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The Right to the Press to Gather Information under the First Amendment

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I. INTRODUCTION

Freedom of the press has long been regarded as one of the most important liberties of a free society. In England, before the American Revolution, the courts regarded freedom of the press as essential to the existence of a free state and held that no previous restraint could be laid upon publication.[1] The importance of freedom of the press to the framers of the United States Constitution was demonstrated by its inclusion in the Bill of Rights.[2]

Although the framers of the Constitution considered a free press to be of importance, the meaning they attached to the provision for freedom of the press is unclear. The House debates regarding its meaning are not revealing[3] and there are no records of debates in the Senate.[4] However, it is likely that the framers envisioned a freedom for the press which was more extensive than that granted under the English common-law view. As Judge Thomas Cooley explained:

> The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.[5]

Thus, the protection provided by the first amendment appears to extend beyond a bar against the traditional previous restraints upon publication, such as censorship, to the point of prohibiting governmental actions which *function* as previous restraints upon publication. Broad

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1. W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *151-52.

2. The first amendment to the United States Constitution states: "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 grievance."

3. The House debates regarding the first amendment primarily concerned the provision regarding the right to assemble. 1 ANNALS OF CONG. 731-49 (Gales & Seaton eds. 1789).

4. THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 920-82, 92d Cong., 2d Sess. 936 (1973).

5. 2 T. COOLEY, CONSTITUTIONAL LIMITATIONS 886 (8th ed. 1927) [hereinafter cited as CONSTITUTIONAL LIMITATIONS]. *See* Grosjean v. American Press Co., 297 U.S. 233, 249-50 (1936); Z. CHAFFEE, FREE SPEECH IN THE UNITED STATES 19-21 (1941) [hereinafter cited as FREE SPEECH]; T. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 300-02 (3d ed. 1898) [hereinafter cited as GENERAL PRINCIPLES]. *But see* L. LEVY, LEGACY OF SUPPRESSION 3 & 18-87 (1960).

first amendment protection secures the right to a free discussion of public events.[6] However, the scope of this right is not clearly established in all aspects. For example, while the right to a free discussion of public events is clearly protected, the extent to which the press has a protected right to gather information which, when disseminated, may be a basis for such discussion, is unclear.

This comment will analyze the recognition, development, and scope of the right of the press to gather information. A suggested approach for determining the types of information to which the press should be allowed access will also be discussed.

II. THE FREE FLOW OF INFORMATION

One commentator has stated that the guarantee of freedom of the press protects a societal interest, the interest in the attainment of truth, so that this nation may knowledgeably choose a course of action and follow it in the most desirable way.[7] The Supreme Court has noted that it is a goal of the first amendment to produce "an informed public capable of conducting its own affairs. . . ."[8] In addition, the Court has often emphasized the need for a free flow of information, finding it to be a purpose of the first amendment to preserve "an uninhibited marketplace of ideas in which truth will ultimately prevail. . . ."[9]

The role of the press in contributing to this interchange of ideas is a key one. It is one which the Supreme Court has clearly acknowledged:

> [T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.[10]

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6. 2 CONSTITUTIONAL LIMITATIONS, *supra* note 5, at 885.

7. FREE SPEECH, *supra* note 5, at 33.

8. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 392 (1969).

9. *Id.* at 390. *See* Buckley v. Valeo, 424 U.S. 1, 14 (1976) (discussion of public issues integral to operation of system of government); Roth v. United States, 354 U.S. 476, 484 (1957) (first amendment designed to assure interchange of ideas to bring about desired changes); Pennekamp v. Florida, 328 U.S. 331, 346 (1946) (free discussion a cardinal principle of "Americanism"); Associated Press v. United States, 326 U.S. 1, 20 (1945) (widest possible dissemination of information is essential to the welfare of the public).

10. Mills v. Alabama 384 U.S. 214, 219 (1966). A similar view was expressed by the Court in Estes v. Texas, 381 U.S. 532, 539 (1965): "The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public of-

The press plays its role by providing the information upon which decisions can be based.[11] An informed public depends upon effective reporting by the press, for it is often impossible for the individual to obtain information about government misconduct unless it is provided by the press.[12] Indeed, even if such information is available, its full import is often understood only after extensive discussion by the press. A prime example is the Watergate affair. Initially, the public, due to a lack of information, was indifferent. However, after the affair was discussed and its ramifications developed by the press, the full import became clear to the public, which then reacted.[13] Thus, in gathering information the press acts as an agent of the public; it provides the information and a forum upon which the public relies.[14]

Considerations such as these led the Supreme Court to recognize, in *Grosjean v. American Press Co.*,[15] the value of "informed public opinion" as "the most potent of all restraints upon misgovernment. . . ."[16] This recognition has led the Court to strengthen the protections surrounding freedom of the press. The Court has held in several contexts that the right to receive information and ideas is protected under the first amendment.[17] And the Supreme Court has also held in an analo-

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ficers and employees and generally informing the citizenry of public events and occurrences. . . ." As Justice Musmanno of the Pennsylvania Supreme Court noted, "[B]y receiving all the news, the American people can, with intelligence based on knowledge, determine for themselves what policy will best serve them in the retention of their freedom. . . ." *In re* Mack, 386 Pa. 251, 271, 126 A.2d 679, 689 (1956) (Musmanno, J., dissenting), *cert. denied*, 352 U.S. 1002 (1957).

11. [I]n a constitutional point of view [the press'] chief importance is, that it enables the citizen to bring any person in authority, any public corporation or agency, or even the government in all its departments, to the bar of public opinion, and to compel him or them to submit to an examination and criticism of conduct, measures, and purposes in the face of the world, with a view to the correction or prevention of evils. . . .

GENERAL PRINCIPLES, *supra* note 5, at 301.

12. *See* Saxbe v. Washington Post Co., 417 U.S. 843, 863 (1974) (Powell, J., dissenting) ("No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities."). The Supreme Court, recognizing the demands of a modern society, has recently reaffirmed the importance of this role:

[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media. . . . Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92 (1975).

13. For a discussion of the role of the press in this instance, see T. WHITE, BREACH OF FAITH—THE FALL OF RICHARD NIXON 222-49 (1975).

14. *See* Saxbe v. Washington Post Co., 417 U.S. 843, 863 (1974) (Powell, J., dissenting).

15. 297 U.S. 233 (1936).

16. *Id.* at 250.

17. Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972) (freedoms of speech and press

gous context that commercial information is protected, finding that society may have a "strong interest" in the free flow of such information.[18] However, the Court has not advanced far beyond this point in defining the scope of the protection for freedom of the press.[19]

III. RIGHT OF THE PRESS TO GATHER INFORMATION

A. Early Development of the Right

In 1935, the Ninth Circuit Court of Appeals noted that freedom of the press refers to freedom from governmental interference for those engaged in news gathering and dissemination.[20] However, thirty years elapsed before the United States Supreme Court acknowledged the existence of the right to gather information in *Zemel v. Rusk*.[21]

In *Zemel*, after the Department of State declared passports invalid for travel to Cuba, appellant, a private individual who had no connection with the press, sought to have his passport validated for Cuban travel, claiming that he wanted to be "a better informed citizen."[22] While the Court agreed that the flow of information regarding Cuba was rendered "less than wholly free" by the travel restriction,[23] it rejected appellant's claim that such a restriction interfered with his first amendment rights to travel abroad and acquaint himself with the American policies toward Cuba.[24] The Court described the restriction

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protect right to receive information); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (right to receive information regardless of social worth protected); Griswold v. Connecticut, 381 U.S. 479, 482-86 (1965) (right to receive birth control information protected); Marsh v. Alabama, 326 U.S. 501, 505 (1946) (free society depends upon right to receive information); Martin v. City of Struthers, 319 U.S. 141, 149 (1943) (statute prohibiting door-to-door distribution of leaflets unconstitutional).

18. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 764 (1976). As the Court explained:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. . . . And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.

Id. at 765 (citations omitted). *See also* First Nat'l Bank v. Bellotti, 435 U.S. 765, 778-80 (1978) (status as corporation does not in itself deny first amendment protection).

19. *See* Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838, 838-39 (1971).

20. Associated Press v. KVOS, 80 F.2d 575, 581 (9th Cir. 1935) (dictum), *rev'd on other grounds*, 299 U.S. 269 (1936).

21. 381 U.S. 1 (1965).

22. *Id.* at 4.

23. *Id.* at 16.

24. *Id.*

as "an inhibition of action" justified by the "weightiest considerations of national security."[25] Chief Justice Warren, speaking for the Court, reasoned that "[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow."[26] However, in a backhanded fashion he also acknowledged the existence of a right, albeit a limited one, to gather information: "The right to speak and publish does not carry with it the *unrestrained* right to gather information."[27] In *Zemel*, it was considerations of national security which overcame the right to gather information. While the Court did not discuss the extent of this right, the fact that it based the right to gather information upon the right "to speak and publish" implies its applicability to the press, as well as to private individuals, since it is the press which "publishes" information. The Court has never held that freedom of the press is entitled to less protection than freedom of speech.[28]

Shortly after its decision in *Zemel*, the Supreme Court focused its attention specifically on the press in *Estes v. Texas*,[29] discussing the degree of publicity permissible at a criminal trial. In holding that the television coverage of Billy Sol Estes' trial was a violation of defendant's due process right to a fair trial, the Court noted that although "maximum freedom" should be allowed the press in informing the citizenry of public events, its exercise of that freedom "must necessarily be subject to the maintenance of absolute fairness in the judicial process."[30] For the first time, the Court explicitly defined the press' right of access in terms of the public's right of access: "The television and radio reporter has the same privilege [of access as does the newspaper reporter]. All are entitled to the same rights as the general public."[31] In his concurring opinion, Chief Justice Warren also defined the scope of the media's right of access in terms of the public's right,[32] as did Justice Harlan in his concurring opinion.[33]

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25. *Id.*

26. *Id.* at 16-17.

27. *Id.* at 17 (emphasis added).

28. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 796-802 (1978) (Burger, C.J., concurring) (rights of free press and free speech entitled to same degree of protection). *Compare* Address by Justice Stewart, Yale Law School Sesquientennial Convocation (Nov. 2, 1974), *reprinted in* Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975) (freedom of press provision provides protections for media over and above those provided by free speech provision) [hereinafter cited as Stewart].

29. 381 U.S. 532 (1965).

30. *Id.* at 539.

31. *Id.* at 540.

32. "When representatives of the communications media attend trials they have no greater rights than other members of the public." *Id.* at 584 (Warren, C.J., concurring).

33. Unquestionably, television has become a very effective medium for transmitting

Thus, it is clear from *Estes* that, at least in the context of a criminal trial, the press has a right to gather information, but that right is no greater than the right of the public. As with *Zemel*, though, the Court failed to discuss the extent of this right, finding the right to be outweighed in this case by countervailing constitutional considerations.[34] The Court recognized a situation in which the media's conduct was the key—the information could be reported, but the particular manner in which the media sought access was impermissible as an interference with the defendant's right to a fair trial.

In 1972, in *Branzburg v. Hayes*,[35] the Supreme Court held that a newsman does not have the right to refuse to reveal confidential sources and information to a grand jury.[36] In reaching this conclusion, the Court recognized the existence of, and need for, a constitutional basis for protection of news gathering: "Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."[37] However, the Court rejected the notion that such protection is unlimited,[38] and, citing *Zemel*, again defined the right of the press to gather information as coextensive with the public's right to gather information: "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special ac-

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news. Many trials are newsworthy, and televising them might well provide the most accurate and comprehensive means of conveying their content to the public. Furthermore, television is capable of performing an educational function by acquainting the public with the judicial process in action.

Id. at 589 (Harlan, J., concurring). He concluded:

Once beyond the confines of the courthouse, a news-gathering agency may publicize, within wide limits, what its representatives had heard and seen in the courtroom. But the line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public.

Id.

34. *Id.* at 539-40.

35. 408 U.S. 665 (1972).

36. *Id.* at 685-86.

37. *Id.* at 681. If the provision for freedom of the press is to have a meaning, it must function as more than a guarantee of a right to public information to which the press has access. As Justice Stewart has observed:

It is tempting to suggest that freedom of the press means only that newspaper publishers are guaranteed freedom of expression. They *are* guaranteed that freedom, to be sure, but so are we all, because of the Free Speech Clause. If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy.

Stewart, *supra* note 28, at 633 (emphasis in original). Thus, the freedom of the press provision has been regarded as providing a constitutional right to gather information.

38. "It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability." 408 U.S. at 682.

cess to information not available to the public generally."[39] The Court cited specific examples to emphasize its point:

> Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal.[40]

Once again the Court failed to discuss the scope of the right.

B. The Need for Access to Information

After *Zemel, Estes*, and *Branzburg*, it is clear that the press has at least a limited right to gather information.[41] The acknowledgment of this right is a recognition of the fact that freedom of the press requires a right, at least to some degree, to gather information—the press cannot inform the public of matters about which it cannot obtain information.[42] As one district court stated, "[f]reedom to publish news, without some protected ability to gather it, would render freedom of the press an unduly gossamer right."[43] The Second Circuit Court of Appeals has expressed a similar view: "Freedom to cull information is logically antecedent and necessary to any effective exercise of the right to distribute news. Indeed, the latter prerogative cannot be given full meaning unless the former is recognized."[44]

Because the press cannot publish unless it has the ability to gather

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39. *Id.* at 684.

40. *Id.* at 684-85. Both the press and the public can be excluded from in camera inspections of evidence. *See* United States v. Nixon, 418 U.S. 683, 714-16 (1974).

41. One district court, citing *Zemel* and *Branzburg*, reached this conclusion: "Journalists and newsmen have a First Amendment right to reasonable access to certain items of news. That right is of necessity a limited one." Lewis v. Baxley, 368 F. Supp. 768, 775 (M.D. Ala. 1973).

42. *See* text accompanying notes 7-14 *supra*. As Justice Musmanno described it:

> Freedom of the press is not restricted to the operation of linotype machines and printing presses. A rotary press needs raw material like a flour mill needs wheat. A print shop without material to print would be as meaningless as a vineyard without grapes, an orchard without trees, or a lawn without verdure.
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> Freedom of the press means freedom to gather news, write it, publish it, and circulate it. When any one of these integral operations is interdicted, freedom of the press becomes a river without water.

In re Mack, 386 Pa. 251, 273, 126 A.2d 679, 689 (1956) (Musmanno, J., dissenting), *cert. denied*, 352 U.S. 1002 (1957).

