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Mine Accident Investigations: Does the Press Have a Right to Be Present

O. Marie Anderson
West Virginia University College of Law

MINE ACCIDENT INVESTIGATIONS: DOES THE PRESS HAVE A RIGHT TO BE PRESENT?

I. INTRODUCTION

The fundamental goal of the Federal Mine Safety and Health Amendments Act of 1977 (Mine Act) is "to promote safety and health in the mining industry, [and] to prevent recurring disasters in the mining industry."[1] To that end, the Mine Act authorized the creation of the Mine Safety and Health Administration (MSHA) as part of the Department of Labor.[2] One of MSHA's primary responsibilities, as an

1. Federal Mine Safety and Health Amendments Act of 1977, S. Rep. No. 181, 95th Cong., 1st Sess. 1 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401. The goal of the Mine Act was emphasized in the first provision of the statute where "[c]ongress declare[d] that . . . the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource — the miner." 30 U.S.C. § 801(a) (1994).

2. 29 U.S.C. § 557(a) (1994). The Secretary of the Department of Labor is responsible for fulfilling the duties and requirements under the Mine Act. *Id.*

authorized representative of the Secretary of Health, Education, and Welfare, is to conduct mine accident investigations "for the purpose of . . . obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines."[3] Investigations are also conducted for the purpose of "gathering information with respect to mandatory health or safety standards, . . . determining whether an imminent danger exists, and . . . determining whether there is compliance with the mandatory health or safety standards."[4]

In the event of a mine accident, the mine operator must notify the Secretary of Health and Human Services. The operator must also prevent the destruction of evidence which would lead to the identification of the cause of the accident.[5] Furthermore, the mine operator or his agent has an obligation to investigate all accidents and "to determine the cause and the means of preventing a recurrence."[6] Records and reports from accident investigations conducted by mine operators are available to the Secretary of Health and Human Services and may be examined by interested persons.[7]

After being notified of the accident, MSHA will conduct its own physical examination of the mine site. A complete investigation may include formal hearings and subpoenaed witness testimony.[8] Currently, MSHA's policy is to allow only company and miner representatives to be present at interviews conducted by either the mine operator or MSHA.[9] Therefore, the press does not have access to the information collected during an accident investigation until after the investigation is complete.

However, in 1986, during a mine accident investigation in Utah, the press demanded live access to the witness interviews.[10] When the press was denied access to MSHA's interviews, which were not con-

3. 30 U.S.C. § 813(a)(1) (1994).
4. 30 U.S.C. § 813(a)(2)-(4) (1994).
5. 30 U.S.C. § 813(j) (1994).
6. 30 U.S.C. § 813(d) (1994).
7. *Id.*
8. 30 U.S.C. § 813(b) (1994).
9. MSHA Accident Investigations Procedures Review, 60 Fed. Reg. 40,859, 40,860-61 (1995).
10. *See generally* Society of Professional Journalists v. Secretary of Labor, 616 F. Supp. 569 (D. Utah 1985).

ducted at the mine, the Society of Professional Journalists sued claiming a violation of their First Amendment right to freedom of the press or a violation of the provisions of the Mine Act.[11] In light of this litigation, MSHA is reviewing its policy on who may be present during witness interviews.[12]

First, this Note will discuss the general right of access granted by the Freedom of the Press Clause in the First Amendment. The historical case law interpreting the press' right of access begins in a series of cases dealing with the right to conduct interviews with prison inmates. Second, this Note will discuss the courts expansion of the Freedom of the Press Clause to include access to trial proceedings. Third, this Note will examine both the historical and current right of access granted to the press at the scenes of accidents or disasters. Fourth, the Note will discuss the leading case on the press' right of access to mine accident investigations. Finally, this Note will offer a suggestion as to the role the press should be allowed to play in mine accident investigations.

II. THE FIRST AMENDMENT AND FREEDOM OF THE PRESS

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[13]

As stated by Justice Potter Stewart, "[T]he primary purpose of the constitutional guarantee of free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches."[14] Freedom of the press provides a check on the potential abuse of power by government officials and serves as a reminder to officials to protect the interests of those whom they were

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11. *Id.*

12. MSHA Accident investigations Procedures Review, 60 Fed. Reg. 40,859 (1995). The notice in the Federal Register provides a summary of the current accident investigation procedures and invited comments from individuals with first hand experience in accident investigations. Specifically, MSHA was interested in opinions on the efficiency and effectiveness of the witness interview phase of accident investigations. *Id.*

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

14. Potter Stewart, Of the Press, Address Before the Yale Law School Sesquicentennial Convocation (Nov. 2, 1974) *in* 26 HASTINGS L. J. 631, 634 (1975).

elected to serve.[15] The Framers of the Constitution intended that the freedom given to the press in the Constitution would "improve our society and keep it free."[16] The press, who is charged with the duty to keep watch on the government, can only perform this task by having free access to information held by the government.

Furthermore, the freedom of the press is an essential part of American society because it "assures the maintenance of our political system and an open society."[17] Through vigorous debate of political issues and constant questioning of the action of government, the press seeks to uncover the truth.[18] Furthermore, Americans, who are committed to uninhibited debate of political issues, want to ensure that information regarding political issues is available to the general public.[19] Freedom of the press provides an efficient method for disseminating information to the general public regarding the affairs of government, thereby providing a check on governmental activities.[20]

A. Historical Overview of the Press' Right of Access

Although the First Amendment guarantees the freedom of the press, it does not guarantee the press free access to all government information which is unavailable to the general public.[21] In *Branzburg*

15. Mills v. Alabama, 384 U.S. 214, 219 (1966).

16. *Id.*

17. Time, Inc. v. Hill, 385 U.S. 374, 389 (1967).

18. ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 33 (1942).

19. New York Times Co. v. Sullivan, 376 U.S. 254, 269-71 (1964).

20. *See* Saxbe v. Washington Post Co., 417 U.S. 843, 863 (1974). Justice Powells' dissent indicates that an individual is not able to obtain the information from the government which is necessary to make an informed political decision. Therefore, society must rely on the press to disseminate information. By permitting the press to have access to the information, the government is limiting the number of people with whom they must have direct contact while ensuring that the information is distributed to the general public.

21. Branzburg v. Hayes, 408 U.S. 665 (1972). In *Branzburg*, the plaintiffs argued that gathering news required reporters to agree to keep their sources anonymous. Without this anonymity, the free flow of information would be inhibited. The Supreme Court recognized that news gathering is protected by the First Amendment. "[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681. In this decision, the Court did not restrict the press' use of confidential sources. However, the Court reasoned that the First Amendment did not cr ate an immunity for the press from the enforcement of valid laws. Therefore, the Court held that the freedom of the press was not abridged by requiring reporters to appear and to testify before a grand jury. *Id.* at 708.

v. Hayes,[22] the Court noted that "the press is regularly excluded from grand jury proceedings, our [the Supreme Court's] own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations."[23] Furthermore, the press has no greater right of access than the general public to the scenes of crimes or disasters.[24] Therefore, the Supreme Court historically recognizes that there are limitations on the freedom of the press.

