Thus, a proponent of the checking value should accord greater weight in First Amendment analysis to claims relating to initial access to otherwise unavailable information than to claims relating to the more vivid transmission of information. He should, nevertheless, accord at least intermediate weight to claims of the latter sort.

Blasi, *supra* note 27, at 610. The teaching of *Cohen* supports this, as did the contemporary electronic reporting of the Vietnam War. The vividness of that war depicted its horror in ways that print accounts from the Somme or Verdun, with their greater slaughter, or the battlefields of World War II or Korea, did not. If in doubt, reflect on *MASH* from television or *Platoon* from the cinema, where differing media with differing methods of presentation utilize the visual electronic media to portray war in a way words cannot. These presentations may carry no more truth, but they seem, to me, more effective in causing actual checks on government action to occur.

154. *Id.* at 7.

therein."<sup>155</sup> This special-access argument fails, in part, because it is excessive. The appropriate extent of access is not established by the demands or whims<sup>156</sup> of the media. Rather, sufficient access to meet the media's needs should be sought. In *Pell*, the media could perform its information-transmitting and checking functions without interviews, particularly interviews of celebrity prisoners. Access can occur upon a demand only when countervailing reasons of substance do not exist.

Consider the information that was to be transmitted in *Houchins*. Beyond recognizing the public's legitimate concern with prison conditions,<sup>157</sup> the Court says little about the larger societal concern with prison conditions. Still, *Houchins* itself highlights the broader societal problem. The alleged conditions which permitted torture and gang rape<sup>158</sup> are illustrative of the often deplorable conditions in the United States's prisons. That the penal system stands as part of the criminal justice system<sup>159</sup> is a salient factor in the analysis of problems involving access to prisons and prisoners.<sup>160</sup> At present, only the trial is constitutionally required to be open to the public.<sup>161</sup> The need for secrecy in investigation<sup>162</sup> and in extrajudicial parts of pretrial activity is obvious.<sup>163</sup> The state and, to a lesser degree, the defendant have

155. *Id.* at 4.

156. Lest the language seem excessive, remember that the Freedom of Information Act, 5 U.S.C. § 552 (1977), does not require any justification for access to information, and has been construed to permit access at whim.

157. *Houchins v. KQED, Inc.*, 438 U.S. 8, 16 (1978). The respondent's argument that the public importance of conditions in penal facilities justified the media's role of providing information was rejected by the plurality opinion. *Id.* at 16.

158. *Id.* at 5. See M. PERRY, *supra* note 39, at 148-54.

159. The criminal justice system operates from the commission of a crime to the end of a prison sentence, including periods of probation and parole. Indeed, it ought to operate before a crime is committed by deterring the crime, or perhaps ameliorating the social and individual psychological conditions leading to criminal conduct. It ought also to operate after a prison sentence by reforming the criminal, or by a combination of reform and deterrence acting on a prisoner to prevent further crime. All these matters are of paramount public importance. One cannot assert that the criminal justice system is the most important issue facing our policy, but it is certainly among the most important.

160. See M. PERRY, *supra* note 39, at 147-62.

161. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980); see also *Gannett Co. v. De Pasquale*, 443 U.S. 368 (1979) (permitting the closure of pre-trial proceedings).

162. *Richmond Newspapers*, 448 U.S. at 564.

163. This need for secrecy is best shown in grand jury investigations where secrecy is kept unless the defendant can show a "particularized need" for the information. *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959). Were this not kept secret, a person under investigation would be able to flee. Disclosure of an investigation could also cause a great deal of harm to a person under investigation even if he or she was subsequently cleared of any wrongdoing. The same is true of the decisions and supervision of probation and parole. Since an adverse decision may greatly harm the convicted, the justification is unclear.

sufficient reasons to avoid publicity regarding what occurs before trial. Under *Gannett v. DePasquale*,<sup>164</sup> the defendant can demand an open pretrial hearing, and in some other cases pretrial hearings must be open.<sup>165</sup> Under *Richmond Newspapers, Inc. v. Virginia*,<sup>166</sup> the trial itself must be open.

Prisons are closed, leaving prisoners isolated. Although this is certainly not "good" or "desirable," it may be "expedient."<sup>167</sup> It is paradoxical that closure of prisons is constitutionally permissible, apparently under any circumstance,<sup>168</sup> while closure of trials is constitutionally forbidden:

It is somewhat ironic that the court should find more reason to recognize a right to access [to trials] than it did [to prisons] in *Houchins*. For *Houchins* involved the plight of a segment of society least able to protect itself, an attack on a longstanding policy of concealment, and an absence of any legitimate justification for information about how government operates. In this case we are protecting the interests of the most powerful voices in the community, we are concerned with an almost unique exception to an established tradition of openness in the conduct of criminal trials, and it is likely that the closure order was motivated by the judge's desire to protect the individual defendant from the burden of a fourth criminal trial.<sup>169</sup>

Jail and prison visitation is a paradigm area for the operation of the constitutional policy favoring a limited preference for the media. It is simply impractical for members of the public at large to discharge their obligations as citizens by actually visiting the institution. The media, on the other hand, cannot discharge its function as media without making such visits. The press clause confers the needed advantage on the media. While the plurality conclusion of *Houchins* should thus be rejected, *Pell* should be construed to form the basis of a first amendment doctrine and jurisprudence which required a slight, functional preference of access for the media.

## 2. The Military Base Cases

Although the military base cases deal with access to military bases for purposes of political campaigning rather than for gathering information, the

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164. *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979). In *Gannett* it was the defendant who moved to close the pretrial hearing to the press and public. The prosecution did not object and the judge closed the hearing. *Id.* at 375. "Publicity concerning the proceedings at a pretrial hearing, however, could influence public opinion against a defendant and inform potential jurors of inculpatory material wholly inadmissible at the actual trial." *Id.* at 378.

165. *Press Enters. v. Superior Court*, 106 S. Ct. 2735 (1986). The decision is limited to the special California procedure. *Id.* at 2741. The trend, however, seems to be to open most or all hearings.

166. 448 U.S. 555 (1980).

167. *Houchins v. KQED, Inc.*, 438 U.S. 8, 13 (1978).

168. *Id.*

169. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 583-84 (1980) (Stevens, J., concurring) (footnote omitted).