43. Lewis v. Baxley, 368 F. Supp. 768, 775 (M.D. Ala. 1973).

44. Herbert v. Lando, 568 F.2d 974, 977 (2d Cir. 1977), *cert. granted*, 435 U.S. 922 (1978).

information, denial of a right of access to information is the functional equivalent of a prior restraint upon publication. The Supreme Court has noted that it is essential "not to limit the protection of [freedom of the press] to any particular way of abridging it."[45] The fact that no direct restraint is involved "does not determine the question."[46] If the information is not otherwise available, it would seem that, in practical terms, the press is restrained from publishing.[47] For example, if the press has access to information, some of which pertains to national security, it might not be permitted to publish all of the information. But, the press could publish that information not affecting national security. However, if the press was not given access to the information, then it would be unable to publish even the information not affecting national security. The free flow of information would cease to exist. Thus, denial of a right to gather information could be the most insidious form of a prior restraint upon publication—members of the press are left unaware of what it is that they could be publishing.

1. The Prison Access Cases

In 1974, the Supreme Court discussed the right of the press to gather information in the context of media access to prisons. In *Pell v. Procunier*,[48] prison inmates and journalists challenged the constitutionality of a California regulation prohibiting interviews with prisoners who had been specificially designated in advance. The prisoners contended that the regulation functioned as an inhibition of free speech.[49] The Court rejected this argument, finding that alternative means of communication existed between the prisoners and persons outside the prison.[50] The journalists in *Pell* contended that they had a constitutional right, in the absence of a clear and present danger to security or some other substantial interest of the prison system, to interview any

45. Grosjean v. American Press Co., 297 U.S. 233, 249 (1936) (citing Near v. Minnesota, 283 U.S. 692, 713-16 (1930)).

46. Garland v. Torre, 259 F.2d 545, 548 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958). *See* American Communications Ass'n, CIO v. Douds, 339 U.S. 382, 402 (1950).

47. *See* note 42 *supra*.

48. 417 U.S. 817 (1974).

49. *Id.* at 821.

50. *Id.* at 826-28. The Court pointed out that under California prison regulations an inmate may communicate with others outside the prison by mail. *Id.* at 824. Such communication may not be censored unless the decision to do so is accompanied "by minimal procedural safeguards." Procunier v. Martinez, 416 U.S. 396, 416-18 (1974). The Court also noted that inmates could receive limited visits from their families, the clergy, their attorneys, and friends of prior acquaintance. 417 U.S. at 824-25.

inmate who was willing to talk with them.[51] The Court found that the regulation was "not part of an attempt by the State to conceal the conditions in its prisons or to frustrate the press' investigation and reporting of those conditions;"[52] rather, this regulation was designed to meet security needs.[53] The Court, noting that security problems had arisen in the past at the prison when the press was allowed to interview any prisoner it chose, emphasized that there was a clear and present danger to security.[54] It also noted that "both the press and the general public [were] accorded full opportunities to observe prison conditions."[55] Indeed, the press actually enjoyed access to the prisons which was unavailable to the general public.[56] Thus, according to the Court, the press had received as much access as it needed. The Court denied the press' request for greater access without specifying whether or not such access would be permitted had there been no danger to security.

However, the Court did suggest that the prison could narrow the press' right of access to a level equal to that of the public. Even though the press had been granted greater access than had the public, the Court's position was that such access is not constitutionally mandated: "[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public."[57] The Court pointed out that while the first and fourteenth amendments protect the press from government interference with publication, they do not grant the press a right of access to information greater than that enjoyed by the public.[58] And it concluded that the proposition that "the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the pub-

51. 417 U.S. at 829.

52. *Id.* at 830.

53. *Id.* at 826-27.

54. *Id.* at 831-32.

55. *Id.* at 830 (footnote omitted).

56. *Id.* at 830-31. The Court specified the forms of access the press enjoyed which were not available to the general public:

> In addition, newsmen are permitted to visit both the maximum security and minimum security sections of the institutions and to stop and speak about any subject to any inmates whom they might encounter. If security considerations permit, corrections personnel will step aside to permit such interviews to be confidential. Apart from general access to all parts of the institutions, newsmen are also permitted to enter the prisons to interview inmates selected at random by the corrections officials. By the same token, if a newsman wishes to write a story on a particular prison program, he is permitted to sit in on group meetings and to interview the inmate participants.

Id. at 830.

57. *Id.* at 834.

58. *Id.*

lic generally"[59] is one which "finds no support in the words of the Constitution or in any decision of this Court."[60]

In *Saxbe v. Washington Post Co.*,[61] the case decided in tandem with *Pell*, the Court faced a factual setting similar to that of *Pell*. Here, members of the press were challenging a federal regulation which prohibited interviews with specifically designated prisoners.[62] As in *Pell*, the Court noted the existence of "liberal visitation privileges."[63] And, the Court pointed out that the press had access to prisons and prisoners which "in significant respects exceed[ed] that afforded to members of the general public."[64] The Court also stated that both the press and the public could use recently released prisoners as information sources about prison conditions.[65]

The Court advanced these arguments to show that, as in *Pell*, prison authorities were not attempting to conceal prison conditions from the public.[66] In fact, the Court found justification for the restriction because of "substantial disciplinary problems" which tended to result from inmate contacts with the press.[67] However, the Court did not undertake to balance such penal interests against the "legitimate de-

59. *Id.*

60. *Id.* at 834-35. However, it has been argued that the press, because of the role it plays in disseminating information to the public, should have a greater right of access, particularly to prisons:

> The prohibition of visits by the public has no practical effect upon their right to know beyond that achieved by the exclusion of the press. The average citizen is most unlikely to inform himself about the operation of the prison system by requesting an interview with a particular inmate with whom he has no prior relationship. He is likely instead, in a society which values a free press, to rely upon the media for information.

Id. at 841 (1974) (Douglas, J., dissenting). Justice Stevens (then Judge) of the Seventh Circuit Court of Appeals has advanced a similar argument:

> Before a democratic society can effectuate drastic institutional changes, the community at large must be informed about the need for change. That there is inadequate public awareness of the nature of our penal system, and that the system as a whole needs to be changed dramatically, are propositions which correctional officials are not likely to challenge. . . . If the reasons for our faith in the principles embodied in the First Amendment are valid, it is not unreasonable to infer that there is a causal connection between those two propositions.

Morales v. Schmidt, 489 F.2d 1335, 1346 n.8 (7th Cir. 1973) (Stevens, J., dissenting), *opinion on rehearing en banc*, 494 F.2d 85 (7th Cir. 1974).

61. 417 U.S. 843 (1974).

62. *Id.* at 844.

63. *Id.* at 846.

64. *Id.* at 847. Representatives of the press could tour the prisons, conduct brief interviews with any inmates encountered, and photograph any prison facilities. *Id.* Newsmen were also allowed to communicate by mail with inmates without fear of censorship, *id.*, and to interview a randomly selected group of inmates. *Id.* at 848.

65. *Id.* at 848.

66. *Id.*

67. *Id.* at 848-49.

mands" of the first amendment.[68] Such an undertaking was deemed to be unnecessary in light of the fact that the restriction was merely a "particularized application" of the general rule that a member of the public, unassociated with a designated prisoner, may not enter a prison and demand to speak to that prisoner.[69]

In place of this balancing approach, the Court set forth a rule which it seemingly intended to use in discussing all claims under the first amendment regarding the press' right to gather information, a rule holding that the press' right to gather information is coextensive with the public's right to do so.[70] Yet, the Court still failed to identify the scope of the public's right, thereby leaving the dimensions of the press' right to gather information undefined.

This equation of the rights of the press and the public presents a key question: Can any denial of press access to information be justified simply by noting that the public also has no right of access? As Justice Powell argued in his dissenting opinion in *Saxbe*:

> From all that appears in the Court's opinion, one would think that any governmental restriction on access to information, no matter how severe, would be constitutionally acceptable to the majority so long as it does not single out the media for special disabilities not applicable to the public at large.[71]

It seems doubtful, though, that such a restriction would be upheld.[72] As the Eighth Circuit Court of Appeals has stated, "[W]e find it hard to

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68. *Id.* at 849.

