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Constitutional Law-Freedom of the Press-Prison Regulation Prohibiting Interviews Between Newsmen and Inmates Held Constitutional

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RECENT DEVELOPMENTS

Constitutional Law—FREEDOM OF THE PRESS—PRISON REGULATION PROHIBITING INTERVIEWS BETWEEN NEWSMEN AND INMATES HELD CONSTITUTIONAL

Saxbe v. Washington Post Co., 417 U.S. 843 (1974)

> "On any given day, approximately 1,500,000 people are under the authority of [federal, state and local] prison systems. The cost to taxpayers is over one billion dollars annually. Of those individuals sentenced to prison, 98% will return to society." The public's interest in being informed about prisons is thus paramount.[1]

A major purpose of a newspaper is to disseminate information in a responsible and accurate manner so that the general public may better understand important social issues.[2] The first amendment,[3] through its guarantee of freedom of the press, serves as the guardian of the public's right to be informed.[4] But the press

[1] Pell v. Procunier, 417 U.S. 817, 840 (1974) (Douglas, J., dissenting, joined by Brennan & Marshall, JJ.), *quoting* SUBCOMM. ON COURTS, CIVIL LIBERTIES AND THE ADMINISTRATION OF JUSTICE OF THE HOUSE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., REPORT ON THE INSPECTION OF FEDERAL FACILITIES AT LEAVENWORTH PENITENTIARY AND THE MEDICAL CENTER FOR FEDERAL PRISONERS 2 (Comm. Print 1974).

[2] Once informed, the public can exert pressure on elected officials, directing them to correct the social problems. In 1971, for instance, the Staten Island *Advance* carried a series of articles on Willowbrook, a large institution in New York City which housed more than 5,000 mentally retarded persons, half of whom were children. These articles were followed up by Geraldo Rivera of WABC-TV, who, despite official obstacles, filmed the deplorable conditions existing within the institution. The public reaction based upon the information provided by the media was vigorous enough to persuade then Governor Rockefeller to add millions of dollars to the state's budget for the mentally handicapped. Vanden Heuvel, *The Press and the Prisons*, 11 COLUM. JOURNALISM REV. 35, 38 (1972).

[3] 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.

U.S. CONST. amend. 1.

[4] The Supreme Court has often recognized the important role the press plays as the public's informer. In Associated Press v. United States, 326 U.S. 1, 20 (1945), the Court observed that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ." In Garrison v. Louisiana, 379 U.S. 64, 77 (1964), the Court, in an opinion by Justice Brennan, upheld "the paramount public interest in a free flow of information to the people concerning public officials, their servants." That same year, in New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964), the Court found a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." "The Constitution specifically selected the press . . . ," declared the Court in Mills v. Alabama, 384 U.S. 214, 219 (1966), "to play an important role in the discussion of public affairs."

must be able to gather information from diverse sources before it can synthesize and disseminate its findings.

In the early 1970's, there was considerable uncertainty as to whether boundaries could legally be drawn around the news-gathering function of the press,[5] and when newsmen sought to gain access to prisons the federal courts were forced to decide between prison regulations which prohibited newsmen from conducting face-to-face interviews with designated inmates and the assertions of reporters that such interviews were essential to the performance of their task.[6] Since there was no established framework for dealing with this issue the different circuits predictably reached contradictory conclusions.[7] At one end of the spectrum was *Seattle-Tacoma Newspaper Guild, Local 82 v. Parker*,[8] where the Court of Appeals for the Ninth Circuit upheld a ban on press-inmate interviews as a reasonable regulation whose promulgation was within the scope of the discretion of the prison administration. At the other end was *Washington Post Co. v. Kleindienst*,[9] where the Court of Appeals for the District of Columbia Circuit struck

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The rationale for the constitutional protection of the informing function of the press has been eloquently stated by Justice Black, in New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (concurring opinion):

> In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people.

The critical role which the press is called upon to play in our society has been acknowledged, not only by the courts, but also by numerous authors and constitutional scholars. *See, e.g.*, T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970); E. HUDON, FREEDOM OF SPEECH AND PRESS IN AMERICA (1963); W. LIPPMANN, LIBERTY AND THE NEWS (1920); A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

[5] *See* Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838 (1971); Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505 (1974). *See also* New York Times Co. v. United States, 403 U.S. 713 (1971).

[6] *See, e.g.*, Washington Post Co. v. Kleindienst, 494 F.2d 994 (D.C. Cir.), *rev'd sub nom.* Saxbe v. Washington Post Co., 417 U.S. 843 (1974); McMillan v. Carlson, 493 F.2d 1217 (1st Cir. 1974) (per curiam); Seattle-Tacoma Newspaper Guild, Local 82 v. Parker, 480 F.2d 1062 (9th Cir. 1973); Globe Newspaper Co. v. Bork, 370 F. Supp. 1135 (D. Mass. 1974); Houston Chronicle Publishing Co. v. Kleindienst, 364 F. Supp. 719 (S.D. Tex. 1973); Hillery v. Procunier, 364 F. Supp. 196 (N.D. Cal. 1973), *vacated sub nom.* Pell v. Procunier, 417 U.S. 817 (1974); Mitford v. Pickett, 363 F. Supp. 975 (E.D. Ill. 1973); Burnham v. Oswald, 342 F. Supp. 880 (W.D.N.Y. 1972); Burnham v. Oswald, 333 F. Supp. 1128 (W.D.N.Y. 1971).

The authority to promulgate regulations for the administration of federal prisons is provided in 18 U.S.C. §§ 4041, 4042 (1970) and 18 U.S.C. § 4001 (Supp. III, 1973).

[7] *See* notes 88-99 and accompanying text *infra*.

[8] 480 F.2d 1062 (9th Cir. 1973).

[9] 494 F.2d 994 (D.C. Cir.), *rev'd sub nom.* Saxbe v. Washington Post Co., 417 U.S. 843 (1974).

down a similar ban on press-inmate interviews as an unconstitutional abridgment of the freedom of the press.

In resolving this conflict between the circuits, the Supreme Court, in *Saxbe v. Washington Post Co.*,[10] by a 5-4 majority, reversed the latter decision, agreed with *Seattle-Tacoma*, and denied the asserted right of the press to gather information from inmates by means of personal interviews. The boundary drawn around the newsgathering function of the press restricted newsmen to gathering information solely from those sources generally available to the public.

I

Saxbe v. Washington Post Co.

When Ben Bagdikian, a reporter for the *Washington Post*, was denied permission to conduct interviews with designated inmates at the Lewisburg, Pennsylvania, and Danbury, Connecticut, prisons,[11] pursuant to the Bureau of Prisons Policy Statement 1220.1A, paragraph 4(b)(6),[12] he and the *Washington Post* brought suit to enjoin enforcement of that regulation. Balancing the government's interest in prison administration[13] against first amendment

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[10] 417 U.S. 843 (1974).