The Supreme Court continues to define the boundaries and limitations of the press' right of access. In *Pell v. Procunier*,[25] both the press and prison inmates challenged the constitutionality of a section of the California Department of Corrections Manual which prohibited face to face interviews between the press and designated inmates.[26] The Court prefaced its opinion by stating that each inmate retains all of his First Amendment rights "that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."[27] Since the inmates were permitted written correspondence and visitation by family, friends, legal counsel and clergy, the Court held that the restriction on face to face interviews by the California Department of Corrections Manual did not violate the inmates First Amendment freedoms.[28]

After determining the extent of the inmates' First Amendment rights, the Court addressed the members of the press who also asserted a constitutional right to conduct face to face interviews with individual inmates.[29] The reporters contended that although the press had broader access to inmates than the general public, the press should also be allowed to conduct face to face interviews in the interest of effective

22. *Id.* at 665.

23. *Id.* at 684.

24. *Branzburg*, 408 U.S. at 685.

25. 417 U.S. 817 (1974).

26. *Id.* at 819. Section 415.071 of the California Department of Corrections Manual states that "'[p]ress and other media interviews with specific individual inmates will not be permitted.'"

27. *Id.* at 822. The Court recognized that the isolation of the inmates from society fulfills the dual objectives of deterrence and protection. Another objective of the prison system is to rehabilitate inmates. The last objective of the corrections system recognized by the Court was to provide internal security within the corrections facilities.

28. *Id.* at 827-28.

29. *Id.* at 819.

news gathering.[30] The Court recognized that the First Amendment affords some protection to news gathering.[31] However, the Court denied that reporters have the right to conduct face to face interviews because "[t]he Constitution does not . . . require government to accord the press special access to information not shared by members of the public generally."[32] Therefore, *Pell* indicates the press' right of access to information is limited to the access granted to the general public.

In the companion case of *Saxbe v. Washington Post Co.*,[33] the Supreme Court interpreted a policy statement which limited a reporter's right to conduct face to face interviews with specific inmates.[34] The reporters alleged that the policy statement abridged their First Amendment rights by limiting a reporter's news gathering abilities.[35] The Court recognized that the general public has only limited access to prisons and prisoners since inmates are only allowed visits by lawyers, clergy, relatives and friends.[36] Hence, the Court concluded that limiting the press' right of access was not a violation of the First Amendment because the restriction on the press was the same as that placed on the general public.[37]

The Court reaffirmed its holdings from *Pell* and *Saxbe* in *Houchins v. KQED*.[38] In *Houchins*, the Court examined whether the press had a greater constitutional right of access to jails and inmates

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30. *Pell*, 417 U.S. at 833.

31. *Id.* at 833 (citing Branzburg v. Hayes, 408 U.S. 665, 681 (1972)). *See supra* note 21.

32. *Id.* at 834.

33. 417 U.S. 843 (1974).

34. *Id.* at 844. The challenged paragraph 46(b) of Policy Statement 1220.1A of the Federal Bureau of Prisons was similar to § 415.071 of the California Department of Corrections Manual which was interpreted in Pell v. Procunier. *See supra* note 25. Paragraph 4b(6) of the Policy Statement 1220.1A states:

> Press representatives will not be permitted to interview individual inmates. This rule shall apply even where the inmate requests or seeks an interview. However, conversation may be permitted with inmates whose identity is not to be made public, if it is limited to the discussion of institutional facilities, programs, and activities.

Saxbe, 417 US at 844.

35. *Id.* at 845.

36. *Id.* at 849.

37. *Pell*, 417 U.S. at 850. Due to the constitutional similarity, the Court adopted the same holding expressed in *Pell*.

38. 438 U.S. 1 (1978).

than a member of the general public.[39] The press, KQED, alleged a violation of their First Amendment rights when reporters were denied permission to inspect and to take pictures in a jail after an inmate committed suicide.[40] The press asserted that "the [p]ublic access to such information was essential" and that the information should be provided to the public through the press.[41] Therefore, KQED argued that the press had "an implied right of access to government-controlled sources of information."[42]

Houchins, the Sheriff who controlled access to the jail, denied the press access to individual inmates because he was concerned that individual interviews with inmates would lead to "jail celebrities."[43] Furthermore, Houchins argued that inmates were given adequate access to persons outside the prison by mail, visitations, and phone calls.[44] Therefore, Houchins believed that the press should not be given access to interview individual prisoners.

The Court analyzed the press' right to discover the true conditions in a prison by conducting individual interviews with designated inmates. The Court recognized the public's need for information regarding the conditions of prisons and the role of the press as the instrument to provide such information effectively.[45] However, the Court further recognized that the First Amendment does not guarantee the press "a right of access to all sources of information within government control."[46] Therefore, the Freedom of the Press Clause would not extend to grant the press a right of access to interview individual inmates.

From *Pell* to *Houchins*, the Supreme Court took a consistent approach in cases regarding the press' right of access to government

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39. *Id.* at 3.
40. *Id.* at 4.
41. *Id.*
42. *Id.* at 7-8.
43. *Houchins*, 438 U.S. at 5.
44. *Id.* at 6.
45. *Id.* at 8. The Court cautioned that implicit in an assertion that the press should have access to information regarding the prison conditions because of the public's need for such information was the assumption that the press is most qualified to discover inappropriate conduct and conditions in jails. *Id.* at 13-14.
46. *Houchins*, 438 U.S. at 9. The Court indicated that the First Amendment is not a Freedom of Information Act. *Id.* at 14.

information on prison conditions. While recognizing that the Constitution provides for freedom of the press, the Supreme Court restricted the press' freedom of access to government information. The Court held that the First Amendment was not violated when the access denied to the press was also denied to the general public.[47] Therefore, the line of cases from *Pell* to *Houchins,* stands for the proposition that the government may regulate the press' access to information so long as the press is treated equally with the general public.

B. The Press' Current Right of Access

The Supreme Court has left unclear the scope of government information to which the press currently has a right of access.[48] In *Richmond Newspapers*, the Supreme Court decided the narrow issue of the press' right of access to criminal trials as guaranteed by the First Amendment.[49] The majority held that "the right to attend criminal trials is implicit in the guarantees of the First Amendment."[50] However, in a concurring opinion, Justice Stevens stated that "the Court unequivocally holds that an arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press protected by the First Amendment."[51] Therefore, the decision in *Richmond Newspapers* may serve to extend the constitutionally protected right of access to government information that is newsworthy.

Chief Justice Burger, writing the main opinion in *Richmond Newspapers*, traced an extensive history of the public's right of access to criminal trials.[52] Then, the Chief Justice examined the rights expressly

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47. *See generally, Pell,* 417 U.S. at 817; *Saxbe,* 417 U.S. at 843; *Houchins,* 438 U.S. at 1.

48. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

49. *Id.* at 558.

50. *Id.* at 580 (holding 7-1 that the First Amendment grants the press access to criminal trials).

51. *Id.* at 583.

