Prison Interviews: The Movement toward Expanded Rights

Kathleen M. Gallogly

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Prison Interviews: The Movement Toward Expanded Rights

I. Introduction

The first amendment of the United States Constitution guarantees the fundamental rights of free speech and freedom of the press. A precise definition of these rights has proved elusive, however, as they continually evolve to meet the demands of changing needs and emerging problems. This note will examine the current status of first amendment rights as they relate specifically to prisoners' rights of access to the press and press' rights of access to prisoners.

The basic issue in the current cases is whether face-to-face interviews between prisoners and the media should be allowed. This question necessarily involves a twofold analysis. First, is the prisoner's constitutional right abridged by denying him direct access to the press, and second, is the freedom of the press effectively denied by prohibiting individual inmate interviews?

The question from the prisoner's perspective is complicated by the uncertain status of the constitutional rights of inmates during lawful incarceration. Certain limitations on personal liberties are inherent in the prison system. These limitations are necessary if incarceration is to fulfill its rehabilitative and deterrent functions. Further, these restrictions are required to insure safety in the prisons. Nevertheless, a prisoner does not lose all constitutional rights during incarceration, although the permissible scope of limitations on personal liberties is not easily defined.

Concomitant with the prisoners' rights of access to the press is the press' right of access to information within the prison. The constitutional protection of the press clearly includes the right to print known information. Whether the press has a right of access to sources of information, however, is not certain. This question must be resolved in light of the media responsibility to keep the public informed.

II. Prisoners' Rights

A. The Evolution of Treatment in the Courts

Prison regulations prohibiting media interviews with inmates are being challenged by prisoners on first amendment grounds. The basis of the prisoners' complaint is that a ban on all press interviews unnecessarily limits their rights of free speech. Whether this limitation is permissible is the question that comes before the courts.

The traditional method of analysis in prisoners' rights cases was evidenced by judicial reluctance to consider prisoners' constitutional claims. Questions of this nature were generally left to the discretion of the prison administrator as matters of internal control.1 The justification for this approach was found in the

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1 See, e.g., Rodriguez v. McGinnis, 451 F.2d 730 (2nd Cir. 1971) ("The federal court
"Loss of Rights Model" which courts used in examining prisoners' rights. The essence of this model was the theory that lawful incarceration brings about the withdrawal or limitation of many privileges and rights, and that this retraction was justified by considerations underlying the prison system.

Although a prisoner no longer enjoys the same free exercise of his constitutional rights as he did prior to incarceration, he by no means loses all his rights at the prison gates. This realization caused a gradual erosion in the "Loss of Rights Model." The emphasis of the courts began to shift from the retraction of prisoners' rights to the necessity of limitations on them. The modern approach is characterized by the "Retention of Rights Model" developed by the Sixth Circuit in Coffin v. Reichards. Under this doctrine a prisoner retains the rights of an ordinary citizen except those which are expressly or by necessary implication taken from him. As the court in Coffin stated, "While the law does take his liberty and imposes on him a duty of servitude and observance of discipline for his regulation and that of other prisoners, it does not deny his rights to personal security against unlawful invasion."

The evolution of these theories is reflected not only in the standard applied in analysis of the constitutional questions involved, but also in the change in the willingness of the courts to hear cases involving prisoners' rights. The courts have slowly moved from a "hands-off" posture to a more traditional approach to constitutional issues.

Early cases evidenced traces of the "hands-off" doctrine in the judicial reluctance to tamper with prison administrative policy. This tendency is typified by the statement that "correctional authorities have wide discretion in matters of internal administration and that reasonable action within the scope of this discretion does not violate a prisoner's constitutional rights." The Second Circuit espoused an even stricter approach, holding that federal courts should interfere with prison administration only in the "most extreme cases involving a shocking deprivation of fundamental rights." The courts feared that a receptive attitude toward prisoners' claims would encourage prisoners to take any grievance to the federal court for redress, thus effectively creating a prison board refuses to interfere with internal state prison administration except in the most extreme cases involving a shocking deprivation of fundamental rights." As the court stated, to do otherwise "would encourage prisoners who have any kind of 'beef' to seek redress in the federal courts, and the courts will end up sitting as prison boards of discipline"). Carswell v. Wainwright, 413 F.2d 1044 (5th Cir. 1969) ("The federal courts interfere in the internal operation and administration of prison systems only in extreme cases"). See also Beard v. Lee, 396 F.2d 749 (5th Cir. 1968).

