THE PUBLIC'S RIGHT TO KNOW: PELL v. PROCUNIER AND SAXBE v. WASHINGTON POST CO.

*by Lawrence K. Rockwell**

It would be difficult to overstate the important role the press has played in the scenario of American history.[1] From the calling of the colonies to arms and the winning of independence from England,[2] to the present exposures of incidents of corruption in government and the Watergate trials,[3] the press has established itself as an influential and powerful entity in American political life.

News is defined as "[a] report of a recent event; information about something before unknown; fresh tidings; recent intelligence."[4] Although the motivation of the press in gathering and presenting news to the general public may depend in some part upon the political viewpoint[5] or economic status[6] of the owner, editor or reporter of the particular medium, it may safely be asserted as did James Madison that:

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* Member, second year class.

1. The question of who constitutes the press is not important for the purposes of this note. Therefore, this note shall utilize the definition of who comprises the news media which is provided by the Federal Bureau of Prisons in U.S. DEP'T OF JUSTICE, BUREAU OF PRISONS, POLICY STATEMENT No. 1220.6/7300.96, INMATE CORRESPONDENCE INTERVIEWS WITH REPRESENTATIVES OF THE PRESS AND NEWS MEDIA, § 4(a)(1), June 10, 1974. Representatives of the news media are: "[p]ersons who are substantially employed in the business of gathering or reporting news for (a) a newspaper qualifying as a general circulation newspaper in the community to which it publishes, (b) news magazines having a substantially national circulation being sold by newsstands to the general public and by mail circulation, (c) national or international news services (d) radio and television news programs of stations holding Federal Communication Commission Licenses."

2. *See* L. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 193-94 (1963); J. TEBBEL, COMPACT HISTORY OF THE AMERICAN NEWSPAPER 35 (1963).

3. *See, e.g.*, B. WOODWARD & C. BERNSTEIN, ALL THE PRESIDENT'S MEN (1974).

4. WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1648 (2d unabr. 1959).

5. The press in early American history served primarily as a vehicle for partisan politics. *See* W. CHENERY, FREEDOM OF THE PRESS 143-45 (1955); F. MOTT, AMERICAN JOURNALISM 113-14 (3d ed. 1962). In the late eighteenth and early nineteenth century the press was a major force in exposing dangerous and unhealthy conditions forced upon the American public by industry. *See, e.g.*, UPTON SINCLAIR, THE JUNGLE (Airmont Publishing Co. 1965). More recently, the press has been attacked as being comprised primarily of political liberals. This political composition allegedly slants the press' re-

> [T]o the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; . . . to the same beneficient source the United States owe much of the lights which conducted them to the ranks of a free and independent nation, and which have improved their political system into a shape so auspicious to their happiness.[7]

Two recent Supreme Court cases, *Pell v. Procunier*[8] and *Saxbe v. Washington Post Co.*,[9] presented the Court with the opportunity to consider the constitutional foundation upon which an effective press rests, namely the right of the press to gather information.[10] It is important to recognize that the right to know consists of both the right to gather information and the right to receive information.[11] If either the right to gather or to receive information is restricted the right to know will be curtailed. In *Pell v. Procunier* the Court held that California prison regulations prohibiting all personal interviews by the press with specific inmates did not violate the constitutional rights of the press.[12] The Court

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porting to the general public. *See* E. EFRON, THE NEWS TWISTERS (1971). Former Vice President Spiro Agnew was perhaps the most prominent and outspoken individual to voice this claim. *Id.* at 133-42. Agnew, in one of his many speeches critical of newsmen, attacked their "instant analysis" and "querulous criticism" with regard to an address by former President Nixon on the subject of Vietnam. 115 CONG. REC. 34,043 (1969). Robert Bartley, the editorial-page editor of the *Wall Street Journal*, has asserted that "[o]ur [the press'] function is to provide the reader with understanding . . . ." ASPEN NOTEBOOK ON GOVERNMENT AND THE MEDIA 89 (W. Rivers & M. Nyhan eds. 1973). News agencies claim to be devoted to presenting the most nonpartisan reporting possible. The wide political spectrum encompassed by the subscribers to these services aids in promoting this end. *See, e.g.*, Associated Press v. Labor Board, 301 U.S. 103, 131 (1936). *See* K. COOPER, THE RIGHT TO KNOW 27-38 (1956).

6. The commercial nature of the press may inevitably lead to accommodation by the press with the views of an advertiser if the member of the press relies on a given advertiser for a sufficiently large portion of its financial existence. *See* Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1661 (1967); GEORGETOWN LAW JOURNAL, MEDIA AND THE FIRST AMENDMENT IN A FREE SOCIETY 23-24 (1973).

7. 4 MADISON'S WORKS, REPORT ON THE VIRGINIA RESOLUTIONS 544, in Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 718 (1931).

8. 417 U.S. 817 (1974).

9. 417 U.S. 843 (1974).

10. The Court has expressly acknowledged the existence of this right. *See* Branzburg v. Hayes, 408 U.S. 665, 681, 707 (1972).

11. The First Amendment "necessarily protects the right to receive [information]." Martin v. City of Struthers, 319 U.S. 141, 143 (1943). *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 564 (1969); Time, Inc. v. Hill, 385 U.S. 374, 388 (1967); Griswold v. Connecticut, 381 U.S. 479, 482 (1965). *See* cases cited note 88 *infra*.

12. 417 U.S. 817 (1974). Chief Justice Burger and Justices White, Blackmun, Stewart and Rehnquist comprised the majority. The dissenting opinions considered *Pell* and *Saxbe* together as to this issue. Justice Douglas wrote a dissenting opinion joined by Justices Brennan and Marshall. *Id.* at 836. Justice Powell wrote a dissenting opin-

also held that the First Amendment rights of the inmates desiring interviews with a willing press were not violated by such regulations.[13] Along similar lines, the Court in *Saxbe v. Washington Post Co.*[14] held that federal regulations prohibiting all press interviews with any federal prisoners violated no rights of the press plaintiffs.

This note focuses on the issue common to the *Pell* and *Saxbe* cases: does a total ban on personal interviews with specific willing inmates by the press unconstitutionally abridge the First Amendment freedom of the press guarantee?[15] The purpose of this note is to demonstrate that the evolution of the press' character and role in American society argues for the reasoning adopted by the dissenters on that issue.

After a brief introduction to the facts of the cases, the majority opinions in *Pell* and *Saxbe* will be examined. This discussion is followed by a consideration of Justice Powell's and Justice Douglas' dissenting opinions. Next, the evolution of the press' character and role in American society and past statements by the Court in this regard are examined. The final portion of this note evaluates how change in the character and role of the press supports the dissenters' position, rather than the majority view, for a press that is a viable means of the public exercising its First Amendment right to gather information.

The Factual Situations of Pell and Saxbe

As they related to the claims of the press plaintiffs in each case, the facts of *Pell* and *Saxbe* were somewhat similar. In *Pell*, representatives of the news media requested of the proper correctional officials permission for face-to-face interviews with specific inmates at the San Quentin State Penitentiary in California. Each inmate whom the press desired to interview had previously consented to the interview. The requests of the news media representatives, however, were all denied pursuant to section 415.071 of the California Department of Corrections Manual which stated: "Press and other media interviews with specific individual inmates will not be permitted."[16] The media plaintiffs then sued to enjoin

ion joined by Justices Brennan and Marshall in Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974).

13. 417 U.S. 817, 828 (1974). On this issue Justice Powell joined the majority. Justice Douglas wrote a dissent joined by Justices Brennan and Marshall. *Id.* at 836.

14. 417 U.S. 843, 850 (1974).

15. "Congress shall make no law . . . abridging the freedom of . . . the press. . . ." U.S. CONST. amend. I.

16. This regulation was adopted August 23, 1971, and has been modified by California Dep't of Corrections Administrative Manual § 415.16, Nov. 6, 1974. Interviews with specific inmates are now allowed with permission of the warden or superintendant. There are, however, several restrictions. Interviews may be prohibited when they would, in the opinion of the warden or superintendant, jeopardize the "safety and good order"

the enforcement of the regulation.[17] Finding no violation of the media plaintiffs' First Amendment rights, the three-judge[18] district court granted the motion of the state of California to dismiss the claims of the media plaintiffs (hereinafter referred to as "the press").[19] In a direct appeal from this decision to the United States Supreme Court, the Court affirmed the district court as to this issue.[20]

In *Saxbe* a reporter for the Washington Post newspaper requested permission to have face-to-face interviews with certain inmates at two federal penitentiaries, Lewisburg and Danbury. The reporter was denied permission for the interviews on the authority of section 4b(6) of the Bureau of Prisons Policy Statement 1220.1A of the Federal Bureau of Prisons which read:

> Press representatives will not be permitted to interview individual inmates. This rule shall apply even where the inmate requests or seeks an interview. However, conversation may be permitted with inmates whose identity is not made public, if it is limited to discussion of institutional facilities, programs and activities.[21]

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of the institution. Interviews may also be denied if they would be "detrimental to the welfare and best interests of the inmate." Only one interview every six months per inmate is allowed unless approved by the Director of Corrections. Interviews are not permitted with inmates while they are in isolation or segregation or for a "reasonable time" after they are returned from parole.