Court's reasoning in the cases is nevertheless helpful. In *Flower v. United States*,<sup>170</sup> the Court reversed the lower court's conviction of Flower for trespass while distributing pamphlets on New Braunfeld Avenue, Fort Sam Houston. The highway was open to all traffic twenty-four hours a day, with a vehicle count of over 15,000, including buses and other public transportation. There was similar civilian pedestrian traffic.<sup>171</sup> Flower had been previously excluded from the base. The reversal came despite a specific statute imposing criminal sanctions on anyone who re-entered a military base after being excluded.<sup>172</sup> The Court, quoting the dissent below, concluded, "Fort Sam Houston was an open post; the street . . . was a completely open street."<sup>173</sup> A policy of exclusion from such streets cannot be supported.

In *Greer v. Spock*,<sup>174</sup> the Court reversed an injunction ordering the commander of Fort Dix to permit access and made it clear that Fort Dix could be closed to candidates for office.<sup>175</sup> The second sentence of the opinion conveys the crux of the factual difference between *Greer* and *Flower*. "[Fort Dix's] primary mission is to provide basic combat training for newly inducted army personnel."<sup>176</sup> The Court also observed that Fort Dix is in a rural area and that local government roads and walkways passing through it are under military police jurisdiction, that the roads and walkways are posted to this effect, and the military police routinely exercise their power.<sup>177</sup> The Court further emphasized a Fort Dix regulation forbidding political campaigning on the base,<sup>178</sup> and General Greer's letter restating its existence and rationale.<sup>179</sup> The Court then found that the policy had been evenly applied.<sup>180</sup>

The opinion also considers the larger functional problem of separating the military from the political process in a democracy. The United States political system seeks to further this separation.<sup>181</sup> Justice Powell, concurring, expounded the concept:

The public interest in preserving the separation of the military from a partisan politics places campaign activities on bases in a unique position. Unlike the normal civilian pedestrian and vehicular traffic that is permitted freely in Fort Dix, person-to-person campaigning may seriously infringe upon the separate and neutral status of the Armed Services in our society. At the

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170. 407 U.S. 197 (1971) (per curiam).

171. *Id.* at 198.

172. *Id.* at 197.

173. *Id.* at 198.

174. 424 U.S. 828 (1976).

175. *Id.* at 838.

176. *Id.* at 830.

177. *Id.*

178. *Id.* at 831.

179. *Id.* at 833.

180. *Id.* at 839.

181. *Id.*

same time, the infringement on the individual First Amendment rights of the candidates and the servicemen is limited narrowly to the protection of the particular Government interest involved. Political communications reach military personnel on bases in every form except when delivered in person by the candidate or his supporters and agents. . . . [S]ervicemen are not isolated from the information they need to exercise their responsibilities as citizens and voters. Our national policy has been to preserve a distinction between the role of the soldier and that of the citizen.<sup>182</sup>

The Court's differing results in *Flower* and *Greer* are based on a rationale closely analogous to this Article's distinction of *Pell* and *Houchins*. In *Pell*, as in *Greer*, the restrictions were contained in published documents. The documents in both *Pell* and *Greer* spoke reasonably to the rationale for restrictions and gave particular reasons. The restrictions were the least intrusive consistent with that reasoned approach and they were evenhandedly enforced. In *Flower*, as in *Houchins*, little reason was given for the government action. The *Flower* regulation was all-inclusive and provided no reason for its scope or particular application. Further, there was no reason for the exclusion in *Flower* or *Houchins* save an arbitrary government decision or a desire to keep matters secret (for no articulated reason or for bad reasons).

Nevertheless, further consideration of the analysis of *Pell* and *Houchins* and its application is warranted. In *Greer*-type situations, the media ought to have the right to the same sort of access as in *Pell*. As in *Pell*, however, the right of the media need not be substantially greater than that of the public. Public tours of training facilities should be permitted if they would not be dangerous. Priority of access, when safety dictates restrictions, should go to the media. The exclusion of the media from military bases is untenable. Opportunities for random interviews of military personnel by the media should be allowed. Such activities would not disrupt the training process generally. In some situations, however, the safety of both the press and military personnel may require restrictions. When weapons are fired or gas is released, both the military personnel and journalists might be endangered. Restraints for dangerous situations can easily be set forth in self-explaining and self-justifying regulations. The media preference should be, as in *Pell*, real but minimal. Accordingly, the media ought to have access to public places unless such access seriously disrupts the functioning of the place, or unless safety would be compromised.

### 3. The Press Now Requires Preferential Treatment

The above analysis of *Lehman*, *Flower*, *Greer*, *Pell* and *Houchins* demonstrates that enforceable, viable rules concerning access can be established for general types of areas. The rules can be adopted and published in a way

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182. *Id.* at 847 (Powell, J., concurring).

that is not cumbersome. The reasonableness of such rules can be considered and reviewed in a way that does not unduly burden the government and does not violate the rights of the public or the press. The capacity to accomplish this task supports the constitutional policy favoring a weak preference for the media under the press clause. Likewise, it demonstrates that this policy should favor media access to government owned and controlled places unless countervailing considerations trump this right.

The press and public have the same constitutional right under the first amendment, but as a matter of first amendment policy these rights should be realized in a somewhat different manner. The public should not be entitled to assert a right to attend a press conference, receive press credentials, visit the scene of a fire, or conduct a random interview of prisoners as permitted by *Pell* or *Saxbe*. The different treatment flows from the same sort of considerations that underpin the Supreme Court's different treatment of the various media under the first amendment. This is because the public *en masse* can not participate in press conferences, receive press credentials, attend fires or interview randomly selected prisoners for the purpose of informing itself. Accordingly, the public is excluded. The media, on the other hand, can be present in sufficient numbers to fulfill its reporting role and to perform its information-conveying function. Equality does not require the same treatment of the media and the public, but rather requires full respect for the first amendment rights of each. Properly understood, constitutional policy supports, and indeed compels, granting the media a functional preference of access to places.