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4 143 F.2d 443 (6th Cir. 1944), cert. denied, 325 U.S. 887 (1945).
5 Id. at 445.
6 For an example of this, see the series of cases involving censorship of prisoners' mail. See, e.g., Wilkinson v. Skinner, 462 F.2d 670, 672 (2nd Cir. 1972) (clear and present danger); Sostre v. McGinnis, 442 F.2d 178, 188 (2nd Cir. 1971) (justified by considerations underlying our penal system); Jackson v. Godwin, 400 F.2d 529, 540 (5th Cir. 1968) (compelling state interest); McCloskey v. Maryland, 337 F.2d 72, 74 (4th Cir. 1964) (hands-off posture).
7 See, e.g., Williams v. Steele, 194 F.2d 32 (8th Cir. 1952).
8 Beard v. Lee, 396 F.2d 749, 751 (5th Cir. 1968).
of discipline in the courts. A development of this nature would hamper prison administration and unnecessarily crowd the court docket.

In recent years, many courts have adopted a more liberal view of the scope of prisoners' rights resulting in a greater willingness to review prisoner grievance cases. This attitude was reflected in the Fifth Circuit's statement in Fox v. Sullivan that, "However reluctant the federal courts may be to interfere with the administration of state prisons by state officials, they may not avoid the determination of whether rights protected by the Constitution have been violated."

This shift from the "hands-off" posture has led to a more rigorous analysis of the nature of the prison system. "No longer can prisons and their inmates be considered a closed society with every internal disciplinary judgment to be blissfully regarded as immune from the limelight that all public agencies ordinarily are subject to." The current status thus reflects both greater willingness on the part of the courts to hear cases involving constitutional claims of prisoners and an increased effort to afford prisoners the constitutional guarantees of free citizens to the greatest possible extent.

B. Recent Case Developments

Most of the recent prisoners' rights cases have involved the question of face-to-face interviews with the media. The prison policies in question generally prohibit press interviews with individual inmates. The former federal policy, which is prototypical of several current state policies, had been delineated by the Federal Bureau of Prisons as follows:

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.

Restrictive policies of this nature were adopted in response to prison unrest which was blamed in part on the "celebrity" status attained by prisoners who were singled out for press interviews. The prison administrators justified these policies chiefly on the grounds that they would enhance security and prison morale by eliminating "celebrities."

The prisoners' objection is that the regulations limit their access to the press and thus restrict their freedom of speech. Although the constitutional right of free speech has never been held to embrace a right to require journalists to pub-

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11 539 F.2d 1065 (5th Cir. 1976).
12 Id. at 1066.
14 California, Connecticut, Kentucky, Virginia, Wisconsin.
lish an individual’s views, under certain circumstances the right of free speech includes the right to communicate to a willing listener, including a representative of the press who may wish to publish the information. The Supreme Court focused on this dilemma in *Pell v. Procunier.*

1. The *Pell* Analysis

In *Pell,* journalists and state prison inmates brought actions in the United States District Court attacking the constitutionality of a state regulation prohibiting face-to-face interviews between media representatives and individual inmates. A three-judge district court granted the inmates’ motion for summary judgment, holding that their first amendment rights had been unconstitutionally infringed. The Supreme Court reversed on appeal.

The Court began its analysis by recognizing that incarceration necessarily limits many privileges and rights, but that a prison inmate retains those rights which are not inconsistent with his prisoner status or with the legitimate penological objectives of the corrections system. These basic objectives are the deterrence of crime, the rehabilitation of criminals, and the internal security of the prison.

The Court then examined the regulation and its method of restricting prisoner communication in the light of alternative means of communication available. Although alternative methods of communication do not altogether extinguish a constitutional claim, the Court found that they do constitute a relevant factor when balancing the prisoners’ rights against the competing governmental interests. Prisoners have a variety of alternative means available, including uncensored communication by mail, which embraces communication with media representatives, and other personal contacts through whom the prisoners may indirectly communicate with the press. These personal contacts include family, attorneys, clergy, and friends allowed to visit under the Corrections Department policy.

The challenged regulation was then analyzed in light of the valid prison objectives and the alternative means of communication available to the prisoners. The Court stressed the obvious necessity for some regulations in the prison context and stated that deference would be given to the administrative decisions made in promulgating the regulations absent some showing of abuse by prison administrators. In the instant case, the Court found that the regulations involved did not abridge the first amendment freedoms retained by the inmates and therefore were not unconstitutional.

