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Constitutional Law - First Amendment - Freedom of the Press to Gather News

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NOVEMBER, 1974]

RECENT DEVELOPMENTS

CONSTITUTIONAL LAW — FIRST AMENDMENT — FREEDOM OF THE PRESS TO GATHER NEWS

I. INTRODUCTION

Before the United States Supreme Court's hint of acquiescence in *Branzburg v. Hayes*,¹ the lower courts had generally recognized a first amendment right of the press to gather information otherwise available to the public.² However, the courts, including the *Branzburg* Court, agreed that there existed no unrestrained right on the part of the press or the public to gather news;³ for example, newsreporters may not claim a right to attend judicial conferences, executive sessions of official bodies, or scenes of crime or disaster.⁴ Beyond these simple strictures, however, the contours of the news gathering right remain vague. It is not clear what the permissible restrictions on the press are when there is public access to information. Nor is it clear whether the press has a special right of access to information not otherwise available to the public.⁵ Finally, given a right to gather news — perhaps even a right of special access — no constitutional definition of "the press" has evolved in order to enable one to determine exactly who it is who enjoys such a right.

The reluctance of the courts to recognize distinctly a news gathering right in the press stems from a valid concern with administrative problems and from the logical necessity of making the determination of what constitutes the press for the purposes of constitutional protection.⁶ If the

1. 408 U.S. 665 (1972). The *Branzburg* Court held that newsreporters and journalists do not have a constitutionally based privilege to refuse to disclose their confidential sources when summoned before a grand jury. *Id.* at 690-91. However, in reaching this conclusion the Court stated, "Nor is it suggested that newsgathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681.

2. *See, e.g.*, *Providence Journal Co. v. McCoy*, 94 F. Supp. 186 (D.R.I. 1950) (conditioning right of press to inspect public tax records on the obtaining of express permission of city council is impermissible abridgment of freedom of press). *Compare Trimble v. Johnston*, 173 F. Supp. 651 (D.D.C. 1959) (press has no right to inspect documents not open to public generally).

3. *See, e.g.*, *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Zemel v. Rusk*, 381 U.S. 1, *reh. denied*, 382 U.S. 873 (1965); *Worthy v. Herter*, 270 F.2d 905 (D.C. Cir.), *cert. denied*, 361 U.S. 918 (1959).

4. 408 U.S. at 684-85.

5. *See generally* Hurst, *Has Branzburg Buried the Underground Press?*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 181 (1973), for a discussion of the desirability of a constitutional right of special access for the protection of the underground press against government discrimination.

6. In responding to the newsreporters' claim to a conditional privilege for members of the press, the Supreme Court in *Branzburg* stated:

The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be

right is merely coextensive with a public right to gather news, then conceptually the press may go only where the public may go. However, if the right is peculiar to the press, it would seem to follow that reporters would have access to many more areas than the public. Therefore, in delimiting the class of persons with such access, the practical problems in defining "the press" appear substantial. The language of the courts suggests an adherence to the first approach, but their application of constitutional principles to real facts occasionally suggests the emergence of the latter.

This note will explore both the recent developments in the judicial evolution of a right to gather news and the practical problems which may arise if courts continue to recognize and expand this arguably new first amendment protection.

II. THE NEWSREPORTER'S PRIVILEGE TO WITHHOLD THE IDENTITY OF CONFIDENTIAL SOURCES

In *Branzburg*, the Supreme Court acknowledged a news gathering right, but deftly avoided elaboration.⁷ The Court found that the state's substantial interest in the administration of a criminal investigation outweighed any claim of privilege based upon freedom of the press asserted by a journalist called to testify before a grand jury.⁸ The operating premise underlying the holding was that the denial of a privilege to newsreporters resulted in only an incidental burden on the press;⁹ the inhibition of the flow of news to the public was at best uncertain.¹⁰ On the narrow facts

necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as the large metropolitan publisher who utilizes the latest photocomposition methods.

408 U.S. at 703-04 (citation omitted).

7. *Id.* at 681. See note 1 *supra*.

8. 408 U.S. at 690-91.