[11] Work stoppages in 1972 at Lewisburg and Danbury prisons had apparently been resolved through negotiations between the warden and inmate representatives. The *Washington Post* had received information which led it to believe that some members of the inmate negotiating committees might have been punished for the role which they had played during the disturbances. The newspaper was interested in publicizing not only the apparently peaceful settlements, but also the brutality and retaliation, if proven. Washington Post Co. v. Kleindienst, 357 F. Supp. 770, 771 (D.D.C. 1972), *modified and aff'd*, 494 F.2d 994 (D.C. Cir. 1974), *rev'd sub nom.* Saxbe v. Washington Post Co., 417 U.S. 843 (1974).

[12] The Bureau of Prisons Policy Statement 1220.1A, ¶ 4(b)(6) provided:

> 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.

Bureau of Prisons, U.S. Dep't of Justice, Policy Statement 1220.1A, Inmate Correspondence with Representatives of the Press and News Media, Feb. 11, 1972 [hereinafter cited as Policy Statement]. The Policy Statement is set out in full as an appendix in Washington Post Co. v. Kleindienst, 357 F. Supp. 770, 776-78 (D.D.C. 1972).

[13] It was the government's contention that the press had no constitutional right of access to inmates for confidential interviews, and that the Policy Statement, which permitted uncensored correspondence between inmates and the media, as well as casual conversations held in the course of prison tours, provided sufficient access and was not arbitrary. In refusing to permit press-inmate interviews, the Bureau of Prisons was prompted by considerations of administrative convenience and possible disciplinary problems which press attention to particular inmates might engender. 357 F. Supp. at 773.

freedoms,[14] District Judge Gesell of the District of Columbia rejected the contention that legal and practical considerations necessitated a total ban on press-inmate interviews, and held in favor of the plaintiffs.[15] In affirming, the Court of Appeals for the District of Columbia Circuit noted that the Bureau's policy governing press interviews placed greater restrictions upon press access to information than were placed upon the visitation rights of inmates' families, friends, attorneys, and religious counsel.[16] "Thus, while we do not question that the concerns voiced by the Bureau are legitimate interests that merit protection," concluded Circuit Judge McGowan, "we must agree with the District Court that they do not, individually or in total, justify the sweeping absolute ban that the Bureau has chosen to impose."[17]

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[14] In weighing the first amendment freedoms, Judge Gesell did not distinguish the rights of the press from those of the prisoners:

> As this inquiry is pursued there is no need to differentiate between the rights of the press and the rights of prisoners committed to the custody of the Bureau. News gathering and news dissemination cannot be disassociated under circumstances such as these where it is assumed there is a mutual desire to communicate and where, in the last analysis, the public right to be informed may well overshadow either of the other two considerations.

Id. at 773-74.

[15] *Id.* at 770. The judgment of the district court was stayed by the Supreme Court pending appeal to the Court of Appeals for the District of Columbia Circuit. 406 U.S. 912 (1972). The court of appeals remanded for additional findings of fact and particularly for reconsideration in light of the Supreme Court's intervening decision in Branzburg v. Hayes, 408 U.S. 665 (1972). 477 F.2d 1168 (D.C. Cir. 1972). *See* notes 45-57 and accompanying text *infra*. On remand, the district court adhered to its former decision. 357 F. Supp. 779 (D.D.C. 1972). The court of appeals modified and affirmed. 494 F.2d 994 (D.C. Cir. 1974). It held that press interviews with inmates could not be totally prohibited, as the Policy Statement purported to do, but could

> be denied only where it is the judgment of the administrator directly concerned, based on either the demonstrated behavior of the inmate, or special conditions existing at the institution at the time the interview is requested, or both, that the interview presents a serious risk of administrative or disciplinary problems.

494 F.2d at 1006-07.

[16] 494 F.2d at 997. The court of appeals had a twofold answer to the government's contention that prison authorities had provided for alternative means of communication. Quoting what the Supreme Court had recently said in Kleindienst v. Mandel, 408 U.S. 753, 765 (1972), the court of appeals answered that "[t]his argument overlooks what may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning." More important, said the court, the government's underlying factual premise was rejected in the district court's findings of fact. 494 F.2d at 999, 1000. *See* note 56 and accompanying text *infra*.

[17] 494 F.2d at 1005.

There were two fundamental concerns which prompted the Bureau of Prisons to develop the ban on press-inmate interviews. The issue most contested in the district court, and upon which extensive fact-finding hearings were held, was characterized as the "big wheel" phenomenon. It was the Bureau's belief that press interviews with "big wheels," those inmates who exert power and influence within the institution, would encourage the negative and hostile elements of the prison to follow a disruptive path. The result, claimed the

The United States Supreme Court, however, did not agree with either the district court or the court of appeals.[18] On June 24, 1974, the Supreme Court, speaking through Justice Stewart, announced in *Saxbe v. Washington Post Co.*,[19] and in the companion case, *Pell v. Procunier*,[20] that newsmen do not have a constitutional right to conduct face-to-face interviews with prison inmates.[21] Despite the existence of an extensive factual record (developed in the lower courts) evidencing the inadequacy of the other means of communication permitted by the Policy Statement,[22] the Supreme

Bureau, would be the failure of institutional discipline, security, and rebabilitative efforts. *Id.* at 1002, 1003. But the district court found tbat the "big wheel" justification did not withstand analysis. Since only a few easily identifiable prisoners would fall into the "big wheel" category, a blanket ban on all interviews was not justified. 357 F. Supp. at 781. The other major justification advanced by the Bureau, in defense of its complete ban on press-inmate interviews, was tbat it is necessary for the maintenance of discipline among tbe inmates to treat all prisoners under a uniform set of rules. Individual distinctions in behavior were not to serve as the basis for deciding whether to allow interviews with the press. 494 F.2d at 1003, 1004. However, the district court found that the recognition of the first amendment rights of prisoners required a more flexible approach than that advanced by the Bureau; in fact, an approach based on individualized judgments in particular cases was found to be required. 357 F. Supp. at 781-82.

[18] The Supreme Court reversed tbe court of appeals and remanded the case to the district court. 417 U.S. at 850.

At the time that the case was in the district court and the court of appeals, the Policy Statement prohibited any personal interviews between newsmen and individually designated federal prison inmates. Prior to consideration of the case by the Supreme Court, the Solicitor General informed the Court that the regulation had recently been amended to permit press interviews at minimum security federal prisons. *Id.* at 844.

[19] 417 U.S. 843 (1974).

[20] 417 U.S. 817 (1974).

[21] The Supreme Court found that the policies of the Federal Bureau of Prisons regarding visits to prison inmates, as challenged in *Saxbe*, did not differ significantly from the California policies considered by the Court in *Pell*. In *Pell*, state prison inmates, as well as journalists, brought actions in the United States District Court for the Northern District of California challenging the constitutionality, under the first and fourteenth amendments, of a state regulation which prohibited face-to-face interviews between newsmen and designated inmates. A three-judge panel of the district court granted the inmates' motion for summary judgment, holding that their first and fourteenth amendment freedoms were unconstitutionally abridged, but dismissed the action of the newsmen. On appeal, tbe United States Supreme Court reversed as to the inmates, affirmed as to the journalists, and vacated the judgment, remanding the case to the district court. The Supreme Court concluded, in view of the inmates' alternative channels of communication, that the regulation did not abridge the inmates' freedom of speech. In addition, the Court held that the regulation did not abridge the freedom of the press, since the regulation did not deny the media access to sources of information available to members of the general public.

