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FREEDOM OF THE PRESS: DOES THE MEDIA HAVE A SPECIAL RIGHT OF ACCESS TO AIR CRASH SITES?

KAREN S. PRECELLA

INTRODUCTION

MUCH HAS BEEN written over the years about the First Amendment's free press clause, which states that "Congress shall make no law . . . abridging the freedom . . . of the press."[1] The literature attempts to isolate the purpose and interpretation of the clause for use in modern society. Currently, press rights include a right to gather news and, in some circumstances, a special right of access to places that is not granted to the general public. The issue analyzed in this Comment is whether that special right of access extends to aviation disaster sites.

An overview of the press' historical role in society as well as the evolution of case law defining general media rights is necessary to determine if the press should have access to air crash sites. Additionally, a summary of cases that specifically involve disasters and accidents will assist in establishing the current status of the press' right of access to aviation incidents. An analysis of those cases also reveals a general standard of review that will aid in formulating a qualified right of access to crash sites.

This Comment, therefore, begins with a look at the traditional role of newsgathering in the self-governance

[1] U.S. CONST. amend. I.

process.[2] The development of the fundamental view that the press' rights do not exceed those of the general public[3] and modern cases that imply a special right of access[4] are then presented. The Comment then focuses upon disaster and accident cases to determine both the trend of such decisions as well as the method of analysis utilized.[5] Finally, the Comment incorporates the identified standard of review into some general guidelines that may be used to evaluate if and when the press should have a special right of access to crash sites.[6]

I. THE ROLE OF THE PRESS IN SELF-GOVERNANCE

Although the First Amendment is traditionally associated with the right to disseminate information, a broader interpretation of the amendment protects the entire newsgathering process.[7] Support for this newsgathering right follows from the premise that the First Amendment was designed to encourage self-governance, which necessarily requires access to information and sources. When access is restricted, information is not secured from competing sources, resulting in uninformed and less meaningful decision-making.[8] The right to gather news, therefore, is in-

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[2] For a discussion of the traditional newsgathering role, see *infra* notes 7-12 and accompanying text.

[3] For a discussion of the fundamental view of press access rights, see *infra* notes 13-61 and accompanying text.

[4] For a discussion of the modern special access cases, see *infra* notes 62-137 and accompanying text.

[5] For a discussion of disaster and accident cases and the method of analysis used, see *infra* notes 138-196 and accompanying text.

[6] For a discussion of the proposed guidelines, see *infra* notes 197-210 and accompanying text.

[7] *See generally* J. BARRON & C. DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS (1979); Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838 (1971); Note, *The Rights of the Public and Press to Gather Information*, 87 HARV. L. REV. 1505 (1974); Note, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109 (1977).

[8] *See* A. MEIKLEJOHN, POLITICAL FREEDOM 27 (1960).

> Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good.

extricably connected with the proposition that the press should have special access rights under the First Amendment.[9]

Proponents have formulated several theories in support of this special access proposition. For example, the separate press clause in the Constitution combined with societal developments, such as the public's increased reliance upon the media for information, supports the proposition of special access rights for the press.[10] Another argument is that the press plays a structural role in the constitutional scheme by acting as a check on governmental power abuses.[11] Finally, a related theory is that the press,

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> *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.*

Id. (emphasis in original).

[9] *See generally* Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731 (1977); Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975); Stewart, *"Or Of the Press"*, 26 HASTINGS L.J. 631 (1975); Van Alstyne, *The Hazards to the Press of Claiming a "Preferred Position"*, 28 HASTINGS L.J. 761 (1977).

[10] Collins, *The Press Clause Construed in Context: The Journalists' Right of Access to Places*, 52 MO. L. REV. 751, 765 (1987). Collins argues:

> The text of the [F]irst [A]mendment, by treating the press or media in a separate clause, clearly supports a slight preference for the media. History buttresses this view. The state constitutions of the era are focused on press protection. . . . Methods of constitutional interpretation enhance this view by clearly demonstrating the propriety, the legitimacy and the need for granting the media a slight preference under the press clause of the [F]irst [A]mendment.

Id.