### C. *Media Access to Private Places*

A functional preference for the media within the first amendment principle should, in some circumstances, protect the media not only when it seeks access to public places but when it seeks access to privately-owned places as well. However, the policy arguments favoring such access are often less forceful and support a more limited right of access. The private party has a countervailing interest (I identify it as a privacy interest) that may be more important than the media right. In addition, the information sought may be trivial compared to knowledge about such things as prisons, military bases, and other governmental functions. Further, the information sought may be readily available from other sources. The importance of particular information and its availability from other sources, however, ought to be emphatically committed to journalistic discretion.<sup>183</sup> What is crucial is the degree of governmental control over private property.

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183. See *Florida Publishing Co. v. Fletcher*, 340 So. 2d 914 (Fla. 1976), *cert. denied*, 431 U.S. 930 (1977). The vesting of editorial discretion in editors is funda-

The media has raised a first amendment defense to criminal prosecution and tort claims arising from the media's entry to private property while pursuing news, just as it has with entry to government facilities. Several courts have rendered decisions involving the right of the media to access to private places under these circumstances.<sup>184</sup> These cases rely on theories of trespass, privacy or other grounds. The first amendment claim is generally rejected and the bulk of the cases have been decided against the journalists. The decisions as a whole lack coherence. Under the proposed analysis, the media should prevail more often than it has. The analysis illustrates the need for a slight functional preference for the media under the first amendment.

The journalist's mode of obtaining access to private property and its effect on the plaintiff should be given substantial importance in the rights of the media. If the media obtains access by intrusion—by guile or merely without consent—and destroys the plaintiff's privacy while trespassing, the plaintiff is wronged. The media action causes harm both by the improperly obtained access and the subsequent publicity. The plaintiff should be protected. If the journalist obtains access properly, no wrong flows from the journalist's conduct. In such situations the journalist does not destroy privacy or harm property. Here entry may be attained by consent of the party owning or controlling the property, or by force of law implying consent. The most important implied consent cases are those in which the government controls the property or the property-owner is compelled to grant access. This situation prevails, for instance, at the scene of a crime or a fire. The place becomes a government-controlled place and should be treated in essence as a government facility.<sup>185</sup>

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mental to the first amendment.

A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to . . . content . . . and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press. . . .

*Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974). Earlier in the opinion, the Court equated printing a reply with prior governmental restraint. *Id.* at 256. The Court is correct. Editorial discretion to say what one wants is part of the core principle enumerated earlier in this Article and must be fully accommodated. *See supra* note 22.

184. *See, e.g.*, *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971); *Le Mistral, Inc. v. CBS*, 61 A.D.2d 491, 402 N.Y.S.2d 815 (1978); *Prahl v. Brosamle*, 98 Wis. 2d 130, 295 N.W.2d 768 (Ct. App. 1980); *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973).

185. For a somewhat different approach, see Note, *Press Passes and Trespasses: Newsgathering on Private Property*, 84 COLUM. L. REV. 1298 (1984), which argues that "the relationship of press access to the democratic process" should control media rights. *Id.* at 1326. This extends to both a checking of government action, and

The essential question when the media seeks access to a private place is whether the place in some sense has become public. This occurs most often when government agents—police, fire, health, safety—take temporary control of the premises to discharge their duties.<sup>186</sup> This control converts the property, in a significant sense, into a governmental domain. The government uses the property more or less as it wishes because its police or fire agents must fully control the premises to perform their functions.

At this juncture the nature of interests changes. No longer is there merely a conflict centered on a private media interest and a private property or privacy interest. Rather there are three interests—the private or privacy interest, the public interest in knowing what the government is doing, and the private media interest. The public interest includes protecting the private party's interests in autonomy from government action both by receiving information for self-governance and via the checking function.<sup>187</sup>

## 1. The Private Interests

### a. *The Trespass Theory*

Limits on access that are based on a trespass theory which protects property owners must be considered. The usefulness of this theory waxes and wanes and, in a sense, is not too important. Regardless of whether the journalist is treated as a trespasser, the crux of the problem is disclosure of information. The journalist lacks justification for the disclosure unless the plaintiff's consent to the journalist's presence negates the objection to disclosure.<sup>188</sup> The journalist may obtain this consent by virtue of acts of the plaintiff, operation of law, or government agents' taking control of the

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observation of private conduct. *Id.* at 1326-28. This Article rejects this balancing-of-interests approach, and prefers the government-control approach. The government-control approach focuses on the function of checking government conduct. An important attribute of this approach is a greater protection of private interests and a clear emphasis on media-government relationships.

186. The less immediate the threat of abuse of government power, the less compelling is the media case. The police use force, and fire departments deal with immediate life-threatening situations and require coverage. Health and safety inspections are less immediately abusive. Often any harm they inflict will be subject to remedy by the victim's checking the media.

Of course, the proper conduct in another sense is important. They must properly perform their job. This, however, is a self-governance concern more than a checking function concern.

187. For purposes of first amendment analysis in this instance, the public and media interest can be threatened, for the most part, together.

188. See King & Muto, *Compensatory Damages for Newsgathering Torts: Towards a Workable Standard*, 14 U.C. DAVIS L. REV. 919 (1981).



premises. In such instances, the media does not trespass and there occurs no intrusion into truly private affairs. Trespass here serves as a delineation of privacy, not as the core value at issue.

Since trespass requires absence of consent, the trespass cases present an intriguing problem of determining when consent occurs. In *Belluomo v. KAKE TV and Radio, Inc.*,<sup>189</sup> one of the plaintiff partners had granted the defendant television station permission to film in the plaintiffs' restaurant. Another partner revoked permission after the filming.<sup>190</sup> The plaintiffs additionally asserted fraud in obtaining consent.<sup>191</sup> The defendant had told the consenting partner that the filming would provide part of a series on restaurants.<sup>192</sup> In fact, the filming was used as part of a program which was critical of the cleanliness and sanitary standards of the restaurant,<sup>193</sup> and which neglected the restaurant's favorable characteristics.<sup>194</sup> The court found for the plaintiffs on both the ground of fraudulently obtained consent and on the revocation of consent. The absence of consent rendered the defendant a trespasser.