52. *Richmond Newspapers,* 448 U.S. at 564-75. Initially, trials were open to the public and attendance by freemen during the era of the Norman Conquest was required because the public rendered the judgment. *Id.* at 565. Throughout the following centuries, the format of the trial was altered, but the pubic nature of criminal trials remained a constant feature. *Id.* at 566. The American colonies adopted the open nature of the trial format. *Id.* at 567-69. Public trials assure that the trial is fair for all parties involved. *Id.* at 569. Furthermore, public trials serve as a catharsis for the general public. *Richmond Newspapers,* 448 U.S. at

guaranteed in the First Amendment.[53] The rights guaranteed by the First Amendment ensure the "freedom of communication on matters relating to the functioning of government."[54] Furthermore, the Chief Justice believed that the right to assemble complemented both the Freedom of Speech and Freedom of the Press.[55] Without the right to assemble, individuals would be limited in their ability to observe, to listen and to discuss; thereby, inhibiting an individual's freedom of expression.[56] Finally, the Chief Justice recognized that the Supreme Court is not precluded from recognizing important rights that are not expressly articulated in the Constitution.[57] Therefore, the Court held that the "right to attend criminal trials is implicit in the guarantees of the First Amendment."[58]

Justice Brennan concurred in the judgment in *Richmond Newspapers* but stated alternative grounds for the decision.[59] Justice Brennan examined the Supreme Court precedent relating to the press' right of access to government information.[60] From the line of precedential cas-

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570. Although the general public no longer attends criminal trials, the press serves as the representatives of the public. *Id.* at 572-73. The press have the responsibility of disseminating trial information thereby providing a legal education to the general public. *Id.* at 572 (citing State v. Schmit, 139 N.W.2d 800, 807 (1966)).

53. *Richmond Newspapers*, 448 U.S. at 575.

54. *Id.* Burger noted that the First Amendment freedoms included the freedom of speech, of the press, the right to peaceably assemble, and the right to petition the Government for redress of grievance. *Id.*

55. *Id.* at 577.

56. *Id.* at 578.

57. *Richmond Newspapers*, 448 U.S. at 579. In footnote 16 of *Richmond Newspapers*, the Chief Justice cites the cases which have held that some fundamental rights exists which are not explicitly expressed in either the Constitution or the Bill of Rights. *Id.* at 580. *See* N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958) (right of association); Griswold v. Connecticut, 381 U.S. 479 (1965) (right of privacy); Estelle v. Williams 425 U.S. 501, 503 (1976) (presumption of innocence); *In re* Winship, 397 U.S. 358 (1970) (standard of proof beyond a reasonable doubt); Shapiro v. Thompson, 394 U.S. 618, 630 (1969) (right to interstate travel).

58. *Richmond Newspapers*, 448 U.S. at 580.

59. *See id.* at 584 (concurring opinion by Justice Brennan with whom Justice Marshall joined).

60. *Id.* at 585-86 (referring to Saxbe v. Washington Post Co., 417 U.S. 843 (1974) (right of access to interview individual inmates denied); Zemel v. Rusk, 381 U.S. 1 (1965) (right of access to travel to Cuba to collect information denied); Houchins v. KQED, Inc., 438 U.S. 1 (1978) (right of access to interview individual inmates denied); Gannett Co. v. DePasquale, 443 U.S. 368 (1979) (right of access to pretrial proceeding denied); and Pell v. Procunier, 417 U.S. 817 (1974) (right of access to interview individual inmates denied)).

es, Justice Brennan developed and offered a two-part test to determine the right of access of the press to governmental information.[61] First, the Court should grant a right of access to the press when there is "an enduring and vital tradition of public entree to particular proceedings or information."[62] However, the Court must also examine how crucial the information is "in individual cases . . . [and] whether access to a particular government process is important in terms of that very process."[63]

The first prong of the test requires an examination of the historical access granted to the press at the specific occurrence. In *Richmond Newspapers,* Justice Brennan identified the nation's custom of having criminal trials which were open to the public.[64] Therefore, the press' right of access to criminal trials met the first factor of the *Richmond Newspaper* test.

The second prong of the *Richmond Newspapers* test requires the court to determine whether publicizing the information is necessary to the government process to which the press desires access.[65] The "public access to court proceedings is one of the numerous 'checks and balances' of our [judicial] system."[66] For instance, Justice Brennan recognized that the public nature of criminal trials helps to ensure that the defendant receives a fair trail.[67] Public trials also serve to assure the public that justice is being done.[68] The open nature of criminal trials aids in fact-finding because witnesses, who were unknown to the parties, are made aware of the trial and may step forward with key testimony.[69] Therefore, Justice Brennan concluded that there was a "specific structural value of public access" to criminal trials which satisfied the second factor of his proposed test for the press' right of access.[70]

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61. *Richmond Newspapers*, 448 U.S. at 589.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 589.
66. *Richmond Newspapers*, 448 U.S. at 592 (quoting In re Oliver, 333 U.S. 257, 270 (1948)).
67. *Richmond Newspapers*, 448 U.S. at 594.
68. *Id.* at 595.
69. *Id.* at 596-97.
70. *Id.* at 598.

C. *Expanded Right of Access After* Richmond Newspapers

The *Richmond Newspapers* decision appears to expand the press' right of access to government information as guaranteed by the First Amendment. Relying on *Richmond Newspapers*, the court in *Cable News Network v. American Broadcasting Cos., Inc.*,[71] recognized that both the general public and the press have a "right of access to news or information concerning the operations and activities of government."[72] However, the right of access was qualified by the countervailing factors of "confidentiality, security, orderly process, spatial limitation, and doubtless many others."[73] Since the *Richmond Newspapers* test was met,[74] the court held that the "total exclusion of television representatives from White House pool coverage denies the public and the press their limited right of access, guaranteed by the First Amendment of the Constitution of the United States."[75] Therefore, this court viewed *Richmond Newspapers* as expanding the press' right of access to government information beyond the access granted to trials.

Two years after the *Richmond Newspapers* decision, the Supreme Court addressed the press' right of access to criminal trials for sexual offenses against minor victims.[76] The Court recognized that the First

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71. 518 F. Supp. 1238 (N.D. Ga. 1981). In this case, the television press sought access to White House events which were designated as "'limited coverage'" events. *Id.* at 1239. The White House required the major networks to select a pool of five reporters to cover specified events. *Id.* at 1240. The pool reporters would have access to the event and then share the information with reporters from other networks. If the press could not select a pool of five reporters to cover the White House events, the television coverage would be denied. *Id.*

72. *Cable News Network*, 518 F. Supp. at 1244. The press has the duty to act as a representative or agent of the general public. The court recognized that it is easier for the limited number of the press to have access to events than it would be to accommodate all of the members of the general public who may have an interest in the event. *Id.*

73. *Id.*

74. *Id. See* discussion *supra* part II.B. In *Cable News Network* the court found a history of pool coverage of presidential activities. 518 F. Supp. at 1244. Furthermore, the Court found that "public awareness and understanding of the President's behavior facilitates his effectiveness as President." *Id.* Press coverage allows the public to determine "the adequacy of the President's performance." *Id.* Therefore, it is essential to the very nature of White House limited coverage events that they be open to the television press and the second part of the *Richmond Newspapers* test is met in this case.

75. *Id.* at 1245.

76. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982). This case determined the constitutionality of the following Massachusetts statute:

Amendment protects rights not explicitly stated in the Constitution but that are required for the full enjoyment of the First Amendment rights.[77] Then, the Court applied the two-part test announced in *Richmond Newspapers*.[78] First, the Court found that criminal trials have a history of being open to the press.[79] Second, the Court emphasized the importance of the press' right of access in the "functioning of the judicial process and the government as a whole."[80] Therefore, the two-part test from *Richmond Newspapers* was met in this case.

Although the Court believed that *Richmond Newspapers* established a right of access to criminal trials, it believed the access was qualified.[81] The state has the burden of proving a compelling state interest which would justify denial of access rights for the press.[82] The state advanced two interests which the Court found to be noncompelling.[83]

> At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, . . . the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case.

MASS. GEN. LAWS ANN. ch. 278, § 16A (West 1981), *reprinted in Globe Newspaper Co.*, 457 U.S. at 598.

77. *Globe Newspaper Co.*, 457 U.S. at 604.

78. *Id.* at 605-06. *See* discussion *supra* Part II.B.

79. *Id.* at 605. The Court acknowledged that in sexual offense cases "portions of the trials have been closed to some segments of the public" *Id.* at 601 (quoting Globe Newspaper Co. v. Superior Court, 423 N.E.2d 773, 778 (Mass. 1981)) (remanded from the Supreme Court's first hearing of the *Globe Newspaper Co.* decision). However, as indicated in Justice Burger's dissent, the majority ignores the history of excluding the press from trials involving sexual assaults against minors by finding instead that in general trials have a history of being open to the public. *Globe Newspaper Co.*, 457 U.S. at 614.

80. *Globe Newspaper Co.*, 457 U.S. at 606. The benefits of the press' right of access include ensuring "the integrity of the fact-finding process" and fostering an "appearance of fairness" in criminal trials." *Id.* Furthermore, access to criminal trials ensures the "free discussion of governmental affairs." *Id.* at 604 (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).

81. *Globe Newspaper Co.*, 457 U.S. at 606.

82. *Id.* at 606-07.

83. *Globe Newspaper Co.*, 457 U.S. 607. The state claimed that the statute protected victims from "further trauma and embarrassment." *Id.* The Court concluded that the trial court should make a case-by-case determination of the potential trauma and embarrassment to each victim. *Id.* at 608. Second, the state claimed that anonymity would encourage victims to "come forward and to provide accurate testimony." *Id.* at 609. However, the Court found that since "the press is not denied access to the transcript, court personnel, or any other possible source that could provide an account of the minor victim's testimony," the interest advanced by the state would not overcome Constitutional attack. *Id.* at 610.

Since the right of access to criminal trials passed the two-part test from *Richmond Newspapers* and the state failed to advance a compelling reason for the statute, the Court held that the construction of the Massachusetts statute denying press access to the sex offense trials violates the First Amendment of the Constitution.[84] Therefore, the court in *Globe Newspaper Co.* recognized the expansion of the right of access granted to the press. The cases decided after *Richmond Newspapers* indicate a trend toward expanding access rights granted to the press.

III. THE FREEDOM OF THE PRESS TO THE SCENES OF ACCIDENTS OR DISASTERS

A. *The Press' Right of Access to Accidents or Disasters Before* Richmond Newspapers

Essentially, the press' right of access to the scene of an accident or disaster was equal to the access granted to the general public.[85] For example, the *Los Angeles Free Press* was denied access to the scene of an accident despite the need to gather news.[86] *Los Angeles Free Press'* application for a press identification card was denied.[87] The court justified Los Angeles' denial of the press identification card by holding that "'as a news gatherer, [the Petitioner] has no constitutionally protected right of access to information which is not freely accessible to the public generally.'"[88] The restricted access was valid despite the interference with the press' ability to gather news.[89]

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84. *Globe Newspapers Co.*, 457 U.S. at 610-11.

85. *See* Los Angeles Free Press, Inc. v. City of Los Angeles, 88 Cal. Rptr. 605 (1970). In *Branzburg*, the Court first stated that the press' right of access to the scenes of accidents or disasters was equal to the access granted to the general public. *Branzburg*, 408 U.S. at 684-85. The holding in *Los Angeles Free Press* also reflects the limitation identified in both *Pell* and *Saxbe*. *See* discussion *supra* part II.A.

86. *Los Angeles Free Press*, 88 Cal. Rptr. at 608.

87. *Id.* at 608. Press identification cards permitted news reporters "to cross police lines and enter areas closed to the general public . . . ." *Id.* at 607.

88. *Id.* at 609 (citation omitted). *See also* Worth v. Herter, 270 F.2d 905, 907-09 (D.C. Cir. 1959); Tribune Review Publishing Co. v. Thomas, 254 F.2d 883 (3d Cir. 1958); Trimble v. Johnston, 173 F. Supp. 651, 655-56 (D.D.C. 1959); United Press Associations v. Valente, 123 N.E.2d 777 (N.Y. 1954); State v. Buchanan, 436 P.2d 729 (Or. 1968); Kirstowsky v. Superior Court, 300 P.2d 163 (Cal. App. 1956).

89. *Los Angeles Free Press*, 88 Cal. Rptr. at 610.

Other courts have recognized the press' limited right of access to the scene of an accident.[90] In *State v. Lashinsky*,[91] a reporter was convicted of disorderly conduct for refusing a police order to step back from the scene of an automobile accident.[92] The reporter claimed that membership in the press was a defense to the charge of disorderly conduct.[93] The court stated that the press' right to gather news is qualified by "'reasonable' time, place, and manner 'regulations.'"[94] The reasonableness of the restrictions depends on the balance between the role of the press as a news gatherer and reporter against the law and specific circumstances of the accident.[95] The police officer was justified in denying the reporter close access to the accident due to the concern for the safety and welfare of the victim and onlookers.[96] Therefore, the press' right of access to the scene of a disaster or accident is no greater than the access granted to the general public.

B. *The Press' Right of Access to Accidents or Disasters After* Richmond Newspapers

After *Richmond Newspapers*, reporters argued that the Supreme Court had granted the press greater access to the scenes of accidents or disasters than the access granted to the general public.[97] In *City of Oak Creek v. King*,[98] four reporters attempted to gain immediate access to the scene of a plane crash.[99] The reporters were convicted of disorderly conduct after refusing to obey two police requests to leave the scene of the accident.[100] The press asserted the right of access

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90. *See* State v. Lashinsky, 404 A.2d 1121 (N.J. 1979).

91. *Id.*

92. *Id.* at 1124-25. The reporter noticed an accident and stopped to investigate. A single police officer attempted to control the crowd of onlookers and provide first aid to the passenger. The police ordered the reporter to step back for the safety of both the passenger and the reporter. *Id.*

93. *Id.* at 1127.

94. *Lashinsky*, 404 A.2d at 1127 (quoting Pell v. Procunier, 417 U.S. 817, 826 (1974)).

95. *Lashinsky*, 404 A.2d at 1128.

96. *Id.*

97. *See* City of Oak Creek v. King, 436 N.W.2d 285 (Wis. 1989).

