

# SUNLIGHT IN THE COUNTY JAIL: *HOUCHINS* *v. KQED, INC.* AND CONSTITUTIONAL PROTECTION FOR NEWSGATHERING

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“Sunlight is said to be the best of disinfectants.’ . . . The district court order would let a little sunlight in the county jail.”<sup>1</sup>

On March 31, 1975, San Francisco public television station KQED reported that a prisoner had committed suicide while confined in the Greystone section of Santa Rita Rehabilitation Center, a jail and pre-trial detention facility operated by Alameda County.<sup>2</sup> According to KQED’s information, inmate Alvin Holly had requested a psychiatric examination from the superior court, which responded by ordering such an examination. The county had failed to provide it, however, and two days later Holly committed suicide.<sup>3</sup> KQED’s broadcast included a statement by a Santa Rita staff psychiatrist that the poor conditions in the Greystone section were responsible for the illnesses of his prisoner-patients.<sup>4</sup> The report also featured Alameda County Sheriff Thomas Houchins’ denial of the psychiatrist’s allegations.<sup>5</sup>

Santa Rita Rehabilitation Center is located in a remote corner of the county, nearly an hour’s drive from Oakland, the county’s major population center.<sup>6</sup> Its inmates are pre-trial detainees, persons convicted of misdemeanors, and those serving short felony terms.<sup>7</sup> Conditions at Santa Rita had been an issue of public concern in the Bay Area for several years. In 1971, the Federal District Court for the Northern

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1. Brief for Respondent at 62, *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), quoting *L. BRANDEIS, OTHER PEOPLE’S MONEY* 92 (1914).

2. *Houchins v. KQED, Inc.*, 438 U.S. 1, 3 (1978).

3. Appendix to Brief for Petitioner, *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (hereinafter cited as App.).

4. 438 U.S. 1, 3 (1978).

5. *Id.*

6. Neither the county bus district nor the regional rapid transit system serve Santa Rita. At the time this note was written, a private bus company ran one bus per day to Santa Rita.

7. *Brenneman v. Madigan*, 343 F. Supp. 128, 135 n.1 & 132-35 (N.D. Cal. 1972). See Brief for Respondent at 33, *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978).

District of California<sup>8</sup> held that conditions there were so poor as to constitute cruel and unusual punishment.<sup>9</sup> The court found that "the subhuman conditions at Greystone could not help but destroy the spirit and threaten the sanity of the men who had to endure them,"<sup>10</sup> and that "Greystone should be razed to the ground."<sup>11</sup> Following the prisoner's suicide, KQED reporters sought Sheriff Houchins' permission to tour Santa Rita with cameras and sound recording equipment in order to ascertain the nature of conditions there.<sup>12</sup> Sheriff Houchins denied the request in accordance with his policy of barring all media access.<sup>13</sup> KQED subsequently obtained a preliminary injunction in federal court which enjoined the sheriff from denying reporters access to Santa Rita and its Greystone section.<sup>14</sup> The court ruled that KQED and other responsible members of the news media were to be allowed to use photographic and sound recording equipment as well as to interview inmates in order to provide the public with full and accurate coverage of the Santa Rita jail facilities.<sup>15</sup> As part of its injunction, the court ordered the sheriff to formulate a new access policy which would balance the right of the press and the public to gather news against the sheriff's responsibility to maintain a safe and adequate jail facility.<sup>16</sup>

Sheriff Houchins appealed the decision to the Ninth Circuit Court of Appeals, which upheld the lower court's order.<sup>17</sup> The United States Supreme Court reversed the Ninth Circuit's judgment, however, and remanded the case with instructions to modify the preliminary relief granted by the district court.<sup>18</sup> Only seven justices participated in the consideration and decision of *Houchins v. KQED, Inc.*, and they split three ways as to the result.<sup>19</sup> Writing for a three justice plurality, Chief Justice Burger denied that there is any constitutional protection for newsgathering.<sup>20</sup> He held that the question of press and public access to investigate the conditions of jails and their inmates requires a legislative solution.<sup>21</sup> Justice Stewart filed a concurring opinion which pro-

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8. *Brenneman v. Madigan*, 343 F. Supp. 128 (1971).

9. *Id.* at 132-33.

10. *Id.*

11. *Id.*

12. 438 U.S. at 3.

13. *Id.* at 20.

14. App., *supra* note 3, at 71.

15. *Id.*

16. *Id.* at 69-70.

17. *KQED, Inc. v. Houchins*, 546 F.2d 284 (9th Cir. 1976), *rev'd*, 438 U.S. 1 (1978).

18. 438 U.S. at 16.

19. *Id.* Justices Marshall and Blackmun did not take part in the consideration or decision of the case.

20. *Id.* at 12-16.

21. *Id.* at 12.

vided the swing vote for remand.<sup>22</sup> Justice Stevens, joined by Justices Powell and Brennan, filed a dissenting opinion in which he argued that Sheriff Houchins' refusal to admit reporters with cameras and recording equipment amounted to an official policy of concealing jail conditions from the public, arbitrarily "cutting off the flow of information at its source" and violating the First Amendment right of the public and the press to gather information.<sup>23</sup>

This note focuses on the question of whether the First Amendment implies a right of press and public access to jails and other public institutions for newsgathering.<sup>24</sup> The first section briefly reviews the historical, theoretical, and legal bases of freedom of the press,<sup>25</sup> and discusses two competing views of the purpose of the press clause.<sup>26</sup> One view, held by Justice Stewart and the *Houchins* plurality, is that the First Amendment protects the press as an institution. The second view, held by the dissenting justices in *Houchins*, is that the Constitution protects the press' societal function. The two lower court decisions and the three Supreme Court opinions issued in *Houchins* are discussed and analyzed in the second section of the note. The final section illustrates how the difference between the two interpretations of the purpose of the press clause adopted by the justices resulted in the split Supreme Court decision. The conclusion recommends legislative action as the surest method of protecting the rights of the press and public to gain access to information about conditions inside public facilities.

## I. Freedom of the Press: An Historical, Theoretical and Legal Background

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."<sup>27</sup>

Although the simplicity of the language of the First Amendment

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22. *Id.* at 16-19.

23. *Id.* at 38.

24. For background discussions of this issue, see Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838 (1971) (hereinafter cited as COLUMBIA Note); Note, *Public and Press Rights of Access to Prisoners After Branzburg and Mandel*, 82 YALE L.J. 1337 (1973); Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505 (1974) (hereinafter cited as HARVARD Note); Comment, *The Right of the Press to Gather Information After Branzburg and Pell*, 124 U. PA. L. REV. 166 (1975) (hereinafter cited as U. PA. Comment); 60 CORNELL L. REV. 446 (1975); 45 FORDHAM L. REV. 1524 (1977); 44 GEO. WASH. L. REV. 453 (1976); *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 165 (1974).

25. This note is concerned primarily with press and public access to public institutions for the purpose of ascertaining conditions therein. A detailed discussion of First Amendment principles is beyond its scope.

26. See text accompanying note 27 *infra*.

27. U.S. CONST. amend. I.

makes determination of its scope and identification of its violation difficult, the intent of the Framers in expressly mentioning the press<sup>28</sup> was to recognize the need to preserve its freedom, strength and independence.<sup>29</sup> James Madison's preliminary draft of the First Amendment illustrates this intention: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments: and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."<sup>30</sup>

The nature of the recognition afforded the press by the Framers has led courts to make a series of assumptions which carry substantial weight whenever questions of limitations upon freedom of the press arise. First, as a result of its unfettered, intrepid and energetic collection and dissemination of news, the press is assumed to be the most important and efficient forum for conveying important information to the public.<sup>31</sup> Second, freedom of expression, which includes both the right of free speech and the right of a free press,<sup>32</sup> must be treated by

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28. It has been noted that defining "the press" involves constitutional difficulties. See HARVARD Note, *supra* note 24, at 1508, and A. Pickerell, *Newsmen's Shield Laws and Subpoenas: California's Farr and the Fresno Four*, 1 COMM/ENT 101, 111-13 (1977). See also *Mills v. Alabama*, 384 U.S. 214, 219 (1966). However, such questions are beyond the scope of this note.

For present purposes, the press shall be defined as those persons eligible for the protection afforded by the California shield law: "A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service or any person who has been so connected or employed . . . [or] a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed . . . ." CAL. EVID. CODE § 1070 (West Supp. 1977).

A distinction between the electronic and print media may be inferred from the Supreme Court decisions in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) and *Miami Herald Publ. Co. v. Tornillo*, 418 U.S. 241 (1974). That distinction was established in the context of attempts by the public to gain access to the media. The Court in *Miami Herald* held unconstitutional a state reply statute requiring newspapers to publish political candidates' replies to critical editorials. The Court failed to mention its prior holding, in *Red Lion*, that the fairness doctrine, which requires the airing of both sides of public issues, was valid as applied to the broadcast media. While the distinction becomes important in specific fact situations when the scope of access is to be determined, the guarantees of the First Amendment apply equally to each method of reporting. Compare *Houchins v. KQED, Inc. with Pell v. Procunier*, 417 U.S. 817 (1974) and *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974).

29. *Mills v. Alabama*, 384 U.S. 214, 219 (1966); *Grosjean v. American Press Co.*, 297 U.S. 233, 243-44, 248-50 (1936).

30. 1 ANNALS OF CONG. 434 (Gales & Seaton eds. 1789).

31. *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J. concurring); *Mills v. Alabama*, 384 U.S. at 219; *Grosjean v. American Press Co.*, 297 U.S. at 243-44, 248-50.

32. "Freedom of expression" is a term which includes both speech and press rights. The Court tended to use this phrase in its earlier First Amendment cases in which the distinction between speech and press rights was either unclear or not essential to its decision. See Co-

the courts with special deference since the institution itself is crucial to our political system.<sup>33</sup> Freedom of speech and of the press, protected by the First Amendment, has been held to occupy a preferred position in the legal and political structure of the United States; due to this preferred position, only a compelling state interest can justify limiting First Amendment rights.<sup>34</sup> Third, the impact of governmental regulations on freedom of speech and of the press must be examined in the context of the particular fact situation.<sup>35</sup> Fourth, regulations affecting First Amendment interests must be drawn with great precision since they touch "our most precious freedoms,"<sup>36</sup> and that broad preventative rules in the area of free expression are intrinsically suspect.<sup>37</sup> Finally, the right to receive as well as the right to disseminate information is protected by the First Amendment.<sup>38</sup> The following sections discuss various interpretations of the press clause and how they have affected the extent and nature of constitutional protection for the press.

### A. Interpretation of the Press Clause

There are three basic patterns for interpreting "or of the press."<sup>39</sup> Freedom of the press is accorded the least protection when the press clause is considered a mere redundancy. Under this view, the rights of members of the press are limited to those which all citizens possess under the speech clause.<sup>40</sup> The logic underlying this narrow interpretation is the principle that inexplicitness should be treated as a total fail-

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LUMBIA Note, *supra* note 24, at 840-41 and cases cited therein; HARVARD Note, *supra* note 24, at 1507; U. PA. Comment, *supra* note 24, at 172.

33. *Pell v. Procunier*, 417 U.S. at 832, 838-39 (1974) (Powell, J., concurring); *Grosjean v. American Press Co.*, 297 U.S. at 243-44, 248-50 (1936); *Abrams v. United States*, 250 U.S. 616 (1919).

34. *NAACP v. Button*, 371 U.S. 415, 438-39 (1963). The Court held that even penal interests do not justify broad administrative or executive measures which limit First Amendment rights, unless the government shows that those interests are compelling. *See also Mills v. Alabama*, 384 U.S. at 217.