[22] On the basis of . . . substantial and uncontroverted evidence, the District Court found that the sources of information provided by Policy Statement 1220.1A were inadequate to permit the news media to develop an accurate and penetrating knowledge of prison conditions or events, and that accurate and effective news reporting about prison conditions is critically dependent on the opportunity for personal interviews with the inmate population.

494 F.2d at 1000.

Court found that members of the press were accorded sufficient access to inmates in light of the legitimate requirements of prison administration.[23] Significantly, in upholding the blanket ban on press-inmate interviews, the Court found it unnecessary to engage in any "delicate balancing"[24] of first amendment rights against penal considerations:

> For it is apparent that the sole limitation imposed on newsgathering by Policy Statement 1220.1A is no more than a particularized application of the general rule that nobody may enter the prison and designate an inmate whom he would like to visit, unless the prospective visitor is a lawyer, clergyman, relative, or friend of that inmate.[25]

II

CONFINING THE FIRST AMENDMENT

The first amendment has traditionally been accorded great respect by the Supreme Court.[26] Its favored position[27] among the constitutional rights has been reflected in Supreme Court decisions which have held that only a compelling state interest could justify limiting first amendment freedoms.[28] In recent years, federal courts have grappled with the difficult task of deciding to what extent the first amendment rights of inmates survive incarceration. A trend of protecting the asserted right of inmates to freely exchange ideas and expressions of feeling with the outside world seemed to be gathering momentum in the lower courts.[29] In *Pell*

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[23] 417 U.S. at 847-48.

[24] *Id.* at 849.

[25] *Id.*

[26] *See* note 4 *supra.*

[27] According to Professor Emerson, there are four functions of the first amendment right to freedom of expression which justify its favored position among the constitutional rights: (*1*) freedom of expression stimulates self-realization and development of character; (*2*) freedom of expression is invaluable in attaining the truth; (*3*) freedom of expression allows all members of society to participate in the democratic decision-making process through open debate; and (*4*) freedom of expression aids the achievement of the compromises necessary for the operation of a viable democracy. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878-86 (1963).

[28] *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 406 (1963) (no compelling state interest to justify infringement of religious freedom); NAACP v. Button, 371 U.S. 415, 444 (1963) (no substantial regulatory interest to prohibit the advocacy of racial equality); Thomas v. Collins, 323 U.S. 516, 530 (1945) (restriction of first amendment liberties justifiable only by clear and present danger to public welfare).

[29] Surviving prisoners' rights are not limited to those protected by the first amendment. One line of cases has developed a due process right of access to the courts. The development began with *Ex parte* Hull, 312 U.S. 546 (1941), which recognized that a prisoner has a right

and *Saxbe*, however, the Court has allowed prison officials to infringe not only the first amendment rights of inmates, but also those of newsmen and the general public.

A. *The Right of Inmates to Gain Access to the Press*

The constitutional right of inmates to seek personal interviews with members of the press was not explored in *Saxbe* because inmates were not a party to the litigation.[30] In *Pell v. Procunier*,[31] however, the Court did explore this dimension of the first amendment, and rejected the inmates' claims. Starting with the proposition that " '[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights' "[32] the Court proceeded to balance the free speech rights of inmates against the state's legitimate interests in deterrence, rehabilitation, and the internal security of penal institutions.[33] Determining that alternative channels of communication remained open to inmates, the Court refused to find that a restriction on one manner of communication was sufficient to violate a prisoner's first amendment rights.[34]

to apply to the federal courts for a writ of habeas corpus, despite the holding of the court which denied the petitioner's release from prison. This development has been extended to the right to correspond with courts, Stiltner v. Rhay, 322 F.2d 314 (9th Cir. 1963), *cert. denied*, 376 U.S. 920 (1964), and with attorneys on matters relating to legal assistance, Nolan v. Scafati, 430 F.2d 548 (1st Cir. 1970). *Accord*, Procunier v. Martinez, 416 U.S. 396 (1974).

With explicit reference to first amendment rights, courts have held that these rights survive incarceration to the fullest extent consistent with prison discipline and security. *See* Nolan v. Fitzpatrick, 451 F.2d 545 (1st Cir. 1971) (right to send letters to news media); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049, 405 U.S. 978 (1972) (right to possess one's own writings); Brown v Peyton, 437 F.2d 1228 (4th Cir. 1971) (right to receive black publications and religious literature); Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969) (right to receive black muslim newspaper and right to correspond with religious leader); Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968) (right to receive black publications); Payne v. Whitmore, 325 F. Supp. 1191 (N.D. Cal. 1971) (right to receive newspapers and magazines); Fortune Society v. McGinnis, 319 F. Supp. 901 (S.D.N.Y. 1970) (right to receive newsletter on prison reform published by former inmates and often critical of prison authorities); Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970) (right to send letter to family critical of prison officials and prison administration).

[30] In Seale v. Manson, 326 F. Supp. 1375 (D. Conn. 1971), the district court held that a restriction which denied unconvicted inmates the right to talk to reporters without the express approval of the Commissioner of Corrections was reasonable, in light of the belief that the limitation of interviews was required to prevent inmates from becoming "big wheels" in the institution. The court denied the inmates' contention that the restriction was an unconstitutional abridgment of their freedom of speech.

[31] 417 U.S. 817 (1974). The district court decision, Hillery v. Procunier, 364 F. Supp. 196, 201 (N.D. Cal. 1973), had enjoined application of California's ban on press-inmate interviews because the court found that the prohibition infringed the first amendment rights of prisoners.

[32] 417 U.S. at 822, *quoting* Price v. Johnston, 334 U.S. 266, 285 (1948).

[33] 417 U.S. at 822-24.

[34] *Id.* at 824-28.

Despite an earlier Supreme Court pronouncement that "[f]ederal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons,' including prisoners,"[35] the reluctance of the *Pell* Court to assert full-fledged first amendment rights on behalf of prisoners was not surprising. The federal courts traditionally have refused to substitute their supervision for the expertise of prison officials, a tendency which has been referred to as the "hands-off" doctrine.[36] Although the *Pell* Court initially appeared to depart from this principle when it openly engaged in a balancing process which weighed prisoners' rights against penal considerations,[37] a troublesome aspect of the balancing technique used was the measure of judicial deference given to the testimony of corrections officials. In short, too much deference predetermined the result, and in this respect the outcome paralleled a traditional application of the "hands-off" doctrine.[38] Although

[35] Cruz v. Beto, 405 U.S. 319, 321 (1972).