The facts of *Belluomo* parallel those of *Dietmann v. Time, Inc.*,<sup>195</sup> involving fraudulent entry. The plaintiff in *Dietmann* was an allegedly bogus medical practitioner. Journalists posing as patients achieved entry into the office in his home<sup>196</sup> where they photographed and sound recorded plaintiff's activities with hidden cameras and electronic gear.<sup>197</sup> The plaintiff first learned of the journalistic enterprise when his picture and quotations appeared in a story in *Life* magazine.<sup>198</sup> A generalized invasion of privacy right based on the fraudulently induced entry was found to have occurred.<sup>199</sup> *Belluomo* could also have been decided on invasion of privacy grounds. The defendant reporters and camera crew entered parts of the plaintiffs' restaurant which were not open to the public,<sup>200</sup> thus both intruding on and subsequently revealing unpleasant facts about the plaintiff. The two cases, which have as their essence the right to be left in repose and freedom from consequent publicity, ought to have been treated as privacy cases. The absence of consent creates both the tort of trespass and the consequent harm of invasion of privacy.<sup>201</sup>

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189. 3 Kan. App. 2d 461, 596 P.2d 832 (1979).

190. *Id.* at \_\_\_\_\_, 596 P.2d at 836.

191. *Id.*

192. *Id.*

193. *Id.* at \_\_\_\_\_, 596 P.2d at 837-38.

194. *Id.* at \_\_\_\_\_, 596 P.2d at 840.

195. 449 F.2d 245 (9th Cir. 1971).

196. *Id.* at 246.

197. *Id.*

198. *Id.* at 247.

199. *Id.* at 249.

200. 3 Kan. App. 2d 461, \_\_\_\_\_, 596 P.2d 832, 840 (1979).

201. See King & Muto, *supra* note 188.

The consent issue in other trespass cases turns upon the right to enter under local custom.<sup>202</sup> Formal consent is not required but is implied on the basis of common practice. For example, where it is customary to hunt on land which is not posted, hunters do no trespass.<sup>203</sup> Likewise the door-to-door salesperson who makes her call without an appointment commits no trespass.<sup>204</sup>

Journalists are expected routinely to cover police and fire activity, just as hunters are expected to roam unposted land in hunting season, or vendors to approach doors. When police or fire department personnel or similar government agents enter property, journalists follow as a part of their job. Certainly the interest of journalists in gathering news is as important today as the interests of hunters or salespersons. That historic interest is reinforced by the weight of the first amendment. A court cannot be seriously faulted for finding that it is customary for journalists to accompany government agents. Indeed, if any customary right to enter is to be recognized, it should be recognized under these circumstances because the privacy interests have been diminished by the action of government agents. Not only does no harm result from the accompanying journalist, but no trespass occurs.

#### b. *The Privacy Analysis*

The infringed interest of the non-journalist plaintiff is nearly always primarily a privacy interest even when the courts articulate other theories. While a trespass often occurs and may be important, the plaintiff usually is concerned about disclosure or publication of information subsequent to the trespass, rather than the trespass *per se*. The privacy rationale of protecting the property owner remains when the trespass rationale is diminished. Con-

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202. See, e.g., *Prahl v. Brosamle*, 98 Wis. 2d 130, 150, 295 N.W.2d 768, 779 (Ct. App. 1980); *Florida Publishing Co. v. Fletcher*, 340 So. 2d 914, 917, *cert. denied*, 431 U.S. 930 (1977).

203. The court in *McKee v. Gratz*, 260 U.S. 127 (1922) stated:

The strict rule of the English common law as to entry upon a close must be taken to be mitigated by common understanding with regard to the large expanses of unenclosed and uncultivated land in many parts at least of this country. Over there it is customary to wander, shoot and fish at will until the owner sees fit to prohibit it. A license may be implied from the habits of the country.

*Id.* at 136.

204. The Restatement Second of Torts section 892 comment d speaks to implied consent from community customs. If salesmen customarily had access to homes, there is an implied consent to this. Localities can also pass ordinances forbidding this activity. See, e.g., *Beard v. Alexandria*, 341 U.S. 66, *reh'g denied*, 342 U.S. 843 (1951); *Real Silk Hosiery Mills v. City of Richmond*, 298 F. 126 (9th Cir. 1924).

Of course, in a case like *Le Mistral v. CBS*, 61 A.D.2d 491, 402 N.Y.S.2d 815 (1978) (facts in text at note 205 *infra*), the plaintiff objected to both intrusion into the restaurant and publicity.

sider the effect of hunters and vendors on a landowner's privacy. They do intrude. They awaken the unwary sleeper who has not posted his land. They disturb the physical tranquility of a place. They do not, however, invade the deeper psychic tranquility of a person by gross physical intrusion or by exposure of private facts. These constitute injury to a privacy interest, not to a property interest.

The privacy doctrine in these cases has not been eloquently developed by the courts, nor is it likely to be with a pure tort analysis. An aspect of intrusion is certainly important in some cases, but protection from intrusion usually is not the ultimate value protected. Thus, in *Le Mistral v. Columbia Broadcasting Company*,<sup>205</sup> when television cameramen entered the plaintiff's restaurant with cameras operating, the disruption caused by the cameras' use may have been a sufficiently intense intrusion to harm the plaintiff, but the subsequent publicity about sanitary conditions probably concerned the plaintiff more. Likewise, in *Prahl v. Brosamle*,<sup>206</sup> a case decided on a trespass theory, where a journalist accompanied a sheriff on a justified night raid of the plaintiff's home and office, the intrusive effect of the journalist's presence may have been harmful but it was only the beginning of the harm. The subsequent publicity was what really hurt. In cases like *Dietemann v. Time, Inc.*,<sup>207</sup> the media's presence is not disturbing because the journalist's misrepresentation keeps the reason for the media's presence from the plaintiff. Were the identity of the journalist and the motives known, discomfort would no doubt arise. In these cases, subsequent publicity is the more important concern of the plaintiffs. The *Le Mistral* plaintiff did not wish films of the premises used in a story linking the establishment to a failed sanitary inspection.<sup>208</sup> The *Prahl* plaintiff asserted harm from publication of a story based on inaccurate police accounts the journalists were given at the time of the raid.<sup>209</sup> The *Dietemann* plaintiff did not wish the dubious nature of his medical enterprise publicized. The plaintiff in each case knew harm occurred only with publication. The public disclosure of private facts imposes harm, not the trespass.<sup>210</sup>

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205. 61 A.D.2d 491, 402 N.Y.S.2d 815 (1978).