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18 417 U.S. at 822.
19 *Id.*
20 *California Department of Corrections Manual,* § 415.071 provides that “press and other media interviews with specific individual inmates will not be permitted.”
22 417 U.S. 817.
23 *Id.* at 822-23.
Although the Court in *Pell* sustained the challenged regulation of prisoner interviews, four justices strongly dissented. The thrust of the dissent was that the regulation was a grossly overbroad restriction on the prisoners' speech and thus constituted an impermissible burden on their first amendment rights. The dissent conceded that some regulation may be necessary to maintain security, discipline, and good order. The absolute ban, however, unnecessarily exceeded those needs. In the area of first amendment rights, this excess is fatal, for "broad prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone in an area so clearly touching our most precious freedoms." Since the necessity for a total ban had not been shown, and since less restrictive means of regulation were clearly available, the dissent argued that the regulation should have been found unconstitutional.

2. Other Judicial Decisions

There have been few other recent decisions directly on the issue of prisoners' rights, but two decisions merit discussion in that they reflect the dichotomy between the majority and minority approaches taken in *Pell*.

In *Finney v. Arkansas*, the Eighth Circuit followed the minority approach in *Pell* and balanced the propriety of limitations on prisoner correspondence against the prisoners' rights to free speech. While recognizing the valid administrative interests involved, the court nevertheless struck down the regulation as an impermissible intrusion into the area of first amendment freedoms. The court stated that "If the prison officials have a valid interest in investigating the potential visitors, obviously that interest may be protected by less intrusive means, such as the submission of a visitors' list."

By way of contrast, the district court in *Mitford v. Pickett* held that prison regulations limiting personal interviews of inmates by the press were valid since they were concerned with the internal affairs of the prison. Thus, the court found that the regulations did not deny inmates their right to free speech under the first amendment at least where inmates and the press were afforded ample opportunity to correspond by mail.

3. Analysis of Recent Case Law Developments

Although the Court in *Pell* applied a balancing test which purported to recognize the prisoners' first amendment rights, it did not realistically weigh the

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24 Mr. Justice Powell, Mr. Justice Douglas, Mr. Justice Brennan, and Mr. Justice Marshall dissented. The dissent in *Pell* is discussed further in the text accompanying note 50 infra.
25 417 U.S. at 838 (citing Kleindienst v. Mandel, 408 U.S. 753, 765 (1972)).
26 See the discussion of available alternative methods in text accompanying notes 68-86 infra.
27 505 F.2d 194 (8th Cir. 1974).
28 The regulations involved limited prisoner correspondence to persons who previously consented to the contact. Thus the procedure affected potential correspondence whenever a prison official refused permission to include a name on the approved correspondence list.
29 505 F.2d at 211.
implications of the limitations imposed. The Court stressed alternative methods of communication available to the prisoners in justifying the prohibition of face-to-face media interviews. This approach, however, shifts the focus away from the actual issue, which is the permissibility of the ban on these interviews. The question is not whether there are alternative means of communication available, but rather whether prohibiting individual interviews impermissibly denies the prisoners their first amendment rights.

In addition, the Court failed to consider that the alternative means of communication do not adequately compensate for the value of personal interviews. Many factors, such as demeanor, tone, and reaction, enter into a personal contact and are lost when the interview is forced from a personal level to a secondhand basis. Further, it is practically impossible to follow up on matters or pursue sidelines of interest when the interview is not face to face.

Finally, less restrictive alternatives are available to accomplish the purposes of these regulations. Instead of an outright ban on personal interviews, prison policies could be developed which would allow interviews on a limited basis. Prisoners' eligibility for interviews could be determined by their overall prison record. Media qualifications could be determined by their credentials. The problems of "celebrity" inmates could be overcome by limiting the number of interviews permissible in a given time span. Less restrictive regulations are quite feasible, yet the Court failed to require that the least restrictive method of regulation be employed.

The Federal Bureau of Prisons Policy Statement recently issued could serve as a valuable guideline to less restrictive methods of regulation. The new policy recognizes the desirability of establishing a system which affords the public greater access to news about prison operation. In so doing it establishes an interview policy whereby either prisoners or media may apply for an interview, and the warden of the prison may, in his discretion, either grant or deny the interview. The adoption of a policy of this nature would lead to a more flexible administrative procedure which would adequately protect the prisoners' first amendment freedoms.