98. *Id.*

99. *Id.* at 286.

100. *Id.* at 286-87. Disorderly conduct is defined in Section 947.01 of the Wisconsin statutes as follows: "Whoever, in a public or private place, engages in violent, abusive,

guaranteed by the First Amendment.[101] The court considered the First Amendment guarantees interpreted by the Supreme Court in the series of cases from *Branzburg* to *Richmond Newspapers*.[102] The reporters argued that *Richmond Newspapers* effectively overruled *Branzburg* and granted the press a constitutionally protected right of access to the scenes of accidents.[103] However, the court disagreed with this argument, and held that, based on the series of Supreme Court cases interpreting the press' right of access, a reporter's duty to gather news does not justify granting greater access rights to the scenes of accidents.[104]

Subsequent cases are based on the premise that the press can report truthful news that is lawfully obtained.[105] In *Connell v. Town of Hudson*,[106] a free lance reporter asserted a First Amendment right to take pictures of the scene of an automobile accident.[107] Initially, the reporter took pictures from within the area cordoned off by the police.[108] After several requests, the reporter moved to observe the scene from a second story window of a nearby house.[109] The police informed the reporter that if he continued to take pictures, he would be

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indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor." WIS. STAT. § 947.01 (1965), *reprinted in City of Oak Creek*, 436 N.W.2d at 288.

101. *City of Oak Creek*, 436 N.W.2d at 291.

102. *Id.* at 291-93. *See also* Branzburg v. Hayes, 408 U.S. 665, 684 (1972) (holding that the press has not special access to scenes of accidents than the access granted to the public); Zemel v. Rusk 381 U.S. 1, 17 (1965) (acknowledging that the decreased flow of information does not justify an "unrestrained right to gather information"); Pell v. Procunier, 417 U.S. 817, 834 (no special access to prison inmates); Houchins v. KQED, 438 U.S. 1, 9 (1978) (no greater access than that granted to the general public).

103. *City of Oak Creek*, 436 N.W.2d at 292.

104. *Id.* The court noted that the press was given access to the information within a short time after the accident. *Id.* at 293.

105. *See* Connell v. Town of Hudson, 733 F. Supp. 465 (D.N.H. 1990).

106. *Id.*

107. *Id.* at 468.

108. *Id.* at 466. The reporter took pictures from a distance of 25 feet from the accident. *Id.* After being asked by the police to move back, the reporter took pictures from two locations which were 30 yards and 40 yards from the scene respectively. *Connell*, 733 F. Supp. at 466.

109. *Connell*, 733 F. Supp. at 466.

arrested for disturbing the peace.[110] The reporter later challenged the police demands in court.[111]

The court recognized that the press have a limited right of access as guaranteed by the First Amendment.[112] The Court said that the reporters right of access must be balanced against "police authority to secure an accident scene."[113] Since the reporter obeyed the police instructions to move back, the court found it unlikely that the reporter "interfered with police or emergency activities by taking pictures from the second floor of a house that others were using to view the accident."[114] Therefore, the court held that the plaintiff had the right to take pictures.[115]

The *Connell* case is distinguishable from the *City of Oak Creek* decision. The courts in both decisions recognized only a limited guarantee of access for the press to the scenes of accidents.[116] Furthermore, both courts were concerned for the safety and welfare of both the accident victims and the onlookers.[117] However, the distinguishing factor between these two cases appears to be the proximity of the press to the actually scene of the accident.[118] If the press is further away from the scene of the accident, there is less chance that they will interfere with the investigation of the accident.

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110. *Id.* at 467.

111. *Id.* at 468.

112. *Id. See generally* Garrett v. Estelle, 556 F.2d 1274 (5th Cir. 1977); Seymour v. U.S., 373 F.2d 629 (5th Cir. 1967).

113. *Connell*, 733 F. Supp. at 471.

114. *Id.* at 470.

115. *Id.* at 473. The court considered several writings by James Madison. *Id.* at 470. Madison believed that one of the sacred rights held by Americans was the liberty of the press. 6 WRITINGS OF JAMES, 1790-1802, at 336 (G. Hunt ed., 1906), quoted in *Connell*, 733 F. Supp. at 470. Although the press may abuse the freedom guaranteed it, the general good stemming from the freedom of the press outweighs this evil. *Id.*

116. *See generally Connell*, 733 F. Supp. at 473; *City of Oak Creek*, 436 N.W.2d at 296.

117. *Id.*

118. *See Connell*, 733 F. Supp. at 466 (reporter was in a building 40 yards away from the scene of the accident); *City of Oak Creek*, 436 N.W.2d at 286 (reporters wanted access to the field where the plane crashed).

IV. MINE ACCIDENT INVESTIGATION PROCEDURES

A. *Current Mine Accident Investigation Procedures*

MSHA conducts independent and unbiased investigations of each mine accident to determine the exact cause of the accident.[119] MSHA investigations include three phases: a physical examination of the accident site, an equipment analysis, and witness interviews.[120] After all phases of the investigation are complete, MSHA investigators distribute the information to prevent future accidents caused by similar scenarios.[121]

First, MSHA conducts a physical examination of the accident site.[122] During this investigation, representatives of the mine operators and the miner's representative may accompany the MSHA investigators.[123] Second, MSHA investigators analyze the equipment in the mining operation to determine whether the equipment malfunction or failure caused the accident.[124] The equipment manufacturer, representatives of the mine operators, and the miner's representatives may observe the equipment testing.[125] Third, MSHA conducts witness interviews to recreate an accurate description of the accident and events leading up to the accident.[126] During the witness interviews, federal and state mining officials, representatives of the mine operators, the miner's representative and the witness may be present.[127] The press

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119. MSHA Accident Investigation Procedures Review, 60 Fed. Reg. 40,859, 40,860 (1995).

120. *Id.*

121. *Id.*

122. *Id.*

123. 30 U.S.C. § 813(f) (1994).

124. MSHA Accident Investigation Procedures Review, 60 Fed. Reg. 40,859, 40,860 (1995).

125. *Id.*

126. *Id.*

127. *Id.* at 40,861. MSHA retains the right to limit the parties who may participate in witness interviews. To determine who may be present during a witness interview, the MSHA investigator considers the following five factors:

> 1. Public statements of disclosures from participants that may compromise the integrity of the investigation;
> 2. Behavior during interviews that could interfere with the effectiveness of the interview process;
> 3. Otherwise creating an atmosphere not conducive to MSHA's carrying out its investigatory responsibilities;

has expressed an interest in observing the witness interviews directly.[128]

B. The Right of Access to Mine Accident Investigations Conducted by MSHA

On December 19, 1984, twenty-seven miners perished after being trapped in a mine that had caught fire.[129] MSHA began their investigation as to the cause of the accident on December 31, 1984.[130] To complete a thorough investigation, MSHA decided to conduct formal fact-finding hearings which would be closed to the public.[131] The Society of Professional Journalists sought to be admitted to MSHA's hearings.[132] After the reporters were denied access, they initiated court proceedings claiming that the Mine Act and the First Amendment of the United States Constitution required that MSHA's fact-finding hearings be open to the public.[133]

Initially, the reporters contended that they had a right of access guaranteed by the Mine Act.[134] The Mine Act indicates that "[f]or the purpose of making any investigation of any accident or other occurrence relating to health or safety in a coal or other mine, the Secretary *may*, after notice, hold public hearings."[135] Since the language of the

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4. Indications of disruptive conduct as evidenced during the physical inspection of the mine; and

5. Requests by the witness for a private interview.

If any of these five factors is present, the witness interview may be conducted in private. During a private interview, MSHA only permits the federal and state mining officials to be present. This investigation procedure for witnesses was the subject of a notice and request for comment in the Federal Register on Aug. 8, 1995. *Id.* at 40,861.