[11] Note, *Press Passes & Trespasses: Newsgathering on Private Property*, 84 COLUM. L. REV. 1298, 1315 (1984). Justice Stewart was one of the primary proponents of this theory, which he stated as follows:

> [T]he Free Press guarantee is, in essence a *structural* provision of the Constitution. Most of the other provisions in the bill of rights protect specific liberties of specific rights of individuals . . . . In contrast, the Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection.
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> . . . .
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> In setting up the three branches of the Federal Government, the Founders deliberately created an internally competitive system. . . .
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> The primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the government as an additional check on the three official branches.

Stewart, *supra* note 9, at 633-34 (emphasis in original).

as a surrogate for the public, provides the public with the information necessary to assist them in preventing governmental abuses.[12] Under this theory, the press does not act as a check but only as a source of information that allows the public to control abuses.

A review of the relevant case law indicates that the Supreme Court implicitly recognizes that, at least in some circumstances, the press has a constitutionally protected special right of access. Acknowledging that such a right does exist, questions will arise as to when and for whom the right should be recognized. And, if the right is recognized, a determination must be made as to what limits can validly be placed upon that right. Finally, an additional issue concerns whether the special right of access can be extended from judicial and administrative proceedings into such areas as emergencies arising from disasters and accidents, particularly aviation crashes. The analysis below focuses upon these issues and necessarily begins with the cases establishing the press' fundamental rights and the standard of review.

II. HISTORICAL VIEW OF THE PRESS' RIGHT OF ACCESS

A. *Fundamental View: Press Has No Greater Rights Than Public*

The development of the press' access rights began from a cautious position acknowledging the need for First Amendment protections while severely limiting the press' newsgathering ability. With *Branzburg v. Hayes*,[13] the general principle that "[n]ewsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded" became a firmly entrenched standard for determining the media's right of access to in-

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[12] Note, *supra* note 11, at 1318. "Like the checking-function theory, this view also concerns the abuses of power by government, but it focuses on the role of the public in preventing such abuses. Under this theory, the press serves as a medium by which the public receives the information necessary to perform its preventative function." *Id.*

[13] 408 U.S. 665 (1972) (5-4 decision).

formation and places.[14] The same Court, however, simultaneously recognized that without some First Amendment protection, the freedom of the press guarantee might be "eviscerated."[15]

In *Branzburg*, the Court held that requiring reporters to divulge the identity of confidential sources to a grand jury in furtherance of a criminal investigation did not violate the First Amendment.[16] The Court ruled that the press was protected from official harassment by a good faith standard applied to the initiation of grand jury proceedings. That is, a court will grant a motion to quash or a protective order when the need for privileged information is only remotely related to the purpose of the law enforcement investigation. Such unjustified interference with a reporter's news sources may constitute official harassment of the press.[17]

The dissenting justices in *Branzburg*, however, presented counterarguments that support a special role for the press. Justice Douglas believed that a free press occupies a special position under the First Amendment protections.[18] Requiring newsmen to reveal their sources

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[14] *Id.* at 684-85; *see also* Zemel v. Rusk, 381 U.S. 1, 17 (1965) (holding that a failure to validate a citizen's passport for travel to Cuba for purposes of investigating the government's foreign policies did not to violate the First Amendment because "[t]he right to speak and publish does not carry with it the unrestrained right to gather information").

[15] *Branzburg*, 408 U.S. at 681, 684. More specifically, in an often cited passage, the Court stated that "it [is not] suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681.

[16] *Id.* at 707-08.

[17] *Id.* The Court acknowledged First Amendment protections but suggested such limits were met by imposing a good faith standard. So, "newsgathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment." *Id.* at 707.

[18] *Id.* at 721 (Douglas, J:, dissenting). In support of his contention that the press occupies a special role, Justice Douglas stated:

> The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know. The right to know is crucial to the governing powers of the people. . . . Knowledge is essential to informed decisions.

to a grand jury, according to Douglas, would inhibit the public's right to know by increasing both the source's fear of exposure and a reporter's fear of accountability.[19] Justice Stewart believed that the majority's holding would undermine the press' independence and diminish its ability to perform functions that were constitutionally protected.[20] Therefore, the Court was not unified in its perception of the newsgathering rights of the press under the First Amendment.