206. 98 Wis. 2d 130, 295 N.W.2d 768 (Ct. App. 1980).

207. 449 F.2d 245 (9th Cir. 1971).

208. 61 A.D.2d 491, —, 402 N.Y.S.2d 815, 817 (1978).

209. 98 Wis. 2d 130, 139-46, 295 N.W.2d 768, 773 (Ct. App. 1980).

210. *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973). Only in a case like *Galella*, is the intrusion the essential element. In *Galella*, the defendant, a self-styled *paparazzo*, intruded on Ms. Jacqueline Onassis and her children by constantly photographing them at close range. *Id.* at 991. The matter was aggravated by the defendant's sometimes sudden appearance, occasionally creating dangerous situations, and his disruption of the children's school life. *Id.* at 991-92. For the widow and children of President John F. Kennedy, and the wife of a well known shipping figure, publicity was commonplace. This publicity included the sort of candid photographs the defendant sought. *Id.* In this case, however, the method of acquiring the photographs

## 2. Interests Supporting Media Access to Private Property

a. *Functions of the Media*

The function of the media is not limited to reporting the plaintiff's conduct and travail. It includes observing and reporting the conduct of the police and fire personnel. Indeed, it is the performance of the public agent's duty, not the plaintiff's misfortune, which ought to be the primary public concern. In this aspect the media exercises its checking function.<sup>211</sup> The public is informed of the action and conduct of its agents. The light of disclosure helps check abuse in that conduct. In addition, reporting provides information useful for self-government. Public receipt of this information is of great importance and the public interest is thus vindicated by the media's presence<sup>212</sup> which results in transmission of this information.

The media interest in obtaining access should be vindicated only if it furthers these first amendment interests. The media concern with profits or prestige does not successfully countervail against the interests of the property owner. The media must have an interest in gathering information of importance to the public. This often will be the circumstance when the government controls the property, less so when it does not. Indeed, to a substantial degree the taking of control by government power, buttressed by possible recourse to the violence lawfully available only to the government, is the act to be observed, not the private plaintiff's conduct. From such observation comes an ability to evaluate performance of the government's job and check its abuses in that performance.

If the property owner is engaged in anti-social behavior or other misconduct, the public has an interest in being made aware of it. In case of serious misconduct such as major criminal activity, the importance is enhanced. Often, however, the interest is trivial. A dirty restaurant,<sup>213</sup> a fraudulent medical practitioner,<sup>214</sup> or even a careless rifleman confusing teenage

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was carried to obnoxious, odious extremes and the crux of the invasion of privacy was the intrusion.

211. See Blasi, *supra* note 27, at 538-639. Of course, violence is not the only aspect of government power. Moral authority supports government action. *Id.* at 540-41.

The potential plaintiff, as a member of the public, shares the public benefit. He is benefitted by good government and proper conduct of its agents. Indeed, he may be a particular victim of improper conduct. This interest may be obscured by his desire for privacy but it exists nonetheless.

212. See Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1278-82 (1976).

213. See *Le Mistral v. CBS*, 402 N.Y.S.2d 815 (1978), (discussed note 261 *infra* and accompanying text).

214. *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971).

boys with rodents<sup>215</sup> is not as important as the mafia.<sup>216</sup> Even the mafia or giant corporation cannot deploy the power of the government. Both are subject, indeed rather amenable, to United States attorneys, local police and even private plaintiffs supported by the judicial power. A tiny fraction of state power is required to cabin if not eliminate these serious malefactors. Private media interest is warranted in these activities, but private media intrusion into private activity is not, no matter how warranted government investigation is. The abuse of government power is especially important, however, because government arrays the full panoply of society's power, including legal violence, against individuals.<sup>217</sup>

#### b. *Preference for the Media*

Once afforded access in these cases, the journalist or other media representative occupies a special role. This special role is conferred by the government, which routinely grants the media special access to the scene of a crime, to a fire or public disorder in progress, or to such routine activities as the news conferences of public officials. Of course the media—or parts of it—is often excluded because it may interfere with proper government functions. Indeed, seldom can all who want access have it, but someone selected rationally usually can.

That the media has some greater functional right of access does not give the media an absolute right of access. The loss of privacy by an individual may not be total. Even if it is total vis-a-vis the government, this does not necessarily mean there is no public interest to be vindicated by governmental prohibitions on access to private places it has entered. Both the interest in effective government and in the vindication of personal privacy continues.

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215. *Prahl v. Brosamle*, 98 Wis. 2d 130, 295 N.W.2d 768 (Ct. App. 1980).

216. Hill, *supra* note 212, at 1278, 1282, in analyzing *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971), hypothesizes infiltration of the mafia, then analyzes the hypothesis to *Dietemann* and suggests no damages should be awarded for publication. Certainly, damages should be limited. See *infra* note 258 and accompanying text. Presumably the exposure of actual criminal conduct is not the basis for damages.

The comparison of *Dietemann* and the mafia is more troubling and is a problem. However evil the mafia, or crooked the politicians, they are private parties. Hill, *supra* note 212, at 1278. It is surely tempting, as Professor Hill demonstrates, to argue from these very serious situations to the rather insignificance of *Dietemann* or of *Le Mistral*. My solution is to: 1) regard the government abuse as great (and it may include the crooked politician), 2) permit media access with government control, and 3) then let the common law rules of damage protect journalists who unveil private rights.

217. See, e.g., *Florida Publishing Co. v. Fletcher*, 340 So. 2d 914 (Fla. 1976), *cert. denied*, 431 U.S. 930 (1977); *Green Valley School, Inc. v. Cowles Florida Broadcasting*, 327 So. 2d 810 (Fla. Dist. Ct. App. 1976); *Prahl v. Brosamle*, 98 Wis. 2d 130, 295 N.W.2d 768 (Ct. App. 1980).

The clearest case, yet one subject to controversy, is when the police in making an arrest, or police or other public officers in dealing with a major misadventure, would be impeded by media presence. This impediment by the media would adversely affect not only government but those private interests the government officers are protecting. Such a circumstance largely negates the arguments for differential treatment of the media. The informing and checking functions are of no value if they destroy or prevent that which they are to inform about or check upon.