17. Hillery v. Procunier, 364 F. Supp. 196 (N.D. Cal. 1973).

18. The three judge district court was convened pursuant to 28 U.S.C. §§ 2281, 2284 (1970).

19. Hillery v. Procunier, 364 F. Supp. 196 (1973). The court's consideration of the press' claim was brief. The court repeated the statement in Branzburg v. Hayes, 408 U.S. 665, 684 (1972), that the press enjoys no greater right of access to information than the general public. The court found this rationale utilized in Seattle-Tacoma Newspaper Guild, Local 82 v. Parker, 480 F.2d 1062 (9th Cir. 1973). The court in *Hillery* viewed that case as controlling the press claims. The regulation in that case, however, only prohibited press interviews with willing inmates at a federal *maximum* security institution. The court in *Hillery* distinguished the decision in Washington Post Co. v. Kleindienst, 357 F. Supp. 770 (D.D.C. 1972) on the ground that the regulation there banned all interviews rather than just ones with specific inmates. The result in *Washington Post Co.* was viewed by the court in *Hillery* as not inconsistent with its decision because in *Washington Post Co.* the press was given only some access to inmates and not a special right of access. This distinction does not withstand analysis because the granting of some access was a grant of special access *vis-à-vis* the general public. This was the very result the court in *Hillery* found constitutionally unwarranted because of *Branzburg v. Hayes.*

20. Pell v. Procunier, 417 U.S. 817 (1974).

21. U.S. DEP'T OF JUSTICE, BUREAU OF PRISONS, POLICY STATEMENT 1220.1A, INMATE CORRESPONDENCE WITH REPRESENTATIVES OF THE PRESS AND NEWS MEDIA, Feb. 11, 1972. The full Policy Statement is included as an appendix in Washington Post Co. v. Kleindienst, 357 F. Supp. 770, 776-78 (D.D.C. 1972). This policy was modified by U.S. DEP'T OF JUSTICE, BUREAU OF PRISONS, POLICY STATEMENT 1220.6/7300.96, INMATE CORRESPONDENCE AND INTERVIEWS WITH REPRESENTATIVES OF THE PRESS AND NEWS MEDIA, June 10, 1974. Personal interviews may now be requested by either an

The reporter and the Washington Post brought an action to enjoin the enforcement of this regulation.[22] The district court held that the policy statement violated the First Amendment rights of the press.[23] The court,

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inmate or a member of the press. *See* Policy Statement, *supra* note 1, for those classified as members of the press. The inmates affected by the modification were limited to those at youth centers and adult minimum security facilities. There are five major reasons which permit the chief executive officer of the institution to deny requests for press interviews. § 4(d)(4). First, the interview may be denied if the news media representative fails to agree to conditions established by the policy (such as a failure to make a reasonable attempt to verify an allegation regarding an inmate, staff member or institution. § 4(f)(3)). The second reason is a doctor's diagnosis that granting the interview would endanger the health of the inmate or the health or safety of the interviewer or that the inmate is mentally unable to give a rational factual statement. The third reason an interview request may be denied is that the inmate is under the age of eighteen and no written consent has been obtained from the parents or guardian. If the juvenile's parents or guardian are not known, the media representative is to be notified of the inmate's status and the requested interview shall be considered by the institution's chief executive officer after receiving the inmate's consent. The fourth reason for denying an interview request is if, in the opinion of the institution's chief executive officer, the interview would probably cause serious unrest or the institution's good order would be disturbed. Finally, the requested interview may be denied if a court has issued a gag rule in a court action in which the inmate is involved. An interview may also be disapproved, of course, when in the opinion of the institution's chief executive officer an internal emergency exists. § 4(d)(5).

22. Washington Post Co. v. Kleindienst, 357 F. Supp. 770 (D.D.C. 1972); *stayed pending appeal*, 406 U.S. 912 (1972); *modified*, 494 F.2d 994 (D.C. Cir. 1974), *cert. granted su nom.*, Saxbe v. Washington Post Co., 415 U.S. 956 (1974).

23. Washington Post Co. v. Kleindienst, 357 F. Supp. 779 (D.D.C. 1972). The first decision by the district court, 357 F. Supp. 770 (D.D.C. 1972), began with the assumption that "the need to grant substantial press access to prisoners is readily apparent. Prisons are public institutions. The conduct of these institutions is a matter of public concern." *Id.* at 772-73. The court found the total ban on press interviews in all institutions to be arbitrary on its face. *Id.* at 773. It then sought to determine whether the government had employed the least restrictive means of limiting the First Amendment freedoms of the press and inmates. (Government curtailment of an individual's or group's First Amendment rights must be done by the least restrictive means consistent with the legitimate goals of the government. United States v. O'Brien, 391 U.S. 367, 377 (1968). The test is applied to determine whether a statute or regulation is, on its face, overly broad. *See* NAACP v. Button, 371 U.S. 415, 444 (1963); Shelton v. Tucker, 364 U.S. 479, 488-90 (1960); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).) The district court found no cause to distinguish whether it was the rights of the inmate or the press which were possibly infringed by the regulation, since both parties were willing to communicate. Furthermore, the public's right to be informed might overshadow both of those interests.

The court found a multitude of factors leading to its conclusion that the government had not employed the least restrictive means of limiting the press' First Amendment rights. These findings included the fact that many other jurisdictions permitted press access to inmates, that as many as 90 percent of the inmates were incarcerated for nonviolent crimes, that successful reintegration of inmates into society would be furthered by the public being kept informed by the press of developments in this area, and that institutions and inmates can readily be differentiated. The court found the govern-

however, asserted that the public's right to be informed (which together with the right to gather information comprises the right to know) overshadowed the rights of the press. The court of appeals modified and affirmed.[24] Holding that the regulations did not infringe upon any First Amendment rights of the press, the Supreme Court reversed the decision of the lower court.[25]

The press plaintiffs in *Pell* and *Saxbe* claimed that the regulations of the prison authorities abridged their First Amendment right to gather news without governmental interference.[26] The state of California and the Federal Bureau of Prisons offered three justifications for the policy of banning personal interviews with specific inmates: (1) the "big

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ment's assertion that possible security and discipline problems might arise, and that "big wheels" could be created, insufficient to justify the total ban on personal interviews. The court held, therefore, that the total ban infringed unconstitutionally on the press' First Amendment rights. On remand, the court adhered to its prior decision, concluding that "private personal interviews are essential to accurate and effective reporting. Ethical newspapers rarely publish articles based on unconfirmed letter communications. Reliability of such information must be determined by face-to-face confrontation." 357 F. Supp. 779, 781 (D.D.C. 1972). The "big wheel" theory was specifically found inadequate to justify the total ban on press interviews because most "big wheels" were identifiable in advance and interviews with these inmates could be requested and granted specially. *Id.*

For an extensive discussion of the lower court decisions in *Pell* and *Saxbe see Significant Developments, Constitutional Law—Freedom of Speech and of the Press: Prison Regulation Limiting Press Access to Prisoners Held Unconstitutional*, 54 B.U.L. REV. 670 (1974).

24. Washington Post Co. v. Kleindienst, 494 F.2d 994 (D.C. Cir. 1974).

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

26. Prior to the Supreme Court decisions in *Pell* and *Saxbe*, lower court decisions had varied as to restrictions on press access to prisoners. The following cases required that press access be permitted: Globe Newspaper Co. v. Bork, 370 F. Supp. 1135 (D. Mass. 1974) (enjoining the enforcement of Policy Statement 1220.1A and permitting an interview by a newspaper reporter); McMillan v. Carlson, 369 F. Supp. 1182 (D. Mass. 1973), *vacated and remanded*, 493 F.2d 1217 (1st Cir. 1974) (enjoining enforcement of Policy Statement 1220.1A and permitting interview by an author); Houston Chronicle Publishing Co. v. Kleindienst, 364 F. Supp. 719 (S.D. Tex. 1973) (requiring press access to federal prisoners held in county jails); Burnham v. Oswald, 342 F. Supp. 880 (W.D.N.Y. 1972) (press interviews with consenting inmates must be permitted absent a clear and present danger). Cases which upheld restrictions on press access are Seattle-Tacoma Newspaper Guild Local 82 v. Parker, 480 F.2d 1062 (9th Cir. 1973) (state prohibition of press interviews at maximum security institution is valid); Mitford v. Pickett, 363 F. Supp. 975 (E.D. Ill. 1973) (Policy Statement 1220.1A is constitutional where sufficient opportunity to correspond by mail exists); Smith v. Bounds (E.D.N.C. Mar. 10, 1972), 1 PRISON L. RPTR. 144 (1972) (interview ban within discretion of prison officials since inmates are permitted sufficient opportunity to correspond with newsmen); Burnham v. Oswald, 333 F. Supp. 1128 (W.D.N.Y. 1971) (following a riot the denial of press interviews does not abridge the First Amendment rights of newsmen); Seale v. Manson, 326 F. Supp. 1375 (D. Conn. 1971) (state prison regulation conditioning press interviews upon approval of warden is proper).

wheel" theory,[27] (2) the policy of uniform treatment to all inmates and (3) the administrative burden that would be incurred from processing applications for interviews and defending decisions to deny requests which were challenged.