35. *Saxbe v. Washington Post Co.*, 417 U.S. 843, 864 (1974) (Powell, J., concurring); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969).

36. *Pell v. Procunier*, 417 U.S. at 838; *NAACP v. Button*, 371 U.S. at 438.

37. 371 U.S. at 438.

38. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976); *Pell v. Procunier*, 417 U.S. at 832; *Kleindienst v. Mandel*, 408 U.S. 753, 762-65 (1972); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 390; *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965); HARVARD Note, *supra* note 24, at 1505.

39. Stewart, "Or of the Press", 26 HASTINGS L.J. 631 (1975) (hereinafter cited as "Or of the Press") (excerpted from an address delivered on November 2, 1974, at Yale Law School).

40. Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add To Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975); "Or of the Press", *supra* note 39, at 633; U. PA. Comment, *supra* note 24, at 174.

ure to say anything. This is a premise which has no proper role in constitutional interpretation.<sup>41</sup> As Justice Stewart noted in an address delivered at the Yale Law School in 1974, many of the state constitutions drafted before the Federal Constitution contained clauses protecting press freedom "while at the same time recognizing no general freedom of speech. By including both guarantees in the First Amendment, the Founders quite clearly recognized the distinction between the two."<sup>42</sup>

A slightly broader interpretation of the press clause maintains that the only purpose of the constitutional guarantee is to ensure that the press serves as a neutral forum for debate and a neutral conduit of information between citizens and government.<sup>43</sup> Under one variation of this theory, the constitutional protection available to the press is limited to the protection against censorship which England afforded its press at the time our Constitution was adopted.<sup>44</sup> Another variation of this second view limits the press to constitutional protection from threats perceived by the Founders such as censorship, stamp taxes and prior restraints.<sup>45</sup> As Justice Stewart also noted in his 1974 speech, these views are flawed in that they give "insufficient weight to the institutional autonomy of the press that it was the purpose of the Constitution to guarantee."<sup>46</sup>

The earliest Supreme Court cases dealing with freedom of expression focused on the First Amendment's free speech guarantee and therefore provide little guidance for press questions.<sup>47</sup> "The Court's decisions dealt with the rights of isolated individuals, or unpopular minority groups, to stand up against governmental power. . . . The Court was seldom asked to define the rights and privileges, or the responsibilities of the organized press."<sup>48</sup> In recent years the Court has been presented with cases concerning such rights, privileges and responsibilities,<sup>49</sup> and in deciding those cases a third interpretation of the press

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41. Frantz, *Is the First Amendment Law—A Response to Professor Mendelson*, 51 CALIF. L. REV. 729, 733-34 (1963).

42. "Or of the Press," *supra* note 39, at 633-34. See U. PA. Comment, *supra* note 24, at 174.

43. "Or of the Press," *supra* note 39, at 634.

44. *Grosjean v. American Press Co.*, 297 U.S. at 248.

45. *Id.* at 248-50.

46. "Or of the Press," *supra* note 24, at 634. See also *Houchins v. KQED, Inc.*, 438 U.S. 1, 17 (Stewart, J., concurring).

47. Litigation of First Amendment speech and press claims has a short history. Freedom of expression was before the United States Supreme Court for the first time in 1919. See *Abrams v. United States*, 250 U.S. 616 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Schenck v. United States*, 249 U.S. 47 (1919). The first case in which a defendant succeeded on a First Amendment claim was *Fiske v. Kansas*, 274 U.S. 380 (1927).

48. "Or of the Press," *supra* note 39, at 632.

49. *Id.* at 632-33. See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (prior

clause has evolved.

In rejecting the view that the press clause is a mere redundancy, this third interpretation resembles the second, which limits constitutional protection to preservation of the press as a neutral forum and a conduit for communication between voters and elected officials. However, the third interpretation goes further, maintaining that press protection should not be so narrowly limited because the press provides more than a "forum" and a "conduit;" it recognizes instead that the press plays an active role in our social and political structure.

## B. Broader Protection for the Press

Support for the broader structural or functional interpretation of the First Amendment is found in a number of Supreme Court opinions. In *Mills v. Alabama*,<sup>50</sup> which held unconstitutional a statute forbidding newspapers to publish political editorials on election day, Justice Black wrote for the majority:

The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.<sup>51</sup>

Protection is thus bestowed on the press because it performs one of the most vital functions in a democratic society: the collection and dissemination of information to the citizens. Separate and distinct rights which reside solely in the press and which are not derived from the free speech rights of individuals have therefore been recognized.<sup>52</sup> It has been said that the government is prohibited from censoring the press because the duty of the press is to censure the government.<sup>53</sup>

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restraints and judicial "gag" orders); *Miami Herald Publ. Co. v. Tornillo*, 418 U.S. 241 (1974) (invalidating state "right to reply" statute); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) (companion case to *Pell*); *Pell v. Procunier*, 417 U.S. 817 (1974) (denying press claim of a right to interview specific prison inmates on request); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (denying press claim of privilege against testifying before grand juries); *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (press liability for invasion of privacy); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (right of criminal defendant to be tried without undue publicity); *Mills v. Alabama*, 384 U.S. 214 (1966) (right of newspapers to publish political editorials on election day); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (press liability for defamation); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (tax on newspapers); *Near v. Minnesota*, 283 U.S. 679 (1931) (prior restraint).

50. 384 U.S. 214 (1966).

51. *Id.* at 219.

52. "*Or of the Press*," *supra* note 39, at 635-36. For similar views expressed with reservations, see HARVARD Note, *supra* note 24, at 1506. *But see* U. PA. Comment, *supra* note 24, at 174.

53. *New York Times Co. v. United States*, 403 U.S. at 717 (Black, J., concurring). Ten opinions were written in this case. A *per curiam* opinion, representing the views of six jus-

Protection of the function of the press is not jeopardized by the commercial or sensationalist motives of publishers, editors or reporters.<sup>54</sup> Although it cannot be disputed that editors of the print and broadcast media sometimes abuse their power in selecting and editing news material, the Supreme Court has held that this lack of editorial discretion does not negate constitutional protection.<sup>55</sup> Such protection of the press is not bestowed by the Constitution for the personal benefit of reporters and editors, but rather for the benefit of all the people.<sup>56</sup> The Court has consistently declined to extend First Amendment protection to the press when it has found that the interests of the public and the press diverged. When press and public interests are consistent, however, the Court has extended constitutional protection to the press.<sup>57</sup>

Coincidence of press and public interests led the Court to establish a protective standard of press liability in defamation cases which furthers the public interest in vigorous and unrestrained debate.<sup>58</sup> The public interest in diverse ideas and unconventional expression has at times also been the basis for decisions extending First Amendment protection to the press in obscenity cases.<sup>59</sup> In contrast, the divergence of press claims and the public interest caused the Court to limit the rights of the broadcast media in *Red Lion Broadcasting Co. v. FCC*.<sup>60</sup> There the court upheld an FCC rule requiring broadcasters to present the views of responsible spokespersons on controversial issues in order to

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tices, held that the government, which sought to prevent publication of the "Pentagon Papers," had not shown a sufficient justification to impose a prior restraint on the New York Times. 403 U.S. at 714. In addition to the per curiam opinion, the individual justices produced six concurrences and three dissents.

54. In *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), the Court held that a gag order imposed by a trial court judge during the trial of an alleged mass murderer was an unconstitutional prior restraint. *Id.* at 570. Chief Justice Burger found that the case juxtaposed the First Amendment guarantee of freedom of the press with the Sixth Amendment right to an impartial jury trial, and that the First Amendment interests were controlling. He reiterated the position he had previously taken in *Miami Herald Publ. Co. v. Tornillo*, 418 U.S. 241, 256 (1974), *see note 28 supra*, that press responsibility, although desirable, is not mandated by the Constitution, whereas freedom of the press is so protected. 427 U.S. at 560.

55. "Calculated risks of abuse are taken in order to preserve higher values. . . . [T]he authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedom of expression." *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm'n*, 412 U.S. 94, 125 (1973). *See James Madison's comments in 4 ANNALS OF CONG.* 934 (1794).

56. First Amendment protections "are not so much for the benefit of the press so much as for the benefit of all of us." *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967).

57. *See generally* HARVARD Note, *supra* note 24.

58. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

59. *See* *Memoirs v. Massachusetts*, 383 U.S. 413 (1966); *Roth v. United States*, 354 U.S. 476, 484-88 (1957).

60. 395 U.S. 367 (1969). *See note 28 supra*.



promote the public interest in receiving varied opinions. By compelling broadcasters to air statements by speakers whose messages meet judicial or administrative standards of relevance to matters of public concern, the Court enhanced rather than abridged the right of free expression.<sup>61</sup>

Judicial reluctance to extend First Amendment protection to press activities which conflict with fundamental public interests was made clear in *Branzburg v. Hayes*,<sup>62</sup> where the Court refused to sanction a reporter's privilege to refuse to testify before grand juries investigating crime. The reporters contended that the First Amendment protected their right to gather news and that forcing them to testify and reveal their sources would hamper their ability to do so, thereby abridging their constitutional rights.<sup>63</sup> Balancing the broad investigatory powers of the grand jury, which might potentially deter news sources from furnishing information, against a privilege which would directly limit those powers, the Court denied the reporter's claims in a five to four decision.<sup>64</sup>

*Branzburg* presented the Court with the claim that newsgathering is constitutionally protected.<sup>65</sup> The question of First Amendment protection for such activities had reached the Court before, but not in the form of a claim asserted by the press.<sup>66</sup> In one case, a private citizen had attacked the State Department's refusal to validate his passport for travel to Cuba on the ground that the refusal violated his First Amend-

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61. The Court similarly rejected the press' claim in *Associated Press v. United States*, 326 U.S. 1 (1945), that the First Amendment precluded the application of the antitrust laws to the press.

62. 408 U.S. 665 (1972).

63. *Id.* at 679-80.

64. *Id.* at 690-91. Four justices held against the privilege; four supported it. Justice Powell's concurring opinion is so narrowly phrased and constructed that some commentators have characterized the decision as 4-1/2 to 4-1/2. "*Or of the Press*", *supra* note 39, at 635; *THE MEDIA AND THE LAW* 12 (Simons & Califano, Jr. eds. 1976) (hereinafter cited as *Simons & Califano*).

The majority opinion recognized some constitutional protection for newsgathering. 408 U.S. at 681, 707. Justice Powell also noted the existence of that protection. *Id.* at 709 (Powell, J., concurring). The dissenters acknowledged such a constitutional right. *Id.* at 729 (Stewart, J., dissenting).

65. *Id.* at 679-81. *Branzburg* had written an article describing illicit drug activities in Kentucky. The second petitioner, Pappas, had been inside a Black Panther headquarters while preparations were made for a police raid. Caldwell, the third petitioner, had gained the confidence of Black Panther Party leaders in California. All three reporters were subpoenaed by grand juries to answer questions regarding their sources.