Over the course of several decisions involving the press' right of access to prisons, the Court continued to limit the press' access rights by holding in accordance with the narrower view that the press was properly excluded in all cases in which the public was also legitimately excluded.[21] For example, in *Pell v. Procunier*,[22] the Court upheld a regulation of the California Department of Corrections that denied media interviews with specific

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Id.

[19] *Id.* Justice Douglas argued that forced disclosure of news sources would impede the press in its role as agent for the public because "[f]ear of exposure will cause dissidents to communicate less openly to trusted reporters. And, fear of accountability will cause editors and critics to write with more restrained pens." *Id.*

[20] *Id.* at 725 (Stewart, J., dissenting). Justice Stewart continued in his support for protecting the rights of the press by emphasizing its role:

> Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised, and a free press is thus indispensable to a free society. Not only does the press enhance personal self-fulfillment by providing the people with the widest possible range of fact and opinion, but it also is an incontestable precondition of self-government.
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> . . . .
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> A corollary of the right to publish must be the right to gather news. The full flow of information to the public protected by the free press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated.

Id. at 726-27.

[21] For a discussion of decisions holding that the press' right of access does not exceed the general public's right of access, see *infra* notes 22-28 and accompanying text outlining the *Pell* holding; *infra* notes 29-41 and accompanying text summarizing the *Saxbe* decision; *infra* notes 42-55 and accompanying text evaluating the *Houchins* holding; *infra* notes 56-61 and accompanying text discussing the *Garrett* decision.

[22] 417 U.S. 817 (1974).

prisoners.[23] California passed the regulation to avoid disciplinary problems caused by inmates who become "public figures" because of concentrated media attention.[24] Citing the *Branzburg* proposition that the press has no greater right of access than the general public,[25] the *Pell* Court held that the restriction did not violate the constitutionally protected rights of a free press because the media had not been denied access to information that was available to the public.[26]

Justice Douglas pointed out in his *Pell* dissent that the California regulation was too broad in its attempt to protect a state interest and was, therefore, an unconstitutional limitation on the free press' rights.[27] He felt that the Court was justifying the exclusion of the press on an unwarranted general exclusion of the public. Douglas argued that the public would be unlikely to seek admission to the prisons but rather would rely upon information disseminated by the media. Therefore, although the majority upheld the regulation because of the public's exclusion, Douglas' dissent questioned the legitimacy of

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[23] *Id.* at 819. The Court identified the relevant provision of section 415.071 of the California Department of Corrections Manual, which stated that "[p]ress and other media interviews with specific individual inmates will not be permitted." *Id.*

[24] *Id.* at 831-32. Disciplinary problems were said to occur when "extensive press attention to an inmate who espoused a practice of noncooperation with prison regulations encouraged other inmates to follow suit, thus eroding the institutions' ability to deal effectively with the inmates generally." *Id.* at 832.

[25] *Branzburg*, 408 U.S. at 684. The Court held that "[d]espite the fact that newsgathering might be hampered" the press had no constitutionally protected special access rights that were not available to the public. *Id.*

[26] *Pell*, 417 U.S. at 835. In explaining its decision that the access restrictions upon the press were constitutional, the Court stated:

> The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally. . . . [Imposing an] . . affirmative duty to make available to journalists sources of information not available to members of the public generally . . . finds no support in the words of the Constitution or in any decision of this Court.

Id. at 834-35 (citations omitted).

[27] *Id.* at 841 (Douglas, J., dissenting). The dissent stressed that an absolute press ban prohibiting interviews with designated federal inmates was broader than necessary to protect any legitimate governmental concerns and, therefore, unconstitutionally infringed upon the free press guarantee, which protects the public's right to know.

that exclusion and recognized the need for the press to act as a surrogate for the public in certain circumstances.[28]

In the companion case of *Saxbe v. Washington Post Co.*,[29] the Court also upheld, on the same basis as *Pell*,[30] a Policy Statement of the Federal Bureau of Prisons that prohibited personal interviews by reporters with designated inmates of medium and maximum security prisons.[31] Designated interviews were limited to families, attorneys, and religious counsel—the general public was precluded from visiting a prisoner with whom no such relationship existed.[32] As in *Pell*, the press was not denied access to any information that was available to the general public.