Majority Opinion in Pell v. Procunier

The majority in *Pell*[28] began its opinion by stressing that the purpose of the regulation in question was not to conceal prison conditions since the press enjoys access to many aspects of prison functionings not granted to the general public.[29] With regard to any attempt to keep the opinions of the inmates from the public, the Court emphasized that the press is allowed to interview[30] inmates selected at random by prison officials or to interview the members of any prison program as to any aspect of that program. The correction officials' strongest justification in the lower court for its regulation had been the "big wheel" theory. The majority in *Pell* gave weight to the "big wheel" theory but because of the analysis of the issues it employed, a decision was never reached as to whether this theory could justify the total ban on personal interviews.

The majority in *Pell*, as well as in *Saxbe*, relied on dicta from both *Branzburg v. Hayes*[31] and *Zemel v. Rusk*[32] in reaching its decision. The

27. A "big wheel" is the characterization given to an inmate who exerts an inordinate amount of power and influence upon other inmates within an instituiton. By allowing press interviews with "big wheels" the discipline, security and rehabilitative efforts of the prison administration allegedly would be hampered. The added prestige given to the "big wheels" through an interview would increase their ability to encourage other inmates to engage in disruptive actions. The lower courts in both *Pell* and *Saxbe* rejected this as sufficient justification for the total ban on press interviews with inmates. *But see* Seale v. Manson, 326 F. Supp. 1375 (D. Conn. 1971) ("big wheel" theory found sufficient to justify denying a press interview with a particular inmate where the regulations expressly permitted interviews with specific inmates upon prior approval by the warden).

28. 417 U.S. 817 (1974).

29. *Id.* at 830. The press was permitted to visit the maximum and medium security sections of any institution and could talk to any inmate they might *randomly* encounter. If security conditions would not be jeopardized, the *conversation* might be in private.

30. Although the majority used the words "interview" and "conversation" interchangeably in describing the privilege given to the press of face-to-face communication between the press and an inmate, there is a distinction. The court of appeals in Washington Post Co. v. Kleindienst, 494 F.2d 994, 998 (D.C. Cir. 1974), considered the difference and found that a conversation is a spontaneous discussion with an inmate randomly encountered during a visit to the institution. The subject matter of a conversation is limited to "institutional facilities, programs, and activities." *Id.* at 998. Also, the reporter is requested not to name any inmate with whom he might speak.

An interview is a "private, scheduled, face-to-face discussion" without limitation as to topic coverage that lasts for sufficient time to allow extensive discourse. *Id.* at 998.

31. 408 U.S. 665 (1972).

32. 381 U.S. 1 (1965).

Branzburg case consolidated four federal and state court cases.[33] The principle issue was whether or not the requirement that newsmen appear and testify before state or federal grand juries with regard to information confidentially obtained by reporters violates the freedoms of speech or press under the First Amendment.[34] The Court held that the rights of the reporter were not abridged. Using a balancing test it found the public interest both in law enforcement and in ensuring effective grand jury proceedings was sufficent to "override the consequential, but uncertain, burden on news gathering that is said to result"[35] from requiring reporters to answer the relevant questions of the grand jury. The evidence had failed to demonstrate that requiring the testimony of the reporters would lead to "a significant constriction of the flow of news to the public."[36] Thus the Court upheld the power to compel relevant testimony of a reporter regarding information confidentially obtained.[37]

Turning to the second case considered by the *Pell* majority brings us to a brief review of *Zemel v. Rusk*.[38] That case involved in part a de-

33. 408 U.S. 665 (1972). The first two cases were Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1971), and Branzburg v. Meigs, an unreported opinion of the Kentucky Court of Appeals. In these cases Branzburg, a reporter for a newspaper in Louisville, claimed that he was privileged under the First Amendment to withhold from the state grand jury information he had gathered. This information concerned the use, manufacture and sale of marijuana and hashish and had been gathered on two separate occasions from confidential sources of information and from confidential personal observation. Branzburg's claim was rejected by the state court. 408 U.S. at 667-71.

The third case, *In re* Pappas, 358 Mass. 604, 266 N.E.2d 297 (1971), involved the claims of Pappas, a reporter for a New Bedford, Massachusetts television station. He claimed he had a First Amendment right to withhold from a state grand jury confidential information concerning what he had seen and heard as well as the identities of persons he had met during a three hour stay inside the local Black Panther Party headquarters. The Massachusetts state court rejected the claims of Pappas. 408 U.S. at 672-75.

In the fourth case, Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), Caldwell, a reporter for the New York Times, asserted a constitutional privilege to withhold from a federal grand jury confidential information as to the aims, purposes and activities of the Black Panther Party. The Ninth Circuit held that absent compelling reasons for requiring his testimony, Caldwell was privileged to withhold the information. Furthermore, absent a special showing of necessity, Caldwell was privileged to refuse attendance at the grand jury meeting. 408 U.S. at 675-79.

The Supreme Court affirmed the decisions in *Branzburg* and *Pappas* and reversed in *Caldwell*. *Id.* at 708-09.

34. Branzburg v. Hayes, 408 U.S. 665, 667 (1972).

35. *Id.* at 690-91.

36. *Id.* at 693.

37. *Id.* at 708-09. For a further discussion of *Branzburg* in relation to access to interview inmates, *see* Note, *Public and Press Rights of Access to Prisoners After Branzburg and Mandel*, 82 YALE L.J. 1337, 1350-54 (1973) (concluding that the decision of the district court in Washington Post Co. v. Kleindienst, 357 F. Supp. 770 (D.D.C. 1972), was correct in light of the *Branzburg* decision).

38. 381 U.S. 1 (1965). Zemel, a private United States citizen, had been denied

termination of whether or not a refusal by the United States secretary of state to validate a passport for traveling to Cuba denied the plaintiff any First Amendment rights. In balancing the individual's right of travel against the needs of the government, the Court found the restriction on travel to be "supported by the weightiest considerations of national security."[39] In dicta the Court stated that as to the denial of the alleged right to learn about the Castro regime, "[t]he right to speak and publish does not carry with it the unrestrained right to gather information."[40] The refusal to validate the passport for travel to Cuba was, moreover, held to be a restraint on action rather than speech and thus only relevant to a consideration of whether or not Zemel was denied due process under the Fifth Amendment. No First Amendment rights were thus at issue.[41]

In attempting to distinguish their case from *Branzburg*, the press plaintiffs in *Pell* tried to frame their claims of infringement of First Amendment rights in terms other than those used by the reporters in *Branzburg*. Whereas the Court in *Branzburg* had found that the burden on newsgathering which resulted from compelling the testimony of reporters to be "consequential, but uncertain,"[42] the press in *Pell* claimed the total ban on personal interviews imposed by the California regulation was both consequential and certain in its burden upon news gathering.[43] The plaintiffs further argued that when employing a balancing test of competing interests the state could not show any substantial gov-

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validation of his passport for travel to Cuba by the United States secretary of state. Zemel contended, among other things, that "the travel ban is a direct interference with the First Amendment rights of citizens to travel abroad so that they might acquaint themselves at first hand with the effects abroad of our Government's policies, foreign and domestic, and with conditions abroad which might affect such policies." *Id.* at 16.

39. *Id.* at 16. The Cuban missile crisis of October, 1962, had occurred less than two months before Zemel filed his complaint. *Id.* at 16.

40. Zemel v. Rusk, 381 U.S. 1, 17 (1965). *See* Note, *Constitutional Law: Resolving Conflict Between the Right to Travel and Implementation of Foreign Policy*, 1966 DUKE L.J. 233 (critical of the standard of review used by the Court in *Zemel* and arguing that the result may substantially diminish First Amendment rights when the right to gather information is denied); Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838, 846 (1971) (suggesting that the result in *Zemel* might have been different if a journalist rather than a private citizen had been denied validation).

41. Zemel v. Rusk, 381 U.S. 1, 16 (1965), *citing* Kent v. Dulles, 357 U.S. 116, 126-27 (1958) as support in finding that the right to travel is protected by the Fifth Amendment.

42. Branzburg v. Hayes, 408 U.S. 665, 690-91 (1972).

43. *See* Note, *Public and Press Rights of Access to Prisoners After Branzburg and Mandel*, 82 YALE L.J. 1337, 1352 (1973) (concluding that the direct restriction on news gathering in Washington Post Co. v. Kleindienst, 357 F. Supp. 770 (1972), unlike the indirect restriction in Branzburg v. Hayes, 408 U.S. 665 (1972), made irrelevant any proof of a causal link between the restriction and the resulting inhibition on the news flow as required by *Branzburg*).

ernmental interest in a total ban.[44] The majority gave these contentions by the press only brief mention and then proceeded to formulate its reasoning from dicta extracted from the *Branzburg* and *Zemel* cases.

While recognizing that "news gathering is not without its First Amendment protections"[45] since "without some protection for seeking out the news, freedom of the press could be eviscerated,"[46] the Court took care to point out that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information."[47] In its discussion, the Court stated that whatever First Amendment protections the press possessed, relating to the right to gather information, they were no greater than those of the general public.[48] In this case, since the general public was denied access to inmates to conduct personal interviews, the denial to the press of access abridged no rights of the press under the First Amendment: "[n]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public."[49] Thus the California prison regulation prohibiting any personal interviews with inmates was upheld as constitutional by the Court.[50]

Majority Opinion in Saxbe v. Washington Post Co.