Thus, in *State v. Lashinsky*,<sup>218</sup> the defendant photographer was properly convicted of disorderly conduct when he refused to obey a lone police officer's order to leave the immediate vicinity of an accident. The victim was severely injured, fire danger existed, the wreckage-strewn scene had to be preserved for investigation and the crowd was difficult to control.<sup>219</sup> The New Jersey Supreme Court observed that the situation must be assessed in the light of all facts, and the defendant treated accordingly.<sup>220</sup> The court took cognizance of the important media interest, but approved the police officer's exercise of discretion. "The [police] officer virtually working alone, could not, in his professional judgment, have permitted [even a journalist] to remain . . . and . . . discharge [the officer's] paramount responsibilities for . . . safety and welfare . . . ." <sup>221</sup> This approach is correct, and the result in its respect for the police officer's discretion is sound.<sup>222</sup>

*Stahl v. State*<sup>223</sup> presents a more complex and difficult situation. In a brief opinion, the Oklahoma Supreme Court, over a vigorous dissent, affirmed the trespass conviction of a journalist who accompanied protestors in entering the grounds of a nuclear power plant. Conceding state action,<sup>224</sup> the court said, "these newsmen were arrested for . . . entering the grounds in violation of a policy supported by valid considerations. Governmental entities are empowered to regulate property under their control in order to preserve the property for the use to which it is lawfully dedicated."<sup>225</sup>

218. 81 N.J. 1, 404 A.2d 1121 (1979).

219. *Id.* at \_\_\_\_ , 404 A.2d at 1124.

220. *Id.* at \_\_\_\_ , 404 A.2d at 1128.

221. *Id.*

222. The dissent argued the correct test was improperly applied. *Id.* at 1131 (Pashman, J., dissenting). This view neglects an important aspect of discretion, that the decision maker may err but still be within discharge of his discretion. See Koch, *supra* note 83, at 470. Of course this makes the individual defendant unhappy, but in a case like *Lashinsky* the police must have the power to control the scene of an accident. Abuse of discretion occurs when there is a lack of reasoned explanation, adequate consideration or inconsistencies of decisions.

223. 665 P.2d 839 (Okla. Crim. App. 1983).

224. *Id.* at 841.

225. *Id.*

The dissent protested vigorously.<sup>226</sup> After finding that the plant did not qualify as a public forum,<sup>227</sup> and determining that the elements of a criminal trespass existed,<sup>228</sup> an analysis based on state constitutional free speech and free press protection was applied.<sup>229</sup> The interests of the media and the state were balanced.<sup>230</sup> The state interest was assessed in the context of purpose and motive. "If, in a particular case, it is found that the purpose behind the State action is not legitimate, and is designed solely to penalize, control or limit speech or press rights, the State must show substantial justification . . . before the restriction will be upheld."<sup>231</sup> The dissent then concluded that the presence of the journalists (as opposed to the demonstrators) presented no danger of adverse consequences<sup>232</sup> and that the journalists themselves were not endangered.<sup>233</sup> The dissent also argued that the state's assessment of the event as not being newsworthy was unavailing<sup>234</sup> and found no property interest warranting the exclusion of the media.<sup>235</sup> Adopting the trial court's finding, the dissent next asserted the true purpose to be control of the presentation of the news. Agreeing that this was "objectionable, ignorable [sic] and incompatible with the rights of free people,"<sup>236</sup> the dissent accorded this factor substantial weight<sup>237</sup> and would have found for the defendants.

The gravest shortcoming of *Stahl* is the lack of support for the state's decision to arrest. The dissent correctly characterized it as being "used arbitrarily and unreasonably."<sup>238</sup> When the media is excluded from government-controlled property, the exclusion must be justified. In *Stahl* it was not. Although the arrests might have been justified on safety or welfare grounds, the state did not do so. The potential for abuse requires that a "hard look" be taken by the state before it exercises its discretion to arrest the media in order to assure that the media receives appropriate access.<sup>239</sup>

### 3. The Doctrine Applied

When applied to some of the leading cases, the above analysis serves well. It suggests somewhat greater protection of journalists and much more

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226. *Id.* at 842-49 (Brett, J., dissenting).

227. *Id.* at 846 (Brett, J., dissenting).

228. *Id.* at 845 (Brett, J., dissenting).

229. *Id.* at 845-46 (Brett, J., dissenting).

230. *Id.* at 846-48 (Brett, J., dissenting).

231. *Id.* at 846 (Brett, J., dissenting).

232. *Id.* at 847 (Brett, J., dissenting).

233. *Id.* (Brett, J., dissenting)

234. *Id.* at 848 (Brett, J., dissenting). The dissent relies on an editorial discretion rationale, following *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (discussed note 183 *supra*).

235. *Stahl v. State*, 665 P.2d 839, 848 (Okla. Crim. App. 1983) (Brett, J., dissenting).

236. *Id.* (Brett, J., dissenting).

237. *Id.* (Brett, J., dissenting).

238. *Id.* at 849 (Brett, J., dissenting).

239. See *supra* notes 90-92 and accompanying text.

clearly defines journalistic rights and the basis for the limits on damages. The analysis is not necessarily consistent with that used by the *Stahl* court. A clearer consideration of privacy is required than appears in the case, or is permitted by some state law. Invasion of privacy must be regarded as a violation of individual interests, not of property, as is trespass. This ameliorates the problem of causation between defendant's initial early conduct and the major wrong. Three leading cases, two from Florida, one from Wisconsin, that have been decided on trespass grounds warrant discussion.

In *Florida Publishing Co. v. Fletcher*,<sup>240</sup> the Florida Supreme Court found customary access a defense against trespass when journalists accompanied officers to a fire<sup>241</sup> and later published photographs of silhouettes of bodies. The officers encouraged the journalists to take the photographs.<sup>242</sup> The court correctly disposed of the trespass problem and gave little consideration to privacy interests. Accurate reporting of a life-taking fire is undoubtedly protected. Further, it cannot be questioned that the reporting did not depend on the media's entry to the premises. A story almost certainly would have resulted even had the media been excluded. The only question is whether the photograph of the silhouettes of the bodies, for which access was necessary, invaded privacy.<sup>243</sup> Without question, the photograph was shocking. Although objectionable, this characteristic of the photograph may also justify its protection. The picture presumably aggravated the plaintiff's grief. On the other hand, the fatality aspect of the story is of substantial public interest. The greater psychological impact of the photograph, albeit offensive to plaintiffs, furthers that interest. Since the story was obtained in a proper fashion, the published information was accurate, and the photograph added to the effectiveness of accurate information, it ought to be protected under a privacy/media right analysis as well as under a trespass theory.