9. *Id.* at 682. The plaintiffs argued that the actions of the defendant officials could be justified only by a "compelling" or "paramount" public interest served by narrowly drawn means having no unnecessary impact on the exercise of freedom of speech, press or association. *Id.* at 680-81 (citations omitted). Rejecting this claim, the Court asserted that, unlike in the cases upon which the plaintiffs relied, the instant facts "involve[d] no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold." *Id.* at 681. This distinction between prior restraint on publishing and limitations on newsgathering activity is consistent with a judicial inclination to equate, under the general rubric of freedom of expression, freedom of the press and freedom of speech; it has been suggested that the failure or reluctance to distinguish between the two constitutional guarantees has limited the protective reach of the first amendment to the distribution and publishing aspects of journalism. Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838, 839-43 (1971). The posture of some lower courts towards the press' newsgathering claims supports this conclusion. See notes 15-24 and accompanying text *infra*.

10. 408 U.S. at 690. The Court was particularly impressed with what it regarded as the uncertain nature of the burden. *Id.* Specifically, it was unpersuaded that newsreporters' confidential sources would dry up as a consequence of compelling testimony at grand jury proceedings. *Id.* at 694.

before it, the Court fashioned a per se rule¹¹ with respect to a news-reporter's claim of privilege before a grand jury. Anticipating overwhelming administrative consequences,¹² the Court rejected an ad hoc approach based upon the conditional privilege desired by the petitioners.¹³ In addition, it regarded the eventual necessity of defining categories of the press to which the privilege would be available as conflicting with traditional notions of the scope of first amendment protections.¹⁴

Lower courts have been reluctant to apply the per se approach of *Branzburg* in other contexts. Within a few months of the *Branzburg* decision, the Second Circuit, in *Baker v. F & F Investment*,¹⁵ declined to extend the Supreme Court's holding to civil actions.¹⁶ Instead, it adopted the balancing approach sought but rejected in *Branzburg*.¹⁷ The court observed that in *Branzburg* the overriding interest inherent in a criminal investigation was "the safety of the person and the property of the citizen."¹⁸ That interest, it asserted, was not necessarily present in a civil action.¹⁹ Furthermore, on the facts, since the reporter claiming the privilege was not a party to the action, and since there were other available sources for the sought-after information possessed by the reporter, the *Baker* court determined that the newsreporter's disclosure was not essential to the public interest.²⁰ Thus, under the balancing test adopted in *Baker*, the interest of a private party in compelled disclosure of a

11. Finding that subpoenas served on newsreporters to testify before a grand jury were constitutionally valid, regardless of whether confidential sources would have to be disclosed thereby, the Court issued a flat denial of newsreporters' claim of privilege. *Id.* at 682-88, 699-705. See Hurst, *supra* note 5, at 186-87.

12. 408 U.S. at 703-04. See note 6 *supra*.

13. The reporters sought a qualified rather than an absolute privilege, which would necessitate determination on a case-by-case basis. They claimed that they could not, within the protections of the Constitution, be compelled to testify in judicial proceedings unless there were sufficient grounds for believing that they possessed information relevant to the crime being investigated, that the information was unavailable from other sources, and that the need for the information was sufficiently compelling to override the abridgment of the first amendment rights that would result from compelled disclosure. 408 U.S. at 680.

14. 408 U.S. at 704 (citations omitted). See notes 5 & 6 *supra*.

15. 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

16. 407 F.2d at 780-81. On an interlocutory appeal, the Second Circuit upheld the district court's refusal to compel a journalist to disclose at deposition the identity of a real estate agent from whom he had learned of certain "block-busting" techniques which subsequently became the subject of a magazine article. The pending civil action involved allegations of racial discrimination in the sale of houses in the Chicago area. *Id.*

17. *Id.* at 783. See note 13 *supra*.

18. *Id.* at 783, quoting *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972).

19. 470 F.2d at 784.