[36] The terminology "hands-off" refers to the fact that courts have often refused to review the administration and supervision of institutions under the authority of the Attorney General and the Bureau of Prisons. *See, e.g.*, Garcia v. Steele, 193 F.2d 276, 278 (8th Cir. 1951) (no supervisory jurisdiction of courts over conduct of various institutions); *In re* Taylor, 187 F.2d 852, 853 (9th Cir.), *cert. denied*, 341 U.S. 955 (1951) (not within province of courts); Stroud v. Swope, 187 F.2d 850, 851-52 (9th Cir.), *cert. denied*, 342 U.S. 829 (1951) (not function of courts); Sturm v. McGrath, 177 F.2d 472, 473 (10th Cir. 1949) (no power of court to superintend).

More recently, in Mitford v. Pickett, 363 F. Supp. 975, 978 (E.D. Ill. 1973), the court stated that "the regulation pertaining to the limitation of personal interviews of inmates by the press is a matter within the internal affairs of the prison. This Court will not interfere with such regulation . . . ."

[37] 417 U.S. at 824. *See also* Morales v. Schmidt, 489 F.2d 1335, 1343 (7th Cir. 1973).

[38] There are additional grounds for criticizing the Court's reasoning in *Pell*. The Court reviewed the visitation policy of the California Corrections Department which permitted inmates to receive limited visits from members of their families, the clergy, their attorneys, and their friends, and concluded that this was not a case in which the selection of these categories of visitors was based upon the anticipated content of the communication. 417 U.S. at 825. However, if the theory that press-inmate interviews can create "hig wheels" is to have the validity which is assumed by the Court in both *Pell, id.* at 831-32, and *Saxbe, id.* at 848-49, it would seem that it must be the content of the communication which creates the "big wheel." The "big wheel" theory is based upon the belief that what an inmate tells a newsman may then be publicized outside the prison. When the news returns to the prison, whether by newspaper, television, or radio, the inmate can gain status and power within the institution and may become a disruptive force. *Id.* at 866-69. It is therefore the content of the interview which either is or is not newsworthy and it is the content of the interview which arguably makes certain inmates "big wheels" in the eyes of other prisoners.

The Court further contended that there are two alternative ways in which inmates can communicate with the press: (*1*) through their families, friends, clergy, or attorneys, who are permitted to visit them at the prison; and (*2*) through correspondence with members of the press. Pell v. Procunier, 417 U.S. 817, 824-25 (1974); Saxbe v. Washington Post Co., 417 U.S. 843, 846-47 (1974). However, if these alternative means of communication are effective, the Court failed to explain why they would be less likely than interviews to create "hig wheels." In Nolan v. Fitzpatrick, 451 F.2d 545, 548-49 (1st Cir. 1971), Judge Coffin held that

deterrence, rehabilitation, and prison discipline must be considered in determining the scope of first amendment rights within the prison environment,[39] these penal interests do not justify "broad prophylactic rules"[40] in a first amendment context without a showing of a compelling state interest. As Justice Douglas said in his dissent, "the State can hardly defend an overly broad restriction on expression by demonstrating that it has not eliminated expression completely."[41]

B. *The Right of Newsmen to Gather Information*

The decision in *Saxbe* was directed at interpreting the scope of the asserted right of newsmen to gather information. The Supreme Court had considered the newsgathering right in past decisions, but had not been directly confronted with the need to expressly define the limits of the asserted right.[42] In *Zemel v. Rusk,* the Supreme Court announced that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information."[43] But *Zemel*'s helpfulness was limited in that it set no boundaries on the right to gather information. Furthermore, *Zemel* did not involve the claim of a newsman attempting to gather news but rather that of a person allegedly seeking to inform himself by

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state prison inmates had the right to send letters to the press notwithstanding the contention that letters would return to the prison as "letters to the editor" or news stories which would cause fellow prisoners to strike or riot.

[39] First amendment principles must always be applied "in light of the special characteristics of the . . . environment . . . ." Tinker v. Des Moines Independent School District, 393 U.S. 503, 506 (1969).

[40] NAACP v. Button, 371 U.S. 415, 438 (1963).

[41] Pell v. Procunier, 417 U.S. 817, 838 (1974) (Douglas J., dissenting, joined by Brennan & Marshall, JJ.).

In support of this position, Douglas quoted Justice Black:

> "I cannot accept my Brother Harlan's view [in dissent] that the abridgment of speech and press here does not violate the First Amendment because other methods of communication are left open. This reason for abridgment strikes me as being on a par with holding that governmental suppression of a newspaper in a city would not violate the First Amendment because there continue to be radio and television stations. First Amendment freedoms can no more validly be taken away by degrees than by one fell swoop . . . ."

Id.

[42] Cases which have recognized that newsmen have a first amendment right to gather information include: McMillan v. Carlson, 493 F.2d 1217 (1st Cir. 1974) (per curiam); Schnell v. Chicago, 407 F.2d 1084 (7th Cir. 1969); Globe Newspaper Co. v. Bork, 370 F. Supp. 1135 (D. Mass. 1974); Lewis v. Baxley, 368 F. Supp. 768 (M.D. Ala. 1973); Consumers Union v. Periodical Correspondents' Ass'n, 365 F. Supp. 18 (D.D.C. 1973); Burnham v. Oswald, 342 F. Supp. 880 (W.D.N.Y. 1972); Quad-City Community News Service, Inc. v. Jebens, 334 F. Supp. 8 (S.D. Iowa 1971).

[43] Zemel v. Rusk, 381 U.S. 1, 17 (1964).

traveling to Cuba.[44] More recently, in *Branzburg v. Hayes*,[45] the Supreme Court acknowledged the right of newsmen to gather information, stating that "without some protection for seeking out the news, freedom of the press could be eviscerated."[46] However, in addressing itself to how much protection should be granted to newsmen, the *Branzburg* Court concluded that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."[47] In *Saxbe*,[48] as in *Pell*,[49] the Supreme Court relied upon this language in *Branzburg* to deny the asserted first amendment right.

The soundness of the Court's application of *Branzburg's* broad language to the factual situation of *Saxbe* is open to criticism. *Branzburg* held that the first amendment did not relieve a newsman of the obligation that all citizens have to respond to a grand jury subpoena and answer questions relevant to a criminal investigation.[50] The *Branzburg* Court rejected a reporter's argument that if he were to testify before the grand jury and reveal information given to him in confidence, his sources of information would dry up, thereby infringing his right to gather news. The Court analyzed the asserted testimonial privilege by balancing the specific interests involved. It balanced the importance of the grand jury—especially its broad investigatory powers—to the adjudicatory process, against the uncertain possibility that a newsman's sources might dry up.[51] The Court implied that under special circum-

[44] After the United States had broken diplomatic relations with Cuba and the Department of State had eliminated Cuba from the area for which passports were not required, Zemel applied to have his passport validated for travel to Cuba allegedly to satisfy his curiosity and to make himself a better informed citizen. His request was denied, and he filed suit in federal district court seeking a judgment declaring that he was entitled under the Constitution and laws of the United States to travel to Cuba and to have his passport validated for that purpose. He further claimed that the Secretary of State's travel restrictions were invalid, and that the Passport Act of 1926, 22 U.S.C. § 211a (1970), and § 215 of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1185 (1970), were unconstitutional. In addition, Zemel sought to have the Secretary and the Attorney General enjoined from interfering with his travel. The Supreme Court affirmed summary judgment for the Secretary and dismissed the action against the Attorney General.