128. *See generally* Society of Professional Journalists v. Secretary of Labor, 616 F. Supp. 569 (D.C. Utah 1985) [hereinafter *Society of Professional Journalists I*]. This case turns on the issue of the media's right of access to government information.

129. *Society of Professional Journalists I,* 616 F. Supp. at 570.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Society of Professional Journalists I,* 616 F. Supp. at 570-71. The Court granted a preliminary injunction stipulating that "the hearings could be closed if the participants were limited to representatives of MSHA, the Utah Industrial Commission, and the UMWA." *Id.* If anyone else was admitted to the hearings, then the press would also have a right of access to the hearings. *Id.*

134. *Id.*

135. 30 U.S.C. § 813(b) (1994) (emphasis added).

statue is permissive, the court held that "the plaintiffs cannot claim a right of access under § 813(b)."[136]

Next, the Society of Professional Journalists claimed that a right of access to formal fact-finding hearing was implicitly provided by the United State Constitution.[137] To give full meaning to the First Amendment guarantee of Freedom of the Press, the Society of Professional Journalists argued that the press must have access to the information as a "necessary part of publishing that information."[138] The court agreed with the Society of Professional Journalists and held that the press had a right of access based on a "penumbra of the first amendment guarantees."[139]

The court found that the two-part test announced in *Richmond Newspapers* and affirmed in *Globe Newspapers Co.* governed the press' right of access.[140] First, the court examined the historical tradition of administrative hearings similar to those conducted by MSHA to determine if they should be open to the press.[141] Upon examination, the court found that there is little historical tradition of openness associated with MSHA hearings.[142] Therefore, the court drew an analogy to civil trials and held that "to the extent that there is a tradition of holding this type of hearing, there is a tradition that the hearings have been

136. *Society of Professional Journalists I,* 616 F. Supp. at 572. Furthermore, the court acknowledged that Congressional intent is not present in the statute to require all mine accident investigation hearings to be open to the press. *Id.*

137. *Id.* Neither the U.S. Constitution nor the common law requires that Congress or the Executive Branch hold their meetings in public. *Id.* (citing Note, *Open Meeting Statutes: The Press Fights for the 'Right to Know'* 75 HARV. L. REV. 1199, 1203 (1962)). However, several states, either by express state constitutional requirements or by custom, hold public legislative sessions. *Society of Professional Journalists I,* 616 F. Supp. at 572 (citing OPEN MEETING STATUTES, at 1203). Sunshine Acts require the state and federal executive branches to hold some public meetings. *Society of Professional Journalists I,* 616 F. Supp. at 572.

138. *Society of Professional Journalists I,* 616 F. Supp. at 573.

139. *Id.* The penumbra of rights includes the freedom of the press, freedom of speech, and the freedom of assembly. *Id.* at 574.

140. *Id. See* discussion *infra* part II.C.

141. *Society of Professional Journalists I,* 616 F. Supp. at 575.

142. *Id.* The court found that MSHA has not heard many of these types of hearings. *Id.* Second, MSHA has the power to dictate whether the format of these hearings are public or private. *Id.*

open to the public."[143] Therefore, the court found that the first part of the *Richmond Newspapers* test was met.

Second, the court examined the procedural importance of the openness of MSHA fact-finding hearings.[144] Openness of MSHA accident investigation hearings provides a catharsis for a community that has suffered the tragedy of a mine accident.[145] Furthermore, open hearings provide a check that MSHA is fully investigating the accident.[146] Without Freedom of the Press allowing access to government information, the government has the "power to distort the information and hide the truths."[147] Therefore, the court was convinced that the openness of hearings was essential to the proper function of MSHA investigations and the press had a First Amendment right of access to formal administrative fact-finding hearings.[148] Hence, the second part of the *Richmond Newspapers* test was met in this case.

Then, the court examined the possible alternatives to requiring that the hearings be open to the public. The Secretary of Labor contended that the press should only be given access to transcripts of the hear-

143. *Id. See* Fitzgerald v. Hampton, 467 F.2d 755, 764 (D.C. Cir. 1972) (holding that based on due process requirements and fairness "in administrative hearings, the rule of the 'open' forum is prevailing-if not by statutory mandate, then by regulation or practice"). Furthermore, the Supreme Court has held that there is a "general policy favoring disclosure of administrative agency proceedings." Federal Communications Comm'n v. Schreiber, 381 U.S. 279, 293 (1965). This holding stemmed from the FCC ruling that hearings would be public except in those "extraordinary instances where disclosure would irreparable damage private, competitive interest and where such interest could be found by the Presiding Officer to outweigh the paramount interest of the public and the Commission in full public disclosure." *Id.* at 285. The FCC mandated public hearings to help the FCC to accumulate all the pertinent information on the topic under investigation. *Id.* at 293. Public hearings permit individuals to "verify, refute, explain, amplify or supplement the record from their own diverse points of view." *Id.* at 294. Furthermore, public hearings "stimulate the flow of information" to individuals affected by the FCC policies. *Id.*

144. *Society of Professional Journalists I*, 616 F. Supp. at 576.

145. *Id.*

146. *Id.* The court felt that openness and public awareness of government information is the key to effective democracy. *Id.* "Openness safeguards our democratic institutions. Secrecy breeds mistrust and abuse." *Id.*

147. *Society of Professional Journalists I*, 616 F. Supp. at 576.

148. *Id.* at 577. However, the court acknowledged that there are limits to the right of access granted to the press. "It is doubtful that the right of access would extend to informal interviews or internal agency deliberations." *Id.* Furthermore, the press would not have a right of access to disclose confidential information "or to invade the decision-making processes of governmental officials." *Id.*

ings.[149] The court believed that transcripts would not be a sufficient substitute for actually having access to the hearings. The court concluded that transcripts were inadequate because MSHA did not have a constitutional duty to provide the transcripts.[150] Furthermore, there is a time delay caused by the preparation of transcripts which would make the news stale by the time it is received by the press.[151] The court also noted that transcripts are filtered through the viewpoint of the author which means that transcripts do not provide a complete account of the nuances in the actual hearing.[152] Thus, the court concluded that transcripts were not an adequate substitute for actual presence during the hearing.

The Secretary of Labor advanced several other reasons to justify denying media access to hearings. First, if the press is admitted to the hearings, it will be more difficult for MSHA to conduct the hearings.[153] For example, it will require more organization and planning to find the facilities and the time when the hearings should be held. Second, there are times when the information reported by the press is not entirely accurate.[154] Finally, by opening the hearings to the press, the search for the truth may be more difficult.[155] Witnesses may be less candid and less likely to tell the complete truth if they know that their name will be in print the next day relating the details of the accident.