20. *Id.* at 783. The court's emphasis of the fact that the claimant was not a party to the suit stemmed from its earlier ruling that a defendant newsreporter in a libel action may claim no privilege where his confidential sources go to the heart of the plaintiff's claim and are unavailable elsewhere. *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958). *Accord*, *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974).

journalist's confidential sources was outweighed by the public interest in nondisclosure.²¹

The same result was reached in civil actions arising out of the Watergate break-in of 1972. In *Democratic National Committee v. McCord*,²² the United States District Court for the District of Columbia recognized a qualified privilege to gather news in personnel of various publications who refused at deposition to reveal their sources.²³ The court held that, absent a showing that alternative sources of evidence had been exhausted, or a positive showing of materiality of documents and other materials sought, a claim of constitutional privilege would be recognized.²⁴

The court in *McCord* distinguished *United States v. Liddy*,²⁵ which held that the right of an accused to a fair trial in a criminal case outweighed any claim of privilege based upon freedom of the press.²⁶ It observed that considerations in a criminal proceeding, such as that before the *Liddy* court, are vastly different from those presented in civil discovery.²⁷

However, in a per curiam decision of the Court of Appeals for the District of Columbia, in which the court suspended for three days the denial of a motion to stay execution of a contempt order stemming from the *Liddy* case,²⁸ Judge Leventhal, who would have extended the denial of the stay for 14 days, took the opportunity to invoke a balancing test not unlike that in *Baker*. While he read the principles elucidated in *Branzburg* as

21. The *Branzburg* opinion attempted to minimize the severity of the burden upon newsgathering occasioned by compelled disclosure by labelling it "uncertain." See note 10 *supra*. Baker, however, was silent on the question of whether such disclosure impermissibly burdened newsgathering. However, one may infer from its adoption of the balancing approach that the court accepted the assertion that a first amendment right had been directly abridged.

22. 356 F. Supp. 1394 (D.D.C. 1973).

23. *Id.* at 1399. This action was upon motions to quash 10 subpoenas issued on behalf of the Committee for the Reelection of the President, the Finance Committee to Reelect the President, and their respective chairmen who were parties in civil actions arising out of the June 17, 1972 break-in at the Watergate offices of the Democratic National Committee in Washington, D.C. The subpoenas summoned reporters and personnel of the *New York Times*, the *Washington Post*, the *Washington Star-News*, and *Time* magazine to appear for depositions and to bring numerous documents, photos, and tapes relating to the break-in. *Id.* at 1397-98.

24. *Id.* at 1398.

25. 354 F. Supp. 208 (D.D.C. 1972). This action arose upon a motion to quash a subpoena duces tecum issued on behalf of Gordon Liddy and others to the bureau chief of the *Los Angeles Times* to produce materials in his possession relating to interviews with a certain party who was to be a key government witness against Liddy at trial. *Id.* at 209-10.

26. *Id.* at 215. The *Liddy* opinion echoed the *Branzburg* Court's observation that the alleged burden on newsgathering was speculative. *Id.* See note 10 *supra*. However, it did evince some uncertainty by noting that the facts were unique and that, in any event, the safeguards sought in *Branzburg*, though not required, had been afforded. *Id.* at 216. See note 13 *supra*.

27. 356 F. Supp. at 1398.

28. *United States v. Liddy*, 478 F.2d 586 (D.C. Cir. 1973). The court suspended denial of the stay to permit application to the Supreme Court for certiorari, the stay to continue on the petition were granted. *Id.* at 586.

applicable to criminal proceedings, he also stated that the Supreme Court's holding did not abrogate the need in each instance to weigh the importance of compelled testimony against the consequential burden upon news-gathering.²⁹ However, he asserted, while the secrecy of grand jury proceedings offers adequate protection for press representatives' rights, a criminal proceeding does not afford the same safeguards.³⁰ Therefore, Judge Leventhal would have ordered an *in camera* determination of whether, on the facts, compelled disclosure was essential to the administration of justice.³¹

Similarly, in *State v. St. Peter*,³² the Supreme Court of Vermont held that a news reporter was entitled to refuse to reveal sources in a deposition proceeding in a criminal case unless the individual conducting the examination could show that there was no other available source of the information and that it was relevant to resolving the guilt or innocence of the defendant in the case.³³ The court compared the newsreporter's privilege to that given to the prosecution, enabling it to withhold the name of an informer provided it was not relevant to the guilt or innocence of the defendant.³⁴ There, the "free flow of criminal intelligence into police hands" was balanced against the constitutional right of the defendant to be confronted by the witnesses against him.³⁵ A similar balance could therefore be struck between the defendant's rights and the newsreporter's first amendment freedoms.³⁶

To the extent that lower courts have departed from the per se approach of *Branzburg* and have granted a "qualified privilege" to press representatives, it would seem that they have recognized a distinct news-gathering right in the press. Once a balancing test is applied on an ad hoc basis, the possibility arises that compelling disclosure by newsreporters of their confidential sources is not "essential to protect the public interest in the orderly administration of justice in the courts,"³⁷ thereby challenging the proposition that newsreporters are entitled to no more protection in their news gathering than the average citizen.