[45] 408 U.S. 664 (1972).

[46] *Id.* at 681.

[47] *Id.* at 684.

[48] 417 U.S. at 850.

[49] 417 U.S. at 833-34

[50] 408 U.S. at 693-95.

[51] *Id. Branzburg* adds constitutional support to a common law principle which has been recognized for more than three centuries; the right of the public to receive every man's evidence. It is this puhlic right which compels a reporter to testify before a grand jury, even though he may be forced to reveal his source of confidential information. As stated by Wigmore:

stances a newsman's right to gather information might be outweighed. The majority observed that, "[d]espite 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 in executive session, and the meetings of private organizations."[52] Significantly, in each special circumstance noted by the *Branzburg* Court, the rationale for press exclusion was the paramount need for secrecy. It is therefore ironic that the Supreme Court in *Saxbe*, following the reasoning of *Pell*, relied upon *Branzburg* while simultaneously emphasizing that the ban on press-inmate interviews "is not part of any attempt by the Federal Bureau of Prisons to conceal from the public the conditions prevailing in federal prisons."[53]

In *Saxbe*, the Supreme Court so completely deferred to the expertise of prison officials that it denied the need to balance at all.[54] Implicit was the assumption that the Federal Bureau of Prisons had already balanced the competing interests in formulating the Policy Statement. In effect, the Court unceremoniously transferred the traditional "hands-off" doctrine from the prisoners' rights dimension of first amendment freedoms to the news-gathering function.[55] No objective standard was offered by the

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> When the course of justice requires the investigation of the truth, no man has any knowledge that is rightly private. All that society can fairly be expected to concede is that it will not exact this knowledge when necessity does not demand it, or when the benefit gained by exacting it would in general be less valuable than the disadvantage caused; and the various privileges are merely attempts to define the situations in which, by experience, the exaction would be unnecessary or disadvantageous. The duty runs on throughout all, and does not abate; it is merely sometimes not insisted upon.

8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2192, at 72 (McNaughton rev. 1961). *See* Branzburg v. Hayes, 408 U.S. 665, 682 (1972).

[52] 408 U.S. at 684-85.

[53] 417 U.S. at 848.

[54] *Id.* at 849. In three lower federal court cases, where prison regulations limiting press access to inmates were beld unconstitutional, the courts applied the traditional balancing test. In Globe Newspaper Co. v. Bork, 370 F. Supp. 1135 (D. Mass. 1974), the right of press access was balanced against the substantiality of the governmental interest in promulgating the regulations. In Hillery v. Procunier, 364 F. Supp. 196 (N.D. Cal. 1973), the inmates' first amendment right of access to the press was balanced against the state's interest in prison discipline. Finally, in Washington Post Co. v. Kleindienst, 357 F. Supp. 770 (D.D.C. 1972), the government's interest in prison administration was balanced against the public's right to know of conditions in the prisons. *See* 54 B.U.L. REV. 670 (1974).

For contrasting views on the value of the balancing test, compare Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962), with Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Frantz*, 17 VAND. L. REV. 479 (1964).

[55] *See* Procunier v. Martinez, 416 U.S. 396 (1974); note 36 and accompanying text *supra*.

The degree of deference which the Supreme Court accorded to the expertise of the Bureau of Prisons in *Saxbe* determined the result. On past occasions, the Court had often

Court for determining when a prison regulation would be found constitutionally deficient. In fact, the Supreme Court directly contradicted the finding of the lower courts that the ban on press-inmate interviews was excessive in light of the legitimate press interest in private, in-depth interviews with inmates.[56] By extending *Branzburg* in order to apply its general language to the specific facts of *Saxbe*, the Supreme Court has found that the Constitution does not require optimal conditions for newsgathering so long as there is no likelihood of a significant constriction of the flow of news.[57]

C. *The Right of the Public to Know of Prison Conditions*

The core of the respondents' first amendment claim in *Saxbe* was the critical need for personal interviews with willing prisoners in order to gather news about prisons effectively, accurately, and

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chosen the delicate and difficult task of appraising the substantiality of the reasons advanced by the state in support of a regulation that might infringe first amendment rights. *See, e.g.*, Schneider v. State, 308 U.S. 147, 161 (1939); Garland v. Torre, 259 F.2d 545, 548 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958). By choosing to avoid this task, the *Saxbe* Court did not make clear under what circumstances a balancing test is to be applied. The Court's statement that the press is entitled to the same newsgathering right as the general public is inconclusive because the Court enunciated no constitutional standard for determining the scope of the public's right to gather information. *See* note 100 and accompanying text *infra*.

[56] In determining that the blanket ban on press-inmate interviews was excessive, the district court and the court of appeals followed the "less restrictive alternative" approach. Under this approach, state action which infringes first amendment rights is permissible only if no other means can be devised to achieve the same goal with less abridgment of individual freedom. 494 F.2d at 1005. *See, e.g.*, Police Dep't v. Mosley, 408 U.S. 92, 101 (1972); NAACP v. Button, 371 U.S. 415, 438 (1963); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

In determining the legitimacy of press-inmate interviews, the district court received extended testimony from numerous persons, including: Arthur L. Liman, who served as general counsel to the New York State Special Commission on Attica; Roy M. Fisher, Dean of the School of Journalism at the University of Missouri; respondent Ben Bagdikian; and Timothy Leland, assistant managing editor of *The Boston Globe*. On the basis of their testimony and other evidence, the district court stated:

> The Court has determined on the basis of detailed factual findings filed herewith that private personal interviews are essential to accurate and effective reporting. Ethical newspapers rarely publish articles based on unconfirmed letter communications. Reliability of such information must be determined by face-to-face confrontation.

357 F. Supp. at 781.

[57] It has been held that press photographers and television cameramen have no absolute right to photograph newsworthy events wherever they may occur. *See, e.g.*, Estes v. Texas, 381 U.S. 532, 539-40 (1965) (televising courtroom proceedings infringes fundamental right to fair trial); Seymour v. United States, 373 F.2d 629, 631-32 (5th Cir. 1967) (upholds constitutionality of finding defendant guilty of criminal contempt for violation of court order prohibiting taking of photographs in connection with judicial proceedings); Tribune Review Publishing Co. v. Thomas, 254 F.2d 883, 885 (3d Cir. 1958) (upholds constitutionality of rule forbidding photographs in courtrooms or vicinity of courtrooms).

reliably.[58] In negating these assertions, the *Saxbe* Court failed to distinguish between a newsman's right to gather information and the public's right to be informed. If the majority opinion had analyzed these asserted rights separately, it might logically have concluded that the newsman's right to gather information, when combined with the public's right to be informed, outweighs the asserted right of prison administrators to control certain inmate behavior.[59]

The public's "right to know" was recognized by the Supreme Court in *Red Lion Broadcasting Co. v. FCC*,[60] where the Court upheld the FCC's "fairness doctrine" as promoting "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas."[61] The Court specifically found that the first amendment does not protect private censorship by broadcasters who are licensed by the government.[62] "It is the right of the viewers and listeners, not the right of the broadcasters," declared the Court, "which is paramount."[63] But in *Kleindienst v. Mandel*,[64] the government's refusal to allow an alien professor to enter the United States was upheld by the Court, despite the contention of several of Professor Mandel's intended listeners that the denial of a visa to him infringed their right to hear.[65] In refusing respondents'

[58] 417 U.S. at 853-54 (Powell, J., dissenting, joined by Brennan & Marshall, JJ.).