69. Justice Powell, dissenting, argued that the balancing test employed by the Court in Procunier v. Martinez, 416 U.S. 395 (1974), should be used in this situation. 417 U.S. at 835-42. In *Procunier*, prisoners challenged mail censorship regulations which proscribed, among other things, statements which unduly complained or magnified grievances and those which were "defamatory" or "otherwise inappropriate." 416 U.S. at 399-400. Justice Powell, speaking for the Court, found first amendment liberties to be "implicated" in the censorship of the mail, but also noted that there were several state interests involved in the censorship. *Id.* at 409. The state interests included the preservation of internal order and discipline, the maintenance of security, and rehabilitation of prisoners. *Id.* at 412. Considering these interests, Justice Powell declared such censorship justified only if (1) the regulation furthers "an important or substantial government interest unrelated to suppression of free expression" and (2) the limitation of first amendment freedoms is no greater than that necessary to protect the interest involved. *Id.* at 413.

In applying this test in *Saxbe*, Justice Powell concluded that while the regulation furthered an important government interest, it was broader than was necessary to protect the interest involved. 417 U.S. at 868. He therefore would have invalidated the regulation. 417 U.S. at 874.

70. The Court found this case "constitutionally indistinguishable from *Pell*. . . and thus fully controlled" by the holding in *Pell* that newsmen have no greater right of access than that possessed by the public. 417 U.S. at 850.

71. *Id.* at 857 (Powell, J., dissenting).

72. *But see* notes 156-75 *infra* and the accompanying text.

believe that the Court intended [in *Pell* and *Saxbe*] that any governmental restriction on access to sources of information is constitutionally permissible as long as it applies to the general public as well as the press."[73] One may find it at least inconsistent with a system of democratic self-rule to allow absolute secrecy in governmental affairs.

2. *Cox Broadcasting Corp. v. Cohn*

After the decisions in *Pell* and *Saxbe*, it is clear that the press has the right to gather information whenever that right exists for members of the general public. The Supreme Court emphasized this point in *Cox Broadcasting Corp. v. Cohn*.[74] The Court held that sanctions may not be imposed on the accurate publication of the identity of a rape victim obtained from public records.[75] In so holding, the Court recognized the press' right of access to information within the public domain: "Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it."[76] The Court was not expanding the press' right of access. It did not require that the government take affirmative action to provide the press with information. Instead, the Court merely recognized that the press could not be discriminated against—if information is made available to the public, it must be made available to the press.

3. Circuit Court of Appeals Cases

The equation of the press' right of access to information with that of the public has continued at the appellate court level. In *Garrett v. Estelle*,[77] a case in which a television reporter petitioned to film the execution of the first person executed in Texas since 1964, the Fifth Circuit Court of Appeals held that "the protection which the first amendment provides to the news gathering process does not extend to matters not accessible to the public generally. . . ."[78] The court gave its analysis of what the Supreme Court meant in *Pell* and *Saxbe*:

> The Court made no *ad hoc* determination in *Saxbe* and *Pell*; it proceeded from the general principle . . . that the press has no greater right of access to information than does the public at large; and that the first amendment does not require government to make available to the press information not available to the public. This principle marks a limit to the first

73. Herald Co. v. McNeal, 553 F.2d 1125, 1131 n.10 (8th Cir. 1977).
74. 420 U.S. 469 (1975).
75. *Id.* at 496-97.
76. *Id.* at 496.
77. 556 F.2d 1274 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 3142 (1978).
78. *Id.* at 1276.

amendment protection of the press' right to gather news.[79]

With this understanding, the court upheld the denial of access to film the execution.[80]

In another case before the Fifth Circuit Court of Appeals, *United States v. Gurney*,[81] newspaper reporters sought to examine certain criminal trial documents, including exhibits not yet admitted into evidence and transcripts of bench conferences held *in camera*.[82] While recognizing that the press "cannot be denied access to any information already within the public domain,"[83] the court upheld the denial of access, relying upon *Zemel, Branzburg, Pell* and *Garrett* as authority.[84]

The court distinguished the denial of access to information from a prior restraint upon publication, reasoning that no such restriction "freezing" speech was involved: "The district judge merely refused to allow the appellants to inspect documents not a matter of public record. Appellants were free to obtain whatever information they desired from any source except from the district court and its supporting personnel."[85] According to the court, there were several alternative sources of information—the parties to the litigation, the attorneys involved in the case, the witnesses, and members of the public.[86] However, the court did not discuss the practicality of these alternatives. It failed to indicate what information members of the general public might have that the press did not. And the court failed to discuss the possibility that the parties, attorneys, and witnesses might not be willing to provide information. By limiting the press to these sources of information, the court might, in effect, have upheld an indirect prior restraint upon publication. The press may not have been able to publish due to a lack of information.

In both *Garrett* and *Gurney*, the Fifth Circuit Court of Appeals failed to define the scope of the right to gather information. Instead, it merely followed the precedents set by the Supreme Court and noted that the first amendment right to gather news is defined "in terms of information available to the public generally."[87]

79. *Id.* at 1278.
80. *Id.* at 1279.
81. 558 F.2d 1202 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 1606 (1978).
82. *Id.* at 1207.
83. *Id.* at 1208.
84. *Id.* (footnote omitted).
85. *Id.*
86. *Id.* at 1208 n.8.
87. 558 F.2d at 1208 (footnote omitted).

IV. THE 1977 SUPREME COURT TERM

In its October 1977 term, the Supreme Court issued three decisions which are relevant to discussion of the press' right to gather information.

A. Nixon v. Warner Communications, Inc.

In *Nixon v. Warner Communications, Inc.*,[88] the media sought to copy tape recordings of conversations held in then-President Nixon's offices which were introduced into evidence in *United States v. Mitchell*,[89] the trial of seven individuals for conspiracy to obstruct justice in connection with the investigation of the 1972 burglary of the Democratic National Committee Headquarters.[90] Copies of the relevant portions of the original tapes were made. During the trial, these copies, over twenty-two hours in length, were played for the jury and public in the courtroom. The district court furnished the jurors, reporters, and members of the public in attendance with transcripts prepared by the special prosecutor. These transcripts were widely reprinted by the press.[91]

Six weeks after the trial had begun, broadcasters filed a motion seeking permission to "copy, broadcast, and sell to the public" the portions of the tapes played at the trial.[92] The motion was granted, with copying prohibited until after the trial.[93] However, after the trial, media requests for immediate access to the tapes were denied on the ground that those appealing the trial verdict could have their rights prejudiced if the petitions were granted.[94] On appeal, the District of Columbia Court of Appeals reversed the decision, stressing the importance of the common-law privilege to inspect and copy judicial records.[95]

On certiorari, the Supreme Court held that the release of the tapes to the media was not required.[96] The Court, while acknowledging a common-law right to inspect and copy judicial records, found that this right is not absolute.[97] The Court also acknowledged the difficulty of providing a "comprehensive" definition of the common-law right of access

88. 435 U.S. 589 (1978).
89. 377 F. Supp. 1326 (D.D.C. 1974).
90. 435 U.S. at 592.
91. *Id.* at 594.
92. *Id.*
93. 386 F. Supp. 639, 643 (D.D.C. 1974).
94. 397 F. Supp. 186, 188 (D.D.C. 1975).
95. United States v. Mitchell, 551 F.2d 1252, 1257-59 (D.C. Cir. 1976).
96. 435 U.S. at 610-11.
97. *Id.* at 597-98.