66. See *Kleindienst v. Mandel*, 408 U.S. 753, 762-65 (1972) (acknowledging the constitutional right of private citizens to receive information but denying that the right was abridged by exclusion of an alien Marxist scholar from the United States); *Zemel v. Rusk*, 381 U.S. 1 (1965) (held that the First Amendment was not violated by a State Department regulation which prohibited private citizens from visiting Cuba).

ment right to gather information.<sup>67</sup> In another, a group of American scholars maintained that the denial of a visa to a Belgian Marxist violated their constitutional right of access to information and opinion.<sup>68</sup> In both cases, the Court based its denial of First Amendment protection on the specific facts underlying the controversies;<sup>69</sup> the Court did not deny that in a suitable set of circumstances, newsgathering may be entitled to constitutional protection.<sup>70</sup>

All nine justices in *Branzburg* recognized that newsgathering is protected by the First Amendment, despite the majority's denial of the specific press claim of entitlement to a testimonial privilege.<sup>71</sup> However, the majority qualified the scope of the constitutional protection for newsgathering by listing places from which the press might legitimately be excluded: deliberative executive and judicial proceedings, as well as the scenes of disasters, emergencies, and catastrophes involving physical danger.<sup>72</sup> Nevertheless, such limitations on the scope of constitutional protection for newsgathering were not a denial of its existence. In the words of Justice White's majority opinion: "We do not question the significance of free speech, press, or assembly to the country's welfare. 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."<sup>73</sup>

Although *Branzburg* has been cited in subsequent opinions involving press access issues, it is important to note that source protection rather than access was at issue in that case, and that the Court's comments regarding press access were dicta.<sup>74</sup> The Court pointed out that its holding involved "no restraint on what newspapers may publish or on the type or quality of information reporters may seek to acquire. . . ."<sup>75</sup> It was therefore unnecessary for the Court to explore a

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67. *Zemel v. Rusk*, 381 U.S. 1 (1965).

68. *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

69. 408 U.S. at 762-63; 381 U.S. at 17.

70. 408 U.S. at 770; 381 U.S. at 16; *See also* cases following *Kleindienst* and *Zemel*, which continue to recognize constitutional protection for newsgathering: *Pell v. Procunier*, 417 U.S. at 833-34; *Saxbe v. Washington Post Co.*, 417 U.S. at 858 (Powell, J., dissenting opinion).

71. *See* note 64 *supra*.

72. 408 U.S. at 684-85. Following the decision, two of the three reporters were recalled by the respective grand juries. A substantial increase in subpoenas to newsmen has occurred as a result of the decision which, at the very least, chills freedom of the press by increasing the legal costs to publishers and reporters. *Simons & Califano*, *supra* note 64, at 14.

73. 408 U.S. at 681.

74. The Court noted that "[t]he sole issue before us is the obligation of reporters to respond to grand jury subpoenas relevant to the commission of crime." *Id.* at 682.

75. *Id.* at 691.

fundamental distinction between two competing views of the press clause.

### C. The Purpose of Constitutional Protection for the Press—Structure v. Function

As the third interpretation of the scope of the press clause has been developed, two diverging views have arisen as to the purpose underlying constitutional protection for the press. One view justifies broad press protection on the ground that the press clause is a structural provision of the Constitution that protects the press as an institution. This argument was propounded by Justice Stewart in his Yale Law School address,<sup>76</sup> and was reflected in his majority opinions in two 1974 press access cases, *Pell v. Procunier*<sup>77</sup> and *Saxbe v. Washington Post Co.*<sup>78</sup> The other view advocates broad protection for the press based on the belief that the press clause is designed to preserve the societal function of the press—the collection, analysis and dissemination of information and ideas. This view was expressed by Justice Powell in his dissenting opinion in *Saxbe*<sup>79</sup> and by Justice Stevens in his dissent in *Houchins v. KQED, Inc.*<sup>80</sup>

Justice Stewart has argued that the press clause should be interpreted as a structural provision:

[T]he Free Press guarantee is, in essence, a *structural* provision of the Constitution. Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals: freedom of speech, freedom of worship, the right to counsel, the privilege against compulsory self-incrimination, to name a few. In contrast, the Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection.<sup>81</sup>

This structural view protects the press against discriminatory governmental regulations such as prior restraints, but it affords no protection against non-discriminatory governmental restraints on newsgathering such as policies prohibiting all first-hand access to government information and public institutions. The extent of access to governmental institutions for newsgathering is to be determined by “the tug and pull of the political forces in American society” rather than on the basis of First Amendment interests.<sup>82</sup> This interpretation of the press clause

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76. “*Or of the Press*,” *supra* note 39, at 633.

77. 417 U.S. 817 (1974).

78. 417 U.S. 843 (1974).

79. 417 U.S. at 850 (Powell, J., dissenting).

80. 438 U.S. at 30 (1978) (Stevens, J., dissenting).

81. “*Or of the Press*,” *supra* note 39 at 633 (emphasis in original).

82. *Id.* at 636 (cited by Burger, C.J., in *Houchins v. KQED, Inc.*, 438 U.S. at 15).

therefore rejects the concept of special constitutional protection for newsgathering.

In contrast, the view that bases First Amendment protection on preservation of the societal function of the press *requires* constitutional protection for newsgathering. Without ideas and information to assemble and analyze, the press has little of value to convey to the public and the ability of the people to govern themselves is seriously damaged.<sup>83</sup> Professor Chafee pointed out in *Free Speech in the United States*<sup>84</sup> that the guarantees of freedom of speech and of the press extend beyond the individual citizen:

There is an individual interest, the need of many [citizens] to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way.<sup>85</sup>

Justice Powell's dissenting opinion in *Saxbe v. Washington Post Co.*<sup>86</sup> quoted this passage and set out the functional view of the press clause:

In its usual application—as a bar to governmental restraints on speech or publication—the First Amendment protects important values of individual expression and personal self-fulfillment. But where as here, the Government imposes neither a penalty on speech nor any sanction against publication, these individualistic values of the First Amendment are not directly implicated.

What is at stake . . . is the *societal function* of the First Amendment in preserving free public discussion of governmental affairs. . . .

[The societal function of the First Amendment] embodies our Nation's commitment to popular self-determination and our abiding faith that the surest course for developing sound national policy lies in a free exchange of views on public issues.<sup>87</sup>

Press access cases such as *Houchins* turn on the Court's interpretation of the purpose of the press clause. The structural interpretation precludes constitutional scrutiny of regulations which do not discriminate between the press and the public, no matter what impact they have on the flow of information and opinion. The functional interpretation requires careful scrutiny of the regulation's effect and of the government interest which it serves. The difference between the scope of constitutional protection of press access for newsgathering afforded by these two views of the First Amendment emerged in two cases decided by the Court in 1974.

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83. 438 U.S. at 32-33 (Stevens, J., dissenting) and authorities cited therein.

84. Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1954).

85. *Id.* at 33.

86. 417 U.S. 843 (1974).

87. *Id.* at 862 (Powell, J., dissenting) (emphasis added).

D. *Pre-Houchins Press Access Cases: Pell v. Procunier and Saxbe v. Washington Post*

Since the *Branzburg* ruling,<sup>88</sup> the Court has decided two cases (besides *Houchins*) in which the press has attempted to establish constitutional protection for newsgathering. *Pell v. Procunier*<sup>89</sup> and *Saxbe v. Washington Post Co.*<sup>90</sup> raised the issue of the press right to gather news within state and federal prisons. Both cases presented the question of whether prison regulations which denied professional journalists the opportunity to interview particular inmates violated the First Amendment.<sup>91</sup>

In *Pell*, four California state prison inmates and three professional journalists challenged the constitutionality of a California Department of Corrections regulation which prohibited interviews with inmates who had been specifically designated by the press.<sup>92</sup> The rule had been promulgated following a violent escape attempt at San Quentin Prison that authorities partially attributed to their former policy of allowing reporters face-to-face interviews with particular inmates upon request.<sup>93</sup> Prison administrators felt that the policy had contributed to prison unrest in that the relatively small number of men interviewed had gained disproportionate notoriety and influence among the other inmates.<sup>94</sup> A three-judge federal district court held that the rule violated the prisoners' First and Fourteenth Amendment rights but dismissed the journalists' claims that their constitutionally protected right to gather news had been illegally infringed.<sup>95</sup> The state prison authorities appealed the ruling which granted the prisoners' claims and the journalists appealed the ruling which denied them a right of access.<sup>96</sup> The Supreme Court reversed the judgment in favor of the prisoners and affirmed the dismissal of the press claims.<sup>97</sup>

In *Saxbe*,<sup>98</sup> a newspaper and one of its reporters challenged a similar policy of the federal prison system which permitted press interviews only with individually designated inmates jailed in minimum security facilities.<sup>99</sup> The district court held that the policy was uncon-

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88. See notes 62-64 and 71-75 and accompanying text *supra*.

89. 417 U.S. 817 (1974).

90. 417 U.S. 843 (1974).

91. 417 U.S. at 829; 417 U.S. at 849-50.

92. 417 U.S. at 819.

93. *Id.* at 831.

94. *Id.*

95. *Hillery v. Procunier*, 364 F. Supp. 196, 200 (N.D. Cal. 1973).

96. 417 U.S. at 821.

97. *Id.* at 827-28, 835.

98. 417 U.S. 843 (1974).

99. *Id.* at 844.

stitutional<sup>100</sup> and the government appealed the judgment to the Court of Appeals for the District of Columbia, which remanded the case for further findings.<sup>101</sup> The district court reaffirmed its prior decision<sup>102</sup> and the circuit court affirmed that holding.<sup>103</sup> Relying on *Pell*, the Supreme Court reversed the circuit court, holding that the regulation did not abridge freedom of the press because it was not discriminatory—the press was not denied access to sources of information available to members of the general public.<sup>104</sup>

In both cases, the Court noted that the prison administrations granted substantial access to the press in excess of that accorded the general public,<sup>105</sup> and that there had been no attempts to conceal prison conditions.<sup>106</sup> Although the public and the press were subject to different access regulations, the *Pell* Court found that both groups were allowed “full opportunities to observe prison conditions” inside the walls.<sup>107</sup> Citing *Branzburg v. Hayes*<sup>108</sup> and repeating the list of situations from which the press is regularly and permissibly excluded,<sup>109</sup> the *Pell* court once again recognized that the public and the press share the constitutionally protected right to gather news.<sup>110</sup> In neither case was the press absolutely barred by informal administrative policy as it was in *Houchins*.

The Court based its holdings on Justice White’s dictum in *Branzburg* that “[i]t has been generally held that the First Amendment does not guarantee the press a constitutional right of special access not available to the public generally.”<sup>111</sup> Justice Stewart expressed the rule in his opinion for the *Pell* majority: “[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public.”<sup>112</sup> In neither *Pell* nor *Saxbe* did the Court consider whether this rule would apply to a case in which no access at all was allowed. Nor did either opinion, after equating the press and public rights of access to gather news, define the extent of constitutional protection for either interest.<sup>113</sup>

These cases illustrate the dichotomy between the view that the

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100. 357 F. Supp. 770 (D.D.C. 1972).

101. 477 F.2d 1168 (D.C. Cir. 1972).

102. 357 F. Supp. 779 (D.D.C. 1972).

103. 494 F.2d 994 (D.C. Cir. 1974).

104. 417 U.S. at 850.

105. 417 U.S. at 830-31; 417 U.S. at 847, 849.

106. 417 U.S. at 830; 417 U.S. at 848.

107. 417 U.S. at 830.

108. 408 U.S. 665 (1972). See notes 62-64 and 71-75 and accompanying text *supra*.

109. 417 U.S. at 833-34.

110. *Id.* at 834.

111. 408 U.S. at 684.

112. 417 U.S. at 834.

113. See *KQED, Inc. v. Houchins*, 546 F.2d at 295 (Hufstedler, J., concurring).

First Amendment protects the press as an institution or structural element of our society and the view that it protects the function of the press and therefore access to gather information. However, the difference did not become clear until the Court was presented with *Houchins v. KQED, Inc.*, a case in which access was, in practical terms, completely denied.