[59] *Id.* at 849.

In Time, Inc. v. Hill, 385 U.S. 374, 389 (1967), the Supreme Court declared that the constitutional guarantees of freedom of speech and press are not for the benefit of the press so much as for the benefit of all the people.

For the theory that the first amendment encompasses the right to receive information and ideas, see Stanley v. Georgia, 394 U.S. 557, 564 (1969); Lamont v. Postmaster General, 381 U.S. 301, 307-08 (1965) (Brennan, J., concurring); Martin v. City of Struthers, 319 U.S. 141, 143 (1943). If the *Saxbe* Court had elevated the newsman's right to gather information and the public's right to be informed to the dignity of recognition as two separate rights, the Court might have seen the case as one where these two separate rights outweigh the countervailing right of prison administrators to control certain inmate behavior.

[60] 395 U.S. 367 (1969).

[61] *Id.* at 390. The "fairness doctrine" requires that opposing points of view on controversial issues be presented responsibly in order to best serve the public's interest in comprehensive coverage.

[62] *Id.* at 390-92.

[63] *Id.* at 390. For a critical examination of the "fairness doctrine" and one potential impact of the decision in *Red Lion*, see Note, *Offensive Speech and the FCC*, 79 YALE L.J. 1343 (1970).

[64] 408 U.S. 753 (1972).

[65] The action was brought to compel the Attorney General to grant a temporary nonimmigrant visa to a Belgian journalist and Marxian theoretician whom American scholars had invited to participate in academic conferences in the United States. The alien had been found ineligible for admission under §§ 212(a)(28)(D) and (G)(v) of the Immigration and Nationality Act of 1952, barring those who advocate or publish "the economic, international, and governmental doctrines of world communism."

request for press-inmate interviews, the *Saxbe* Court accepted the petitioners' claim that the broad discretion of the Attorney General in operating the federal prison system was comparable to his far-reaching power to exclude aliens.[66] Thus, since the Director of the Bureau of Prisons gave a "facially legitimate and bona fide reason"[67] for prohibiting press-inmate interviews, the Court in *Saxbe*, as in *Mandel*, declined to look behind the "exercise of that discretion"[68] to see how well it balanced against the public's right to be informed.

Particularly because prison officials exercise broad discretion over the lives of inmates, the need for an effective check on their actions is vital.[69] Prisons are public institutions, and the ultimate control over the quality of their administration is exerted not by the Attorney General, nor by the courts, but rather by the power of public opinion.[70] Since most members of the general public are unlikely to enter prisons in order to inform themselves of the conditions therein, they rely instead upon the media for their information.[71]

An argument can be made that by refusing to grant the press the right to interview prisoners, the Court has avoided much future litigation with respect to the definition of the term "press."[72] But such litigation may still arise in the context of determining who has the right to "converse" with unidentified inmates, in accordance with the Policy Statement.[73] More important, however, is the fact that with a free press an informed public can exert its influence within the political branches of the government, leaving the courts to serve as a secondary forum of remedial action.[74] In the political process, the press must play a vital role.[75] Congres-

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[66] Petitioners' Brief for Certiorari at 35, Saxbe v. Washington Post Co., 417 U.S. 843 (1974).

[67] Kleindienst v. Mandel, 408 U.S. 753, 770 (1972).

[68] *Id.*

[69] Pell v. Procunier, 417 U.S. 817, 836 (1974) (Douglas, J., dissenting, joined by Brennan & Marshall, JJ.).

[70] Saxbe v. Washington Post Co., 417 U.S. 843, 861 (1974) (Powell, J., dissenting, joined by Brennan & Marshall, JJ.). Justice Powell noted in his dissent that Chief Justice Burger had spoken out against the ignorance and apathy that characterizes the nation's approach to the problems of prisons. *Id.* at 861 n.7.

[71] *Id.* at 863; Pell v. Procunier, 417 U.S. 817, 841 (1974) (Douglas, J., dissenting, joined by Brennan & Marshall, JJ.).

[72] *See* Petitioners' Brief for Certiorari at 48-49, Saxbe v. Washington Post Co., 417 U.S. 843 (1974).

[73] *See* note 12 *supra.*

[74] Brief for Respondents at 34, Saxbe v. Washington Post Co., 417 U.S. 843 (1974).

[75] *See* note 4 and accompanying text *supra.*

sional investigations and hearings held in response to the demands of an enlightened citizenry can have more immediate and expansive effect on the correction of abusive prison conditions than might particular court decisions limited to the parties in interest and their specific claims for judicial relief.

Alternative means of communication, such as correspondence, are unlikely to be adequate guardians of the public's right to be informed. However efficient a prison mail service may be, correspondence is just too slow to permit timely coverage of fast-breaking news events. Such "hot news"[76] is particularly unlikely to be adequately reported when reliance must be placed upon the mail. This is true even when the correspondents are educated and experienced writers. The Supreme Court has recognized, however, that "[j]ails and penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited."[77] For these inmates, the mail system is virtually useless as a means of communication. Faced with this reality, one might have expected that the *Saxbe* Court would find press-inmate interviews to be a vital means of communication not just to newsmen, but also to the general public.

In deciding that such interviews are not constitutionally compelled, the Supreme Court has taken an important step in *Saxbe* by adopting the "constriction in news flow" test as its standard of reasonableness in place of the more traditional balancing test.[78] Since Policy Statement 1220.1A "does not deny the press access to

[76] *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 157 (1967) (opinion of Harlan, J., joined by Clark, Stewart, & Fortas, JJ.).

[77] Johnson v. Avery, 393 U.S. 483, 487 (1969). *See also* Goldberg v. Kelly, 397 U.S. 254, 269 (1970), where the Supreme Court noted the inadequacy of relying on written statements from welfare recipients:

> Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations . . . . Particularly where credibility and veracity are at issue, . . . written submissions are a wholly unsatisfactory basis for decision.