The second Florida case, *Green Valley School, Inc. v. Cowles Florida Broadcasting, Inc.*,<sup>244</sup> decided by the Florida Court of Appeals and affirmed without opinion by the Florida Supreme Court the same day *Fletcher* was decided, must be distinguished.<sup>245</sup> In *Green Valley* the police, accompanied

240. 340 So. 2d 914 (Fla. 1976), *cert. denied*, 431 U.S. 930 (1977).

241. *Id.* at 915.

242. *Id.* at 916.

243. *Id.* at 917.

244. 327 So. 2d 810 (Fla. Dist. Ct. App. 1976), *cert. discharged*, 340 So. 2d 1154 (Fla. Dist. Ct. App. 1977).

245. While in both cases the authorities invited the journalists, in *Green Valley* a large number of police acting under color of warrant broke into plaintiff's school and facilities late at night, whereas in *Fletcher* no crime was alleged on the part of the homeowner. In *Green Valley*, the television crew aired accusations of criminal conduct after watching police disrupt the area. There was no indication that such coverage by the reporters was customary. See *Florida Publishing Co.*, 340 So. 2d 914.



by television journalists, raided a private school where possession of drugs was suspected.<sup>246</sup> Journalists accompanying the police on the raid should not, in itself, be objectionable. As in *Fletcher*, the physical presence of the journalists does little harm and to some degree aids the transmission of information to the public. The journalists undertook, however, to rearrange some of the contents of the school before taking the photographs.<sup>247</sup> This was done with the apparent acquiescence of the police. This did harm the plaintiff. A report on the circumstances and result of the raid would have been fully acceptable. Adjusting the circumstances of the raid to enhance its appeal as a bogus news item, whether by words or pictures, is not. The report, although enhanced, is not accurate and either false light invasion of privacy or defamation occurs. Since the journalists themselves in *Green Valley* altered the material they reported, they should be liable for damage flowing from the alteration. The magnitude of damages would depend upon the seriousness of the alterations of facts by the journalists, a matter which is unclear from the case.

The outcome of *Prahl v. Brosamole*<sup>248</sup> would be a more problematic outcome. In that case, the journalists accurately reported the sheriff's view of what charges should be preferred and prosecuted.<sup>249</sup> The view of the sheriff, however, was not adopted by the prosecuting attorney.<sup>250</sup> As a result, the media's account was misleading if not technically incorrect. The plaintiff objected to this error. However, the error arose not from the mere physical presence of the journalists, but from their affirmative inquiries.<sup>251</sup>

Among the cases where an officer is not accompanied by journalists, *Belluomo v. KAKE TV and Radio, Inc.*,<sup>252</sup> *Dietemann v. Time, Inc.*,<sup>253</sup> and *Le Mistral v. Columbia Broadcasting Company*<sup>254</sup> warrant discussion. They illustrate varying circumstances, values and magnitude of damages and suggest that the media should have little if any immunity from invasion of privacy actions. They also demonstrate that a rule can be established and followed with little real harm to the media's first amendment interests or to the public. For a diligent but careful and ethical media, violations should be rare and damages for those violations slight.

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246. *Green Valley*, 327 So. 2d at 813.

247. *Id.* at 814-16.

248. 98 Wis. 2d 130, 295 N.W.2d 768 (Ct. App. 1980).

249. *Id.* at 135-36, 295 N.W.2d at 773.

250. *Id.* at 136, 295 N.W.2d at 773.

251. *Id.* Upon the arrest of Dr. Prahl, the sheriff informed the reporter, Brosamle, that Dr. Prahl would be charged with the crime of reckless use of a weapon. This information was used in Brosamle's broadcast. The district attorney subsequently decided not to press charges against Dr. Prahl.

252. 3 Kan. App. 2d 461, 596 P.2d 832 (1977).

253. 449 F.2d 245 (9th Cir. 1971).

254. 61 A.D.2d 491, 402 N.Y.S.2d 815 (1978).

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*Dietemann* is both the leading case and the most difficult in final resolution. The first essential problem of finding invasion of privacy is simple. The journalists' fraudulent conduct, particularly when acting as police informants,<sup>255</sup> is clearly an intrusion. The entering of the plaintiff's premises to observe his conduct betrays his confidence and invades his privacy. The resulting disclosure of the unsavory fact that the plaintiff is a quack is equally an invasion of privacy. The problem for the plaintiff is establishing his damages. The reports of the defendants are accurate, so false light issues do not arise. The disclosure of the nature of the plaintiff's enterprise, although no doubt damaging, is true.<sup>256</sup>

Also, it cannot be said that the defendants' disclosure is merely unjustified meddling. The disclosure of the true nature of the plaintiff's activities is of public value, and indeed aids law enforcement. However, the journalists did not infiltrate organized crime and expose its operations, and even these activities are not of the magnitude of abuse of government power.<sup>257</sup> Only when an invasion of the citizen's rights by the government is likely should journalists be permitted to enter private premises, and then only when the government effectively controls those premises. The plaintiff has been harmed by the media defendant without justification and should prevail. Nevertheless, the plaintiff's recovery should be severely circumscribed. He ought to have no more than nominal damages and what actual damages<sup>258</sup> he can

255. *Dietemann*, 449 F.2d at 246.

256. *Dietemann* was exposed as a fraudulent practitioner of medicine. *Id.*

257. *Cf.* Hill, *supra* note 212 (organized crime is discussed). However, organized crime presents a much greater hazard to society than one person fraudulently practicing medicine.

258. Actual damages are "such losses as are actually sustained and are susceptible of ascertainment." *Western Union Tel. v. Lawson*, 77 Kan. 660, 662, 72 P. 283, 284 (1903). Nominal damages "are usually considered as a small and trivial sum awarded for a technical injury due to a violation of some legal right, and as a consequence of which some damage must be awarded to determine the right." *Southland Co. v. Aaron*, 224 Miss. 780, 786-87, 80 So. 2d 823, 826 (1955). One can conclude that fraudulent healers are a greater social harm than less than immaculate kitchens in restaurants and still regard it as an open question as to whether a sufficiently substantial public interest renders defendant safe from trial. To a large extent, the resulting story is one of human interest and this gains news value.