## II. *Houchins v. KQED, Inc.*

The language of the First Amendment and the historical context of its adoption justify reading the press clause as a structural provision protecting the societal function of the press as an institution.<sup>114</sup> Narrower constructions of the meaning and function of the syntactically separate guarantee of freedom of the press have been noted by the courts but generally discarded.<sup>115</sup>

When it first began construing the free speech and press guarantees, the Supreme Court was not presented with cases raising questions as to the rights and responsibilities that pertain to the gathering and dissemination of news. As the number of cases raising these issues has increased, however, the Court's opinions have indicated a general acceptance of the proposition that the First Amendment protects the press as an institution which performs a crucial role in our political and social structure. Chief Justice Burger's opinion in *Houchins* exemplifies this view:

It is equally true that with greater information, the public can more intelligently form opinions. . . . Beyond question, the role of the media is important; acting as the "eyes and ears" of the public, they can be a powerful and constructive force, contributing to remedial action in the conduct of public business. They have served that function since the beginning of the Republic. . . .<sup>116</sup>

Prior to the *Houchins* decision the Court had recognized—in particular, limited circumstances—a constitutionally protected right to gather news. In *Pell* and *Saxbe* it rejected First Amendment challenges to prison rules and policies limiting press access to interview specified inmates. However, those cases can be distinguished from *Houchins* in that both the California prison authorities in *Pell* and the federal authorities in *Saxbe* allowed substantial press and public access that was not impaired by upholding the regulations at issue. The question that remained open, and which was a major factor in splitting the *Houchins* Court, is whether administrators violate the First Amend-

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114. See notes 76-80 and accompanying text, *supra*.

115. See notes 36-50 and accompanying text, *supra*.

116. 438 U.S. at 8.

ment by totally denying the public and the press access to public institutions (such as jails) to gather information regarding conditions.

**A. Lower Court Decisions In *Houchins v. KQED, Inc.***

*1. The District Court*

Following Sheriff Houchins' refusal to allow reporters to tour Santa Rita with cameras and sound recording equipment, KQED and two local branches of the National Association for the Advancement of Colored People filed suit against him under 42 U.S.C. section 1983.<sup>117</sup> They alleged that the sheriff had violated their First Amendment rights by arbitrarily refusing to permit media access and failing to provide any effective means by which the public could learn about conditions inside the jail.<sup>118</sup>

There was no formal access policy regarding either the public or the press when KQED filed suit in June, 1975.<sup>119</sup> Shortly thereafter, the sheriff instituted a program of public tours at Santa Rita; one tour was to be held each month for a period of six months.<sup>120</sup> Each tour was limited to twenty-five persons, and did not include the cell portions of the Greystone facility. The use of cameras and communication with inmates was prohibited.<sup>121</sup> KQED moved for a preliminary injunction prohibiting the sheriff from "excluding KQED news personnel from the Greystone cells . . . and generally preventing full and accurate news coverage of the conditions prevailing therein."<sup>122</sup> In opposing the injunction the sheriff contended that the public tours, together with the inmates' mail and visiting privileges, afforded adequate media access.<sup>123</sup>

After the first four monthly tours had taken place, the district court held a hearing on KQED's motion. It was shown that KQED had extensive experience in reporting about jail and prison conditions and

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117. *Id.* 42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party so injured in an action of law, suit in equity, or other proper proceedings for redress."

States are prohibited from abridging the freedom of speech or of the press by the due process clause of the Fourteenth Amendment. *Grosjean v. American Press Co.*, 297 U.S. at 243. Any due process or equal protection questions raised by *Houchins v. KQED, Inc.*, are outside the scope of this note, since they were not at issue there and the Court did not consider them.

118. 438 U.S. at 4; *id.* at 21 (Stevens, J., dissenting).

119. *Id.* at 4 (majority opinion).

120. *Id.*

121. *Id.* at 4-5.

122. *Id.* at 4.

123. App., *supra* note 3, at 67.



inmates.<sup>124</sup> Its reporters had been granted access with cameras and recording equipment to various California correctional facilities; no disturbances or problems had occurred on any of those occasions.<sup>125</sup> The reporters testified that precautions were taken to protect the privacy of prisoners.<sup>126</sup> No pictures were taken of anyone who did not wish to be photographed, nor was anyone interviewed without his or her knowledge and consent. Written releases were routinely obtained from any inmates who ultimately appeared in KQED's television programs.<sup>127</sup> Affidavits of local correctional officers other than Sheriff Houchins and those of various Bay Area news reporters described the more liberal access policies of other penal institutions and uniformly expressed the opinion that first-hand coverage of conditions at such institutions by professional reporters had no harmful consequences. Sheriff Houchins stated that since Santa Rita had never experimented with a more liberal press access policy than that in existence at the time of the hearing, there had never been press disturbances at the jail.<sup>128</sup> He also admitted that he had no knowledge of any disruptions caused by the media at other penal institutions.<sup>129</sup>

Evidence was also introduced concerning the adequacy of the tour program instituted by the sheriff. All six tours had been completely booked shortly after they were announced, and it was uncertain whether they would be continued after the first six months. The tours did not enter the Greystone facility and thus avoided the most troublesome and controversial area. Inmates were kept out of sight during the tour, and visitors were not allowed to photograph jail conditions. The county offered photographs for sale to tour visitors, but those photographs did not depict all of the areas visited.<sup>130</sup> In addition, the photographs were taken from angles which omitted catwalks and television monitors by which inmates were subject to surveillance.<sup>131</sup>

The district court found that the broad restraints on access to Santa Rita were not required by legitimate penological interests and that under the sheriff's policy KQED was afforded no access at all.<sup>132</sup> Sheriff Houchins was enjoined from excluding KQED and other responsible members of the news media or preventing them from providing full and accurate coverage of the conditions in the entire jail,

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124. 438 U.S. at 19 (Stevens, J., dissenting).

125. App., *supra* note 3, at 8-12.

126. *Id.* at 69.

127. *Id.* at 11, 14.

128. *Id.* at 69.

129. *Id.*

130. *Id.* at 68.

131. *Id.* See 438 U.S. at 23 (Stevens, J., dissenting).

132. App., *supra* note 3, at 69-70. See 438 U.S. at 23 (Stevens, J., dissenting).

including the Greystone section.<sup>133</sup> The sheriff was ordered to establish reasonable "time and hour restrictions" for press access, although he was given discretion to deny access "for the duration of those limited periods when tensions in the jail make such media access dangerous."<sup>134</sup> The court further ordered that KQED and other members of the press be allowed to use cameras and sound equipment and to interview inmates, in order to provide the public with adequate reports on the conditions inside the Santa Rita facilities.<sup>135</sup> On the basis of the testimony presented, the court was satisfied that such access would not endanger the prisoners' privacy.<sup>136</sup>

The district judge noted that as long as the sheriff's access regulations and policies were consistent with the constitutional rights of the press and the public, their specific details should be determined by the sheriff rather than the court:

In fashioning the form of preliminary injunction, however, the Court has carefully refrained from usurping the Sheriff's role as jail administrator. By way of this Memorandum the Court merely notes that meaningful press access to a jail includes some use of cameras and inmate interviews. The specific methods of implementing such a policy must be determined by Sheriff Houchins. Of course, should a situation arise in which jail tensions or other special circumstances make such implementation dangerous, defendant can restrict media access for the duration of such circumstances.<sup>137</sup>

The sheriff had relied on the Supreme Court's decision in *Pell v. Procunier*<sup>138</sup> in arguing for denial of the preliminary injunction.<sup>139</sup> The district court distinguished *Pell* from *Houchins* on the grounds that KQED, unlike the media plaintiffs in *Pell*, had no access to Santa Rita at the time the suit was filed and that KQED was merely seeking the type of access that the media was granted in other California state prisons both before and after the *Pell* decision:

[T]he [*Pell*] Court carefully noted that the subject regulation was not designed to frustrate media investigation and reporting of prison conditions and that the media has access not only to a program of public tours but also to interviews of inmates selected at random—precisely the access sought by plaintiffs in this case. Therefore this Court reads *Pell* as standing for the proposition that a prison or jail administrator may curtail media access upon a showing of past resultant disruption or present institutional ten-

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133. App., *supra* note 3, at 71.

134. *Id.*

135. *Id.*

136. *Id.* at 69.

137. *Id.* at 69-70.

138. 417 U.S. 817 (1974). See notes 92-97 and 105-113 and accompanying text *supra*.

139. App., *supra* note 3, at 67.

sions. Defendant has not made such a showing in this case.<sup>140</sup>

The district court thus held that the First Amendment mandates press and public access to jails to gather information about conditions therein, that Sheriff Houchins' policy violated the First Amendment, and that *Pell* did not compel identical access rules for the press and the public. This judgment was appealed.

## 2. *The Ninth Circuit Decision*

The Ninth Circuit Court of Appeals affirmed the district court's preliminary injunction.<sup>141</sup> Citing *Branzburg v. Hayes*<sup>142</sup> and *Pell*, the Ninth Circuit stated that "[c]learly, the First Amendment grants the news media a constitutionally protected right to gather news."<sup>143</sup> The appellate court also approved the test of constitutionality which it concluded had been applied to Sheriff Houchins' access policy by the district court. Under this test, formulated in *United States v. O'Brien*,<sup>144</sup> a restriction on First Amendment rights can be upheld only if it furthers an important or substantial governmental interest unrelated to suppressing speech, and then only if the restriction is the least drastic means of furthering that interest.<sup>145</sup>

Having approved the test used by the lower court as well as its application of that standard, the Ninth Circuit also approved the scope of the preliminary injunction. The constitutional rule establishing equal access rights<sup>146</sup> was interpreted to allow flexible application and separate rules for the press that would differ from those imposed upon the public: "Although both groups have an equal constitutional right of access to jails, because of differing needs and administrative problems,

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140. *Id.* at 67-68.

141. 546 F.2d at 286.

142. 408 U.S. 665 (1972). See notes 62-64 and 71-75 and accompanying text *supra*.

143. 546 F.2d at 285. Each of the three Ninth Circuit judges filed an opinion in *KQED, Inc. v. Houchins*. Judge Pregerson wrote the main opinion, which is discussed in the text accompanying these footnotes. Judge Duniway filed a concurring opinion in which he expressed doubt that the flexibility necessary for the proper administration of the right to gather news had been recognized or was allowable under the *Pell* holding. 546 F.2d at 295. Judge Hufstедler filed a special concurrence emphasizing the necessity of flexibility in the implementation of the equal access order and "that a candid view of prisons and prison life is not possible if both the news media and the general public are limited to white glove inspections at hours and on days scheduled by prison administrators for their own convenience." 546 F.2d at 296.

144. 391 U.S. 367 (1968).

145. 546 F.2d at 286. Although the district court did not give specific consideration to selection of the appropriate constitutional standard of review, the structure and language of its memorandum and order support the Ninth Circuit's conclusion that the lower court had granted the injunction on the ground that Houchins' policy was *not* the least drastic means of furthering legitimate government policy in view of the substantial restriction on First Amendment interests.

146. See notes 86-113 and accompanying text *supra*.

common sense mandates that the implementation of those correlative rights not be identical."<sup>147</sup> The court recommended that the sheriff consider the press access policy of federal prisons and appended the official statement of that policy to its opinion.<sup>148</sup> No mention was made of any necessity for legislative action to support a right of access to public institutions to ascertain conditions.

The appellate court thus found that Sheriff Houchins' policy violated the First Amendment right to gather news, that *Pell* did not require identical regulations for the press and the public, and that the district court's injunction was an appropriate remedy.<sup>149</sup> The Supreme Court granted certiorari,<sup>150</sup> and subsequently reversed the lower courts.