The language of the post-*Branzburg* cases suggests that the courts are responding equivocally to the claim of a special constitutional protection for the press when it is seeking news. Such a claim is one which is not merely coextensive with the broad protections normally associated with freedom of expression; it is in addition to the limited right of the public to know or have access to information about or through the government.

29. *Id.* at 587.

30. *Id.*

31. *Id.* at 588.

32. _____ Vt. _____, 315 A.2d 254 (Vt. 1974).

33. *Id.* at 256.

34. *Id.*, citing *Roviaro v. United States*, 353 U.S. 53 (1957).

35. 315 A.2d at 256.

36. *Id.*

37. 356 F. Supp. at 1398.

III. THE PRESS' ACCESS TO INFORMATION FROM PRISON INMATES

The prisoner interview cases have held generally that a flat ban on all press communications with consenting inmates constitutes an impermissible abridgment of freedom of the press.³⁸ As a result, the pivotal question has become what mode of access is constitutionally protected.

On the issue of press demands for face-to-face interviews with willing prisoners, the United States Supreme Court has held recently in the companion cases, *Pell v. Procunier*³⁹ and *Saxbe v. Washington Post Co.*,⁴⁰ that a flat ban on particular interviews requested by the press is not an unconstitutional abridgment of the first amendment right to freedom of the press.⁴¹ Reaffirming the traditional theory that the press enjoys no greater right of access to information than does the general public, the Court found in both cases that since the general public is not admitted to prisons, the press cannot complain of constitutional injury.⁴² According to the Court, although certain persons were permitted to speak with specific inmates, these discrete categories of persons did not constitute "the public" for the purposes of discovering the parameters of press rights.⁴³ In so doing, the Court declined the opportunity presented by lower court opinions to develop a flexible approach to press news gathering claims.

The court of appeals in the *Washington Post* case had affirmed⁴⁴ a holding that a blanket prohibition of face-to-face interviews with willing inmates was unconstitutional.⁴⁵ The court rejected the defendants' argu-

38. *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974); *Pell v. Procunier*, 417 U.S. 817, 828 (1974); *Seattle-Tacoma Newspaper Guild v. Parker*, 480 F.2d 1062, 1066 (9th Cir. 1973); *McMillan v. Carlson*, 493 F.2d 1217 (1st Cir. 1974); *Houston Chronicle Publishing Co. v. Kleindienst*, 364 F. Supp. 719, 730 (S.D. Tex. 1973).

39. 417 U.S. 817 (1974).

40. 417 U.S. 843 (1974).

41. *Id.* at 828; *id.* at 849. In *Pell*, the regulations of the California Department of Corrections pertaining to visitations were promulgated during a disruptive prisoner strike at the maximum security prison housing the plaintiff prisoners. While the press was denied interviews with specific individual inmates, reporters were permitted to interview randomly selected prisoners and to maintain contact through written correspondence. *Id.* at 819. In *Washington Post*, the regulations of the Federal Bureau of Prisons, applicable to minimum and maximum security prisons, were substantially the same as those challenged in *Pell*. *Id.* at 847.

42. *Id.* at 819; *id.* at 849-50.

43. In both cases, the regulations permitted personal interviews with inmates' families, friends, attorneys, and religious counsel. *Id.* at 2813, 2814.

44. 494 F.2d 994 (D.C. Cir. 1974).

45. 357 F. Supp. 779 (D.D.C. 1972). On appeal to the Supreme Court, however, the Court stressed that the privileges of the press available under the federal regulations, *i.e.*, prison tours and random interviews, exceeded those accorded members of the general public. 94 S. Ct. at 2813. In *Pell*, prior to the promulgation of the disputed California rule, the press was permitted face-to-face interviews with willing prisoners of their choice. The Court observed that this was a privilege specially reserved for the press and that, therefore, its elimination did not constitute discrimination. 417 U.S. at 828.

ments that correspondence and prison tours for the press were adequate protections of a newsgathering right⁴⁶ and that, further, the restrictions were necessitated by the "big-wheel" phenomenon.⁴⁷