On the federal level *Saxbe*[51] presented the same issue raised by the press in *Pell*, namely, the right of the press to gather information from face-to-face interviews with specifically designated consenting inmates. The federal regulation[52] banned all personal interviews by the press as did the California regulation[53] in *Pell*. The press in *Saxbe* asserted, as did the press in *Pell*, that the First Amendment protections of news gath-

44. In First Amendment controversies, where there are incidental limitations on the First Amendment, the Court has required that the government show a sufficiently important interest and that the limitation be accomplished by the least restrictive means. *See, e.g.*, Police Dep't v. Mosley, 408 U.S. 92, 101 (1972); United States v. O'Brien, 391 U.S. 367, 377 (1968); Cox v. Louisiana, 379 U.S. 559, 562-64 (1965); Shelton v. Tucker, 364 U.S. 479, 488 (1960). *See also* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

45. Pell v. Procunier, 417 U.S. 817, 833 (1974), *quoting* Branzburg v. Hayes, 408 U.S. 665, 707 (1972).

46. Pell v. Procunier, 417 U.S. 817, 833 (1974), *quoting* Branzburg v. Hayes, 408 U.S. 665, 681 (1972).

47. Pell v. Procunier, 417 U.S. 817, 834 n.9 (1974), *quoting* Zemel v. Rusk, 381 U.S. 1, 17 (1965).

48. Pell v. Procunier, 417 U.S. 817, 833 (1974).

49. *Id.* at 834.

50. *Id.* at 835.

51. 417 U.S. 843 (1974).

52. U.S. BUREAU OF PRISONS, POLICY STATEMENT 1220.1A § 4b(6).

53. CALIF. DEP'T OF CORRECTIONS, ADMINISTRATIVE MANUAL § 415.16.

ering by the press, which the Court recognized in *Branzburg*, were abridged by the ban on all personal interviews by the press.[54]

The majority prefaced its reasoning in the case by acknowledging that the press had privileges of special access similar to those accorded the press by the correction officials in *Pell*.[55] The majority, moreover, felt as in *Pell*, that great deference was due the argument of the correctional authorities that allowing press interviews would create "big wheels."[56]

In *Saxbe* the Court found the limitation on permissible visitors[57] justified by a "truism" acknowledged by the court of appeals: "[P]risons are institutions where public access is generally limited."[58] Finding the issues raised by the press in *Saxbe* to be constitutionally indistinguishable from those raised by the press in *Pell*, the Court utilized its reasoning in *Pell* to support a decision against the press in *Saxbe*. Thus the existence of a constitutionally protected right to gather news was acknowledged.[59] The Court in a cursory statement then found that the general public was legitimately denied access to prisons and their inmates.[60] This point had not been raised by the majority in *Pell* although its essentiality to the reasoning of the majority is unquestionable. Without this finding the majority rationale would still leave the constitutionality of the regulation at issue since the general public might not be constitutionally denied personal interviews with inmates. If this were so, then any attempt to uphold a denial of press access by referring to the public's access would fail. As the Court saw the general public to be legitimately denied access to prisons and their inmates, it found no validity in the claim that the First Amendment rights of the press had been abridged since, as declared in *Pell*, a newsman's constitutional right of access to prisons or their inmates was no greater than the public's right.[61] The Supreme Court thus reversed the decision of the court of appeals.

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54. See text accompanying notes 42-4 *supra*.

55. See text accompanying notes 29-30 *supra*.

56. Saxbe v. Washington Post Co., 417 U.S. 843, 849 (1974). The "big wheel" theory is discussed in note 27 *supra*.

57. Visitation policy is controlled by the U.S. DEP'T OF JUSTICE, BUREAU OF PRISONS, POLICY STATEMENT 7300.4A, Visiting Regulations, April 24, 1972. The Policy Statement is set out in full as an appendix in McMillan v. Carlson, 369 F. Supp. 1182, 1189-95 (D. Mass. 1973). Essentially, it provides that permissible visitors include members of the inmate's immediate family (para. 5(e)(1)), certain other relatives (para. 5(e)(2)), genuine friends and associates (para. 5(e)(3)), clergymen, former or prospective employers, sponsors and parole advisors (para. 5(e)(7)).

58. 417 U.S. at 849, *quoting* Washington Post Co. v. Kleindienst, 494 F.2d 994, 999 (1974). *See* Adderly v. Florida, 385 U.S. 39, 41 (1966).

59. Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974).

60. *Id.* at 849.

61. *Id.* at 850.

Dissenting Opinions of Pell and Saxbe

Justices Powell and Douglas each wrote a dissenting opinion applicable to both *Pell v. Procunier*[62] and *Saxbe v. Washington Post Co.*[63]

Dissenting Opinion of Justice Powell

The dissenting opinion of Justice Powell[64] considered the issues raised by the press in *Pell* and *Saxbe* within the factual context of *Saxbe*. Powell would affirm the lower court holding in *Saxbe* that the regulation prohibiting all press interviews with inmates was unconstitutional.[65] He would, however, remand the case with instructions to permit the government to adopt written standard regulations regarding press interviews. In *Pell*, the justice would reverse that portion of the lower court decision which held the total ban on press interviews constitutional.[66]

Justice Powell's concluding remarks are best stated at the beginning of this examination of his opinion, as they reveal the essence of his approach to the issue under discussion. According to Justice Powell's view, the majority is content to establish the First Amendment protections of the press as freedom of speech, a prohibition of governmental prior restraints on publication and a nondiscriminatory right of the press to gather information vis-á-vis the general public.[67] Justice Powell sees this as determining only the outer boundaries of First Amendment concerns and believes that if First Amendment protections of the press are to maintain viability in a changing society the Court must "enter the thicket of a particular factual context in order to determine the effect on First Amendment values of a nondiscriminatory restraint on press access to information."[68] To avoid this duty and follow the course of the majority is to permit, in Justice Powell's opinion, the erosion of First Amendment freedoms in an evolving society where absolute guarantees are not possible.

Although the subject is discussed more fully in the latter portion of this note, an understanding of the differences between the reasoning of the majority and Justice Powell is facilitated by brief discussion of the fundamentally different view of the press taken by each opinion. With respect to any issue raising constitutional rights to gather information, the majority views the press as existing separately from, but on the same

62. 417 U.S. 817 (1974).
63. 417 U.S. 843 (1974).
64. Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974).
65. *Id.* at 874.
66. Pell v. Procunier, 417 U.S. 817, 835 (1974) (concurring in part and dissenting in part).
67. Saxbe v. Washington Post Co., 417 U.S. 843, 875 (1974).
68. *Id.*

footing, as the public at large. The rights of the press to gather information are simply a mirror of the rights accorded the general public.[69] Thus the conclusion in *Pell* and *Saxbe*, that the press presented no viable claims of an abridgement of their First Amendment rights, follows logically from the finding that the public at large had been constitutionally denied the right to have personal interviews with inmates.

The approach taken by Justice Powell asserts, on the other hand, that the general public's right to know is of paramount importance in any claim by the press of an independent right to gather information. His view of the role of the press within the functionings of American society differs from that of the majority in that the press is viewed as an entity whose right to gather information may exist within the general public's right to know. Rather than paralleling the rights of the general public, the press, in Justice Powell's view, is in the position of a vertical subgroup of the general public. At the minimum, the press has the right, accorded by the majority, to gather information which is granted to the general public. The majority and Justice Powell disagree, however, whenever the general public at large has been denied the right to gather information. The rights of the press according to the majority cease at that point,[70] but in Justice Powell's view the issue is not completely settled. In a position of the vertical subgroup of the general public, permitting the press to gather information is viewed as a possible less drastic means of curtailing the general public's right to gather information than a total denial of the right.[71] Justice Powell, therefore, finds the burden imposed upon the government to be more stringent when it attempts to justify denying the press the right to gather information than when it denies that right to the general public. The press could be denied the right to gather information only upon an independant showing by the government of a compelling state interest. This process gives the government a less drastic means of achieving its compelling interest than a total curtailment of the right to know. The press might in some instances, then, possess rights to gather information greater than those of any individual member of the general public.

The Effect of Banning Prison Interviews

Turning to Justice Powell's examination of the nature and effect of the total ban on personal interviews with inmates, he notes testimony in the district court to the effect that personal interviews were "crucial

69. See text accompanying notes 45-50 *supra.*

70. *Id.*

71. See text accompanying notes 90-93 *infra.* *See* Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505, 1525 (1974) (asserting that permitting the press to gather information could be considered as one less restrictive means of limiting the public's right to gather information from voluntary sources).

to effective reporting in the prison context."[72] Justice Powell likened the reliance of a newsman on personal interviews to the reliance of an attorney upon cross-examination: each is indispensable in the pursuit of truth and accuracy.

Justice Powell also examined in detail the distinction between "interviews," which were denied, and "conversations," which were permitted.[73] He agreed with the lower courts that "conversations" were not a viable alternative to personal interviews with designated inmates. In support of his conclusion, Justice Powell noted that an inmate qualified to speak on the subject being investigated by a newsman might not be encountered by that newsman on his tour of the prison. Even if the reporter met a qualified speaker, the inmate might feel pressured by the presence of other prisoners to give distorted account of the subject matter and emphasize rhetoric rather than hard facts.