## B. The Supreme Court Opinions

The Supreme Court split three ways in *Houchins v. KQED, Inc.*<sup>151</sup> Only seven justices participated in the decision.<sup>152</sup> Three justices voted for reversal, Justice Stewart concurred but noted that further relief should be available to KQED on remand and the remaining three justices voted to affirm the injunction. Although four justices agreed that the district court's injunction was too broad, no more than one-third of the Court agreed as to the controlling legal theories—the views of the justices who voted for reversal were far from the positions of the three dissenting justices who voted to affirm.

### 1. Chief Justice Burger's Plurality Opinion

Writing for a plurality of the Court, Chief Justice Burger characterized the question presented by Sheriff Houchins' appeal as "whether the news media have a constitutional right of access to a county jail, over and above that of other persons, to interview inmates and make sound recordings, films, and photographs for publication and broadcasting by newspapers, radio, and television."<sup>153</sup> He noted that the sheriff had instituted his limited monthly tours shortly after the suit was filed and that, based on the sheriff's mail, telephone and visiting regulations, other "means [existed] by which information concerning the jail could reach the public."<sup>154</sup> The mail regulations allowed inmates to send an unlimited number of letters to judges, attorneys involved in their cases and various law enforcement and prison officials; those reg-

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147. 546 F.2d at 286.

148. *Id.*

149. *Id.*

150. 431 U.S. 928 (1977).

151. 438 U.S. 1 (1978).

152. Justices Marshall and Blackmun took no part in the consideration or decision of the case. *Id.* at 2.

153. *Id.* at 3.

154. *Id.* at 6.

ulations also allowed prisoners to send a limited number of letters to other persons.<sup>155</sup> Anyone personally acquainted with an inmate was allowed to visit him or her, although visiting periods and areas were designated by the sheriff. Those who did not know inmates were not allowed such visits or interviews.<sup>156</sup> The Chief Justice included the provision allowing maximum security prisoners free access to telephones to make unmonitored collect phone calls in his list of significant sources of information concerning jail conditions.<sup>157</sup> He did not address KQED's contention that neither the tours nor the mail, visitation and telephone rules afforded any opportunity for the press or the public to verify at first hand stories received through these channels, and that responsible newspeople could not present substantial, meaningful reports on jail conditions when they were limited to unverified and unverifiable sources. Nor did he recognize that KQED sought only non-confidential information concerning the physical conditions inside Santa Rita and its Greystone section. In describing the district court's findings the Chief Justice noted that the court had rejected Sheriff Houchins' argument that press access would endanger prisoner privacy, but he did not allude to the court's positive finding, based on substantial evidence submitted during the hearing, that press policy and past practice proved that prisoners' privacy could be easily and adequately protected.<sup>158</sup>

The Chief Justice stated that he agreed with "many of the respondents' [KQED's] . . . assertions"—that jails are clearly matters of great public importance and that the press "can be a powerful and constructive force, contributing to remedial action in the conduct of public business."<sup>159</sup> He echoed Justice Stewart's structural interpretation of the press clause by noting that the press is one of the "components of our society. . . ."<sup>160</sup> Following a brief description of the role of the press, he concluded, without citation to any authority, that "[t]he public importance of conditions in penal facilities and the media's role of providing information afford no basis for . . . a right . . . to enter these institutions, with camera equipment, and take moving and still pictures of inmates for broadcast purposes."<sup>161</sup>

Having stated his conclusion, the Chief Justice criticized KQED's reliance on the prior Supreme Court decisions in *Grosjean v. American Press Co.*<sup>162</sup> and *Mills v. Alabama.*<sup>163</sup> KQED had relied on broad lan-

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155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 7.

159. *Id.* at 8.

160. *Id.*

161. *Id.* at 9.

162. 297 U.S. 233 (1936).

163. 384 U.S. 214 (1966).

guage in those cases concerning the purpose of constitutional protection for the press and had argued that the First Amendment guarantees encompass both the gathering and the dissemination of news. In *Grosjean* the Court struck down a newspaper tax<sup>164</sup> and in *Mills* it invalidated a statute prohibiting the publication of political editorials on election day.<sup>165</sup> Neither case involved any question of press access to public institutions. In Chief Justice Burger's opinion, these cases did not support KQED's claim since they "did not remotely imply a constitutional right guaranteeing anyone access to government information beyond that open to the public generally."<sup>166</sup> He discounted KQED's reliance on language concerning the purpose of the press clause on the ground that *Houchins*' access regulations were too dissimilar to the specific governmental restrictions struck down in those cases.<sup>167</sup>

The Chief Justice used a contrasting approach in his analysis of more recent decisions in which claims of constitutional protection for newsgathering had been raised. In discussing *Branzburg v. Hayes*,<sup>168</sup> a case concerning source protection and testimonial privilege, and *Zemel v. Rusk*,<sup>169</sup> which did not even involve the press, he went beyond their narrow fact situations and specific questions presented and expanded the Court's general language to fit the issues raised by *Houchins*. *Branzburg* involved the claims of three newsmen to a constitutionally based reporters' privilege against testifying before grand juries. "That the Court assumed in *Branzburg* that there is no First Amendment right of access to information is manifest," Chief Justice Burger found, from Justice White's dicta that the press does not have a "constitutional right of *special* access to information not available to the public generally" and that news reporters may be excluded from "scenes of crime or disaster when the general public is excluded."<sup>170</sup> The Chief Justice also found that "[t]he appellant in *Zemel* made essentially the same argument" that KQED made in *Houchins*.<sup>171</sup> In *Zemel* the appellant, a private citizen, contended that the State Department's ban on travel to Cuba "interfered with his First Amendment right to acquaint himself with the effects of our Government's foreign . . . policies and the conditions in Cuba that might affect those policies."<sup>172</sup> Chief Justice Burger stated that the Court's denial of *Zemel*'s constitutional argument

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164. 297 U.S. at 251.

165. 384 U.S. at 218.

166. 438 U.S. at 10.

167. *Id.* at 8-10.

168. 408 U.S. 665 (1972). See notes 62-64 and 71-75 and accompanying text *supra*.

169. 381 U.S. 1 (1965).

170. 438 U.S. at 11 (quoting *Branzburg v. Hayes*, 408 U.S. at 684, 685 (1972) (emphasis added)).

171. 438 U.S. at 11.

172. *Id.* at 11-12.

“further negates any notion that the First Amendment confers a right of access to news sources.”<sup>173</sup>

In the Chief Justice’s view, *Pell v. Procunier*<sup>174</sup> and *Saxbe v. Washington Post Co.*<sup>175</sup> controlled *Houchins*, since he found that KQED was seeking special access beyond that granted to the public.<sup>176</sup> He rejected the contention that the Constitution entitles the public and the press to some degree of access to public institutions to gain first-hand information regarding conditions therein, and held that such access “is a question of policy which a legislative body might appropriately resolve one way or the other.”<sup>177</sup> Here again Chief Justice Burger echoed Justice Stewart’s view that non-discriminatory regulations do not present constitutional questions no matter what impact they have on the function of the press.<sup>178</sup> He quoted Justice Stewart’s 1974 address to the Yale Law School for the proposition that the free press and free speech guarantees inure to the press as an institution. The Constitution protects only “‘the contest [for information], not its resolution . . . . For the rest, we must rely . . . on the tug and pull of the political forces in American society.’”<sup>179</sup>

In concluding his opinion, the Chief Justice combined his rejection of the lower courts’ decisions with a denial of the ability of federal trial courts to determine the scope of First Amendment protection:

Because the Constitution affords no guidelines, absent statutory standards, hundreds of judges would, under the Court of Appeals’ approach, be at large to fashion ad hoc standards, in individual cases, according to their own ideas of what seems to be “desirable” or “expedient.” We, therefore, reject the Court of Appeals’ conclusory assertion that the public and the media have a First Amendment right to government information regarding the conditions of jails and their inmates and presumably all other public facilities such as hospitals and mental institutions.<sup>180</sup>

The Chief Justice’s opinion was joined by Justices White and Rehnquist and constituted the judgment of the Court.

## 2. Justice Stewart’s Concurrence

Justice Stewart’s concurring opinion suggests an acceptance of

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173. *Id.* at 11. This reasoning ignores the discrepancies in the analogy between Zemel’s individual claim that he had a First Amendment right to investigate conditions in Cuba and those of KQED and the NAACP to access to a local county jail to ascertain non-confidential information concerning conditions therein.

174. 417 U.S. 817 (1974).

175. 417 U.S. 843 (1974).

176. See notes 86-113 and accompanying text *supra*.

177. 438 U.S. at 12.

178. See notes 81-82 and accompanying text *supra*.

179. *Id.* at 14-15, quoting “*Or of the Press*,” *supra* note 39, at 636.

180. 438 U.S. at 14.

Chief Justice Burger's statement of the issue before the Court. He found that the injunction was unwarranted to the extent that it was inconsistent with *Pell* and *Saxbe* in granting the press greater access rights than those granted to the public:

In two respects . . . the District Court's preliminary injunction was overbroad. It ordered the Sheriff to permit reporters into the Little Greystone facility and it required him to let them interview randomly encountered inmates. In both these respects, the injunction gave the press access to areas and sources of information from which persons on the public tours had been excluded, and thus enlarged the scope of what the Sheriff and Supervisors had opened to public view. The District Court erred in concluding that the First and Fourteenth Amendments compelled this broader access for the press.<sup>181</sup>

Like the Chief Justice, Justice Stewart did not question the applicability of *Pell* and *Saxbe* to *Houchins*. However, unlike Chief Justice Burger, he approved those parts of the injunction which provided for press access distinct from that allowed by the public tour program, and which allowed the press to use cameras and sound equipment in order to prepare full and accurate reports on jail conditions.<sup>182</sup> His partial approval of the lower courts' remedy was based on his belief that flexibility is essential in applying the *Pell-Saxbe* equal access rule.<sup>183</sup>

Despite his belief that the concept of equal access must be accorded flexibility in order to accommodate the practical distinctions between the needs of the press and the public, Justice Stewart would still uphold exclusionary regulations or policies as long as they did not discriminate between the public and the press.<sup>184</sup> He believed that KQED was entitled to relief solely because the tour program instituted by the sheriff did not give the press effective access equal to that given the public in that the press was not allowed to use the audio-visual tools of its trade.<sup>185</sup> By finding the district court injunction overbroad, Justice Stewart provided the vote necessary to reverse the lower court decisions.

### 3. Justice Stevens' Dissent

Three justices voted to affirm the district court's injunction granting KQED access to Santa Rita, subject to regulations established by the sheriff. Justices Powell and Brennan joined Justice Stevens' dissenting opinion.<sup>186</sup> Justice Stevens reviewed the evidence presented at

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181. *Id.* at 18 (Stewart, J., concurring).

182. *Id.* at 17-18.

183. See notes 86-113 and accompanying text *supra*.

184. 438 U.S. at 18.