Noting that the first amendment requires that administrative decisions regarding a requested interview "respond more precisely to the particular evils posed by that request,"⁴⁸ the circuit court in *Washington Post* found that the legitimate interests in prison security and discipline did not necessitate a total ban on prison interviews.⁴⁹ It postulated that an interview could be prohibited "only where it is the judgment of the administrator directly concerned, based on either the demonstrated behavior of the inmate, or special conditions existing at the time the interview is requested, or both, that the interview presents a serious risk of administrative or disciplinary problems."⁵⁰

Similarly, in *Houston Chronicle Publishing Co. v. Kleindienst*,⁵¹ a blanket proscription of all personal interviews was held invalid as overbroad and vague.⁵² The *Houston Chronicle* court found that the case did not present an instance where the press was being precluded from gathering information "not available to the public generally . . . for the simple reason that certain members of the general public, to wit, friends, family, and attorneys, are for good reason allowed into the jails for the purpose of seeing their inmates face-to-face."⁵³ The other prisoner interview cases⁵⁴ seem

46. 494 F.2d at 1001-03. In his dissent in the Supreme Court's decision in *Washington Post*, Justice Powell pointed out that testimony presented at an evidentiary hearing at the district court level tended to show that "personal interviews are crucial to effective reporting in the prison context" and that random conversations, prison tours and written correspondence are inadequate substitutes. 417 U.S. at 853 (Powell, J., dissenting).

47. *Id.* Defendants argued that when certain inmates who exert considerable power and influence within the institution are interviewed by the press the consequential increase in their visibility and status enhances their ability to encourage other inmates to follow disruptive paths. *Id.* The argument was rejected at trial: "The 'big wheel' justification cannot . . . be used to stifle expression . . . and certainly it goes too far afield to blanket all federal prisoners under this rhetoric for the obvious purpose of stultifying dissent." 357 F. Supp. at 781.

48. 494 F.2d at 1005.

49. *Id.* at 1002, 1005.

50. *Id.* at 1006. Adopting essentially the same view, Justice Powell noted that the Federal Bureau of Prisons had not shown that it could not deal with disruptive "big wheels" by precautions specifically designed for that purpose and he observed incidentally that other prison systems have successfully permitted personal interviews and have provided for individual evaluation of interview requests. 417 U.S. at 868 (Powell, J., dissenting).

51. 364 F. Supp. 719 (S.D. Tex. 1973).

52. *Id.* at 730-31.

53. *Id.* at 725. The Supreme Court explicitly rejected this logic in *Pell*. While acknowledging the extensive visitation privileges which California prisons granted certain categories of persons, the Court took the position that such persons have either a professional or personal relationship to the inmates which prison officials may reasonably deem vital in the achievement of rehabilitation of prisoners. In the view of the Court, the press does not share this function. 417 U.S. at 825.

54. *McMillan v. Carlson*, 369 F. Supp. 1182 (D. Mass. 1973), *aff'd*, 493 F.2d 1217 (1st Cir. 1974); *Washington Post Co. v. Kleindienst*, 357 F. Supp. 779 (D.D.C.

to have adopted the *Houston Chronicle* rationale that the press' news-gathering right arises solely because other members of the public are admitted.⁵⁵

The results in those two cases⁵⁶ suggest that simply because some categories of the public are admitted on a limited basis, the press, as a discrete group, shall also be admitted on the same limited basis. The press obtained a right of access not only where the general public was admitted, but also where access was otherwise available only to certain categories of unspecified individuals. Thus, without having to make the difficult determination, in the face of increasing public and press interest, of whether the press has an absolute right of access to prison inmates,⁵⁷ these courts fashioned a workable rule which recognized a newsgathering role unique to the press, but which may be limited by the factual circumstances. While this approach was rejected by the Supreme Court in the context of prisoner interviews,⁵⁸ it may yet find application in other instances of press claims to a right of special access to information.

IV. THE PRESS' ACCESS TO LEGISLATIVE PRESS GALLERIES

The newsgathering right has been asserted recently by representatives of the press who were denied access to the periodical gallery of the United

1972), *aff'd*, 494 F.2d 994 (D.C. Cir. 1974), *rev'd sub nom.* *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Seattle-Tacoma Newspaper Guild v. Parker*, 480 F.2d 1062 (9th Cir. 1973).