III. Press' Rights

A. Evolution of Treatment in the Courts

Regulations prohibiting inmate interviews are frequently challenged by the media as a violation of the first amendment guarantee of freedom of the press. The media claim focuses on the press' rights of access to information, an emerging aspect of first amendment freedom which defies precise definition.

The press is afforded special protection under the first amendment to accommodate the particular function which it serves. The press is viewed by the courts as an agency of the public, and is given special protection in an effort to secure the public right to know. The function of the press is to keep the public

informed. Thus the press has the duty to disseminate to the public at large the news which it can reliably assemble.\(^{33}\)

The question then arises whether a coexistent right to gather information exists. The existence of a right to gather information was first suggested by the Supreme Court in *Zemel v. Rusk*.\(^{24}\) In *Zemel* the plaintiff argued that the denial of a passport violated his right of free speech by denying him the opportunity to become better acquainted with foreign affairs. The Court avoided addressing this issue directly by stating that the restriction involved was an inhibition of action rather than one of speech, and decided the case on that basis. Still, the suggestion remained that there was some existing right to inform oneself, and that this right could be asserted in a proper case.

Whether a coexistent right to gather information exists was directly addressed in subsequent cases. In *Associated Press v. United States*\(^{35}\) the Supreme Court specifically stated that "the right to speak and publish does not carry with it the unrestrained right to gather information."\(^{36}\) Although the Court made it clear that the media does not possess an "unrestrained" right to gather information, it did not define the extent of the right that is constitutionally cognizable.

The Supreme Court did refine its analysis of the extent of press rights in *Branzburg v. Hayes*.\(^{37}\) *Branzburg* involved the question of whether reporters were privileged from revealing news sources in grand jury investigations. In refusing to recognize any special media privilege, the Court stressed that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."\(^{38}\)

The *Branzburg* doctrine has been repeatedly applied in cases finding that members of the press are not constitutionally guaranteed a right of access greater that that afforded to the general public,\(^{39}\) although a strong dissent on this issue has developed in recent cases.\(^{40}\) In applying this logic to the prison cases, the question is whether the ban placed on press interviews of prisoners denies the freedom of the press. In answering this negatively, the courts stress that prisons are institutions where public access in general is limited.\(^{41}\) Since, under *Branzburg*, the press has no right of special access beyond that afforded the public generally, denying individual interviews to the press does not constitute an impermissible burden on the freedom of the press.

### B. Recent Case Developments

Three recent lower court decisions reflect the variety of results possible under


\(^{34}\) 381 U.S. 1 (1965).

\(^{35}\) 326 U.S. 1 (1945).

\(^{36}\) Id. at 17.

\(^{37}\) 408 U.S. 665 (1972).

\(^{38}\) Id. at 684.


the Branzburg method of analysis. In Mitford v. Pickett, an Illinois District Court, following the traditional methodology, held that the inmate interview regulations did not infringe on the first amendment rights of freedom of the press since prison interview policies were internal affairs properly regulated by prison administrators.

The Ninth Circuit, in Seattle-Tacoma Newspaper Guild Local #82 v. Parker, required closer scrutiny of the regulations involved than was given in Mitford. In Seattle-Tacoma, the court also held that the interview regulations were within the scope of official discretion in the administration of a federal prison, but carefully reviewed the regulation to ensure that it did not unduly restrict the flow of information to the public. The court relied on the fact that alternative means of communication were available; members of the press had extensive access to facilities and personnel in addition to unlimited rights to confidential correspondence.

In McMillan v. Carlson, however, a Massachusetts District Court reached a radically different result. The court there held that the Federal Bureau of Prisons' total ban on personal interviews by authors was unconstitutional as an invalid restriction of first amendment rights regardless of the alternative written correspondence that was allowed. In McMillan, the plaintiff, who was writing a biography of James Earl Ray, was barred from interviewing Ray's brother while he was an inmate in the United States Penitentiary at Leavenworth, Kansas. The court found that the regulation was unconstitutional and ordered the prison to grant the plaintiff permission to confidentially interview the prisoner.