and of identifying the factors to be weighed in determining whether access is appropriate, concluding that the decision as to access is "best left to the sound discretion" of the trial court.[98]

The Court, after assuming *arguendo* that the common-law right applied to the tapes in question,[99] listed the interests that would normally be balanced in determining whether or not access should be granted. The interests advanced by the broadcasters favoring release of the tapes were the gain in public understanding that would result from their release and the presumption favoring access;[100] the interests advanced by Nixon, the petitioner, against release of the tapes were his property interest in the sound of his own voice, infringement upon his privacy if the tapes were released, and the fact that *United States v. Nixon*[101] authorized only a very limited use of subpoenaed presidential conversations.[102] However, the Court did not decide how the balance would be struck among these interests. Instead, it noted the existence of the Presidential Recordings and Materials Preservation Act,[103] which provides for "legislative and executive appraisal of the most appropriate means of assuring public access to the material, subject to prescribed safeguards."[104] The existence of this act, the Court held, "tip[ped] the scales in favor of denying release."[105]

The Court failed to indicate if the result would have been the same in the absence of the statute. And it did not discuss what would happen if the Administrator of General Services did not release the tapes. It would seem, though, that the result should be different. *Nixon* did authorize only a limited use of the conversations; the Court wanted to ensure that only relevant information which would be admissible at the trial was released and published.[106] However, this consideration should not apply in determining whether to allow the recordings actually used in the trial to be sold and broadcast—transcripts of the information had already been published and members of the public would hear nothing more than they would have heard had they attended the trial. The concern for petitioner's privacy was also minimized by the fact that transcripts of the tapes had been released. In reality, there-

98. *Id.* at 598-99.
99. *Id.*
100. *Id.* at 602.
101. 418 U.S. 683 (1974).
102. 435 U.S. at 601.
103. 44 U.S.C. §§ 3315-3324 (1976).
104. 435 U.S. at 604-05.
105. *Id.* at 606.
106. 418 U.S. at 714-16.

fore, petitioner's property interest in the sound of his voice would be balanced against the gain in public understanding and the presumption favoring access. Given the strong policy favoring the free flow of information, the gain in public understanding is probably as important, or more important, than petitioner's property interest. And, the presumption favoring access would place the burden of proof upon the petitioner. Under these circumstances, it seems likely that the balance would be struck in favor of access.

The broadcasters also argued that the release of the tapes was required under the first amendment guarantee of freedom of the press.[107] The broadcasters, relying upon *Cox Broadcasting*, contended that the press had a right of access to exhibits and materials displayed in open court, in this case a right to copy and publish that material.[108] The Court rejected this argument, saying that the broadcasters "misconceived" the holding in *Cox Broadcasting*:

> Our decision in that case merely affirmed the right of the press to publish accurately information contained in court records open to the public. Since the press serves as the information-gathering agent of the public, it could not be prevented from reporting what it had learned and what the public was entitled to know.[109]

The *Warner Communications* Court found that the press had fully exercised this right:

> In the instant case . . . there is no claim that the press was precluded from publishing or utilizing as it saw fit the testimony and exhibits filed in evidence. There simply were no restrictions upon press access to, or publication of any information in the public domain. . . . The contents of the tapes were given wide publicity by all elements of the media. There is no question of a truncated flow of information to the public.[110]

Thus, the Court reaffirmed the importance of a "free flow of information" and, in doing so, had recognized once again the role of the press as the information-gathering agent of the public.

However, it is questionable as to whether the Court applied these theories in this case. It is clear that the press had access to the information in question. What the broadcasters actually sought was *physical* access to the tapes. The Court denied this request, holding that the first amendment "generally grants the press no right to information about a

107. 435 U.S. at 608. The broadcasters also argued that the sixth amendment's guarantee of a public trial mandated the release of the tapes. The Court rejected this argument, holding that the sixth amendment did not require that "the trial—or any part of it—be broadcast live or on tape to the public." *Id.* at 610.

108. *Id.* at 608-09.

109. *Id.* at 609.

110. *Id.*

trial superior to that of the general public."[111] By so holding, the Court avoided dealing with the issue of whether physical access to the tapes should have been granted to the press. The release of recordings of the tapes would have provided the public with information which the release of the transcripts did not provide. Transcripts merely indicate *what* was said, not *how* it was said. The listener can notice emotions reflected in the speakers' voices and can hear intonations and hesitations which would not be apparent if the words were only read and not heard. By hearing the words spoken, the listener can get a better understanding of what transpired. Physical access to the tapes would therefore serve to promote the free flow of information to the public.

Thus, *Warner Communications* presents a situation which is similar to that presented in *Pell* and *Saxbe*. In these three cases, it is unclear whether the information to which the press had sought access was ever communicated to the public. And, in these cases the Court failed to discuss whether the information sought should have been communicated to the public.

B. Landmark Communications, Inc. v. Virginia

Shortly after its decision in *Warner Communications*, the Supreme Court announced its decision in *Landmark Communications, Inc. v. Virginia*.[112] In *Landmark*, the Court faced the question of whether a state may subject persons to criminal sanctions for divulging information about proceedings before a judicial review commission which are declared confidential by state law.[113] A newspaper had identified a judge whose conduct was being investigated by the commission. Subsequently, the newspaper was indicted for violating this law. The Virginia Supreme Court affirmed a lower court decision convicting the newspaper.[114]

The Supreme Court reversed the Virginia conviction. It emphasized that a major purpose of the first amendment is to protect free discussion of governmental affairs.[115] It saw the newspaper and article in question as playing an important role in contributing to the free flow of information:

> The operation of the Virginia Commission . . . is a matter of public

111. *Id.* In support of this decision, the Court cited *Estes*, *Zemel*, *Pell*, and *Saxbe*. *Id.* at 609-10.

112. 435 U.S. 829 (1978).

113. *Id.* at 830.

114. *Id.* at 832.

115. *Id.* at 838-39.

> interest, necessarily engaging the attention of the news media. The article published by Landmark provided accurate factual information about a legislatively authorized inquiry pending before the Judicial Review and Inquiry Commission, and in so doing clearly served those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect.[116]

Thus, the vitality of the "free flow of information" goal of the first amendment remains undiminished.

The Court pointed out that this case involved no claim for any "constitutionally compelled right of access" for the press.[117] And the majority agreed with the Virginia Supreme Court that the statute did not constitute a prior restraint upon publication.[118] However, it determined that the publication sought to be punished lay "near the core of the first amendment" and that the interests advanced by the imposition of criminal sanctions were insufficient to justify encroachments upon the freedom of the press.[119]

While it is clear that the conviction of the newspaper should have been overturned in this case, the Court's holding presents an irony. In past cases, the Court had rejected the press' attempts to gain access to information by legal means. Yet, here the Court upheld the press' right to publish the information, even though this information was obtained in violation of a state statute. The Court's actions seem to suggest that if the press seeks access to information to which the public does not have access, it will not get it, but if the press obtains the information, even by means illegal at the time of acquisition, it cannot be stopped from publishing it. This is reflective of the Court's treatment of claims by the press for access as demands that the government affirmatively provide information, rather than as requests that government not interfere with press attempts to gather information. While the distinction is a thin one which often rests on semantics rather than analysis, it has served to allow the Court to summarily reject press requests for access to information without considering whether such access is warranted.[120]

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116. *Id.* at 839.

117. *Id.* at 837-38.

118. *Id.* at 838.