The *Saxbe* Court noted that the reporters' access to the prisons was not totally restricted. For instance, the press was allowed general access to the prisons for tours and photographs, interviews by mail were virtually unlimited, brief general conversations about prison conditions were allowed with random inmates, prison officials were required to provide background information about prisoner complaints, and a large volume of recently released prisoners provided an additional source of information to the

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[28] *Id.*

[29] 417 U.S. 843 (1974) (5-4 decision).

[30] *Pell*, 417 U.S. at 834. The *Saxbe* court ruled that the case was indistinguishable from and controlled by the *Pell* decision. *Saxbe*, therefore, reaffirmed the *Pell* holding that the press had no constitutionally protected access rights beyond those of the public. *Saxbe*, 417 U.S. at 850.

[31] *Saxbe*, 417 U.S. at 844 n.1. The Court quoted the pertinent policy from paragraph 4b(6) of Policy statement 1220.1A of the Federal Bureau of Prisons:

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

Id.

[32] *Id.* at 846. The Court expressed its view of the restrictions as follows:

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

Id. at 849.

reporters.[33] These examples of access combined with the state interest of avoiding substantial disciplinary problems in the prison population convinced a majority of the Court that the provision did not violate any First Amendment guarantee.[34]

Justice Powell, writing for the *Saxbe* dissent, downplayed the alternative means of gaining prisoner information as less effective and inferior to the personal interviews that are essential to the accurate reporting of prison conditions.[35] While agreeing that newsgatherers have no constitutional rights superior to members of the public, Powell argued that nondiscriminatory restrictions on press access did not negate the existence of a right to gather news. Powell believed that *Branzburg*, read broadly and in context, supports a constitutional guarantee to some prepublishing activities.[36] The press, he said, must act as the "necessary representative of the public's inter-

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[33] *Id.* at 847-48. Therefore, the Court believed that, other than the Policy Statement 1220.1A limit on personal press-inmate interviews, press members were afforded substantial opportunities to observe and report the federal prison conditions.

[34] *Id.* at 849-50.

[35] *Id.* at 852-56 (Powell, J., dissenting). Justice Powell urged that a personal interview is essential. Specifically, he stated:

> Only in a face-to-face discussion can a reporter put a question to an inmate and respond to his answer with an immediate follow-up question. Only in an interview can the reporter pursue a particular line of inquiry to a satisfactory resolution or confront an inmate with discrepancies or apparent inconsistencies in his story. Without a personal interview a reporter is often at a loss to determine the honesty of his informant or the accuracy of the information received.

Id. at 854.

[36] *Id.* at 858-59. Justice Powell expressed his view of the prior decision as follows:

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

Id. (citation omitted).

est" in protecting an uninhibited flow of information from the prison.[37] The press represents the instrumentality through which the public gains information about the affairs of the government.[38]

Believing that the guarantee of freedom of the press had been invaded, Justice Powell then conducted an analysis of whether the government had justified the need for such a restrictive policy. As discussed in *Pell*,[39] concentrated media attention can result in disciplinary problems from prisoners who become "public figures" or "big wheels."[40] While acknowledging the "big wheel" phenomenon and the potential for disruptive behavior, the dissent contended that less restrictive alternatives were available that satisfactorily mitigated the "big wheel" problems.[41]

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[37] *Id.* at 864.

[38] *Id.* Justice Powell supported his view of the press' role as the public's representative in newsgathering as follows:

> That function is recognized by specific reference to the press in the text of the Amendment and by the precedents of this Court: 'The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.'

Id. at 863-64 (quoting Mills v. Alabama, 384 U.S. 214, 219 (1966)(striking down a criminal statute prohibiting newspaper editors from publishing election day editorials urging citizens to vote in a particular manner)).

[39] *Pell*, 417 U.S. at 831.

[40] *Saxbe*, 417 U.S. at 866-68. Expert testimony at the trial indicated that whether increased media attention actually resulted in a leadership role for the inmate depended upon the inmate's individual personality and prior reputation. Therefore, selective attention received by certain inmates could, in some cases, result in disciplinary problems. *Id.* at 867 n.10.