In reaching this decision, the court first found newsgathering to be within the ambit of the first amendment protection as a corollary of the right to publish. The court further found that the public has a constitutional right to receive information and ideas which the regulations in question unreasonably restricted. The court then held that the burden was on the Bureau of Prisons to justify the restraints on this information, and that the Bureau had failed to sustain this burden. Further, the court found it unreasonable to treat all authors or inmates alike in denying interviews, particularly when distinctions could rationally be drawn. Thus, the ban was an unreasonable restriction of first amendment rights.

Two subsequent Supreme Court cases, Pell v. Procunier and Saxbe v. The Washington Post Co., reaffirmed the Court's holding in Branzburg and denied media claims of first amendment violations based on prisoner-press interview prohibitions. Both of these decisions, however, contained strong dissents which argued in favor of the media claim.

In Pell v. Procunier, the Court examined the media defendants' claims that the California state prison regulation prohibiting individual inmate interviews infringed upon their first amendment rights. The defendant members of

43 480 F.2d 1062 (9th Cir. 1973).
45 James Earl Ray was the assassin of Martin Luther King.
46 417 U.S. 817.
48 417 U.S. 817.
49 See note 20 supra.
the press contended that, in the absence of an individualized determination that the particular interview might create a clear and present danger to prison security or to some other substantial interest served by the corrections system, they had a constitutional right to interview any inmate who was willing to speak with them. 50

In rejecting this claim, the Court focused on the justification for the prohibition and on the other avenues of access available to newsmen. The Court particularly noted that the regulation was not an attempt to conceal prison conditions or to frustrate press investigation of those conditions, as newsmen are accorded the opportunity to enter the prison and interview inmates randomly selected by corrections officials. Rather, the policy prohibited individual interviews in an effort to advance prison security and morale.

The regulation involved in Pell was developed in response to mounting disciplinary problems in San Quentin and other state prisons. Part of the disciplinary problem was blamed on the liberal posture toward press interviews. The regulation sought to eliminate the prison "celebrity" phenomenon which resulted from the concentration of attention on individual inmates. The press contended that the regulation suffered from overbreadth. The majority of the Court upheld the regulation, following the Branzburg rationale that the press had no special right of access to information.

Four justices dissented from the majority holding on the media claim in Pell. The crux of Mr. Justice Powell's separate dissent was that the absolute interview ban impermissibly restrained the ability of the press to perform its constitutionally protected function of informing the people of the conduct of the government. 52 In addition, the other dissenting justices emphasized the traditional role of the press of informing the public, and then looked at the regulation in light of the scope of its effect on that function. The thrust of their argument was that a complete ban goes beyond what is necessary for prison security and policy objectives and infringes upon the cherished right of a free press. 53

In Saxbe v. The Washington Post Co., a companion case to Pell, newsmen challenged a Federal Bureau of Prisons Policy Statement prohibiting interviews between newsmen and individually designated inmates of the federal prisons. The majority, citing to their analysis in Pell, found that the press had no special right of access, and therefore the media's first amendment rights were not abridged by the regulation.

Three justices dissented in Saxbe again focusing on the absolute nature of the interview ban and the corresponding effect of the ban on the press. Specifically, the dissent focused on the aspects of a personal interview which are lost in substituting correspondence or secondhand contacts for news sources. The dissent noted that this deficiency was critical to the news media, since

50 417 U.S. at 829.
51 See note 24 supra.
52 417 U.S. at 835.
53 Id. at 840.
54 417 U.S. 843.
55 See note 15 supra.
56 Mr. Justice Powell, Mr. Justice Brennan, and Mr. Justice Marshall dissented.
“Ethical newsmen are reluctant to publish a story without an opportunity through face-to-face discussion to evaluate the veracity and reliability of its source.”

The prevalence of functional illiteracy among inmate populations poses serious difficulties if the press must rely on written communications for its sources.

Further, reliance on random interviews is an inadequate substitution for personal contact since randomly selected prisoners are often not qualified to speak on the topic at issue.

In analyzing the issue of the press' rights of access to sources of information, the dissent, like the majority, looked to the Zemel and Branzburg precedents, but distinguished both cases. The majority concluded from these opinions that non-discriminatory restrictions on press access to information are constitutionally acceptable, but the dissent differed on this point. In analyzing Zemel, the dissent found the Court's distinction between inhibition of action and restraint of speech to be too uncertain a dichotomy to be effective in deciding the present question as interviews necessarily entail both conduct and speech.