119. *Id.* The Court questioned the relevance of the clear and present danger test used by the Virginia Supreme Court in balancing the interests of the first amendment and those involved in the need for confidentiality. *Id.* at 842-43. However, the Court concluded that even if this test was used, the risk here fell "far short" of presenting a "clear and present" danger. *Id.* at 845.

120. The Court used this approach in *Pell*. It viewed the press' request for access as one which, if granted, would impose upon the government the affirmative duty of making infor-

C. Houchins v. KQED, Inc.

The last case in the Supreme Court's October 1977 term to deal with freedom of the press and the right to gather information was *Houchins v. KQED, Inc.*[121]

1. Facts of the Case

In March of 1975, KQED's radio and television stations reported the suicide of a prisoner in the Greystone portion of the Santa Rita jail. KQED requested permission to inspect and photograph the Greystone facility. When this request was denied by Sheriff Houchins, KQED filed suit,[122] claiming that the denial of access violated first amendment protections by denying effective means by which the public could be informed of prison conditions or learn of prisoners' grievances.[123]

After the suit was filed, a program of six monthly tours of the prison was announced. Members of the news media were given notice in advance of the public, and several reporters, including a KQED reporter, were on the first tour.[124] The tours did not include disciplinary cells or the Greystone facility, the subject of the KQED report and the site of "alleged rapes, beatings, and adverse physical conditions."[125] No cameras or tapes were allowed on the tours, and interviews with inmates were prohibited.[126] KQED argued that these tours were inadequate because of their limited nature and because, once the tours were filled, members of the media who had not signed up for them had no access to the jail.[127]

The district court accepted KQED's arguments and issued a preliminary injunction, barring Houchins from denying "responsible repre-

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mation available. 417 U.S. at 834-35. Yet, the Court failed to explain why the request would impose such a duty. It did not explain why the situation was not one in which the government was interfering with the efforts of the press to gather information. The situation would seem to be one of governmental interference, for the Court had noted in Procunier v. Martinez, 416 U.S. 395 (1974), that prisoners had a right to communicate with the press and the press had a right to receive communications from the prisoners. *Id.* at 408-09. Arguably, one form of communication would be interviews with the prisoners.

121. 98 S. Ct. 2588 (1978).

122. The Alameda and Oakland branches of the National Association for the Advancement of Colored People were also plaintiffs in the suit. The suit was filed pursuant to 42 U.S.C. § 1983 (1976), which provides that any person who, under the color of state law, deprives an American citizen of his constitutional rights shall be liable in an action at law or equity or for any other appropriate relief.

123. 98 S. Ct. at 2591.

124. *Id.* These tours were filled within a week after they were announced. *Id.* at 2592.

125. *Id.* at 2592.

126. *Id.* Indeed, the inmates were usually "removed from view."

127. *Id.*

sentatives" of the media access to the prison facilities, including Greystone, and from preventing media representatives from photographing facilities and interviewing inmates.[128] The court construed *Pell* as requiring media exclusion from prisons only when its presence would create burdensome security and administrative problems.[129]

Sheriff Houchins filed an appeal, arguing that the district court had departed from *Pell* and abused its discretion in ordering that greater access be given to the press than was provided the public.[130] Judge Pregerson,[131] speaking for the Ninth Circuit Court of Appeals, found that *Pell* did not "stand for the proposition that the correlative constitutional rights of the public and the news media to visit a prison must be implemented identically."[132] He acknowledged that the public and the press have "an equal constitutional right of access" to prisons,[133] but concluded that, due to differing needs and administrative problems, common sense "mandates that the implementation of those correlative rights not be identical."[134]

Judge Duniway concurred in the disposition of the case. He accepted the proposition that "only the media, as distinguished from the submerged, often alienated, and often frightened individual, can be counted on to dig out and disseminate the facts about the public's business."[135] However, he admitted that he could not reconcile this proposition nor the result of the *Houchins* case with the decisions in *Pell* and *Saxbe*.[136]

Judge Hufstedler, concurring, interpreted *Pell* and *Saxbe* as meaning that the press does not have a right of access to obtain information that the public cannot obtain.[137] She argued that because prison conditions are of great public importance, newsmen, as the "eyes and ears of the public," are "entitled to see and hear everything within the institution about which the general public is entitled to be informed."[138] Judge Hufstedler reasoned that since the media is better able to collate and communicate information to the general public, restrictions on me-

128. KQED, Inc. v. Houchins, 18 CRIM. L. REP. (BNA) 2252 (N.D. Cal. 1975).
129. *Id.* at 2253.
130. 98 S. Ct. at 2593.
131. Judge Pregerson, a district court judge, was sitting by designation.
132. 546 F.2d 284, 286 (9th Cir. 1976).
133. *Id.*
134. *Id.*
135. *Id.* at 294.
136. *Id.*
137. *Id.* at 295.
138. *Id.* at 295-96.

dia access should be different than those governing access by members of the general public.[139] Thus, the Ninth Circuit Court of Appeals viewed the press as being entitled to a different form of access than that to which the public is entitled, a form which would allow the press to carry out its function of gathering information for the public.

2. Holding and Reasoning

On certiorari, the Supreme Court reversed the decisions of the district court and the court of appeals, remanding the case for further proceedings.[140] The Court agreed with KQED's assertions that prison conditions are matters of public importance.[141] It conceded that "[b]eyond question" the role of the media in gathering information is important.[142] But, the Court also stated that it has "never intimated a First Amendment guarantee of a right of access to all sources of information within government control."[143]

The plurality discussed *Grosjean* and *Mills v. Alabama*[144] as cases emphasizing the importance of informed public opinion and the role of the press as a source of public information.[145] But, it found *Grosjean* and *Mills* to be concerned with the media's freedom to *communicate* information once it is obtained, rather than with a right to gather information.[146]

The Court then advanced to a discussion of *Branzburg, Pell, Saxbe*, and *Zemel*. These cases, the Court explained, "negate any notion" that the first amendment confers on the press a right of access to information beyond that available to the general public.[147] According to the Court, the issue was a claimed "special privilege of access which the Court rejected in *Pell* and *Saxbe*, a right which is not essential to guarantee the freedom to communicate or publish."[148] However, the Court

139. *Id.* at 296.

140. Chief Justice Burger, joined by Justices White and Rehnquist, delivered the opinion of the court. Justice Stewart filed a concurring opinion. Justices Brennan and Powell joined in Justice Stevens' dissenting opinion. Justices Marshall and Blackmun did not take part in the decision.

141. 98 S. Ct. at 2593.

142. *Id.* at 2594.

143. *Id.*

144. 384 U.S. 214 (1966). In this case the Supreme Court held that the free press guarantee prohibited a state from imposing criminal sanctions on a newspaper editor for writing and publishing an editorial on election day urging people to vote a certain way.

145. 98 S. Ct. at 2594.

146. *Id.* at 2594-95.

147. *Id.* at 2595.

148. *Id.* at 2596. The validity of this statement is doubtful. *See* note 42 *supra*.

offered no explanation as to why the right of access is not essential to the freedom to publish. Furthermore, the Court misconstrued KQED's claims. KQED was not seeking a special right of access. Its claim was that the first amendment was violated by both the refusal to permit media access and the failure to provide an effective means by which the public could obtain information about prison conditions.[149] By phrasing the issue as it did, the Court avoided defining a right of access for the press in terms other than the public's right of access.