55. In his dissent to *Pell* and *Washington Post*, Justice Douglas apparently accepted the majority's view that the grant of the interview privilege to certain categories of persons is but an exception to the general rule that the public is to be excluded from prisons. However, Douglas opined that the scope of the privilege available to the public should not determine that available to the press because the free press right is not personal to the media, but is designed to serve the public's right to know; thus, "the prohibition of visits by the public has no practical effect upon their right to know beyond that achieved by the exclusion of the press." 417 U.S. 841 (Douglas, J., dissenting).

56. Before the Supreme Court struck down the restrictive press visitation rule, a federal district court in California had reached a contrary result in a companion case to *Pell v. Proconier*, not on the basis of freedom of the press claim advanced by plaintiff journalists, but on the basis of freedom of speech claims by plaintiff prisoners. *Hillery v. Proconier*, 364 F. Supp. 196, 202-05 (N.D. Cal. 1973). Relying on *Seattle-Tacoma Newspaper Guild v. Parker*, 480 F.2d 1062 (1973), a Ninth Circuit case upholding a restrictive press visitation rule, the *Hillery* court found that the disputed regulation imposed no prior restraint or restriction on publishing and that the resultant burden on news reporting was uncertain; it held that in the interests of prison security a ban on face-to-face interviews was reasonable provided some access to information within prisons was available. 364 F. Supp. at 199-200. Thus, these courts adopted the view that the regulations need be only "rationally related to the achievement of legitimate goals of prison administration." 480 F.2d at 1066. *But see* notes 48-50 and accompanying text *supra*, 417 U.S. at 862-64 (Powell, J., dissenting).

57. The First Circuit recently raised and simultaneously rejected the possibility that there may not be a right of access at all and that the press might be excluded entirely. *McMillan v. Carlson*, 493 F.2d 1217 (1st Cir. 1974), *aff'g* 369 F. Supp. 1182 (D. Mass. 1973).

58. *See* notes 48-50 and accompanying text *supra*.

States Congress⁵⁹ and the press section of the Alabama state legislature.⁶⁰ The question of whether newsreporters have a right in the first instance to galleries set aside specially for the press was not an issue in either case; each concerned due process and equal protection claims quite apart from a bare right of special access. Though press galleries do provide special privileges and benefits⁶¹ not afforded by admission to public galleries,⁶² the conclusion cannot be drawn from the cases that special galleries are mandated by the constitution.⁶³ Thus, the legislative gallery cases, on their face, are consistent with the traditional principle that there is no right of special access.

In *Consumers Union v. Periodical Correspondents' Ass'n*,⁶⁴ the plaintiffs applied for admission to the defendant association,⁶⁵ whose members had access to the periodical press gallery of Congress. Pursuant to the rules governing that gallery, the application was rejected because *Consumer Reports*, a consumer-oriented publication of the Consumers Union, was not "owned and operated independently of any industry, business, association, or institution . . ." ⁶⁶ The court found that to the extent that a limitation upon the content of news results from a burden on newsgathering, the rule abridged freedom of the press.⁶⁷ Moreover, since there was no evidence in the legislative history that the rule served a compelling state interest, and since the application of the rule was based upon no precise standards, the rule was arbitrary and unnecessary.⁶⁸

In *Lewis v. Baxley*,⁶⁹ news representatives were denied admission to both the press and public galleries of the Alabama state legislature because

59. *Consumers Union v. Periodical Correspondents' Ass'n*, 365 F. Supp. 18 (D.D.C. 1973).

60. *Lewis v. Baxley*, 368 F. Supp. 768 (M.D. Ala. 1973).

61. For example, members of the Periodical Correspondents' Association are provided with special seating in the periodical press galleries; they do not have to compete for seating in the public galleries. They are provided typewriters and telephones and four administrators to maintain their facilities. Correspondents have access to the Senate President's Room and the House Speaker's Lobby where they may arrange for interviews. In addition, they are provided press tables during public congressional committee meetings, and have been granted exclusive permission to attend daily press conferences held by the Senate leadership and the Speaker of the House. 365 F. Supp. at 21-22.