Similarly, the dissent failed to find the Branzburg rationale convincing:

It is true, of course, that the Branzburg decision rejected an argument grounded in the assertion of a First Amendment right to gather news and that the opinion contains language which, when read in isolation, may be read to support the majority's view. . . . Taken in its entirety, however, Branzburg does not endorse so sweeping a rejection of First Amendment challenges to restraints on access to news. The Court did not hold that the government is wholly free to restrict press access to newsworthy information. To the contrary, we recognized explicitly that the constitutional guarantee of freedom of the press does extend to some of the antecedent activities that make the right to publish meaningful: "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."

In distinguishing Zemel and Branzburg, the dissent contended that a point exists beyond which official restraints on news sources undermine the first amendment. At that point the government must justify such regulations in terms of a compelling interest rather than asserting its discretionary authority.

The dissent then analyzed the government's justifications for the regulation in light of the substantial interest test announced in Procunier v. Martinez as the standard to be applied in dealing with first amendment liberties. Applying this test in Saxbe, the dissent found the Bureau's justifications unpersuasive in light of the heavy burden of this standard.

The dissent also emphasized the empirical evidence relating to prisoner-press

57 417 U.S. at 854.
58 Id. at 854-55.
59 Id. at 855.
60 Id. at 859.
62 In Procunier, the Court stated the applicable standard as follows: “First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. . . . Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.” 416 U.S. at 413.
interviews gathered in a survey of other prison systems. This data substantiated the dissent's contention that less restrictive means of regulating prisoner interviews were available. Of the twenty-four American jurisdictions in the sample, only five broadly prohibited personal interviews of inmates, whereas seven vested authority in correctional authorities to allow or deny the interviews on a case-by-case basis, and eleven generally permitted the interviews. In analyzing the data the dissent concluded that there was no compelling reason to adopt a blanket prohibition.

Thus, the dissent stressed the merits of a case-by-case evaluation policy. Such an evaluation would meet the needs of the prison authorities while avoiding the first amendment hazards of a policy which broadly denies access to prisoners for individual interviews.

The options available to the Bureau of Prisons in formulating a workable policy were considered by the dissent. Reasonable restrictions on the time, place, and manner of interviews would clearly be enforceable. Further, to overcome the prisoner "celebrity" phenomenon the dissent suggested limiting the number of interviews of an inmate in a time span while making eligibility for interviews contingent upon an acceptable prison conduct record. Finally, the dissent noted that an emergency power to suspend all interviews could be retained by the prisons in order to deal with extraordinary situations.

The analysis of the majority of the Court parallels that used in its examination of prisoners' first amendment claims in conjunction with the same regulation, and thus suffers from the same infirmity. The Court stressed the justifications for the regulation and alternative means of communication available, but it avoided addressing the issue of whether the regulations involved unconstitutionally infringe upon the first amendment guarantees of freedom of the press.

The regulations involved do infringe on the press' ability to inform the public, for they limit any access on an individual basis to sources of information in prison. Since these regulations restrict the first amendment freedom of the press, the government should bear the burden of justifying the limitations by showing a compelling state interest which necessitates regulation. Absent this justification, the regulation should be held to constitute an impermissible burden on the freedom of the press.

The Court sidestepped this analysis by finding that the press had no constitutionally protected right to access to information. It emphasized the contention that the press' rights of access to information were no greater than that afforded the public generally. Thus, antecedent newsgathering activities are not within the ambit of first amendment protection.

Strict adherence to this approach dilutes the impact of the first amendment protection of freedom of the press. Press activities are protected to insure an informed public, and to effectively retain this safeguard some protection must

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63 See note 14 supra.
64 Alaska, Georgia, Montana, New Jersey, Oregon, Pennsylvania, South Carolina.
65 Illinois, Maine, Maryland, Massachusetts, Nebraska, North Carolina, Ohio, Vermont, Iowa, New York City, and the District of Columbia.
66 417 U.S. at 871-74.
67 See note 62 supra.
be given to antecedent newsgathering activities. If not, certain newsworthy topics would be essentially removed from the scope of media coverage. Such is the case when all interviews of individual inmates are prohibited. Prison conditions may still be reported, but those conditions are not the only newsworthy activity within the prison. Stories relating to prisoners’ lives before incarceration, their impending appeals, and even general public interest stories may be newsworthy. These other types of subject matter must be afforded some measure of protection in order to guarantee an informed public. The regulations in question in Pell deny this protection and should have been found unconstitutional for that reason.