The Court also suggested that the question of access to prisons was "a question of policy," the resolution of which is a legislative task.[150] Such an undertaking by the Court, it reasoned, would be improper.[151] However, because the question of access to prisons involves consideration of first amendment protections, such an undertaking would be a proper function of the Court. The Supreme Court has long been regarded as an appropriate forum for consideration of claimed violations of first amendment freedoms.[152]

As a final basis for its decision, the Court cited the existence of other means of informing the public about prison conditions. Such means included citizen task forces, prison visitation committees, and grand juries with subpoena power.[153] Beyond this, the Court also stressed alternatives by which the press could learn about prison conditions.[154] Specifically, the Court said that members of the press have a first amendment right to receive letters from inmates, are free to interview those who render legal assistance to inmates, and are free to seek out former inmates, visitors, and institutional personnel.[155] These alternatives, the plurality felt, were sufficient to provide the press with the in-

149. 98 S. Ct. at 2591.

150. *Id.* at 2596. Congress had indeed taken steps to provide for access to information in some contexts. For example, under the Freedom of Information Act, 5 U.S.C. § 552 (1976), "any person" may obtain certain non-confidential government records, and under the Privacy Act of 1974, 5 U.S.C. § 552a (1976), a person has a right of access to government records on himself or herself. Members of the press can thus seek access to information under either of these statutes. However, agencies have hampered access to their records through delay and other tactics. *See* Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. C.R.-C.L.L. REV. 1 (1970). And, the press has been reluctant to use the Act due to the delays from waiting for court decisions and the costs of litigation. *See* Kohlmeier, *The Journalist's Viewpoint*, 23 AD. L. REV. 143 (1971).

151. 98 S. Ct. at 2596.

152. *See, e.g.*, Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) (first amendment rights are in "preferred position").

153. 98 S. Ct. at 2596.

154. *Id.* at 2597. The Court admitted that these alternatives might not be as convenient as members of the press would desire, but noted that Sheriff Houchins could not prevent the press from employing them. *Id.*

155. *Id.*

formation it might need. However, the Court merely noted the existence of these sources of information. It did not show them to be effective as a means of conveying information to the public. Indeed, the lack of information available to the public about the conditions in Greystone suggests that these sources of information were inadequate. As for the alternatives by which the press could learn about prison conditions, there was no showing that this information had been, or could be, obtained from letters from prisoners or from those individuals who rendered legal assistance to inmates. There was no discussion of the ability of former inmates to provide information about current conditions in Greystone, nor was there an indication that institutional personnel would be willing to discuss those conditions. Finally, there was no discussion of how visitors would be able to convey information about the conditions in Greystone when members of the public were excluded from that portion of the prison. Thus, the alternatives the Court mentioned clearly fail to approach the level of effectiveness of the alternatives which were available in *Pell* and *Saxbe*.

Justice Stevens, joined by Justice Brennan and Justice Powell, issued a strong dissent. He pointed out that, as the Court conceded, there was a need for information about the conditions of the Santa Rita Jail.[156] The need was clearly significant, for, as the district court reported, the conditions at Greystone "were truly deplorable."[157] The conditions were characterized as "shocking and debasing," "subhuman," and violative of "basic standards of human decency";[158] the district court's "inescapable conclusion" was that "Greystone should be razed to the ground."[159]

Justice Stevens argued that the public should be informed about these conditions and that the press should not be barred from having access to Greystone to examine them. He noted that the decision in *Pell* was based in part upon the fact that officials were not attempting to conceal prison conditions.[160] Here, given the conditions at Greystone as described by the district court, it is possible that access was denied as a means of concealing those conditions.

Justice Stevens also pointed out that in *Pell* the media actually enjoyed greater access to the prison than did members of the general pub-

156. *Id.* at 2599 (Stevens, J., dissenting). *See* Pell v. Procunier, 417 U.S. 817, 840 (1974) (prisons are a public responsibility and the public needs to know of their effectiveness).

157. Brenneman v. Madigan, 343 F. Supp. 128, 133 (N.D. Cal. 1972).

158. *Id.*

159. *Id.*

160. 98 S. Ct. 2604 (Stevens, J., dissenting). *See* text accompanying notes 52 & 53 *supra*.

lic;[161] and that the flow of information to the public was "adequate to survive constitutional challenge."[162] Here, prior to the commencement of the litigation, restrictions on access to Greystone and other areas of the prison concealed the conditions from the general public.[163] After the litigation began and the program of public tours was introduced, access was still inadequate since the tours covered only limited areas of the prison.[164]

To Justice Stevens, the question eventually was one of the public's right to be informed about prison conditions. He appears to be correct in this determination, for the plurality, by saying that the press was not entitled to the degree of access it was seeking because the public had no such right of access, was in effect denying that the public has a right to know about such conditions.[165] Justice Stevens acknowledged that on some occasions governmental activity may be carried on in secrecy,[166] but he concluded that there was "no legitimate, penological justification for concealing from citizens the conditions in which their fellow citizens are being confined."[167] Therefore, he held that the freedom of the press protected by the first and fourteenth amendments had been abridged in this case.[168]

Having decided that first amendment rights were abridged, Justice Stevens proceeded to consider the injunction entered by the district court. He acknowledged that the press and the public have an equal right of access to information.[169] But, reasoning that "different methods of remedying a violation of that right may sometimes be needed,"

161. 98 S. Ct. at 2604.

162. *Id.* at 2607.

163. *Id.*

164. *See* text accompanying notes 125-27 *supra*. Justice Stevens also argued that the establishment of the tour program did not preclude review of the previous policy of virtually total exclusion of both the public and the press from areas in the jail where inmates were confined. 98 S. Ct. at 2602-03. Since there was no guarantee that the tours would continue without the issuance of the preliminary injunction, such review seems appropriate. *Id.* at 2603.

165. The Court stated: "We, therefore, reject the Court of Appeals' conclusory assertion that the public and the media have a First Amendment right to government information regarding the conditions of jails and their inmates and presumably all other public facilities such as hospitals and mental institutions." *Id.* at 2597.

166. *Id.* at 2607 (Stevens, J., dissenting).

167. *Id.* at 2608. He pointed out that prisons are "public institutions, financed with public funds and administered by public servants" and are an "integral component of the criminal justice system." *Id.* He also noted that a substantial number of inmates in the Santa Rita Jail are pretrial detainees and that, as such, society has a "special interest" in ensuring that they are treated in accord with their status. *Id.* at 2608-09.

168. *Id.* at 2609.

169. *Id.*

he concluded that the preliminary relief granted by the district court was appropriate.[170]

Justice Stewart concurred in the judgment of the Court. Unlike the plurality, Justice Stewart believed that KQED was entitled to injunctive relief, but of a more limited nature than that granted by the district court.[171] He agreed with the Court's view that the press enjoys a right of access equal to that of the public. However, he believed that the concept of "equal access" must be accorded flexibility.[172] He recognized the role played by the press in providing information to the public and suggested that the terms of access for the public and the press could therefore vary:

> A person touring Santa Rita Jail can grasp its reality with his own eyes and ears. But if a television reporter is to convey the jail's sights and sounds to those who cannot personally visit the place, he must use cameras and sound equipment. In short, terms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see.[173]

According to Justice Stewart, the press' right of access is no greater than that of the public; but, the form of access granted to the press may be different. The press must be able to effectively gather information to convey to the public. For Justice Stewart, the question was thus one of "effective access."[174] And he rejected the notion that the tours provided such access, concluding that he would not "foreclose the possibility of further relief for KQED on remand."[175]

Thus, it is possible that KQED will receive some form of injunctive relief in the future, since four of the seven Justices participating in this decision manifested beliefs that KQED should be granted greater access than that provided by the public tours. However, once again the Court has issued a decision in which the press' right of access to information is defined in terms of the public's right of access. And, once again the public's right of access is undefined, leaving the scope of the press' right unestablished. However, since four members of the *Houchins* Court favored greater access for the press than was actually

170. *Id.* at 2609-10.