62. Courts have usually taken the position that "[i]t is of no significance in the constitutional sense that the plaintiffs may have occupied a place on the Senate floor, as distinguished from the gallery, as a matter of 'privilege' and not as a matter of strict legal right." *Kovach v. Maddox*, 238 F. Supp. 835, 844-45 (M.D. Tenn. 1965).

63. However, the right of the press to have access to open sessions and proceedings of Congress is undisputed. *Id.* at 845.

64. 365 F. Supp. 18 (D.D.C. 1973).

65. The Periodical Correspondents' Association, composed of newsreporters approved for admission to the separate gallery for periodical representatives, is empowered by the Senate Committee on Rules and Administration and the Speaker of the House to pass upon applications for admission and otherwise to administer the facilities. *Id.* at 21.

66. *Id.* at 22.

67. *Id.* at 25-26.

68. *Id.* at 25, citing *Broderick v. Oklahoma*, 413 U.S. 601 (1973), and *Police Dep't v. Mosley*, 408 U.S. 92 (1972).

69. 368 F. Supp. 768 (M.D. Ala. 1973).

they refused to file statements of economic interest as required by an Alabama statute⁷⁰ governing ethics of public officers in the state. In answer to the defendant's contention that the statute was designed to protect the public from interested and improperly influenced news coverage, the court responded that such an interest was not only insubstantial, but probably not legitimate.⁷¹ Regarding the assertion that the statute served the state's interest in "protection of the legislature from surreptitious lobbying newsmen," the court concluded that, assuming such an interest was substantial, requiring detailed economic disclosure from the press or any single occupational group bore no substantial relation to that valid interest.⁷²

The significance of the *Lewis* case lies not in its conclusion, but in its dicta. On the facts, the court held that where the state seeks to exclude one or more members of the press from areas or occasions to which other members of the press are admitted, the state must show a *substantial* nexus between the action and the asserted paramount state interest.⁷³ In dicta, while reaffirming the traditional principle that the same test applies when the state seeks to bar journalists from areas to which the general public is admitted,⁷⁴ the court posited that where the public is generally excluded, the state need show only a *reasonable* nexus with a legitimate interest to exclude the press.⁷⁵ In holding that reporters have a limited right of reasonable access to legitimate items of news,⁷⁶ the court conceded that there may be occasions when the press may claim a constitutionally protected right to gather news where the public is excluded.

However, it is difficult to imagine under what factual circumstances such a test would inure to the benefit of the press, for so long as it is reasonable to exclude all members of the public, presumably it will be reasonable to exclude all members of the press. The test is particularly troublesome when measured against the holdings of those lower courts

70. Section 14 of the Alabama statute governing ethics reads in part: Members of the press who cover the State Legislature or state government in any way . . . prior to being admitted to galleries, press rooms, committee meetings, any space set aside for use of the press, the floor of the legislature, or press conferences . . . shall file a statement of economic interests . . . and shall have been approved by the State ethics commission for a special press pass The statement of economic interest . . . shall . . . include the names of all newspapers or publications, radio stations, or news-gathering organizations by which they are employed, and what other occupations or employment they may have, if any; and they shall further declare that they are not employed in any legislative or executive department of government, and that they are not employed, directly or indirectly, by any person or corporation having legislation before the State Legislature, and that they will not become so engaged in any of these activities while covering the State Legislature or state government.

ALA. CODE tit. 55, § 327(21) (Cum. Supp. 1973).

71. 368 F. Supp. at 779.

72. *Id.* at 780.

73. *Id.* at 779.

74. *Id.*

75. *Id.*

disposed to find a press right to face-to-face interviews with prisoners.⁷⁷ Read narrowly, the language in *Lewis* would require that since prisons are not open to the general public, the burden would fall upon the press to show that its exclusion was unreasonable. Against the broad assertion that the state's substantial interest in security and discipline is reasonably served by a blanket exclusion, such a burden would be difficult to meet.

V. AN EMERGING COMPROMISE

A resolution may turn upon a matter of policy. Because of the expanding role of the press in an increasingly complex society, it may not be enough to assure the press that it will not be excluded from those places or occasions where the average citizen may go. The interest of a well-informed public, which is served by rigorous protection of freedom of the press, requires a more flexible approach towards the efforts of the press to obtain information about or through the government.