C. Houchins v. KQED, Inc.\(^{68}\): The Recent Supreme Court Decision

The Supreme Court recently addressed the propriety of prisoner-press interview prohibitions in Houchins v. KQED, Inc.\(^{69}\) This case arose when KQED broadcasting company was refused permission to inspect and take photographs of a portion of a county jail where a prisoner suicide had reportedly occurred. A psychiatrist’s report of the suicide had blamed prison conditions for the death. KQED filed an action against the supervisor of the jail alleging deprivation of their first amendment rights since prison policy denied all public access to the jail.

Following the filing of the action, the prison authorities announced a new program of monthly prison tours open to the public. These tours, however, were restricted to certain sections of the jail and the use of tape recorders or cameras was prohibited. In addition, no prisoner interviews were allowed on the tours.

The district court granted preliminary injunctive relief to the plaintiff based on its finding that the prison policy denied reasonable access to the jail.\(^{70}\) The court of appeals affirmed this decision.\(^{71}\) In a 4-3 decision, the Supreme Court reversed the judgment and remanded the case.\(^{72}\) Mr. Chief Justice Burger announced the judgment of the Court and delivered an opinion in which Mr. Justice White and Mr. Justice Rehnquist joined. The opinion of these justices rejects 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 facilities such as hospitals and mental institutions.”\(^{73}\) The Court distinguished the right to publish information from the right of access to information in order to publish. Citing the Pell decision,\(^{74}\) the Court held that there was no right of access such as that relied on by the court of appeals.\(^{75}\) Further, questions of access were held to be

\(^{68}\) 46 U.S.L.W. 4830 (1978).
\(^{69}\) Id.
\(^{70}\) The United States District Court for the Northern District of California issued a preliminary injunction restraining the county sheriff from depriving or excluding, as a matter of general policy, representatives of the news media from the county jail facilities and requiring that reporters be given access to facilities at reasonable times and that they be allowed to use photographic and sound equipment to interview inmates.
\(^{71}\) 546 F.2d 284 (9th Cir. 1976).
\(^{72}\) 46 U.S.L.W. 4830.
\(^{73}\) Id. at 4833.
\(^{74}\) 417 U.S. 817.
\(^{75}\) 46 U.S.L.W. at 4832.
essentially questions of legislative policy and were better left to legislative reform. To allow these questions to be decided on Constitutional grounds would set the first amendment up as a "Freedom of Information Act" and, absent statutory standards, would lead to an ad hoc approach by the court of appeals according to their own notions of what was expedient or desirable.\textsuperscript{76}

Mr. Justice Stewart, in a separate opinion, found that the preliminary injunction issued was unwarranted, and therefore concurred with the judgment of the Court.\textsuperscript{77} Justice Stewart did, however, find that KQED was entitled to injunctive relief of a more limited scope. Although he agreed that the Constitution does no more than assure the public and the press equal rights of access once the government has opened the door, he disagreed with the definition of "equal access" found in Chief Justice Burger's opinion. Rather than a static view of "equal access," Justice Stewart urged that a realistic approach to the problem be adopted which would allow flexibility to accommodate the practical distinctions between the needs of the press and the general public. He found that the "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."\textsuperscript{78} Although KQED should be entitled to some form of injunctive relief, Justice Stewart found that the relief granted by the district court was overbroad because it allowed the press access to areas not generally open to the public and because it allowed random press interviews which were denied to the public. Justice Stewart contended however that in allowing more effective reporting of subject matter open to the public, injunctive relief would be appropriate.\textsuperscript{79}

Three justices dissented asserting that KQED was entitled to the injunctive relief granted by the district court.\textsuperscript{80} Their conclusion was based on the analysis of the prison regulations in effect at the time the suit was instituted. The regulations prohibited public access to the jail and allowed some censorship of prisoners' mail.\textsuperscript{81} This is not the situation anticipated by the \textit{Pell} decision for, as the dissent noted:

\begin{quote}
The decision in \textit{Pell}, therefore, does not imply that a state policy of concealing prison conditions from the press, or a policy denying the press any opportunity to observe those conditions, could have been justified simply by pointing to like concealment from, and denial to, the general public. If
\end{quote}