171. *Id.* at 2598 (Stewart, J., concurring). Justice Stewart felt that the injunction was overbroad in that it granted the press access to areas and sources of information from which the public was excluded. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 2599.

provided, the holding of the Court loses much of its precedential value as a limitation of the press' right of access to that of the public's right. For the first time, a majority of the Supreme Court justices has indicated a willingness to allow the press to have greater access to information than that of the public, a willingness based upon the realizations that the press acts as an agent of the public in gathering information and that the real question is one of "effective access."

V. A SUGGESTED APPROACH: THE CONTENT-CONDUCT TEST

It would seem that when an issue is a matter of public importance, the press should be granted a right of access to the necessary information in order to convey it to the public. However, it must be acknowledged that not all types of information should be communicated.[176] The question thus becomes one of determining to which information the press may be allowed access.

Under the Supreme Court's current approach, this determination is made by examining the scope of the public's right of access—there is no constitutional mandate for the press to have a right of access which is greater than that granted to the public. While such an approach is straightforward, it involves inherent difficulties. The public commonly relies upon the press as its source of information.[177] When the press is denied the right to gather information, it is the public which remains ill-informed, contrary to the goal of a free flow of information. When the public has a right to know, but is denied access on the basis of practical problems (due, for example, to the sheer size of the general public), the press also may be denied access, even though access by one representative would often be adequate to convey the desired information to the general public.

It is therefore suggested that a more desirable approach would be one which is similar to that employed by the Court in dealing with prior restraints upon publication. In *Near v. Minnesota*,[178] the Court found the concept of prior restraints to be opposed to the chief purpose of the first amendment.[179] As such, prior restraints are subject to a stricter standard of review than are other infringements upon first amendment rights. Any system of prior restraints bears "a heavy presumption against its constitutional validity."[180] Such an approach

176. *See* note 40 *supra*.
177. *See* notes 11-14 *supra* and the accompanying text.
178. 283 U.S. 697 (1931).
179. *Id.* at 713.
180. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

would be justified in the information-gathering area because a denial of access to information functions as the equivalent of a prior restraint upon publication.[181]

Application of this approach to the information-gathering area would mean that the government would bear the burden of justifying its denial of press access to information. The government should be held to have met this burden only upon satisfaction of one part of a bifurcated test, the content-conduct test.

Under the first part of this test, the focus is on the *content* of the information. Denial of press access to the information will be upheld under this part of the test only if the content of the information is such that publication would seriously threaten the public good or welfare. Given the strong policy against any system which functions as a prior restraint, such a threat would be extremely difficult to establish. An example of the difficulty involved may be found in the national security area. A generalized claim of national security would not be enough to validate a denial of access. This result was demonstrated by the Supreme Court's rejection of a national security claim in *New York Times Co. v. United States*.[182] In *New York Times*, the Court dismissed a temporary restraining order against publication of a classified study on United States policy-making in Viet Nam, holding that the government had not met its burden of justification.[183] However, as the Court earlier recognized, a prior restraint could be upheld if necessary to prevent "publication of the sailing dates of transports or the number and location of troops" in a time of war.[184] In the latter situation, the threat to public welfare is much stronger and more direct. The danger to the public welfare from publication of information about troop locations in a time of war is obvious. Thus, it is only in exceptional circumstances that the content of the information may justify the denial to the press of access to information. If such circumstances are found to exist, though, all forms of access sought by the press which are greater than those granted to the public may be denied. However, if the public is given a right of access to the information, the press must be given the same right.

Under the second part of this test, the focus is on *conduct*. Denial of access by the press to information will be upheld under this part of the test only if the means of gathering information significantly interfere

181. *See* text accompanying notes 42-47 *supra*.
182. 403 U.S. 713 (1971).
183. *Id.* at 714.
184. 283 U.S. at 716.

with either the constitutional rights of others or a compelling government interest. However, a determination that one form of access (for example, interviews with specifically designated prisoners) is impermissible under this part of the test does not mean that another form of access (for example, interviews with prisoners randomly selected) is also impermissible. Each form of access must be subjected to this test before it can be deemed impermissible. An example of a situation in which the conduct of the press would warrant the denial of access to information is found in *Estes*. In *Estes*, the media sought to televise the trial. It already had access to the trial inasmuch as the press was allowed to report and publish information about the trial. Such access was deemed permissible. However, the additional access in the form of televising the trial was found to interfere with the conduct of the trial and to breach the defendant's right to a fair trial.[185] Therefore, this additional access was denied.

The effect of the adoption of this content-conduct test can be shown by examining its application to the cases involving media access to prisons. In *Pell* and *Saxbe*, it is clear that the information sought was not such that its content warranted a denial of access to the information. The government's basis for denying access was the effect upon security and discipline which would result if access by the press were permitted. Because there was no threat to the public welfare, no bar to access could have been imposed under the first part of the test. However, denial of the press' requests to interview specifically designated prisoners would be upheld under the second part of the test. In those cases, the government did demonstrate that severe disciplinary problems would arise if these requests were granted.[186] Since no such showing was made as to the other forms of access which the press was allowed, the government could not bar those forms.

In *Houchins*, as in *Pell* and *Saxbe*, access to Greystone could not be denied under the content part of the test. However, the considerations regarding conduct are different. In *Houchins*, the press was not given a greater degree of access than the public. Neither the press nor members of the general public were permitted access to certain areas of the prison. While security considerations were claimed to be the basis for this denial of access, the government indicated potential security problems only from interviews with prisoners.[187] If the interference was found to be significant, the right of the press to interview prisoners

185. 381 U.S. at 542-43.
186. *See, e.g.*, Pell v. Procunier, 417 U.S. at 831-32.
187. 98 S. Ct. at 2592.

could be limited. However, since no interference with the government's security interest was demonstrated from tours of prison facilities,[188] Sheriff Houchins could not deny the press a right of access to the Greystone facilities. Thus, the media would be able to inspect, and perhaps even film, the conditions in those facilities. Information about the conditions would be conveyed to the public, thereby furthering the free flow of information.

VI. CONCLUSION

Freedom of the press should mandate the recognition of a right, independent of the public's right, for the press to gather information. The failure to recognize such a right would create, in effect, a restraint upon what the press could publish. Given the goal of a free flow of information so that the public can be well-informed, and given the importance of the press in contributing to this flow of information, the recognition by the Supreme Court in recent cases of at least a limited right to gather information is a beginning. But, by merely defining the press' right of access to information in terms of the public's right of access, the Court leaves the real possibility that the press will be denied access to information at a time when such information should be communicated to the general public. *Houchins* is such a possibility realized.

However, the decision in *Houchins* indicates that the Court may finally be ready to define, at least in the circumstances of that case, the press' right to gather information in terms other than just those of the public's right to gather information.

It is suggested that the Court adopt the content-conduct test. Such a step is necessary, for the right to gather information is critical to maintaining freedom of the press. Regardless of how strong the right to communicate information may be, the press cannot communicate information to which it does not have access. Ultimately, the question is one of the public's right to know. For, if the press is without a right to gather information in a setting where the public is also without such a right, and in which there are no adequate alternate means of communicating this information, then the public will not "know."

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188. *Id.* The Sheriff also argued that unregulated access would invade inmates' privacy and that unscheduled tours would disrupt jail operations. *Id.* These problems could be avoided by simply scheduling media visits in advance.