[41] *Id.* at 866-68. Since disciplinary problems failed to automatically result from media attention, the breadth of the interview ban was questioned by the dissent:

> Moreover, the Bureau has not shown that it is unable to identify disruptive 'big wheels' and to take precautions specifically designed to prevent the adverse effects of media attention to such inmates. In short, the remedy of no interview of any inmate is broader than is necessary to avoid the concededly real problems of the 'big wheel' phenomenon.

Id. at 868 (footnote omitted).

Another prison access case, *Houchins v. KQED, Inc.*,[42] arose in 1977. As a result of an inmate suicide in a facility where conditions were allegedly contributing to mental health problems, KQED, a broadcasting company licensed to operate television and radio stations, sought access to inspect the prison environment.[43] Prison officials originally denied access. Subsequently, after a formal complaint was filed by a local organization, the sheriff established monthly public tours. The sheriff, however, banned all cameras and tape recorders, disallowed inmate interviews during tours, and prohibited the viewing of disciplinary cells and the portion of the facility in which the press purported that excessive violence and adverse conditions existed.[44] Prison officials justified these restrictions as necessary to ensure that inmate privacy was protected and that security problems did not arise from the creation of "jail celebrities."[45]

KQED argued that *Branzburg* and *Pell*[46] established a constitutionally guaranteed newsgathering right, and from that right, the petitioners urged the existence of "an

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[42] 438 U.S. 1 (1978).

[43] *Id.* at 4.

[44] *Id.* at 4-5.

[45] *Id.* at 3-5. "[The sheriff] asserted . . . that unregulated access by the media would infringe inmate privacy, and tend to create 'jail celebrities,' who in turn tend to generate internal problems and undermine jail security. He also contended that unscheduled media tours would disrupt jail operations." *Id.* at 5 (footnote omitted). The Court emphasized that inmates did not lose the fundamental right to privacy upon confinement. Inmates "are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters, however 'educational' the process may be for others." *Id.* at 5 n.2. The Court's recognition of privacy rights for inmates is important to the dignity protections for air crash victims that are developed later in this Comment. Dignity considerations may represent a need to limit the degree of access allowed the press. *See supra* note 199 and accompanying text.

[46] For a discussion of the *Branzburg* decision in which the Court acknowledged that newsgathering must be protected to prevent the obliteration of the First Amendment's freedom of the press guarantees, see *supra* notes 13-20 and accompanying text. For a discussion of the *Pell* case in which the court reaffirmed the constitutionally protected right to gather information, see *supra* notes 22-28 and accompanying text. KQED used both of those decisions to imply that special access rights should be permitted to investigate governmental abuses in the prisons about which the voting public had a right to know.

implied special right of access to government-controlled sources of information."[47] In short, KQED proposed that public access to prisons is required to prohibit prison officials from effectively concealing substandard conditions.[48] Although the *Houchins* Court agreed with some of the general assertions regarding the importance of jail conditions and the media's role of acting in the public's behalf,[49] the Court found no precedential support for an implication of special access rights.[50] Rather, the Court believed that it was the legislature's task to determine prison access policies.[51] Therefore, since no constitutional right to governmental information was accorded to the general public, the Court held that the media also had no right of access.[52]

Justice Stevens, in his dissent, acknowledged the majority's view that the press had no greater right of access than the public, but he felt that the denial of public access to information about prison conditions was itself unconstitutional.[53] The right to gather such information about public facility operations, he contended, is essential to the self-governance process intended by the Constitution's

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[47] *Houchins*, 438 U.S. at 7-8.

[48] *Id.*

[49] *Id.* at 8. In short, the Court said:

> We can agree with many of the respondents' generalized assertions; conditions in jails and prisons are clearly [important public] matters . . . . Beyond question the role of the media is important; acting as the 'eyes and ears' of the public, they can be a powerful and constructive force, contributing to remedial action in the conduct of public business. . . . [B]ut like all other components of our society media representatives are subject to limits.

Id.

[50] *Id.* at 14.