185. *Id.*

186. *Id.* at 19 (Stevens, J., dissenting).



the district court hearing, emphasizing the inadequacy of the sheriff's tour program.<sup>187</sup> His characterization of the issue before the Court differed from that of the Chief Justice, who had not questioned the applicability of the *Pell-Saxbe* holdings and who viewed KQED's claim as an attempt to secure a special access privilege beyond that granted the general public.<sup>188</sup> According to Justice Stevens, the controlling questions were actually: (1) whether *Pell* and *Saxbe* controlled cases such as *Houchins*, where the applicable regulations afforded no public or press access at all; and (2) if *Pell* and *Saxbe* did not preclude judicial relief from regulations prohibiting access, whether the specific injunction granted KQED was proper.<sup>189</sup> Justice Stevens found that *Pell* and *Saxbe* should not be considered controlling because those decisions were rendered in the context of prison systems which granted substantial access that was not significantly affected when the Court upheld the challenged regulations.<sup>190</sup> In sharp contrast, Sheriff Houchins' policy arbitrarily prohibited all press and public access to ascertain conditions at the time when KQED filed suit.<sup>191</sup> Justice Stevens also found that the district court did not abuse its discretion in tailoring its injunction to meet the needs of KQED, and that a court need not withhold relief for the press until members of the general public challenge the sheriff's policies.<sup>192</sup>

In determining what the controlling authority should be, Justice Stevens carefully distinguished *Pell* from *Houchins*. He noted that the press in *Pell* claimed the right to interview specifically designated inmates, and that in evaluating this claim the Court did not merely inquire whether prison officials allowed members of the general public to conduct such interviews.<sup>193</sup> Instead, the *Pell* Court "canvassed the opportunities already available for both the public and the press to acquire information regarding the prison and its inmates"<sup>194</sup> and specifically found that the regulation at issue was not "part of an attempt by the State to conceal conditions in its prisons."<sup>195</sup> Justice Stevens also noted that the access restriction in *Pell* was imposed only after actual experience had demonstrated that such interviews gave rise to disciplinary problems<sup>196</sup> and that it was "an isolated limitation"<sup>197</sup>

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187. *Id.* at 19-23.

188. *See* text accompanying note 176 *supra*.

189. 438 U.S. at 24-25.

190. *Id.* at 25-30.

191. *Id.* at 26.

192. *Id.* at 25.

193. *Id.* at 28.

194. *Id.*

195. *Id.*, quoting *Pell v. Procunier*, 417 U.S. at 830.

196. 438 U.S. at 28.

197. *Id.*

whose enforcement did not materially curtail the substantial access otherwise available to the press and the public. Despite the regulation, the prison policy in *Pell* therefore “accorded full opportunities to observe prison conditions”<sup>198</sup> to both the press and the public. In Justice Stevens’ view, *Houchins* presented a wholly different situation in that “[t]he public and the press had consistently been denied any access” to the sections of Santa Rita in which prisoners were held.<sup>199</sup> He concluded that the *Pell* Court’s equation of public and press access rights did not support the plurality’s contention that non-discriminatory governmental regulations prohibiting *all* access to public institutions can withstand constitutional challenge.<sup>200</sup> According to Justice Stevens, the *Pell* decision did require that the constitutionality of the sheriff’s no-access policy be considered in the context of a broader question: whether sufficient press and public opportunity to ascertain conditions inside Santa Rita would exist if the regulation were allowed to stand.<sup>201</sup> He stated that Sheriff Houchins’ policy could survive such scrutiny “only if the Constitution affords no protection to the public’s right to be informed about conditions within . . . public institutions . . . .”<sup>202</sup>

According to Justice Stevens, the purpose underlying the press clause is the protection of the societal function of the press rather than protection of the press as an institution.<sup>203</sup> The no-access policy therefore violated the press clause by severely limiting the ability of the press to fulfill that function. He pointed out that ensuring the “full and free flow of information to the general public” has historically been a “core objective”<sup>204</sup> of the First Amendment. As a result, both the dissemination and the receipt of ideas and information are constitutionally protected.<sup>205</sup> Justice Stevens emphasized that protecting this flow of information “serves an essential societal function” in addition to safeguarding individual rights.<sup>206</sup> He found it entirely inadequate in

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198. *Id.*

199. *Id.* at 30.

200. *Id.* “The decision in *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 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.” *Id.* at 29 (footnote omitted).

201. *Id.* “What *Pell* does indicate is that the question whether respondents established a probability of prevailing on their constitutional claim is inseparable from the question whether petitioner’s policies unduly restricted the opportunities of the general public to learn about the conditions of confinement in Santa Rita jail. As in *Pell*, in assessing its adequacy, the total access of the public and the press must be considered.” *Id.* at 29-30.

202. *Id.* at 30.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 31.

constitutional terms to limit press rights to protection of the institution:

It is not sufficient, therefore, that the channels of communication be free of governmental restraints. Without some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance.<sup>207</sup>

Justice Stevens supported his argument that the press clause protects the societal function of the press with a discussion of *Grosjean v. American Press Co.*<sup>208</sup> He focused on an aspect of *Grosjean* which the Chief Justice ignored in his examination of that case—the *Grosjean* majority's conclusion that informed public opinion is the most potent of all restraints on misgovernment, and that the Constitution protects the public from deliberate and calculated attempts to disrupt the flow of information to the public.<sup>209</sup>

Justice Stevens pointed out that *Houchins* presents a constitutional issue for judicial review, not a policy question for legislative action.<sup>210</sup> He also noted that the limited access granted KQED by the district court should be upheld due to the non-confidential nature of the information sought.<sup>211</sup> Justice Stevens further emphasized that protecting the flow of reliable information from jails, prisons and pre-trial detention facilities is particularly important since they are “public institutions, financed with public funds and administered by public servants . . . .”<sup>212</sup> He also noted that community interest in jail conditions stems from the community's role as jurors whose decisions result in

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207. *Id.* at 32. In an accompanying footnote, Justice Stevens developed this point further: “Admittedly, the right to receive or acquire information is not specifically mentioned in the Constitution. But ‘the protection of the Bill of Rights goes beyond the specific guarantees to protect from . . . abridgement those equally fundamental personal rights necessary to make the express guarantees fully meaningful. . . . The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.’ *Lamont v. Postmaster General*, 381 U.S., at 308 (BRENNAN, J., concurring). It would be an even more barren marketplace that had willing buyers and sellers and no meaningful information to exchange.” *Id.* at n.22.

208. 297 U.S. 233 (1936).

209. 438 U.S. at 33 (Stevens, J., dissenting). See 297 U.S. at 250.

210. 438 U.S. at 34-36.

211. *Id.* at 35-36. “In this case, however, [r]espondents do not assert a right to force disclosure of confidential information or to invade in any way the decisionmaking processes of governmental officials.’ They simply seek an end to petitioner's policy of concealing prison conditions from the public. Those conditions are wholly without claim to confidentiality. While prison officials have an interest in the time and manner of public acquisition of information about the institutions they administer, there is no legitimate penological justification for concealing from citizens the conditions in which their fellow citizens are being confined.” *Id.* (footnotes omitted).

212. *Id.* at 36 (footnote omitted).

incarceration,<sup>213</sup> and that the individual prisoner's personal constitutional rights are best served where access to information regarding conditions is least hampered: "While a ward of the State and subject to its stern discipline, he retains constitutional protections against cruel and unusual punishment, . . . a protection which may derive more practical support from access to information about prisons by the public than by occasional litigation in a busy court."<sup>214</sup> He added that "in final analysis, it is the citizens who bear responsibility for the treatment accorded those confined within penal institutions."<sup>215</sup> He concluded that the record clearly showed that Sheriff Houchins' policy constituted a substantial and serious constitutional violation since the press' function was impeded almost entirely:

In this case, the record demonstrates that both the public and the press had been consistently denied any access to the inner portions of Santa Rita jail, . . . and that there was no valid justification for these broad restraints on the flow of information. . . . [E]xistence of a constitutional violation rested upon the special importance of allowing a democratic community access to knowledge about how its servants were treating some of its members who have been committed to their custody. *An official prison policy of concealing such knowledge from the public* by arbitrarily cutting off the flow of information at its source abridges the freedom of speech and of the press protected by the First and Fourteenth Amendments . . . .<sup>216</sup>

In the final part of his opinion, Justice Stevens responded to Chief Justice Burger's sweeping and general denial of the ability of federal district courts to make legitimate assessments of the constitutionality of government policies and regulations and to grant appropriate relief.<sup>217</sup> Granting an injunction which provides relief beyond a mere prohibition against repetition of past illegal conduct is well within the traditional equitable powers of federal trial courts. And in exercising such powers, courts have often required wrongdoers to take affirmative steps to eliminate the effects of their illegal conduct even though no legal duty to take remedial action existed.<sup>218</sup> He found that the district court's injunction, which would bring to light previously suppressed

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213. *Id.* "The citizens confined therein are temporarily, and sometimes permanently, deprived of their liberty as a result of a trial which must conform to the dictates of the Constitution. . . . It is important not only that the trial itself be fair, but also that the community at large have confidence in the integrity of the proceeding. That public interest survives the judgment of conviction and appropriately carries over to an interest in how the convicted person is treated during his period of punishment and hoped-for rehabilitation." *Id.* at 36-37 (footnote omitted).

214. *Id.* at 37 (citation omitted) (footnote omitted).

215. *Id.* at n.33.

216. *Id.* at 38 (emphasis added).

217. *Id.* at 40.

218. *Id.*

facts concerning conditions inside Santa Rita, was therefore an entirely appropriate remedy.<sup>219</sup>

### C. Analysis of the *Houchins* Opinions

#### 1. *The Plurality*

Chief Justice Burger agreed with two points raised by KQED in support of the district court's injunction. He recognized that since each person placed in prison effectively becomes "a ward of the state for whom society assumes broad responsibility," and since penal facilities are public institutions which require massive funding, the conditions inside prisons are matters of great public concern.<sup>220</sup> He also recognized that an informed public makes more intelligent decisions and that the press, acting as the "eyes and ears" of the public, can be a powerful and constructive force in contributing to informed public debate.<sup>221</sup> But relying on Justice Stewart's structural interpretation of the press clause,<sup>222</sup> he concluded that the government is not compelled to provide the press with access to public institutions or governmentally-held information.<sup>223</sup>

The Chief Justice analyzed several prior Court decisions in an attempt to show that the Court has never recognized a First Amendment right of access to gather information.<sup>224</sup> He focused on two cases which had emphasized the importance of informed public opinion and constitutional protection for the free press as a source of public information.<sup>225</sup> *Grosjean v. American Press Co.*<sup>226</sup> and *Mills v. Alabama*<sup>227</sup> both contain very broad language concerning the scope of First Amendment press protection. In the Chief Justice's restrictive view they did not imply the existence of a constitutional right of access beyond that accorded the public.<sup>228</sup> But the *Grosjean* court noted that decisions construing the extent of protection for the press are not to be read as limiting its scope to any particular form of restraint:

Liberty of the press within the meaning of the constitutional provision . . . meant "principally although not exclusively, immunity from previous restraints or censorship." . . . "*The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free*

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219. *Id.*

220. *Id.* at 8.

221. *Id.*

222. See notes 81-82 and accompanying text *supra*.

223. 408 U.S. at 9.

224. *Id.* at 9-12.

225. *Id.*

226. 297 U.S. 233 (1936).

227. 384 U.S. 214 (1966).

228. See note 166 and accompanying text *supra*.

*and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.*"<sup>229</sup>

The emphasis in *Grosjean* was therefore on protection of the societal function of the press rather than protection of the press as an institution. Comparable language emphasizing the wide scope of protection for the press' societal function can be found in *Mills*:

Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press . . . muzzles one of the very agencies the Framers of our Constitution . . . selected to improve our society and keep it free.<sup>230</sup>

The explicit language of both *Grosjean* and *Mills* thus undermines the Chief Justice's narrow reading of those cases.

In a further attempt to rebut KQED's claim of entitlement to a constitutional right of access, the Chief Justice equated KQED's position with that of the appellant in *Zemel v. Rusk*.<sup>231</sup> He quoted former Chief Justice Warren's rejection of First Amendment claims in *Zemel*, which concluded that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information."<sup>232</sup> But the *Zemel* Court stated only that the First Amendment does not guarantee an *unrestrained* right to gather information,<sup>233</sup> it did not imply that no such right exists. Additionally, the facts underlying *Zemel* did not involve press access to public institutions to ascertain conditions therein. *Zemel* was a private citizen challenging a State Department regulation which prohibited him from visiting Cuba. The Court rejected his contention that as an American citizen he had a First Amendment right to visit Cuba to inform himself of the conditions there.<sup>234</sup> The context of *Zemel* was thus far removed from that of *Houchins* and its reasoning is not entitled to the broad application given to it by the plurality.