Noting that the government did not argue at length against the district court's finding that personal interviews by the press were "essential to accurate and effective reporting"[74] Justice Powell moved to the next part of his dissent: the goverment's contentions that the denial of press interviews raised no constitutional issues.

The Constitutional Questions

Upon examining the claims by the Washington Post that the First Amendment protects dissemination and acquisition of news, Justice Powell found the reasoning of the majority to be faulty in that it gave too broad a reading to the *Branzburg* and *Zemel* cases.

Justice Powell viewed any attempt to use the conduct versus speech categories developed in *Zemel*[75] as creating distinctions without substance when examining the claims of the press in *Pell* and *Saxbe*.[76] Stressing that the *United States v. O'Brien*[77] Court did not consider the

72. Saxbe v. Washington Post Co., 417 U.S. 843, 853 (1974). The district court had received the testimony on remand of the case to consider the "extent to which the accurate and effective reporting of news has a critical dependence upon the opportunity for private personal interviews." 477 F.2d 1168, 1169 (D.C. Cir. 1972). Testimony was obtained from three reporters, two journalists and an attorney, and emphasized that "[t]hose [reporters] who do publish without interviews are likely to print inaccurate, incomplete, and sometimes jaundiced news items." Saxbe v. Washington Post Co., *supra* at 854.

73. For a discussion of the distinction between "interviews" and "conversations" see note 30 *supra*.

74. Saxbe v. Washington Post Co., 417 U.S. 843, 856 (1974).

75. The Court in *Zemel* saw the restriction on travel to Cuba as a restraint on action rather than on speech and thus found no First Amendment rights in issue. Zemel v. Rusk, 381 U.S. 1, 17 (1965).

76. Saxbe v. Washington Post Co., 417 U.S. 843, 858-59 (1974).

77. 391 U.S. 367 (1968) (the government's prohibition of burning selective service

conduct versus speech distinction to be an all-embracing standard in determining if First Amendment rights were in issue, Justice Powell found *Zemel* of no help in these cases.

Justice Powell noted that the *Branzburg* Court had recognized that newsgathering qualified for some protection under the First Amendment. He saw, however, an unwarranted extension of *Branzburg* developed by the majority in *Pell* and *Saxbe* that was caused by a misreading of the Court's analysis in *Branzburg*.[78] Only if dicta from *Branzburg* were read in isolation might the result reached by the majority in *Pell* and *Saxbe* be supported by that case. The Court in *Branzburg* had used a balancing test of competing interests to determine if the reporters could be compelled to testify at grand jury proceedings as to information confidentially received.[79] The result in *Branzburg* had hinged on this balancing test "rather than on any determination that First Amendment freedoms were not implicated."[80]

The First Amendment claim in *Branzburg*, *Pell* and *Saxbe* was the right to gather information. Although in *Branzburg* the public had no right to withhold from the grand jury confidentially received information, the Court did not decide that the press claim presented no First Amendment issue. But in *Pell* and *Saxbe*, the Court found that the press did not present a First Amendment claim because the general public was denied access to prisons for personal interviews with inmates. The majority in *Pell* and *Saxbe* essentially used *Branzburg* to support their holding that the press presented no First Amendment claim, without employing the balancing test of competing interests utilized in *Branzburg*. The differences, therefore, of the facts and issues in *Branzburg* and *Zemel* from those in *Pell* and *Saxbe*, and the analysis used by the Court in *Branzburg* and *Zemel*, convinced Justice Powell that it was proper to consider independently the constitutionality of the government's regulation prohibiting all press interviews with prisoners.

Justice Powell first sought to determine whether the Bureau of Prisons' regulations and the challenge by the press gave rise to a question

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certificates is constitutional even though the prohibition of conduct may involve First Amendment issues of free speech).

78. Justice Powell's vote was necessary to form a majority in *Branzburg*. Although he joined in the opinion of the Court he also wrote a concurring opinion, 408 U.S. 665, 709 (1972), to emphasize what seemed to him "to be the limited nature of the Court's holding." *Id.* "The asserted claim to privilege should be judged . . . by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." *Id.* at 710.

79. The interests of the general public in effective law enforcement and grand jury proceedings outweighed the burden on the constitutionally protected right to gather news. Branzburg v. Hayes, 408 U.S. 665, 690-91 (1972).

80. Saxbe v. Washington Post Co., 417 U.S. 843, 860 (1974).

of "constitutional dimensions."[81] What constitutional rights were potentially being abridged by the total ban on personal interviews? Justice Powell rested his analysis upon the theory of Professor Chafee[82] who viewed freedom of speech and of the press as protecting two kinds of interests: the individual interest and the societal interest.[83] The individual interest is in "individual expression and personal self-fulfillment,"[84] and is protected by barring governmental restraints on speech or publication. As the government's regulations in *Pell* and *Saxbe* infringed upon no individual interest of the press, the character of Chafee's societal interest was scrutinized. The societal interest encompasses the right of the public to discuss the affairs of their government[85] which is essential if an informed populace is to be created which will maintain a government reflecting the public's true desires.[86] Protection of the social interest of the First Amendment must therefore encompass the right to express and receive ideas.[87] To facilitate the effective operation of the societal interest, Justice Powell saw the press as being utilized as a conduit "by which people receive that free flow of information and ideas essential to intelligent self-government."[88] For Justice Powell, the role of the press as it relates to the societal interest is that of an agent for the general public.

The important conclusions in Justice Powell's analysis follow from the role he assigns to the press. If the press is to serve as an effective agent of the general public in fulfilling its purpose of informing the public, the press must in some instances have access to information not directly accessible by the general public.[89] Justice Powell accepted the argument that there are good reasons for not permitting unrestrained public access

81. *Id.* at 856.

82. Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (1967).

83. *Id.* at 33.

84. *Id., as quoted in* Saxbe v. Washington Post Co., 417 U.S. 843, 862 (1974). A vital First Amendment interest is in assuring "self-fulfillment [of expression] for each individual." Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972).

85. Saxbe v. Washington Post Co., 417 U.S. 843, 862 (1974).

86. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). *See* Hart, *The Congressional Perspective of Competition in the Communications Industries,* 13 ANTITRUST BULL. 973 (1968) (America's strength is the unhindered exchange of many ideas and these ideas will live only to the extent they are communicated). See note 125 *infra.*

87. *See* Kleindienst v. Mandel, 408 U.S. 753, 762 (1972); Red Lion Broadcasting Co. v. Federal Communication Comm'n, 395 U.S. 367, 390 (1969); Lamont v. Postmaster Gen'l, 381 U.S. 301, 307 (1965); Martin v. City of Struthers, 319 U.S. 141, 143 (1943). See note 11 *supra.*

88. Saxbe v. Washington Post Co., 417 U.S. 843, 863 (1974). See notes 86-87 *supra.*

89. Saxbe v. Washington Post Co., 417 U.S. 843, 863 (1974).

to the prisons and their inmates.[90] He found, however, that the general public does have the right to a free flow of information concerning public institutions. The question then arose of whether or not there is equal justification for denying the press access to inmates for interviews in its capacity as an agent for the general public acting to exercise the public's right to obtain information. Justice Powell saw no legitimate government interest in preventing the press from acquiring any information which they might obtain by a personal interview with an inmate. The regulation's effect was to ban a method of "news gathering that is essential to effective reporting in the prison context"[91] thus preventing "accurate and effective reporting on prison conditions and inmate grievances."[92] The government's regulation, therefore, infringed upon the general public's right to a free flow of information encompassed within the societal interest guarantees of the First Amendment. Justice Powell concluded that the regulation must be measured against rights guaranteed by the First Amendment.

The Bureau of Prisons' Justifications and a Standard of First Amendment Review

Turning to the case of *Procunier v. Martinez*,[93] Justice Powell considered that case's prison mail regulation which limited the First Amendment rights of nonprisoners. Since the regulations in *Pell* and *Saxbe* also concerned prison regulations limiting the First Amendment rights of nonprisoners, Justice Powell adopted for these cases the First Amendment standard of review established by the Court in *Procunier v. Martinez*.[94] The requirements of this standard are:

> First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression . . . . Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.[95]

Justice Powell accepted the lower courts' finding that the government's interest in security, discipline and rehabilitation of inmates was, under the *Martinez* case, a "substantial governmental interest unrelated to the suppression of expression."[96] He also accepted the finding that these interests could be disrupted by prison interviews on the basis of the "big wheel" theory. However, the "big wheel" theory was not sufficient

90. *Id.* at 864.
91. *Id.* at 861.
92. *Id.* at 860-61.
93. 416 U.S. 396 (1974).
94. *Id.*
95. *Id.* at 413.
96. *Id.*

justification for the total ban on press interviews with specific willing inmates. Justice Powell was persuaded that the total ban violated the second part of the test and was, therefore, unconstitutional as an overly broad limitation on First Amendment rights.