[51] *Id.* at 12. "Whether the government should open penal institutions in the manner sought by respondents is a question of policy which a legislative body might appropriately resolve one way or the other." *Id.*

[52] *Id.* at 15-16. "[U]ntil the political branches decree otherwise, as they are free to do, the media have no special right of access to the . . . [j]ail different from or greater than that accorded the public generally." *Id.* at 16.

[53] *Id.* at 27-28 (Stevens, J., dissenting). Precedential authority, Justice Stevens argued, shows that "the Court has never intimated that a nondiscriminatory policy of excluding entirely both the public and the press from access to information about prison conditions would avoid constitutional scrutiny." *Id.*

framers.[54] Particularly, the public needs information about the operation of prisons to monitor the publicly financed facilities and to ensure that the accused receives his constitutionally protected right to a fair, public trial, which includes the punishment phase.[55]

One of the final cases holding to the narrow view of press access rights was *Garrett v. Estelle*,[56] a 1977 Fifth Circuit case that involved a state of Texas media policy prohibiting the audio or video recording of executions.[57] In reversing the district court's order to allow the filming, the circuit court relied upon *Pell*[58] and *Saxbe*[59] for the proposition that the press had no greater right of access than the general public.[60] The *Garrett* court was not persuaded by the argument that the event's degree of public importance should affect the outcome of the decision. That is, even acknowledging the importance of the event, the court held that the right to gather news protected under the First Amendment was not impaired by the policy because the press had access to the same information as the public and no effort to conceal the execution process was involved.[61]

In summary, the cases from *Branzburg* to *Garrett* held

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[54] *Id.* at 32. In support of an information gathering right, Justice Stevens stressed that the safeguard "is not for the private benefit of those who might qualify as representatives of the 'press' but to insure that the citizens are fully informed regarding matters of public interest and importance." *Id.*

[55] *Id.* at 36-37. Prisons represent an integral part of a criminal justice system that is financed with public monies and operated by civil servants such that the public's right and need to know of its conditions is of paramount importance. The public must have faith in the criminal justice system. Stevens believed that "[i]t is important not only that the trial itself be fair, but also that the community at large have confidence in the integrity of the proceeding." *Id.*

[56] 556 F.2d 1274 (5th Cir. 1977), *cert. denied*, 438 U.S. 914 (1978).

[57] *Id.* at 1276 n.1. The pertinent section of the Texas Department of Corrections "Media Policy: Execution Proceedings" was quoted as follows: "No recording devices, either audio or video, [shall] be permitted either in the execution chamber or monitor room." *Id.*

[58] For a discussion of the *Pell* decision, see *supra* notes 22-28 and accompanying text.

[59] For a discussion of the *Saxbe* decision, see *supra* notes 29-41 and accompanying text.

[60] *Garrett*, 556 F.2d at 1279.

[61] *Id.* at 1278-79. At this point in the case law development, the Court still

firmly to the position that the press had no greater right of access to information than the general public. The cases did, however, establish a constitutionally protected right to gather news. The recognition of this right foreshadowed the evolution of access rights that occurred in subsequent opinions. Modern cases would, in fact, begin to recognize additional guarantees of access to which the press was entitled under the First Amendment.

B. *Modern Cases Imply Special Access Rights*

In 1980, the Supreme Court delivered the landmark decision of *Richmond Newspapers, Inc. v. Virginia*.[62] For the first time, the Court recognized that the public's right to attend criminal trials was guaranteed under the First Amendment.[63] The Court reversed the Virginia Supreme Court's holding and struck down a statute that allowed closure of a criminal trial at the presiding judge's discretion.[64] After a review of the historical origins of and a societal need for open criminal proceedings,[65] the Court

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focused upon a comparison between the press' and the public's right of access. Highlighting that equality, the Court opined:

> While we agree that the death penalty is a matter of wide public interest, we disagree that the protections of the [F]irst [A]mendment depend upon the notoriety of an issue. The Supreme Court has held that the [F]irst [A]mendment does not protect means of gathering news in prisons not available to the public generally, and this holding is not predicated upon the importance or degree of interest in the matter reported.

Id. at 1279.