Although the district court recognized that the Secretary of Labor's arguments were not frivolous, the court held that the press has a constitutional right to be present during MSHA accident investigation hearings. However, this holding was limited to grant access to the investigations to the circumstances of the present accident which occurred in the Wilberg Mine in Utah.[156] Therefore, the right of access granted by the court was not an absolute openness and access of all hear-

149. *Society of Professional Journalists I*, 616 F. Supp. at 577.

150. *Id.*

151. *Id.*

152. *Society of Professional Journalists I*, 616 F. Supp. at 578. The Court recognized that transcripts cannot capture emotions, gestures, facial expressions and pregnant pauses.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Society of Professional Journalists I*, 616 F. Supp. at 578.

ings.[157] "Governmental interests in confidentiality, security, or orderly process may weigh heavily enough to limit the right of access, or even outweigh it."[158] Therefore, to close MSHA hearings from the press, the government must assert a compelling reason to warrant the closure.[159]

The Secretary of Labor appealed the district court's decision in *Society of Professional Journalists*.[160] Under the district court decision, the Secretary of Labor was barred from holding further hearings regarding the specific accident if the press was not afforded access.[161] When the district court rendered its judgment, MSHA had already concluded its investigation of the accident and did not have any plans to conduct future investigations.[162] The appellate court held that the decision was moot; therefore, the appeal was dismissed and the district court's judgment was vacated.[163]

In the appellate court, neither party raised the issue of mootness; however, the judge concluded that it applied to the situation presented by the facts of the case.[164] The court believed that this case did not present a situation that was "'capable of repetition, yet evading review.'"[165] To be capable of repetition, yet evading review, "there must be a 'reasonable expectation that the parties will again be em-

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157. *Id.*

158. *Id.*

159. *Id.*

160. *See* Society of Professional Journalists v. Secretary of Labor, 832 F.2d 1180 (10th Cir. 1987) [hereinafter *Society of Professional Journalists II*].

161. *Id.* at 1184. Specifically, the district court Memorandum Decision and Order stated:

> 1. That the public and the press have a constitutional right of reasonable access to the formal administrative hearings of the type being conducted by the Secretary of Labor in relation to the Wilberg Mine accident in Price, Utah. Such right of access of the press includes, at a minimum, the right to access to such hearings by means of a pool reporter from the print media and a pool camera.

Id. at 1183. The second part of the district court order stated:

> 2. That the Secretary of Labor and all persons acting at his request or under his auspices be and is hereby permanently enjoined from conducting formal administrative hearings into the Wilberg Mine accident unless members of the public or the press are afforded at least such access as they are declared entitled to hereunder.

Id. at 1184.

162. *Id.*

163. *Society of Professional Journalists II,* 832 F.2d at 1186.

164. *Id.* at 1184.

165. *Id.* (citations omitted).

broiled in the controversy and that its limited duration prevents full judicial review.'"[166] The court found that there was insufficient evidence that the Society of Professional Journalists, a Utah based organization, would be embroiled in the same controversy with the Secretary of Labor in the future.[167] Furthermore, the court recognized that the "'case must be viable at all stages of the litigation; it is not sufficient that the controversy was live only at its inception' and that where a controversy has become moot by subsequent events which preclude a grant of effective relief, the appeal should be dismissed as moot."[168] The decision was moot because the judgment was directed at the hearings for the accident on December 19, 1984, which had been complete by the time of the court's decision.[169]

In an analogous situation, the UMWA was denied access to offsite interviews conducted by MSHA.[170] On February 27, 1991 eleven miners were injured in an explosion in the Golden Eagle Mine.[171] MSHA began an on site investigation of the accident and also conducted interviews in a local Holiday Inn.[172] During the interviews, the witnesses were sworn, recorded, and allowed to bring a representa-

166. *Id.* (citing Combined Communications Corp. v. Finesilver, 672 F.2d 818 (10th Cir. 1982)). The two-part test for mootness applied in *Combined Communications Corp.*, stated that a case is moot when:

> (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, *and*
>
> (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.

Society of Professional Journalists II, 832 F.2d at 1186 (citing *Combined Communications Corp.*, 672 F.2d at 820-21.

167. *Society of Professional Journalists II*, 832 F.2d at 1184. The court required a "'demonstrated probability'" that there would be a recurrence of similar case. *Id.* at 1185. The court suggested that the appropriate time to bring this action was after the preliminary injunction was ordered and before the investigatory hearings were complete. The court distinguished *Globe Newspaper Co.* and *Richmond Newspapers* on a factual basis where those cases would be capable of repetition due to the frequency of trials. *Id.* However, in *Society of Professional Journalists*, the facts required a subsequent mine accident in Utah where MSHA conducted formal investigatory hearings under 30 U.S.C. § 813(a)(1) and the press were barred from the hearings. *Id.*

168. *Society of Professional Journalists II*, 832 F.2d at 1185-86 (citing C & C Products, Inc. v. Messick, 700 F.2d 635, 636 (11th Cir. 1983)).

169. *Society of Professional Journalists II*, 832 F.2d at 1186.

170. *See* UMWA v. Martin, 785 F. Supp. 1025 (D.C. Cir. 1992).

171. *Id.* at 1026.

172. *Id.*

tive.[173] In this case, the UMWA sought access to the all stages of MSHA's investigation, including investigatory hearings.[174]

The UMWA argued that their right of access to MSHA investigations stemmed from the Mine Act. Under the Mine Act, MSHA is required to conduct investigations of all mine accidents.[175] As part of its investigation, MSHA may conduct a physical inspection of the mine.[176] Both a representative of the operator and a representative of the miners "shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal mine made . . . pursuant to the provisions of subsection (a) of this section, [30 U.S.C. § 813] for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine."[177] The plaintiff asserts congressional intent indicates that union representatives should help the Secretary of Labor assure the safety in mines by cooperating with MSHA.[178] Therefore, the statute expressly grants the union the right to be present for inspection and discussions *at the mine*.[179] However, when MSHA conducts an interview at a location other than the actual mine site, "the agency ha[s] discretion to determine whether or not it wanted to admit union and company officials to the interviews . . . . "[180] Therefore, the court found that the union has a limited right to demand access to MSHA investigatory proceedings. However, as long as the investigation is held on the mine site, the union has the right to attend all MSHA inspections and investigation proceedings.

Furthermore, the Mine Act permits MSHA to hold public hearings as part of its investigation of the cause of the mine accident.[181] However, the statute does not "require[] that investigations outside the mine

173. *Id.*

174. *Id.*

175. *Martin*, 785 F. Supp. at 1026-27 (citing to 30 U.S.C. § 813(a) (1988)). *See* discussion *supra* part I.

176. 30 U.S.C. § 813(f) (1994).

177. *Id.*

178. *Martin*, 785 F. Supp. at 1026.

179. *Id.* (emphasis added).