First, at most only 5 to 10 percent of the inmate population were troublemakers[97] and because of the requisite leadership qualities all prison troublemakers would not become "big wheels." Thus, the number of "big wheels" with whom the prison administrators had a legitimate concern would be less than the number of prison troublemakers. Second, the government did not show it was unable to ascertain in advance of any press interview which inmate would be a disruptive "big wheel." Finally, of the twenty-four jurisdictions having written policy regulations concerning press interviews with inmates, only five states (including California) totally prohibited press interviews with consenting inmates.[98] In *Saxbe* the district court had compared the prison systems in states permitting press interviews to those denying interviews and found no evidence to support a conclusion that prison systems denying press interviews faced problems any more severe than jurisdictions permitting press interviews.

Toward A Constitutional Interview Policy

Having found the government regulation unconstitutional as an overly broad limitation of First Amendment rights, Justice Powell delineated what limitations he thought the government could constitutionally impose on press interviews. The government's actions would be subject to a First Amendment standard of review only where those actions significantly curtailed the free flow of information to the general public.[99] Not every regulation of press interviews with inmates would significantly impede the flow of information. Thus, there was no impediment to the government adopting standard written regulations regarding press interviews rather than implementing the ad hoc balancing test of competing interests with each request for an interview as required by the lower courts. Such a written policy could include regulations on the time, place and manner of interviews as is done with other visitors. The number of interviews with an inmate within a certain time period could be limited to guard against the creation of "big wheels." The government could also prohibit interviews with inmates under temporary disciplinary measures and prohibit all interviews during an institutional crisis. Justice Powell concluded that standard written regulations would allay the government's fears that an ad hoc balancing test, as ordered by the lower

97. Saxbe v. Washington Post Co., 417 U.S. 843, 868 (1974).
98. *Id.* at 869 and nn.13 & 14.
99. *Id.* at 871-72.

courts in *Saxbe*, would cause disruption in prison discipline and rehabilitation. Finally, a written standard policy would avoid the difficulties of a case-by-case determination of who is a member of the press while still preserving the constitutional right of the general public to a free flow of information.

Dissenting Opinion of Justice Douglas

Justice Douglas would reverse[100] the holding in *Pell* as it relates to the claims of the press[101] and affirm the judgments of the lower courts in *Saxbe*.[102] The source of his disagreement with the majority opinion rests on the characterization of the interests involved in the two cases. Justice Douglas reasserts his statements made in dissent in *Branzburg v. Hayes*,[103] that the guarantee of a free press protects not only the interests of the media but extends protection to the general public's right to know.[104] Thus, the total ban on personal interviews is a limitation on the First Amendment rights of a free press. The issue, therefore, becomes the same as it was for Justice Powell: does the total ban exceed what is necessary to protect the legitimate interests of the prison authorities and thus infringe on the guarantee of a free press?[105]

Justice Douglas agreed with the lower courts in *Saxbe* that prison authorities may impose reasonable time, place and manner restrictions on interviews, without imposing a total ban, in order to protect the legitimate governmental interests of discipline and security. He found the regulations prohibiting all personal interviews to be too broad and thus unconstitutional.[106]

Justice Douglas' reasoning rests on his clarification of the dangers he perceived, and which Justice Powell had also sought to expose, underlying the majority's opinion. He asserted that the general public might easily be denied access for interviews with the inmates because there are few practical hardships involved and very few individuals would personally seek to investigate the prison system. But it does not follow from this that the general public lacks the desire to be informed on prison conditions and policies. Justice Douglas emphasized that prisons, being public institutions, are the responsibility of the general public.

100. Pell v. Procunier, 417 U.S. 817, 836 (1974). Justice Douglas was joined by Justices Brennan and Marshall in this dissent which also applies to *Saxbe*.

101. *Id.* at 841. Justice Douglas would also affirm the lower court's holding in *Pell* as it related to the claims by the inmate plaintiffs. *Id.*

102. *Id.* at 842.

103. 408 U.S. 665, 711 (1972).

104. *Id.* at 721, *quoted in* Pell v. Procunier, 417 U.S. 817, 840 (1974).

105. Saxbe v. Washington Post Co., 417 U.S. 843, 872 (1974).

106. Pell v. Procunier, 417 U.S. 817, 841-42 (1974).

With 1.5 million people[107] under the authority of federal, state and local prisons at a cost of one billion dollars annually,[108] the public's interest in being informed upon this public activity is "paramount."[109] Thus to assert, as the majority does, that the press can automatically be denied the right to gather information once the general public at large has been denied it,[110] is dangerous. By not permitting the press to have access to information as a less drastic means of limiting the general public's right to gather information, the government is provided with an awesome ability to curtail the general public's right to be informed.

The Role of the Press—Past and Present

The next part of this note will briefly examine the character and role of the press at the time the First Amendment became part of the Constitution,[111] followed by a discussion of the press as it has existed in recent years. Next, statements by the Supreme Court, and its members individually, which shed light on the Court's view of the character and role of the press prior to *Pell* and *Saxbe* will be examined. Finally, these three parts will be compared to the opinions by the majority and dissenters on the freedom of the press issue in *Pell* and *Saxbe*. By this process this note seeks to accomplish two goals: first, to expose the apparently new view of the role of the press taken by the Supreme Court and; second, to show that the evolution of the character and role of the press to its current activities argues for the reasoning and result of the dissenters in *Pell* and *Saxbe*. Although the survey is brief, it is done in the belief that a representative sampling of facts and opinions in each area of discussion is sufficient. Utilizing a pure additive process would not change the conclusions arrived at through the sampling process.

The Character of the Press in the Revolutionary Period.

Between 1776 and 1810 the press included the newspaper and the pamphlet. Because of slow transportation and circulation, the impact of the press upon society, although powerful,[112] was generally limited to the locality of the editor.[113] Thus, any news from outside that locality was never "current" news.

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107. Pell v. Procunier, 417 U.S. 817, 840 (1974).

108. *Id.* at 840.

109. *Id.*

110. See text accompanying notes 47-50 and 57-61 *supra.*

111. "The first ten Amendments—The Bill of Rights—were submitted together in 1791; ratification was completed on December 15, 1791." G. GUNTHER & N. DOWLING, CASES AND MATERIALS ON CONSTITUTIONAL LAW lxxxiv n* (8th ed. 1970).

112. *See* S. KOBRE, THE DEVELOPMENT OF THE COLONIAL NEWSPAPER 168 (1944); A. SCHLESINGER, PRELUDE TO INDEPENDENCE 44 n.68 (1957).

113. *See* M. ERNST, THE FIRST FREEDOM 589 (1946).

Little was written during the revolutionary period on the character of the press. However, the few comments made in this regard give some insight into this question. James Madison said:

> Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.[114]

Writing in 1807 Thomas Jefferson stated:

> Nothing can now be believed which is seen in a newspaper . . . the man who never looks into a newspaper is better informed than he who reads them; inasmuch as he who knows nothing is nearer to the truth than he whose mind is filled with falsehoods & errors.[115]

Jefferson's conviction of the necessity of the press to preserve a free nation was undaunted, however:

> The way to prevent these irregular interpositions [acts toward tyranny] of the people is to give them full information of their affairs thro' the channel of the public papers, & to contrive that those papers should penetrate the whole mass of the people.[116]

The Sedition Act[117] was the federal government's first major attempt to curb the First Amendment freedoms of the press. Although the constitutionality of the act was never determined by the Supreme Court, the debate at that time sheds light on the character of the press. John Allen of Connecticut, in the House of Representatives, upon opening debate in support of the act requested that:

> gentlemen look at certain papers printed in this city and elsewhere, and ask themselves whether an unwarranted and dangerous combination does not exist to overturn and ruin the Government by publishing the most shameless falsehoods against the Representatives of the people of all denominations . . . .[118]

Jefferson opposed the act but seemed to find no error in the characterization of the press made by Allen. Jefferson, however, blamed the state of the press upon the federalists who had pushed the press'

> licentiousness & it's [sic] lying to such a degree of prostitution as to deprive it of all credit . . . . [E]ven the least informed of the people have learnt that nothing in a newspaper is to be believed.[119]

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114. 4 ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 571 (2d ed. 1876), in New York Times Co. v. Sullivan, 376 U.S. 254, 271 (1964).

115. Letter from Thomas Jefferson to John Norvell, June 14, 1807, in C. PATTERSON, THE CONSTITUTIONAL PRINCIPLES OF THOMAS JEFFERSON 185 n.14 (1953).

116. Letter from Thomas Jefferson to Edward Carrington, Jan. 16, 1787, in C. PATTERSON, THE CONSTITUTIONAL PRINCIPLES OF THOMAS JEFFERSON 186 (1953).

117. Act of July 14, 1798, ch. 74, 1 Stat. 596.

118. 8 ANNALS OF CONG. 2093-94 (1798), in E. HUDON, FREEDOM OF SPEECH AND PRESS IN AMERICA 46 (1963).

119. Letter from Thomas Jefferson to Thomas McKean, Feb. 19, 1803, in E. HUDON, FREEDOM OF SPEECH AND PRESS IN AMERICA 47-48 (1963).

In essence, the press could hardly be viewed as providing an objective account of newsworthy events. The publications of the times provided a forum for politicians and editors to express their partisan views on issues of the day[120] on a wider scale than was possible by mere speech. The press became the instrument through which political parties could applaud their own actions or condemn those of their opponents.[121] Yet the essentiality of a free press was not questioned in the revolutionary times.[122] Although First Amendment rights for the press may always to some degree be limited,[123] the minimal protection afforded by the Constitution prohibited the federal government from imposing prior restraints on publication.[124] Without uninhibited public exposure to the many shades of opinion presented in the press, the theory of a government acting to fulfill the people's true desires is clearly a mere hope.