[62] 448 U.S. 555 (1980) (plurality opinion). For a detailed discussion of the case, see Note, *Richmond Newspapers, Inc. v. Virginia: A New But Uncertain "Right of Access"*, 32 SYRACUSE L. REV. 989 (1981).

[63] *Richmond Newspapers*, 448 U.S. at 581.

[64] *Id.* at 560. The statute provided in pertinent part:

> In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated.

VA. CODE ANN. § 19.2-266 (1980).

[65] *Richmond Newspapers*, 448 U.S. at 564-73. The Court's recognition of the psychological as well as procedural function of trials is shown in the following statement:

> When a shocking crime occurs, a community reaction of outrage and

recognized that a freedom to listen must necessarily accompany the right to free speech and press.[66] In other words, the right to publicize what occurs at a trial would have little meaning if public observance of the proceedings were arbitrarily foreclosed.[67] Further, the Court noted that the trial judge had made no findings to support the closure order, no search for possible alternative solutions to ensure fairness, and no recognition of the constitutional right of the public to attend trials.[68] Absent a showing of these factors, the Court held that the criminal trial must be open to the public.

The *Richmond Newspapers* Court was far from unified in its opinion as to how the case should be analyzed. Seven separate opinions were voiced by the justices. Of particular note, Justice Stevens, in his concurrence, stated that "for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of

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> public protest often follows. Thereafter the open processes of justice . . . provid[e] an outlet for community concern, hostility, and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful 'self-help.'

Id. at 571 (citations omitted).

[66] *Id.* at 576. "In a variety of contexts [the] Court has referred to a First Amendment right to 'receive information and ideas.' " *Id.* (quoting Kleindienst v. Mandel, 408 U.S. 753, 762 (1972) (holding that executive decisions to exclude an alien from entering the country would not be weighed against the First Amendment interests of those wishing to personally communicate with the alien)).

[67] *Id.* at 576-77. The Court has increasingly regarded the press as the public's representative in modern society.

> That the right to attend may be exercised by people less frequently today when information as to trials generally reaches them by way of print and electronic media in no way alters the basic right. Instead of relying on personal observation or reports from neighbors as in the past, most people receive information concerning trials through the media whose representatives 'are entitled to the same rights [to attend trials] as the general public.'

Id. at 577 n.12 (quoting Estes v. Texas, 381 U.S. 532, 540 (1965) (holding that televising a criminal trial over the defendant's objections represents an infringement upon the fundamental right to a fair trial)).

[68] *Id.* at 580-81.

the press protected by the First Amendment."[69]

In a concurring opinion, Justice Brennan proposed the following two-step analysis: (1) conduct a review of the historical and current practices to determine if any special force of tradition warrants a right of access to proceedings, and (2) balance the value of protecting a right of entrance to the proceedings under the First Amendment against the importance of that particular process or governmental interest.[70]

Justice Brennan found the closure before the Court inappropriate because trials have historically been open and the publicity surrounding a trial serves to advance the fairness of the proceedings.[71] Arguing that the publicity arising from access to proceedings functions to avoid prejudice and arbitrariness and aids in accurate fact-finding, Brennan found that the governmental interest in allowing closure at the judge's discretion did not outweigh the purposes advanced by access.[72] Brennan concluded by noting that the statute allowed the trial judge to exercise "unfettered discretion" without the justification of countervailing interests that would overcome a presumption of openness.[73]

Justice Stewart, in his concurring discussion of openness in the trial process, also recognized the qualified nature of the right of attendance at trials. Citing *Houchins*,

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[69] *Id.* at 583 (Stevens, J., concurring). Justice Stevens stated in his concurrence:

> [T]he First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government, including the Judicial Branch; given the total absence of any record justification for the closure order entered in this case, that order violated the First Amendment.

Id. at 584.

[70] *Id.* at 589. The second balancing step is the standard that subsequent courts would adopt in analyzing access cases.

[71] *Id.* at 598.

[72] *Id.* at 593, 595-96.