[78] *See* Note, *Public and Press Rights of Access to Prisoners After Branzburg and Mandel*, 82 YALE L.J. 1337, 1346 n.64, 1352 n.89 (1973). According to the author of this note, the standard of proof established by *Branzburg*—whether the flow of news will be unreasonably constricted—may ensure that the newsgathering right will rarely prevail over state practices alleged to inhibit indirectly its exercise. But what constitutes unreasonable constriction is a factual determination, apparently to be made by the Court on a case-by-case basis. Constriction is not an absolute shutting off of the flow of news, but only a diminution of the "amount" of news to be conveyed. Since the Court must still decide, based upon the facts of the particular case, whether sufficient alternative means exist for informing the general public so that the constriction is not unreasonable, one may well doubt whether the *Branzburg* majority framed a workable test, as adopted subsequently in *Saxbe*.

sources of information available to members of the general public,"[79] the test led a majority of the Court to conclude that no unreasonable constriction had resulted, and therefore that the first amendment freedom of the press had not been abridged.[80] As Justice Powell commented in his dissent, the test framed by the majority has the virtue of simplicity.[81] The Court does not have to "enter the thicket of a particular factual context"[82] to weigh and balance the competing interests. Unfortunately, however, the test, as applied to the prison environment, has weakened the protective power of the first amendment.[83]

III

ASSESSING THE IMPACT

The notion that freedom of expression is vital to the objectives of the Constitution has led the Supreme Court in past decisions to elevate the first amendment to a "preferred position."[84] A variety of devices have been employed to enable—and require—courts to give the necessary strict scrutiny to regulations or statutes which might endanger the preferred first amendment freedoms. Among these are the clear and present danger test; the narrowing of the presumption of constitutionality; the prohibitions against prior restraint; the relaxation of the requirement of standing to sue

[79] 417 U.S. at 850, *quoting* Pell v. Procunier, 417 U.S. 817, 835 (1974).

[80] *Id.*

[81] 417 U.S. at 875. (Powell, J., dissenting, joined by Brennan & Marshall, JJ.).

[82] *Id.*

[83] In Murdock v. Pennsylvania, 319 U.S. 105 (1943), the Supreme Court struck down a city ordinance which required the licensing of all persons soliciting orders for merchandise within the city because that ordinance had been applied to the sale of religious books and pamphlets by Jehovah's Witnesses. In so holding, Justice Douglas said:

> The fact that the ordinance is "nondiscriminatory" is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position.

Id. at 115.

[84] *See, e.g.*, NAACP v. Button, 371 U.S. 415, 439 (1963); Thomas v. Collins, 323 U.S. 516, 529-30 (1945). Writing for the Court in *Thomas*, Justice Rutledge expressed the "preferred position" view as follows:

> The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment.

Id.

where first amendment freedoms are involved; and generally higher standards of procedural due process where these freedoms are endangered.[85]

Whether the first amendment should be accorded the same judicial protection within the prison environment as on the "outside," however, was unresolved prior to *Saxbe*.[86] Numerous federal court decisions in the prisoners' rights area suggested that when prison regulations infringed first amendment freedoms, the compelling interest test should be applied, giving due weight to the special characteristics of the prison environment.[87] But when newsmen sought direct access to inmates in the early 1970's federal courts divided over the proper standard to be applied.[88]

In *Burnham v. Oswald, (Burnham I)*,[89] newsmen instituted a lawsuit against the New York State Commissioner of Correctional Services and the Superintendent of the Attica Correctional Facility, seeking an order from the district court to permit press interviews of inmates in New York State correctional facilities. In the aftermath of the Attica riot, press-inmate interviews had been barred.[90] Applying a standard of reasonableness, the court in *Burnham I* upheld the prohibition on interviews at the Attica facility as reasonable in light of the circumstances existing at that time.[91] The following year, however, in considering whether inmates and representatives of the news media had a right under the first and fourteenth amendments to communicate with each other, the same district court in *Burnham II*[92] held that they had a right to com-

[85] *See* McKay, *The Preference for Freedom*, 34 N.Y.U.L. REV. 1182, 1184, 1191-93 (1959).

[86] *See* notes 5-9 and accompanying text *supra*.

[87] *See, e.g.*, Nolan v. Fitzpatrick, 451 F.2d 545, 548 (1st Cir. 1971) (restrictive effect on first amendment rights of prisoners and public must be no greater than essential to ensure security); Brown v. Peyton, 437 F.2d 1228, 1231 (4th Cir. 1971) (prisoner's desire to practice religion may be restricted only on convincing showing of paramount state interest); Jackson v. Godwin, 400 F.2d 529, 541-42 (5th Cir. 1968) (heavy burden to justify racial discrimination or curtailment of first amendment freedoms); Long v. Parker, 390 F.2d 816, 822 (3d Cir. 1968) (prison officials must prove religious literature creates clear and present danger of breach of prison security or discipline or some other substantial interference with orderly functioning of institution); Pierce v. La Vallee, 293 F.2d 233, 235 (2d Cir. 1961) (freedom of religion and conscience a fundamental "preferred" freedom).

[88] *Compare* Seattle-Tacoma Newspaper Guild, Local 82 v. Parker, 480 F.2d 1062 (9th Cir. 1973) (reasonableness standard), *with* Houston Chronicle Publishing Co. v. Kleindienst, 364 F. Supp. 719 (S.D. Tex. 1973) (compelling justification), *and* McMillan v. Carlson, 493 F.2d 1217 (1st Cir. 1974) (per curiam) (reasonableness standard).

[89] 333 F. Supp. 1128 (W.D.N.Y. 1971).

[90] *Id.* at 1128-29.

[91] *Id.* at 1131.

[92] Burnham v. Oswald, 342 F. Supp. 880 (W.D.N.Y. 1972). *See* Comment, *Beyond Attica: Prison Reform in New York State 1971-1973*, 58 CORNELL L. REV. 924, 970-73 (1973).

municate both by mail and by visitation. "To say that inmates have the right to correspond," the district court reasoned, "necessarily means that, with suitable regulation, they must also have the right to have newsmen visitors."[93] Thus, the *Burnham II* court held

> that an interview with a consenting inmate must be permitted unless it is determined that to hold the interview would present a clear and present danger of breach of the security, discipline or orderly administration of the institution, . . . or that the inmate had clearly abused his right of access to the press . . . on a prior occasion.[94]

In 1973, another district court reached a similar result in *Houston Chronicle Publishing Co. v. Kleindienst*.[95] In that case a newspaper publisher instituted a lawsuit against the Attorney General, a United States marshall, and county sheriffs, seeking declaratory and injunctive relief from a refusal to permit interviews with federal prisoners incarcerated in county jails.[96] In line with the reasoning of *Burnham II*, the court found that, "[i]n the absence of a compelling State reason why the press should be excluded, the first amendment is good enough reason to allow the press into jails."[97] But that same year, in *Seattle-Tacoma Newspaper Guild, Local 82 v. Parker*,[98] the Court of Appeals for the Ninth Circuit returned to the reasonableness standard applied in *Burnham I*. In upholding the ban on interviews at the McNeil Island Penitentiary, a maximum security institution, the court found that "the interview ban is reasonable action within the scope of the wide discretion of the prison administrators and that it does not violate the prisoners' First Amendment rights."[99]

In agreeing with *Seattle-Tacoma*, the Supreme Court in *Saxbe* resolved the dilemma by adopting a reasonableness standard of review instead of the compelling interest test. To apply this standard to the freedom of the press issue, a court need only consider whether a regulation appears reasonable as officially promulgated, and whether, as a result, the flow of news will be unreasonably constricted in light of the general availability of such information to the public-at-large. There is no need for a court to look behind the regulation in order to determine independently whether it

[93] 342 F. Supp. at 885.
[94] *Id.* at 887.
[95] 364 F. Supp. 719 (S.D. Tex. 1973).
[96] *Id.* at 720.
[97] *Id.* at 725.
[98] 480 F.2d 1062 (9th Cir. 1973).
[99] *Id.* at 1065-66.

furthers an important or substantial governmental interest.[100] Whether a nexus exists, for example, between press-inmate interviews and the motivation of some inmates to exert power and create disorder within the institution is a question to be left to the expertise of prison officials, rather than to be decided by a court.