The press' character in the revolutionary period was dominated by its editorial nature.[125] The press as an objective reporter of news was a rare, if not nonexistent, creature. When we realize the character of the press, we see its role as one which permitted people to express, and have access to, opinions of wider dissemination than speech afforded. The reader, however, was expected to realize without editorial acknowledgement that any fact in the printed matter was most likely submerged beneath a barrage of less than objective assertions.

The Nature of the Press Today

To attempt to state definitively the character and role of the press in modern society would inevitably lead to injecting personal opinion and

120. *See* E. EMERY, THE PRESS AND AMERICA 68 (1962); S. KOBRE, FOUNDATIONS OF AMERICAN JOURNALISM 77 (1958).

121. *See* W. CHENERY, FREEDOM OF THE PRESS 143-45 (1955); W. HOCKING, FREEDOM OF THE PRESS 12-13 (1947).

122. James Madison said: "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." Letter from James Madison to W.T. Barry, Aug. 4, 1822, in Branzburg v. Hayes, 408 U.S. 665, 723 (1972) (Douglas, J., dissenting opinion).

123. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 283-85 (1964) (First Amendment rights are not absolute); Schenck v. United States, 249 U.S. 47, 52 (1919). *See also* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 11 (1965).

124. New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716-17 (1931). *See* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 165 (1973) (Douglas, J., concurring opinion, giving an extensive discussion of prior restraint). *See also* Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648, 659-69 (1955).

125. See text accompanying notes 113-22 *supra.*

thus potential error. For the purpose of this note, however, the general public's expectation of the press in recent times and the press' attempts to satisfy them, may be compared with the character and role of the press in the revolutionary period.

It is readily apparent that the general public today has certain expectations of the press, such as editorial comment,[126] which are similar to the public's expectations in the revolutionary period. Technology and advances in education, however, have created a wide schism between the public of the two time periods as to the expected scope of press presentation of news. The development of radio, television and the virtually instant transmission of information have made press activities in recent times qualitatively different from that which existed in the revolutionary period.[127] One major result has been a press which strives for objectivity and balance in the reporting of news,[128] that is, the separation of reporting news as an objective observer from editorializing.

The individual member of the general public knows the physical, if not economic, impossibility of personally ascertaining the facts of all events he might consider important to his welfare or appealing to his desire to be well informed on local, national and international events. An information gap would arise today if an individual could act only upon information which he obtained through a press similar in character to the one that existed in the revolutionary period. Thus, the economic necessity of the press to respond to the desires of its subscribers,[129] coupled with an increasing public reliance upon the press as the public's primary source of information,[130] has caused the press' character to change.

126. Congress sought to aid the maintenance of diverse editorial commentary in newspapers by enacting the Newspaper Preservation Act, 15 U.S.C. §§ 1801-04 (1971). This act liberalized the antitrust restrictions on newspaper combinations. One prerequisite for two newspapers to enter into a joint operating agreement (a common reason for this action being economics) is that the two newspapers maintain autonomous editorial and reportorial policies. 15 U.S.C. § 1802(2) (1971).

127. "The various forms of modern so-called 'mass-communications' raise issues that were *not implied* in the means of communication known or contemplated by Franklin and Jefferson and Madison." Kovacs v. Cooper, 336 U.S. 77, 96 (1949) (Frankfurter, J., concurring opinion) (emphasis added).

128. *See* K. COOPER, THE RIGHT TO KNOW 25-29, 42-47 (1956). Roger Fisher (Professor of law, Harvard University) states there is great ambiguity in references by newspaper and television people to "professionalism." ASPEN NOTEBOOK ON GOVERNMENT AND THE MEDIA 78 (W. Rivers & M. Nyhan ed. 1973). The standard for young reporters seems to be "accuracy, unbiased reporting, [and] presentation of the hard facts . . . ." *Id.* The standard for leaders of the profession seems to be "sage comments and reasoned opinions on major questions of the day." *Id.*

129. *See* K. COOPER, THE RIGHT TO KNOW 27-28 (1956) (giving the character change of the Associated Press as an example of the press' response to the economics of a change in readers' desires).

130. The electronic media are the "public's prime source of information." H.R. REP. No. 91-257, 91st Cong., 1st Sess. 6 (1969). According to a Roper survey, tele-

Whether or not this change is supported by the First Amendment, it has in fact resulted in the press exercising the public's right to gather information (one aspect of the right to know).[131]

By the end of the nineteenth century the wide political spectrum of newspaper readers tended to encourage objective reporting of newsworthy events.[132] With the creation of large news agencies such as the Associated Press and United Press International, to which many newspapers subscribed, a subscriber risked exposure by a competitor or possible expulsion from the agency, if it chose to inject its own political emphasis into the agency's report. Through the pooling of resources from the subscribers, the scope of coverage of newsworthy events around the world is now greater than any one newspaper could hope to provide. Because subscribing newspapers are thus tied to larger news agencies, the general public ends up receiving greater information on newsworthy events than any individual could possibly obtain from a newspaper relying solely on its own resources or through personal investigation.

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vision is the primary source of news for 60 percent of Americans over the age of 21, TELEVISION 3 (B. Cole ed. 1970). *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 n.15 (1969) (acknowledging the press as the public's primary source of news).

131. A recent example of the press gathering information for the public was in regard to the "Watergate" affair. According to a Louis Harris poll, Americans, by 56 percent to 18 percent, believed that if not for the press' exposés the Watergate scandal would not have been uncovered. N.Y. Times, July 3, 1973, at 20, col. 6.

Several states have provided by statute that in various situations the press is to be permitted to gather information while the general public is denied this right. The press, therefore, gathers information for the general public who receives its information from the press.

Press representatives are often part of a very limited group allowed to be present at executions. *E.g.*, N.J. STAT. ANN. § 2A:165-66 (1971); OHIO REV. CODE ANN. tit. 29, § 2949.25 (1975); PA. STAT. ANN. tit. 19, § 1125 (1964).

Oregon provides that the press is allowed to attend executive sessions of any governing body whereas the general public may be excluded. ORE. REV. STAT. § 192.660(4) (1973).

Some states accord the press special office space in legislative buildings. *E.g.*, ME. REV. STAT. ANN. tit. 3, § 342 (1964); NEV. REV. STAT. § 331.120 (1973).

Several states grant the press special rights to be admitted on the floor of the legislature. *E.g.*, CONN. GEN. STAT. ANN. tit. 2, § 2-51 (1958); ME. REV. STAT. ANN. tit. 3, § 341 (1964).

Indiana provides that election results must be furnished to the press immediately after the results are certified. IND. STAT. ANN. 3-1-25-7 (1971).

Some states permit the press to be present in voting polls whereas the general public is prohibited except to vote. *E.g.*, CONN. GEN. STAT. ANN. tit. 9, § 9-236 (Supp. 1974-75); IND. STAT. ANN. 3-1-23-24 (1971).

Connecticut expressly permits the press to remain on the floor of the legislature when the general public has been cleared from the galleries. CONN. GEN. STAT. ANN. tit. 2, § 2-1(c)(7) (Supp. 1974-75).

132. K. COOPER, THE RIGHT TO KNOW 26-28 (1956).

When television serves as a provider of news,[133] the public also expects a certain objectivity in reporting. Because there are relatively few television and radio stations, laws have been enacted to ensure that the public receives a balanced view of current events. Stations must be licensed by the Federal Communications Commission[134] and the fairness doctrine[135] requires each station licensee to provide balanced programming of opinions on controversial issues. In theory, noncontroversial events are presented objectively and controversial issues are treated as such, with the opinion of advocates of various positions accurately reported.

If the press is viewed as an entity which responds to the demands made upon it by the general public, it is evident that it serves at least in part as the primary gatherer and presenter of news for the public. In this capacity the press is the practical filler of the general public's potential information gap.

The Supreme Court's View of the Press Prior to Pell and Saxbe

Comment by the Court and various justices upon the character and role of the press in American society has been relatively recent. In 1907 the Court was presented for the first time[136] with a case in which a newspaper asserted First Amendment rights.[137] Justice Holmes spoke for the Court and limited his comments to the First Amendment protections given to the press.

> [T]he main purpose of such constitutional provisions [the First Amendment] is "to prevent all such *previous restraints* upon publications as had been practiced by other governments," and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.[138]

Twenty-five years later the Court began to articulate a more expansive view of First Amendment protections extending to the press. Chief Justice Hughes in *Near v. Minnesota ex rel. Olson*[139] acknowledged that

133. See note 130 *supra.*

134. Communications Act of 1934, 47 U.S.C. § 307.

135. In 1959, Congress amended § 315 of the Communications Act of 1934 to give express statutory approval to the Federal Communication Commission's fairness doctrine. Act of Sept. 14, 1959, § 1, 73 Stat. 557, *amending,* 47 U.S.C. § 315(a) (1934).