180. *Id.* at 1028. The court noted that it is important to defer to the expertise of the agency in determining "whether or not the effectiveness of its investigations has been hampered by the presence of union and company officials at certain types of interviews." *Id.*

181. *See* 30 U.S.C. § 813(b) (1988).

be conducted solely as public hearings."[182] The court found that the only time hearings are public is when the agency decides to open the hearings to the public.[183] If the agency believes that the hearing will be more effective if conducted in private, it may hold a private hearing.[184]

V. CONCLUSION

Given the current state of the law regarding the freedom of the press, the press does not appear to have a constitutional right of access to MSHA investigations. Furthermore, MSHA should not alter its current regulations to grant the press access to mine accident investigations.

Under the *Richmond Newspapers* two-part test, the press does not have a right of access to MSHA investigations. First, MSHA investigations do not have a history of being open to the press.[185] Second, the openness of this type of investigation is not crucial to the purpose of the MSHA investigation.[186] Therefore, neither factor of the *Rich-*

182. *Martin*, 785 F. Supp. at 1027. Furthermore, the statute does not identify a specific format of interview which would trigger the requirements of a public hearing. *Id.*

183. *Id.*

184. *Id.*

185. *See Society of Professional Journalists I*, 616 F. Supp. at 575. The Secretary of Labor indicated that "there is not a tradition of openness in this type of hearing because MSHA almost always closed its hearing to the public." Since MSHA wants to changes its regulations, the logical inference is that these type of MSHA proceedings were historically closed to the press. Furthermore, MSHA's investigations are typically conducted at the mine. The press does not have the right of access to interviews conducted on private property. The protection of the First Amendment are invoked upon a finding of state action. Lloyd Corp. Ltd. v. Tanner, 407 U.S. 551, 567 (1972). Therefore, "before a servitude of First Amendment freedoms may be imposed on privately held property, that property must be invested to some degree with the physical or functional attributes of public use." Association de Trabajadores Agricolas de Puerto Rico v. Green Giant Co., 518 F.2d 130, 136 (3d Cir. 1975). A mine is privately owned property that does not have the physical or functional attributes of public use, therefore, the lack of state action would bar the press from exercising First Amendment rights on mine property.

186. The purpose of the MSHA investigation is to "identify all relevant facts about a mining accident in an orderly manner and then to determine the contributory causes of a particular accident." MSHA Accident Investigation Procedures Review, 60 Fed. Reg. 40,859 (1995). MSHA has the expertise to conduct mine investigations and to determine the cause of mine accidents. The press does not have such expertise.

mond Newspapers two-part test is met regarding MSHA investigatory proceedings.

Furthermore, the government has a strong interest in denying the press access. MSHA investigations should be conducted in the most efficient and effective manner possible.[187] Allowing the press to be present during MSHA investigations of the mine would be inefficient for investigations procedures.[188] "In the past, MSHA has successfully, conducted joint interviews with the participation of the mine operator, the representatives of the miners, and the state inspection agency, and has found that such procedures often result in the most complete account of an accident."[189] Therefore, MSHA's current investigatory procedures, which deny the press access, are considered to be efficient and effective.

However, openness of MSHA investigations to the press may be beneficial. First, the presence of the press may ensure that MSHA is carrying out its statutorily imposed duties properly.[190] Second, the immediate feedback on the cause of an accident as reported by the press may serve as an emotional catharsis for the community that has recently suffered a tragedy.[191] Finally, access by the press provides an effi-

187. The investigations, which determine the cause of an accident, may provide other mines with information which will prevent additional accidents. Furthermore, the "information obtained by the Secretary of Health and Human services . . . shall be obtained in such a manner as not to impose an unreasonable burden on the operators." 30 U.S.C. § 813(e) (1994). The presence of the press during MSHA accident investigations would place an addition burden on the mine operator.

188. First, mine sites are dangerous for individuals who are unfamiliar with mines. Ensuring the safety of the members of the press would create an additional burden on either the mine operators or MSHA investigators. Second, immediately after an accident, there is an increased level of activity at the mine in the form of rescue operations. The presence of the press could inhibit the rescue operation. Moreover, members of the press are only granted limited access to the scene of an accident to prohibit the interference with rescue operations. *See* discussion *supra* part III.B. Finally, there might be spatial limitations which would prohibit easy access by the press.

189. MSHA Accident Investigation Procedures Review, 60 Fed. Reg. 40,859, 40,861 (1995). Furthermore, the presence of additional people, specifically the press, might inhibit the candid response of the interviewees; thereby, hindering the effectiveness of MSHA's investigation.

190. *Society of Professional Journalists I*, 616 F. Supp. at 576. *See also Mills*, 384 U.S. at 219.

191. *Society of Professional Journalists I*, 616 F. Supp. at 576. *See also* Karen S. Precella, *Freedom of the Press: Does the Media Have a Special Right of Access to Air Crash Sites?* 56 J. AIR L. & COM. 641, 681 (1990).

cient method of disseminating information to the general public when spatial constraints prohibit access by the general public.[192]

Despite the justifications for press access to MSHA investigations, MSHA should not alter its regulations to grant the press access to its mine accident investigations. Denial of access to the press is based on the need for "confidentiality, security, and orderly process."[193] Orderly process is a justification for the limited right of access granted to the press to the scene of other types of accidents. This limited access ensures the safety of the victims, the press, and the investigators.[194] Therefore, for the sake of safety and an orderly, efficient investigation, the press should be denied access during the actual MSHA accident investigations procedures.[195] The current MSHA regulations provide an adequate degree of openness to MSHA investigations. Since the freedom of the press clause does not grant unqualified access to all

192. *See Saxbe*, 417 U.S. at 863.

193. *Cable News Network*, 518 F. Supp. at 1244. Witnesses may provide more candid responses if they believe that the source of information will remain confidential from the press. Furthermore, MSHA investigations typically are conducted at the mine site. Therefore, witness interviews are also conducted at the mine. It would be inefficient to force MSHA to conduct interviews at another time and place to allow the press access to the interview.

194. *See generally* Garrett v. Estelle, 556 F.2d 1274 (5th Cir. 1977); Seymour v. U.S. 373 F.2d 629 (5th Cir. 1967).

195. The press would have access to the information generated by the investigation. "All records, information, reports, findings, citations, notices, orders or decisions required or issued pursuant to this chapter may be published from time to time, may be released to any interested person, and shall be made available for public inspection." 30 U.S.C. § 813(h) (1994). The Mine Safety and Health Act itself makes the release of information for public inspection is mandatory. Furthermore, the press will have access to MSHA accident investigation reports under the Freedom of Information Act. *See generally* 5 U.S.C. § 552 (1994). Other agencies complete investigations and then allow the press and the public access to the information based on Freedom of Information Act requests. *See* 49 C.F.R. § 801.30 (1994) (field aircraft accident investigations by the NTSB); 49 C.F.R. § 801.33 (1994) (surface transportation accident investigations by NTSB); 49 C.F.R. § 801.35 (1994) (aviation accident reports by the NTSB); 49 C.F.R. § 801.36 (1994) (surface transportation accident reports by the NTSB).

sources of government information, the First Amendment should not be used as a club to gain access to MSHA mine accident investigations.

O. Marie Anderson