\textsuperscript{76} Id. at 4833.  
\textsuperscript{77} Id. at 4834.  
\textsuperscript{78} Id.  
\textsuperscript{79} Suggested improvements would be a more flexible and frequent basis than monthly scheduled tours and use of cameras and recording equipment be allowed to enable more effective audience presentation.  
\textsuperscript{80} Mr. Justice Stevens, Mr. Justice Brennan, and Mr. Justice Powell.  
\textsuperscript{81} As stated in \textit{Houchins:}  
\begin{quote}
When this suit was filed, there were no public tours. Petitioner enforced a policy of virtually total exclusion of both the public and the press from those areas within the Santa Rita jail where the inmates were confined. At the time petitioner also enforced a policy of reading all inmate correspondence addressed to persons other than lawyers and judges and censoring those portions that related to the conduct of the guards who controlled their daily existence.
\end{quote}

46 U.S.L.W. at 4836.
that were not true, there would have been no need to emphasize the substantial press and public access reflected in the record of that case. 82

The central question in the dissent's analysis was whether the restrictions on access to the prison in effect on the date the litigation commenced concealed from the general public the conditions of confinement within the facility and thus abridged the public's right to be informed about those conditions. KQED's case was based on the contention that the conditions were wholly without claim to confidentiality and thus no legitimate penological justification existed for concealing the prison conditions. 83 The constitutional issue addressed by the dissent was whether "an official prison policy of concealing such knowledge from the public by arbitrarily cutting off the flow of information at its sources abridges the freedom of speech and of the press protected by the First and Fourteenth Amendments to the Constitution." 84

Given this statement of the issue, the dissent held that the injunctive relief granted was an appropriate remedy. The relief was tailored to the needs of the litigant, a member of the press. Thus the relief did not consciously grant the press greater rights of access than those afforded the general public. Rather, the relief granted was concerned only with the press, as the rights of the general public were not litigated. Thus the dissenting justices would have affirmed the judgment of the court of appeals. 85

The approach taken in the dissent raised an additional critical factor: the time which the court must look to in deciding the constitutionality of the regulation. The majority decision emphasized the monthly jail tour and the liberal communication policy available to the inmates even though these policies were instituted after the complaint was filed in this action. According to the dissent, the injunctive relief should be examined in relation to the prior restrictive policies which essentially limited all access to the prison and sharply abridged free communication by prisoners. 86 When considered in that posture, the first amendment rights in question were abridged and injunctive relief was appropriate. The form of relief should have met the needs of the litigant, a member of the press, and should have allowed for reasonable press access. As such, the injunctive order in question should have been affirmed.

IV. Conclusion

The prisoner and press claims in prisoner interview cases involve overlapping considerations. Both classes of plaintiffs possess first amendment claims. A balance must be obtained between these interests and the legitimate prison interests in security and in advancing correctional objectives. The law is still in an evolutionary stage in this area. The leading case at present, KQED, Inc. v.

82 46 U.S.L.W. at 4837.
83 This is based on the fact that prisons are public institutions financed by public funds and administered by public servants. They are an integral part of the criminal justice system and can greatly affect the rights of citizens confined there.
84 46 U.S.L.W. at 4839.
85 Id. at 4840.
86 Id. at 4836.
Houchins,\textsuperscript{87} was a 4-3 decision in which the concurring opinion recognized the existence of the right in question but disagreed with the remedy granted in the lower court. It should be noted that this was only a plurality decision, and that a strong dissent was filed. Thus the Supreme Court decision in the case reflects the unsettled status still present in this area of case law.

Strong consideration should be given to the factors emphasized by the dissents in Pell v. Procunier\textsuperscript{88} and Saxbe v. The Washington Post, Inc.,\textsuperscript{89} as well as the dissent and concurring opinion in KQED, Inc. First, the court should look realistically at the implications that a total interview ban has on the newsman's ability to effectively inform the public. Second, the court should carefully analyze the alternative means of communication and realize the shortcomings inherent in them, both from the perspective of the prisoners and of the press. Finally, the court should assess the scope of the regulation in an effort to determine whether its purpose could be accomplished by less restrictive means. The court should then require that the least restrictive means of regulation be utilized, so as to safeguard the first amendment rights of both the prisoners and the press.

\textit{Kathleen M. Gallogly}

\textsuperscript{87} Id. at 4830.
\textsuperscript{88} 417 U.S. 817.
\textsuperscript{89} 417 U.S. 843.