For a summary of the development and nature of the fairness doctrine *see* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375-86 (1969); Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (reviewing and approving *Red Lion*); Barrow, *The Fairness Doctrine: A Double Standard for Electronic and Print Media,* 26 HAST. L.J. 659 (1975).

136. Note, *The Right of the Press to Gather Information,* 71 COLUM. L. REV. 838, 840 (1971).

137. Patterson v. Colorado, 205 U.S. 454 (1907).

138. *Id.* at 462 (citations omitted).

139. 283 U.S. 697 (1931).

historically freedom of the press had meant primarily immunity from previous restraint or censorship.[140] In light of the changing character and role of the press, a wider scope of protection under the guarantee of a free press was now required because, the "conception of the liberty of the press in this country had broadened with the exigencies of the colonial period and with the efforts to secure freedom from oppressive administration."[141] The Court, following the tradition of Madison who had praised the press at length,[142] perceived the indebtedness of the American public to the press to be as great now as it was in revolutionary times.

The Court took up the cause of the press again in *Grosjean v. American Press Co.*,[143] the first major exposition of its views of the press' character and role.

> The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded a free press cannot be regarded otherwise than with grave concern.[144]

The free press in the Court's opinion had to be considered "a vital source of public information [which] stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."[145] Essentially, the press was acknowledged to be the general public's primary instrument for obtaining local, national and international news.[146] Although not expressly stated by the Court, the

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140. *Id.* at 716.

141. *Id.* at 716-17.

142. *Id.* at 717-18. For the statement by Madison see text accompanying note 7 *supra.*

143. 297 U.S. 233 (1936).

144. *Id.* at 250.

145. *Id.* at 250.

146. In *Associated Press v. United States* (326 U.S. 1, 26 (1945)) Justice Frankfurter (concurring opinion) echoed this view of the press in commenting on the character and role of the Associated Press in the United States. "The historic development of this agency, its world-wide scope, the pervasive influence it exerts in obtaining and disseminating information, the country's dependence upon it for news of the world—all these are matters of common knowledge and have been abundantly spread upon the records of this Court. International News Service v. Associated Press, 248 U.S. 215 (1918); Associated Press v. Labor Board, 301 U.S. 103 (1936)." "The business of the press . . . is the promotion of truth regarding public matters by furnishing the basis for an understanding of them." *Id.* at 28.

The press has also been viewed as serving as a "marketplace of ideas." *See, e.g.*, Mills v. Alabama, 384 U.S. 214, 218-19 (1966); New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting opinion).

logical corollary was that the press was also a vital gatherer of news for the general public.

The Court in the 1960's expanded the views expressed in *Grosjean v. American Press Co.*[147] and stressed the close ties between the First Amendment rights of the general public and the press and the press' role in protecting these rights. The Court stated in *Mills v. Alabama*[148] that the press was specifically selected in the Constitution to serve as an antidote to abuses of power by government officials and to keep them responsible to all the people.[149] The First Amendment guarantee of a free press was "not for the benefit of the press so much as for the benefit of all of us."[150] The Court has since affirmed that the public benefit is information and that the press is the general public's primary source of this benefit.[151]

Declaring on many occasions that the free flow of information to the general public is essential for a democracy to function,[152] the Court has recognized that it is essential to protect the process of providing the general public with information.[153] In *Branzburg v. Hayes*,[154] the Court expressly recognized that the newsgathering function of the press qualified for First Amendment protection[155] because "without some protection for seeking out the news, freedom of the press could be eviscerated."[156] In summary, the Supreme Court has acknowledged that the press, as the primary provider of information to the public, is entitled to First Amendment protection in the gathering and dissemination of news. The Court, furthermore, has recognized that the general public

147. 297 U.S. 233 (1936).

148. 384 U.S. 214 (1966).

149. *Id.* at 219.

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

151. "The press was protected so that it could bare the secrets of government and inform the people." New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring opinion).

152. On the essential role in a democracy of a free exchange of information, *see, e.g.*, Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964); Stromberg v. California, 283 U.S. 359, 369 (1931). On the importance of a free flow of information, *see, e.g.*, Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 41-42 (1971); Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 (1969); Time, Inc. v. Hill, 385 U.S. 374, 388 (1967); Grosjean v. American Press Co., 297 U.S. 233, 243 (1936). *See also* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 6 (1941); A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT 88-89 (1948).

153. "We have often described the process of informing the public as the core purpose of the constitutional guarantee of speech and a free press. *See, e.g., Stromberg v. California*, 283 U.S. 359, 369; *De Jonge v. Oregon*, 299 U.S. 353, 365; *Smith v. California*, 361 U.S. 147, 153." Branzburg v. Hayes, 408 U.S. 665, 726 n.1 (1972) (Stewart, J., dissenting).

154. 408 U.S. 665 (1972).

155. *Id.* at 681, 707.

156. *Id*, at 681.

is the beneficiary of the press' activities and the protections extended to those activities.

A Comparison of the Reasoning of the Majority and the Dissenters in Pell and Saxbe

In *Pell* and *Saxbe* the majority viewed the press as an entity existing separately from the public when it measured the press' right to gather information against the general public's right to gather information. The Court concluded that once the general public's right to gather information had been legitimately curtailed, a press challenge to the restriction did not present a First Amendment question.[157] The press could not exercise the public's right to gather information. Therefore, the Court did not consider permitting the press to gather information as a possible less drastic means of restricting the public's right to gather information than total curtailment of the right.

In criticism of the majority's reasoning, the Court's decision in *Pell* and *Saxbe* fails to recognize the evolution of the press, and departs from past Court statements regarding the press' character and role in American society. The press as the public's primary source of news[158] strives to provide the public with information which will permit intelligent analysis of current issues. Viewing the press as a representative of the general public in gathering news would merely acknowledge reality. The current character of the press demonstrates that its role is to present information for the public's, not the press', benefit.[159] Similarly, the press does not gather information for itself, i.e., to keep just itself informed; it gathers information for presentation to the public. The majority in *Pell* and *Saxbe* frustrates attempts by the press to maximize the amount of information which it could gather and present to the public. To allow the press to fulfill its role of gathering and presenting information for the public requires that the press be viewed in the same position of fulfilling the public's right to know when it *gathers* information *for* the public as when it *presents* information *to* the public.

The Court prior to *Pell* and *Saxbe* had recognized the evolving character and role of the press,[160] and acknowledged that the press' activity of informing the general public was a "core purpose" of the First Amendment[161] benefiting the entire public and not just the press. How-

157. See text accompanying notes 48-50 and 61 *supra.*

158. See text accompanying notes 143-51 *supra.*

159. See text accompanying notes 124-33 and 150-51 *supra.*

160. See text accompanying notes 136-56 *supra.*

161. Branzburg v. Hayes, 408 U.S. 665, 726 n.1 (1972), *as quoted supra* at note 153.

ever, the Court in *Pell* and *Saxbe* ignored the press' role in fulfilling the public's corollary right to gather information, thus implying that the Court would not recognize the press' role in fulfilling the public's right to know when the right to gather information was in issue.

The possible ramifications of the majority's reasoning upon the ability of the public to obtain information are severe. The net result of the public's inability to utilize the press as a means of exercising the public's right to gather information is a limitation of the press' role of providing information to the general public. The practical effect is that the right to know is curtailed. Both the majority and the dissenting justices in *Pell* and *Saxbe* agreed that the general public at large was justifiably denied access to personal interviews with inmates.[162] Unlike the majority, however, the dissenters viewed the press as a subgroup of the general public, thus perceiving that permitting the press to have access was a less drastic means of restricting the public's right to know than totally curtailing the right. The dissenters found the government's justifications insufficient to deny access to the press by considering whether or not there was separate sufficient justification for denying the press access to gather information. The majority's failure to utilize the approach of the dissenters, particularly the detailed opinion of Justice Powell, evidenced a failure to see, or a disregard of, the impact of the character and role of the press within American society.

The dissenters considered the public's right to know paramount, and viewed the rights of the press in the context of attempting to fulfill that right to know. Thus, the dissenters recognized that restrictions on the press' right to gather information limited the public's right to know[163] since the millions of recipients to whom the press would have provided information lost some of their power to know.

Conclusion

The major question underlying the different reasoning used by the majority and dissenters in *Pell* and *Saxbe* may be stated thus: when does the general public lose the right to gather information and, therefore, a portion of its right to know? The majority believed the right to be lost when the general public, viewed independently of the press, lost the right to gather information. The dissenters saw the public's right lost when the *press* lost the right to gather information. It has been the purpose of this note to suggest that the evolution of the press' character and role within

162. The majority so found in Saxbe v. Washington Post Co., 417 U.S. 843, 849 (1974). Justice Powell agreed with this view in his dissenting opinion. *Id.* at 857. Justice Douglas, in his dissenting opinion, implied this view in Pell v. Procunier, 417 U.S. 817, 841 (1974).

163. See text accompanying notes 82-96 and 100-05 *supra.*

American society, and the Court's past statements acknowledging this evolution, argue for the dissenters' position in *Pell* and *Saxbe*. When the press loses the right to gather information the general public effectively loses that right and, therefore, a part of its right to know. Maintaining the press' role of providing information for the public requires that the courts consider permitting the press to gather information as a possible less drastic means of curtailing the public's right to gather information whenever the government puts forward a justification for restricting public access.