The Chief Justice also cited *Branzburg v. Hayes*<sup>235</sup> in support of his argument that there is no constitutional right to gather news. He construed the express limitation of the constitutionally protected news-gathering right as a denial of any First Amendment protection.<sup>236</sup> But the *Branzburg* Court accompanied its list of limitations on press access with the statement that without some First Amendment protection for

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229. 297 U.S. at 249-50 (citation omitted) (emphasis added).

230. 384 U.S. at 219.

231. 381 U.S. 1 (1965). See text accompanying note 171 *supra*.

232. 381 U.S. at 16-17.

233. *Id.*

234. See 438 U.S. at 11-12.

235. 408 U.S. 665 (1972). See notes 62-64 and 71-75 and accompanying text *supra*.

236. See note 170 and accompanying text *supra*.

newsgathering, freedom of the press could be "eviscerated."<sup>237</sup> Although the *Branzburg* Court rejected the claim that constitutional protection for newsgathering supported a privilege to refuse to testify before grand juries, it did not endorse a sweeping rejection of all First Amendment challenges to restraints on access to news.<sup>238</sup> In relying on *Branzburg*, the Chief Justice utilized the same approach which he adopted in applying *Zemel* to *Houchins*: he interpreted recognition of a limited right as a denial that any broader right exists, and applied a narrow holding formulated in the context of a limited situation to a remote and distinguishable set of facts.

In applying the rule of equal access announced in *Pell* and *Saxbe*<sup>239</sup> to *Houchins*, Chief Justice Burger glossed over two aspects of those cases: (1) although public and press rights had been equated by the Court, neither was defined as to the extent of constitutional protection to be afforded;<sup>240</sup> and (2) *Pell* and *Saxbe* concerned situations in which the public and the press already had substantial access to ascertain prison conditions at first hand, whereas Sheriff Houchins' policy allowed no access at all at the time the suit was brought.<sup>241</sup> In this analysis the Chief Justice also ignored several assumptions which have traditionally carried substantial weight in discussions of First Amendment issues. He failed to examine the particular facts of *Houchins* in applying rules formulated in remote fact situations to foreclose the possibility of relief for KQED, although courts have been extremely sensitive to factual context in evaluating the impact of governmental policies on First Amendment freedoms.<sup>242</sup> By endorsing the sheriff's broad denial of access, Chief Justice Burger failed to recognize that governmental restrictions affecting free expression should be drawn with great precision.<sup>243</sup> Justice Stevens' dissenting opinion in *Houchins*, with its thorough review of the impact of sheriff's policy and the interests it served, demonstrates an alternative approach to resolving the issues before the Court.

## 2. *The Dissent*

Justice Stevens noted that the Court has never intimated that a nondiscriminatory policy, that nevertheless entirely excludes both the public and the press from access to information about jail conditions,

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237. 408 U.S. at 681.

238. *Saxbe v. Washington Post Co.*, 417 U.S. 843, 859 (1974) (Powell, J., dissenting opinion).

239. See notes 86-113 and accompanying text *supra*.

240. See note 113 and accompanying text *supra*.

241. *Id.*

242. See note 35 and accompanying text *supra*.

243. See note 36 and accompanying text *supra*.

could avoid constitutional scrutiny.<sup>244</sup> Prior cases failed to define the extent of the constitutional right to gather news beyond equating the right of the press with that of the public.<sup>245</sup> Such decisions listed certain situations from which the press can properly be excluded<sup>246</sup> and denied that the right to gather news gives the press a privilege against testifying before grand juries.<sup>247</sup> None of these cases, however, denied the existence of First Amendment protection for newsgathering. The *Pell* Court emphasized the minimal restraint on the flow of information concerning prison conditions caused by the challenged regulation and the substantial alternative access afforded both the public and press.<sup>248</sup> This focus on the importance of existing opportunities for access implies that a nondiscriminatory policy excluding everyone from public institutions and severely limiting access to information about conditions therein would require a rule more complex than a mere equating of press and public rights.

The plurality opinion maintained that *Houchins* presented a dispute which the legislature rather than the judiciary should resolve.<sup>249</sup> Before *Houchins* reached the Supreme Court, there had been no suggestion by the lower courts that the question of press access at Santa Rita involved legislative policy questions rather than a legal question as to the scope of constitutional protection. Responsible administrative action, not legislation, had resulted in the successful, open and efficient access policies in effect at other prisons and jails neighboring Santa Rita.<sup>250</sup> The dissent pointed out that there is nothing novel in the injunctive relief granted by the district court to KQED, even though that remedy went beyond a mere prohibition of further unlawful conduct by the sheriff:

In situations which are both numerous and varied the chancellor has required . . . affirmative steps to eliminate the effects of a violation of law even though the law itself imposes no duty to take the remedial action. . . . [I]t is perfectly clear that the court had power to enter an injunction which was broader than a mere prohibition against illegal conduct.<sup>251</sup>

The dissent did not speak directly to the propriety of legislative action to insure access, since it found that the Constitution protects the right to gather news. It agreed that the degree of public scrutiny to

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244. 438 U.S. at 27-28.

245. *Pell v. Procunier*, 417 U.S. at 834. See note 113 and accompanying text *supra*.

246. *Branzburg v. Hayes*, 408 U.S. at 684-85.

247. *Id.* at 685.

248. The *Pell* opinion emphasized the substantial access available despite the effect of the challenged regulation on three occasions. 417 U.S. at 830-31, 831 n.8, 833.

249. 438 U.S. at 12.

250. See notes 125-29 and accompanying text *supra*.

251. 438 U.S. at 40.



which most government activity should be exposed involves policy questions best left to the political branches.<sup>252</sup> However, Justice Stevens noted an important distinction between situations in which governmental secrecy concerning its operations is necessary and subject to legislative oversight and Sheriff Houchins' policy of concealing prison conditions from the public:

Those conditions are wholly without claim to confidentiality. While prison officials have an interest in the time and manner of public acquisition of information about the institutions they administer, there is no legitimate penological justification for concealing from citizens the conditions in which their fellow citizens are being confined.<sup>253</sup>

The plurality opinion authored by Chief Justice Burger failed to recognize this distinction, and the *Houchins* decision limits public and press recourse for access to gather information to legislative interference with jail administration—an area which legislatures and the courts have generally left to the exclusive control of the executive branch. Press and public access to federal prisons is controlled by the Bureau of Prisons.<sup>254</sup> California's state prisons are subject to regulations promulgated by the director of the state's Department of Corrections;<sup>255</sup> local correctional facilities are administered by the county sheriff.<sup>256</sup> Prior Supreme Court decisions have recognized that, in the absence of constitutional violations, jail and prison officials should be allowed broad discretion in administering their institutions.<sup>257</sup>

An example of judicial deference to the expertise of prison officials is found in the *Pell* Court's discussion of state prison visiting rules:

In the judgment of the state corrections officials, this visitation policy will permit inmates to have personal contact with those persons who will aid in their rehabilitation, while keeping visitations at a manageable level that will not compromise institutional security. Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgement in such matters. Courts cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties.<sup>258</sup>

The traditional role of the courts in reviewing jail and prison policies for constitutional violations was summarized by the federal district

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252. *Id.* at 34.

253. *Id.* at 35-36 (footnote omitted).

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

255. CAL. PENAL CODE § 5058 (West Supp. 1979).

256. CAL. GOV'T CODE § 26605 (West 1968).

257. *See, e.g., Pell v. Procunier*, 417 U.S. at 823-24, 826-27.

258. *Id.* at 827.

court which ultimately held in *Brenneman v. Madigan*<sup>259</sup> that the conditions at Santa Rita constituted cruel and unusual punishment:

The federal courts do not sit to superintend the administration of the county jail system; but what they do sit to do, and what they must do, is insure that those who administer that system comply with the requirements of the Constitution: *The duty to confront and resolve constitutional questions, regardless of their difficulty or magnitude, is the very essence of the judicial responsibility.* While the federal courts must be sensitive to the problems created by unwarranted judicial interference with the administration of state penal institutions . . . *when questions of constitutional dimension arise, the courts cannot simply abdicate their function out of misplaced deference to some sort of "hands off" doctrine.*<sup>260</sup>

The plurality approach would have the courts abandon their duty to confront and resolve difficult constitutional questions; it would also have the legislature hamper jail administrators' discretion with statutes that may or may not be suitable to their particular institutions. Creation of effective jail regulations and policies requires great flexibility, expertise and experience. Press and public access problems require the accommodation of the needs of the public and the press, legitimate penal objectives such as rehabilitation, punishment and deterrence and the safety, convenience and privacy of those who live and work inside the facility. Formulation of adequate state-wide or system-wide regulations would present a tremendous burden to legislative bodies, but in the absence of such legislation, the *Houchins* decision aids those jail officials who wish to conceal conditions by enabling them to prohibit first-hand, independent press and public inspection of their facilities.

### 3. Justice Stewart's Concurrence

In his concurring opinion in *Houchins*, Justice Stewart did not comment on the plurality's denial of the ability of federal trial courts to formulate injunctive relief in First Amendment cases. He agreed, however, that the question of whether a public institution must open its doors is a legislative rather than a constitutional issue.<sup>261</sup> Although he joined the plurality in holding that the decision granting the preliminary injunction should be reversed, he emphasized that the possibility of further relief to KQED should not be foreclosed on remand.<sup>262</sup> In his view, the injunction was overbroad in two respects: it allowed press access to areas of the jail from which the public was barred, and it allowed the press to interview inmates with whom the general public

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259. 343 F. Supp. 128 (N.D. Cal. 1971).

260. *Id.* at 130-31 (citations omitted) (emphasis added).

261. 438 U.S. at 16 n.\*.

262. *Id.* at 17-18. See notes 82-83 and accompanying text *supra*.

was not allowed to speak.<sup>263</sup>

Under Justice Stewart's analysis, the First Amendment protects the press as an institution rather than protecting its societal function. A regulation which limits access for newsgathering by restraining the function of the press does not violate its constitutional rights as an institution as long as the regulation is not discriminatory. Thus Justice Stewart held that, absent such uneven treatment, the First Amendment may not be invoked by the press or the public in an attempt to gain access to public institutions: "The Constitution does no more than assure the public and the press equal access once government has opened its doors."<sup>264</sup>

In a footnote, Justice Stewart cited his concurring opinion in *New York Times Co. v. United States*<sup>265</sup> and stated that "[f]orces and factors other than the Constitution must determine what government-held data are to be made available to the public."<sup>266</sup> However, *New York Times* concerned the necessity for governmental secrecy in defense and foreign affairs matters; it did not involve access to public institutions to gather non-confidential information regarding conditions therein. And in his concurring opinion in that case, Justice Stewart limited his comments to national defense and foreign affairs data in the hands of the executive branch.<sup>267</sup> Although he emphasized that the ideal executive policy would allow maximum public disclosure,<sup>268</sup> there is no indication that this view should be applied to any field outside national defense and foreign affairs, nor any specific suggestions for implementing it. Justice Stewart's *New York Times* concurring opinion therefore does not support his rejection of the propriety of constitutionally-based relief from denials of access to information.

#### 4. Summary

In reversing the lower court decision granting the preliminary injunction, the plurality and Justice Stewart relied on the latter's view that the First Amendment protects the press as an institution. This structural interpretation of the press clause protects the press from discriminatory governmental regulations, but it does not provide any constitutional protection for newsgathering if the government adopts a policy (like that of Sheriff Houchins) which denies access to both the public and the press on a non-discriminatory basis. According to the

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263. 438 U.S. at 18.