Control of damages is a compelling means to limit harm to media defendants. Justice White observed in his concurring opinion in *Dun & Bradstreet, Inc. v. Greenmoss, Builders, Inc.*:

In *New York Times*, instead of escalating the plaintiff's burden of proof to an almost impossible level, we could have achieved our stated goal by limiting the recoverable damages to a level that would not unduly threaten the press. Punitive damages might have been scrutinized . . . or perhaps even entirely forbidden. Presumed damages to reputation might have been prohibited, or limited. . . .

472 U.S. 749, 771 (1985). Aside from the discussion herein, this Article does not

prove. This formula appropriately punishes the journalists' wrongful conduct and vindicates the role of the media in obtaining information.

*KAKE* is a fitting case for juxtaposition against *Dietemann*. The filming of the plaintiff's kitchen where a health inspector found some violations is no doubt of some value. However, the plaintiff in *KAKE* alleged, as the *Dietemann* plaintiff apparently could not, that the plaintiff's restaurant had good aspects which deserved reporting.<sup>259</sup> Thus, the public policy reasons for protecting the journalists in *Dietemann* are greatly reduced. Moreover, the functions of informing the public about government activity or checking government action are not really served. The entry did not occur while the government agents performed their function, but at a later time. Although some residual value of control of government continued to exist, it was at a reduced level. The *KAKE* journalist might have determined that the health inspection was done improperly, but this could have been done more effectively if the journalist had been present during the inspection.

The *KAKE* court's trespass analysis renders the resulting publication actionable. Trespass, however, is essentially an action concerning unlawful entry to land, so its application here is strained if not an outright legal fiction. The act of entering the plaintiff's kitchen does not lead to publication. It is the act of intruding upon plaintiff's activity of preparing food that leads directly—proximately if you will—to the publication and the resulting harm. This view of the defendant's conduct as a personal rather than property invasion greatly reduces the problem of causation, and it leads directly to a consideration of the plaintiff's damages under a false light theory of privacy.<sup>260</sup>

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deal with this problem, but does advise the Justice's approach.

Nor should police investigation of possible violations be thought to destroy privacy since they will not be publicized until their completion. In any case, the public interest requires that investigations be kept secret until their culmination in order for them to succeed. Further, in the administrative search context, the United States Supreme Court has drawn a distinction between public and private portions of a business. The public portions may be entered without a warrant. The private portions may be entered only with a warrant. This corresponds to the limits of a business invitee's access. In the absence of some indication beyond investigation, the privacy assured against government inquiry without warrant should protect against press intrusion as well. In addition, the act of investigating is comparatively a much less disruptive investigation which the government undertakes. They are, even if an irritant, a function of day-to-day business. They neither destroy privacy (except insofar as government dossiers are filled and kept) nor disrupt the function of the business nor the lives of the individuals involved. Accordingly, in these more routine types of activities, both by the police, and fire personnel, and other personnel, the interests of journalists would be less compelling.

259. *Belluomo v. KAKE TV & Radio, Inc.*, 3 Kan. App. 2d 461, \_\_\_\_, 596 P.2d 832, 840 (1977).

260. *Id.* at \_\_\_\_, 596 P.2d at 840-42.

*Le Mistral* is the most difficult case to clearly analyze under a privacy theory rather than a trespass theory. The physical presence of the camera crew in the restaurant, after being ordered to leave,<sup>261</sup> clearly has the capacity to disrupt the restaurant's activity. The physical act of trespassing, without more, harms the plaintiff. Damages for trespass, including possible punitive damages, are thus appropriate.

Nevertheless, an action for invasion of privacy should also be available. Just as the physical presence of the camera crew is a trespass, it is also an intrusion into privacy. The act of filming suggests that something out of the ordinary, or at least something interesting, is occurring. The continuation of filming after the demand to cease suggests the occurrence is displeasing to the plaintiff proprietor, possibly because he fears losing customers.<sup>262</sup>

However, when viewed as either a trespass or invasion of privacy problem, *Le Mistral* is like *KAKE*. The entry does not occur when the government agents are performing their duty, but later. Such retrospective investigation of government action in the sanitary inspection situation is of limited value in controlling government action.

## V. CONCLUSION

The media should have under the press clause of the first amendment a slight, functional preference beyond that of the general public for access to places which the government controls. Ownership by the government is the most extensive sort of control, but control also exists when places are temporarily the site of government action requiring effective dominion by the government. In both situations, the first amendment principle of a right to publish is enhanced by a policy-based right to access for the media. The policy is based on the experience of American democracy. It includes the public's need to know for both the purposes of self-government and the need for government power to be checked by the media. The media must be given a slight preference over the public in order to fulfill these interests.

The media has a slight preference of access to privately-owned property when the property is properly controlled by the government. When government control exists, the privacy rights of the private party are greatly eroded. The government's intrusion itself often destroys the privacy interest. If the taking of control does not destroy the privacy right the government employees will often know of the private interest and disclose (or be forced to disclose) it in the course of the conduct of government affairs. This diminished private right is insufficient to countervail against the public's receiving information and the media's checking the function of the government. Properly under-

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261. *Le Mistral v. CBS*, 61 A.D.2d 491, 493, 402 N.Y.S.2d 815, 816 (1978).

262. *Id.* at 494, 402 N.Y.S.2d at 817.

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stood, the idea of equality of treatment does not preclude, but rather supports, this result. In order for the media to be effectively treated equally it must be permitted to function as the media. The decisions of the Supreme Court which generally equate the treatment of the public and the media do not foreclose this result. *Pell v. Procnier* is consistent with this theory. *KQED v. Houchins* is not inconsistent and when properly analyzed supports the idea that the media should have a slight preference over the public. The cases in which the various media are treated differently within the first amendment exemplify the differential treatment of equally protected entities within the first amendment. Unless the media and the public are treated differently in access to places cases, the media cannot function as the media, and will effectively be denied equal treatment. The first amendment jurisprudence permits and should be construed to require a slight functional preference for the media over the public in access to places.