Saxbe represents an attempt by the Supreme Court to assist prison officials in maintaining prison discipline by recognizing that prison officials have the greatest familiarity with daily administrative demands. *Saxbe* also recognizes that there is a right to gather information, but that the right does not impose upon government the affirmative duty to make available to newsmen sources of information not available to members of the public generally.[101] But one perplexing problem, which Justice Powell summarized in his dissent, remains unsolved:

> 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.[102]

Whether the courts will extend the scope of *Saxbe* and allow the government to deny the public and the press access to other public institutions, such as mental hospitals and military camps, must await future litigation.[103]

The general public shares an interest with inmates in the

[100] In United States v. O'Brien, 391 U.S. 367, 377 (1968), the Supreme Court announced a four-criteria test for determining whether incidental limitations on first amendment freedoms are justifiable: (*1*) if the regulation is within the constitutional power of the government; (*2*) if it furthers an important or substantial governmental interest; (*3*) if the governmental interest is unrelated to the suppression of free expression; and (*4*) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

In Procunier v. Martinez, 416 U.S. 396, 413-14 (1974), Justice Powell applied the *O'Brien* test to the facts before the Court and found that the challenged mail censorship regulations of the California state prison were unconstitutional as violative of the first amendment's guarantee of freedom of speech. The regulations authorizing censorship were found to be far broader than was demanded by any legitimate governmental interest in prison security, order, or prisoner rehabilitation. By refusing to apply the *O'Brien* test to the facts in *Saxbe*, the Court was able to conclude that the Constitution does not compel face-to-face interviews, despite the prior holding in *Martinez* that the Constitution does compel uncensored prisoners' mail.

[101] 417 U.S. at 850.

[102] *Id.* at 857 (Powell, J., dissenting, joined by Brennan & Marshall, JJ.).

[103] The vigor of the dissenting opinions written by Justices Powell and Douglas suggests that it is unlikely that the Supreme Court will extend the rationale of *Saxbe* beyond situations involving prison-like institutions. Moreover, the reasoning of *Saxbe* relies heavily upon *Branzburg*, where Justice Powell's vote was necessary to constitute a majority. It is significant that in his concurring opinion in *Branzburg*, Justice Powell emphasized "the limited nature of the Court's holding." 408 U.S. at 709.

indirect impact which *Saxbe* may have on prison conditions.[104] The underlying premise of the *Saxbe* rationale was that allowing press-inmate interviews would have led more certainly to disruption of prison discipline than to constructive reform. However, the district court had received testimony from corrections officials who disagreed with that premise.[105] In fact, numerous officials testified that press-inmate interviews actually had highly beneficial effects on penal institutions.[106] It is possible, therefore, that *Saxbe* may have the unfortunate effect of blocking a necessary and personal conduit for the expression of grievances, thereby making it more difficult to uncover legitimate sources of discontent before they grow beyond control. If so, the impact could extend beyond the federal prison system, since, under *Pell*, state prison officials may now decide to adopt policies similar to the Federal Policy Statement.[107] In the aftermath of *Saxbe*, prison officials have the responsibility of deciding whether such a step would serve or hinder the preservation of internal order and discipline, the maintenance of security, and the rehabilitation of inmates.

CONCLUSION

Saxbe makes clear that the public's right to know is not unlimited, but rather is subject to reasonable constraints when con-

[104] The majority view that reporters have no greater constitutional right of access to prisons than does the public generally will unquestionably impede efforts at prison reform based on first-hand reports of what goes on inside the penal system. N.Y. Times, June 27, 1974, at 44, col. 1.

[105] Washington Post Co. v. Kleindienst, 357 F. Supp. 770 (D.D.C. 1972), *modified and aff'd*, 494 F.2d 994 (D.C. Cir. 1974), *rev'd sub nom.* Saxbe v. Washington Post Co., 417 U.S. 843 (1974).

[106] *See* Brief for Respondents at 18-23, Saxbe v. Washington Post Co., 417 U.S. 843 (1974). Commissioner John O. Boone of the Massachusetts State Department of Corrections testified that in his experience, press-inmate interviews had not created any disciplinary problems, but rather had helped to alleviate tensions within Massachusetts penal institutions. In addition to the testimony of Commissioner Boone, the district court received testimony from officials of the prison systems in Illinois, Florida, California, Iowa, New York City, the District of Columbia, and the federal prison system. Peter Bensinger, Illinois Director of Corrections, testified that a discretionary press-inmate interview policy was working satisfactorily in Illinois. Commissioner Benjamin Malcolm of the New York City Department of Corrections testified that in his experience press-inmate interviews had been advantageous to the correctional system by alleviating inmate tensions and improving public understanding of the correctional system. Leroy Anderson, Executive Assistant to the Director of the District of Columbia Department of Corrections, testified that the District of Columbia's discretionary press-inmate interview policy was successful and had created no problems. *Id.*

On the basis of the above testimonial evidence, the district court found: "The rule adopted by the Bureau of Prisons is a rule of comfortable convenience and not of compelling necessity. It simply serves to prevent too sharp an inquiry into official conduct." 357 F. Supp. at 782.

[107] 417 U.S. 817 (1974). *See* note 21 and accompanying text *supra*.

fronted with competing governmental interests. It also makes clear that the freedom of the press to gather information is not absolute. When the sole limitation imposed on newsgathering in prisons applies equally to newsmen and the general public, the first amendment freedom of the press is not abridged. Prisons are institutions where access is limited, and it is constitutionally permissible to enforce a regulation which prohibits press-inmate interviews when alternative avenues of communication exist.

In so deciding, a majority of the Supreme Court in *Saxbe* has blocked the flow of news through the most professional of means. Whenever people are incarcerated, the opportunity for human indignities and administrative insensitivity exists.[108] The problems within our prisons are largely invisible to the general public, and it is the press that must bring them to our attention. To keep the public informed to the fullest extent, the in-depth interview is essential. If the problems of our prisons are not to be ignored, the most energetic support compatible with justice must be given to the freedom of the press.

Mark L. Goldstein

[108] Washington Post Co. v. Kleindienst, 357 F. Supp. 770, 773 (D.D.C. 1972) *modified and aff'd*, 494 F.2d 994 (D.C. Cir. 1974), *rev'd sub nom.* Saxbe v. Washington Post Co., 417 U.S. 843 (1974).