264. *Id.* at 16 (footnote omitted).

265. 403 U.S. 713, 727 (1971) (Stewart, J., concurring).

266. 438 U.S. at 16 n.\*, citing *New York Times Co. v. United States*, 403 U.S. 713, 728-30 (1971) (Stewart, J., concurring).

267. *Id.*

268. *Id.* at 729.

*Houchins* majority, access policy presents questions which are best resolved by the legislature. These four justices differed, however, on the application of the *Pell-Saxbe* equal access rule<sup>269</sup> to *Houchins*. Whereas Justice Stewart found that equal access must be implemented with flexibility in order to accommodate the practical differences in the needs of the press and the public, the plurality held that equal access mandates identical regulations for both groups.

In contrast to this approach to the question of constitutional protection for newsgathering, Justice Stevens' dissent relied on the interpretation of the First Amendment which extends protection for the societal function of the press. Under this view, governmental regulations which restrain the flow of information to the public violate the First Amendment if, like Sheriff *Houchins*' access policy, they unjustifiably restrict the right of the press and the public to gather news. In his view, the preliminary injunction represented an appropriate remedy and was within the traditional scope of the trial court's equitable powers.

The main reason that the Court split over the question of whether administrators violate the First Amendment by totally denying the public and the press access to public institutions to gather information regarding conditions therein is that the seven justices who participated in the decision divided as to the proper interpretation of "or of the press." The four justice *Houchins* majority adopted Justice Stewart's structural analysis while the dissenters supported the societal function view. The relative merits of these divergent approaches to the rights of the press under the First Amendment will be discussed in the next section of the note.

### III. The First Amendment and The Press: Structural or Functional Protection

Three different views of the press clause were discussed at the beginning of this note. One view holds that the rights guaranteed by the press clause are identical to those guaranteed to the public by the speech clause.<sup>270</sup> The second view holds that press protection is limited to that which England afforded its press when our Constitution was adopted, or to those threats to press freedom perceived by the Framers.<sup>271</sup> The third view holds that the press is entitled to broad protection beyond that guaranteed to the public under the speech clause or perceived by either the English or the Americans of the late eighteenth

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269. See notes 86-113 and accompanying text *supra*.

270. See note 40 and accompanying text *supra*.

271. See notes 43-45 and accompanying text *supra*.

century.<sup>272</sup>

*Houchins v. KQED, Inc.* was the first case to present the issue of press access to public institutions for purposes of gathering non-confidential information. It is therefore the first case in which the importance of the theoretical difference between the structural and functional interpretations has emerged. The issues in *Pell*, *Saxbe*, and *Branzburg* involved press claims for special privileges in situations in which governmental restrictions imposed burdens on newsgathering that were either difficult to evaluate or arguably insubstantial.<sup>273</sup> In *Houchins*, however, the sheriff's policy concealed prison conditions from the public "by arbitrarily cutting off the flow of news at its source . . . ."<sup>274</sup> Sheriff Houchins' absolute denial of effective press access did not raise as many peripheral considerations as did the regulations in *Pell* and *Saxbe* because in *Houchins* the burden on the press was much more absolute: there were virtually no alternative means of obtaining information about conditions inside Santa Rita.<sup>275</sup> Nor did the sheriff in *Houchins* have any justification for his restrictions on newsgathering that were as important to the public interest as the investigative powers of the grand jury which were held to outweigh the press claim in *Branzburg*.<sup>276</sup> The following sections will evaluate these conflicting views, with emphasis on their relative contributions to the democratic process.

#### A. The Structural Interpretation

Justice Stewart's historical argument in support of the structural interpretation of the press clause was discussed in the first section of this note.<sup>277</sup> His view requires the same sort of limited reading of prior press cases, such as *Grosjean* and *Mills*, which the Chief Justice utilized in *Houchins*.<sup>278</sup> The structural theory emphasizes that the First Amendment supports the press as an institution.<sup>279</sup> Justice Stewart's majority opinions in *Pell* and *Saxbe* upheld regulations restricting newsgathering and the flow of information to the public. Since these regulations did not discriminate against the press by granting it less access than was accorded the public, they did not impair the institutional position of the press.<sup>280</sup> The regulations challenged by the press

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272. See notes 49-50 and accompanying text *supra*.

273. For a discussion of *Pell* and *Saxbe*, see note 89 and accompanying text *supra*. For a discussion of *Branzburg* see note 62 and accompanying text *supra*.

274. 438 U.S. at 38.

275. *Id.* at 25-26.

276. *Id.* at 38.

277. See notes 81-82 and accompanying text *supra*.

278. See notes 224-30 and accompanying text *supra*.

279. 438 U.S. at 31-32.

280. See note 104 and accompanying text *supra*.

in *Pell* and *Saxbe* arguably hampered its function by limiting the opportunity to obtain first-hand information by interviewing particular inmates. However, since the function of the press is not protected by the Constitution under Justice Stewart's view, he held that governmental restraints on newsgathering do not present constitutional questions.<sup>281</sup> As the *Houchins* dissent noted, under the structural view there is no constitutional protection for access to information and the press therefore may not be able to publish any information about government operations that would aid a self-governing people.<sup>282</sup> The structural interpretation of the press clause, which protects the institution but allows restriction of its essential functions, elevates the press' status as a formal institution over its ability to perform its substantial function in a democratic society.

The *Houchins* plurality's reliance on Justice Stewart's view is evident in the statement that media representatives are "components" of our society,<sup>283</sup> the narrow readings of *Mills* and *Grosjean*,<sup>284</sup> and the reliance on *Pell*, *Saxbe*, and Justice Stewart's 1974 speech.<sup>285</sup> The strongest evidence of the adoption of this approach is the conclusion that there is no constitutional protection for newsgathering.

## B. Constitutional Protection for the Societal Function of the Press

The societal function of the press was described by Justice Powell in his dissenting opinion in *Saxbe v. Washington Post Co.*:<sup>286</sup>

An informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities. For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government. By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment.<sup>287</sup>

Like those who advocate the structural interpretation of the press clause, Justice Powell bases his functional interpretation on the explicit mention of the press by the Framers.<sup>288</sup> In the view of Justice Powell

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281. See "Or of the Press," *supra* note 39, at 636.

282. 438 U.S. at 32 nn.22 & 23.

283. *Id.* at 8.

284. See notes 24-30 and accompanying text *supra*.

285. 438 U.S. at 11, 14-15.

286. 417 U.S. 843 (1974).

287. *Id.* at 863 (Powell, J., dissenting).

288. See notes 28, 81-82 and accompanying text *supra*.

and the other justices who dissented in *Houchins*, the Framers were concerned with protecting the press role in the maintenance of an informed citizenry. Justice Stevens' *Houchins* dissent cited Madison in support of this position: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."<sup>289</sup>

What is at stake in press access cases such as *Houchins*, *Pell*, and *Saxbe* is the preservation of free public discussion of governmental affairs. Since the United States is committed to popular self-determination and development of sound national policy through the free exchange of views on public issues, "public debate must not only be unfettered; it must also be informed."<sup>290</sup> The *Houchins* dissent views information gathering as entitled to some measure of constitutional protection because merely prohibiting governmental interference with the institutional aspects of the press, the "channels of communication," provides insufficient protection for the democratic process.<sup>291</sup> In the words of Justice Stevens, "[w]ithout some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance."<sup>292</sup>

Advocates of the functional interpretation of the press clause need not impose artificially narrow readings on cases like *Grosjean* and *Mills*.<sup>293</sup> Careful consideration of those cases reveals that the Court's object was preservation of the flow of information to the public, not just the elimination of an objectionable local tax or statute.<sup>294</sup> The functional view of the press clause does not force its advocates into unnaturally broad readings of *Zemel* and *Branzburg* which transform limitations on the constitutional right to gather news into a denial of the very existence of that right.<sup>295</sup> As Justice Powell stated in his *Saxbe* dissent:

Those precedents arose in contexts far removed from that of the instant case, and in my view neither controls here. To the extent that *Zemel* and *Branzburg* speak to the issue before us, they re-

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289. 438 U.S. at 31-32 (Stevens, J., dissenting), quoting 1X WRITINGS OF JAMES MADISON 103 (G. Hurst ed. 1910).

290. *Saxbe v. Washington Post Co.*, 417 U.S. at 862-63 (Powell, J., dissenting). See also Justice Holmes' dissent in *Abrams v. United States*, 250 U.S. 616, 624-31 (1919).

291. 438 U.S. at 32.

292. *Id.*

293. *Mills v. Alabama*, 384 U.S. 214 (1966); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

294. See notes 224-30 and accompanying text *supra*.

295. See notes 231-38 and accompanying text *supra*.

flect no more than a sensible disinclination to follow the right-to-access argument as far as dry logic might extend.<sup>296</sup>

Governmental regulations which do not significantly affect the societal function of the press and which do not have a "palpable impact on the underlying right of the public to information needed to assert ultimate control over the political process" are not subject to challenge under this view.<sup>297</sup> The proper standard for determining the constitutionality of challenged prison or jail regulations or policies is the test formulated by the Supreme Court in *United States v. O'Brien*<sup>298</sup> and applied by the district court and the Ninth Circuit to *Houchins*.<sup>299</sup>

Since the structural interpretation denies the existence of constitutional questions in press access cases, the plurality of the Court in *Houchins* and Justice Stewart in his concurrence were spared the task of applying the *O'Brien* test to the sheriff's policy. As Justice Powell said of the majority position in *Saxbe*, "[t]he Court's resolution of this case has the virtue of simplicity."<sup>300</sup> By applying the structural interpretation of the press clause to deny constitutional protection for newsgathering, the *Houchins* majority was attempting to force the courts to abandon their traditional role of enforcing freedoms guaranteed by the First Amendment.<sup>301</sup>

## Conclusion

The press is afforded broad protection by the First Amendment, but whether that protection includes a right of access to public institutions to gather information concerning conditions therein depends upon whether one accepts the structural interpretation of the press clause or the interpretation which extends protection to the societal function of the press. Constitutional protection for newsgathering in the absence of discriminatory governmental regulations follows directly from the functional interpretation, while the structural interpretation leads to the denial of such protection.

The question of constitutional protection for newsgathering was presented to the Court by *Houchins v. KQED, Inc.* The seven justices who participated in the decision were sharply divided on the question of the existence of this constitutional right and the propriety of the district court's preliminary injunction. Four justices denied that the First Amendment was violated by a jail policy which prevented any effective press access to gather news and therefore voted to reverse the injunc-

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296. 417 U.S. at 860 (Powell, J., dissenting).

297. *Id.* at 872.

298. 391 U.S. 367 (1968). See note 144 *supra*.

299. See notes 143-45 and accompanying text *supra*.

300. 417 U.S. at 875 (Powell, J., dissenting).

301. See notes 258-60 and accompanying text *supra*.



tion. Three justices, adopting the functional approach, found that the policy was a clear constitutional violation and voted to affirm the injunction.

Perhaps the next time the Court agrees to review a case presenting the issue of the constitutional protection to which newsgathering is entitled it, will reach a decision which will produce a greater consensus within the Court. In the interim, however, legislation is needed to guarantee the right of the press and the public to enter public institutions to ascertain the conditions therein, since the *Houchins* Court failed to provide effective protection for these fundamental constitutional interests. Unless jail administrators are willing to provide access voluntarily so that the public can learn about the conditions and activities within penal institutions, the press, the public and the inmates must rely on the legislature rather than the courts to provide some "sunlight in the county jail."<sup>302</sup>

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302. Brief for Respondents at 62, *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978).