It is to be expected that the courts will respond with caution to increasing pressure to expand press rights beyond the scope normally associated with freedom of expression.⁷⁸ That it has been held that a qualified privilege will be granted where a reporter who refuses to disclose his confidential sources is not a party to the action and where certain safeguards are lacking,⁷⁹ demonstrates judicial reluctance to disregard totally the proposition that granting to the press newsgathering rights that are merely coextensive with freedom of speech rights is not inadequate to allow the press to serve its vital function in our society.⁸⁰ Notwithstanding the Supreme Court's disposition⁸¹ of first amendment claims in prisoner interview cases,⁸² the history of judicial debate illustrates a continuing ambivalence over whether the constitution mandates, or even permits, preferential treatment of the press in some circumstances. The treatment of the issue in the legislative gallery cases⁸³ was less tentative because questions of discrimination, and not the more basic question whether the press generally could be denied access to sessions of the legislature, were addressed there. However, the appealingly simple delineation of first amendment tests in *Lewis v. Baxley*,⁸⁴ underscores the continuing difficulty encountered by the courts with the notion of a newsgathering right: peculiar to the press.

77. See notes 48 & 51 and accompanying text *supra*.

78. The traditional approach of the courts has been to treat freedom of speech and freedom of the press under the general rubric of freedom of expression. For a discussion of the impact of that approach upon an analysis of a newsgathering right, see Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838, 840-45 (1971).

79. See notes 15-28 and accompanying text *supra*.

80. See note 60 *supra*.

81. See notes 39 & 40 and accompanying text *supra*.

82. See Section II of the text.

83. See notes 59-60 and accompanying text *supra*.

84. 368 F. Supp. 768, 779 (M.D. Ala. 1973). See notes 73-75 and accompanying

Among those cases discussed above, the results which obtained in *Washington Post v. Kleindienst*⁸⁵ and *Houston Chronicle v. Kleindienst*⁸⁶ suggest a solution that is a palatable compromise between, on the one hand, denying the press any preferential treatment and, on the other, attempting to define those areas or occasions wherein the press should have an absolute right of access regardless of the circumstances. The press would not have a special right merely because a named or specified individual has been granted access; however, the press would be given an equal right of access where generic categories of the public are admitted. Thus, where a member of congress grants an exclusive interview with only certain constituents the press would not have the same right of access. However, where the same member of congress arranges for a meeting with, for example, all manufacturers of office machines, the press also would be admitted.

As foreseen in the *Branzburg* opinion,⁸⁷ determinations will have to be made as to who is entitled to claim a press newsgathering right. For example, press definitions are used routinely by the police for the issuance of passes,⁸⁸ are incorporated as exemptions in lobbying statutes,⁸⁹ and are used in visitation rules of penal institutions.⁹⁰ These definitions and others will have to be examined on a case-by-case basis; limitations upon the basis of such factors as frequency of publication, circulation, and mailing privileges, among others, will have to meet constitutional standards. Further, consideration will have to be given to the required credentials for freelance writers and book authors. In all these determinations, since the foundation of a special newsgathering right inheres in its educative role, the extent to which the press performs that function will be central. Presumably, the courts are well-equipped with the traditional principles of freedom of expression to deal with the potential extant in any press classification scheme for the evils of discrimination and prior restraint.

VI. CONCLUSION

In theory, the press exists for the benefit of the public; it serves as an outlet for expression and as a funnel of information to the populace. To the extent that these facilitating functions are served, press rights, under certain circumstances, may demand qualitatively unique protections. If freedom from prior restraint is to have any practical significance for the press and, in turn, for the public, newsgathering activities may have to receive special constitutional consideration. Judicial ambivalence in the

85. 494 F.2d 994 (D.C. Cir. 1974). See note 44 and accompanying text *supra*.

86. 364 F. Supp. 719 (S.D. Tex. 1973). See note 51 and accompanying text *supra*.

87. See note 6 and accompanying text *supra*.

88. See generally Hurst, *supra* note 5, at 194. See also *Quad-City Community News Serv. v. Jebens*, 334 F. Supp. 8 (S.D. Iowa 1971).

89. See, e.g., Federal Regulation of Lobbying Act, 2 U.S.C. § 267 (1970).

90. See *Seattle-Tacoma Newspaper Guild v. Parker*, 480 F.2d 1062, 1064 n.1

(9th Cir. 1973).