[73] *Id.* at 597-98. Brennan stated: "Popular attendance at trials, in sum, substantially furthers the particular public purposes of [those] critical judicial proceeding[s]. In that sense, public access is an indispensable element of the trial process itself. Trial access, therefore, assumes structural importance in 'our government of laws' . . . ." *Id.* at 597 (footnote and citation omitted).

he stressed that even though physical limitations may require quotas on attendance, "[i]n such situations, representatives of the press must be assured access."[74] In short, Stewart believed that the trial judge's failure to consider either the press' or the public's right to attend the criminal trial necessitated reversal.

Following *Richmond Newspapers*, courts began to acknowledge a broader right of access to gather information by extending the right beyond the criminal trial setting. *Cable News Network, Inc. v. American Broadcasting Cos.*[75] involved the exclusion of broadcast media from certain White House events after the networks could not agree among themselves which of them would represent the others at restricted capacity events.[76] After a brief summary of the right of access cases, the federal district court granted a temporary restraining order to prevent implementation of the media exclusion policy.[77] The court held that the right of access to information was constitutionally protected; the press acted as the public's agent in such newsgathering; and, the right was qualified, not absolute.[78] The court suggested that acceptable bases for restricting access could range from physical space limitations to security considerations.[79]

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[74] *Id.* at 600 n.3. In assessing the qualified nature of the First Amendment right of access, Justice Stewart recognized that "[j]ust as a legislature may impose reasonable time, place, and manner restrictions upon the exercise of First Amendment freedoms, so may a trial judge impose reasonable limitations upon the unrestricted occupation of a courtroom by representatives of the press and members of the public." *Id.* at 600. For a discussion of the *Houchins* case, see *supra* notes 42-55 and accompanying text.

[75] 518 F. Supp. 1238 (N.D. Ga. 1981).

[76] *Id.* at 1239-40.

[77] *Id.* at 1240.

[78] *Id.* at 1244.

[79] *Id.* The newsgathering right acknowledged in the decision was a qualified right subject to reasonable limitations. In recognizing the right, the court said:

> [T]he rights guaranteed and protected by the First Amendment include a right of access to news or information concerning the operations and activities of government. This right is held by both the general public and the press, with the press acting as a representative or agent of the public as well as on its own behalf. Without such a right, the goals and purposes of the First Amendment would be meaningless. However, such a right of access is qualified, rather

After recognizing the existence of a protected newsgathering right, the *Cable News Network* court analyzed the restrictions upon that right by utilizing the *Richmond Newspapers* balancing test.[80] The court compared the interest served by the newsgathering activity with the government's interest protected by the restriction. Since the print media was represented at the White House events in question, information was able to flow to the public. The fact that many citizens predominantly rely upon television for information, however, weighed heavily in favor of the public's significant interest in protecting the broadcast networks' access to the White House.[81] The White House Press Office offered no compelling reason to exclude the television networks but only desired to avoid selecting any particular network over another.[82] In short, the government did not justify the burdensome restriction that reduced the public's access to constitutionally protected information.[83]

> than absolute, and is subject to limiting considerations such as confidentiality, security, orderly process, spatial limitation, and doubtless many others.

Id.

[80] *Id.* at 1244-45. For a discussion of the *Richmond Newspapers* balancing test, see *supra* note 70 and accompanying text.

[81] *Cable News Network*, 518 F. Supp. at 1245. In addition to the public's increased reliance upon television, the court noted that video coverage provides a visual impact, comprehensiveness, and immediacy not available in print media. Also, as the importance of the event increases, such as presidential activities, the court stated that the importance of providing the public the fullest information possible also increases. The conclusion, therefore, was that the public had a significant interest in continued press coverage at White House events. *Id. But cf.* Combined Communications Corp. v. Finesilver, 672 F.2d 818, 821 (10th Cir. 1982) (stating that the position of *Cable News Network* has been rejected in the context of the courthouse, where the electronic media can be constitutionally excluded on due process grounds).

[82] *Cable News Network*, 518 F. Supp. at 1245. Since the court previously decided that a limited right of access existed, the Press Office's reliance upon the legal premise that no right existed, failed to justify exclusion of the press from White House events. *Id.*

[83] *Id.* at 1245. The government failed to establish any overriding interest that would outweigh the protected right of access. The court stated:

> [T]he Press Office [has not] advanced any reason such as considerations of security or space limitation for refusing television coverage. . . . Having applied the proper balancing test, the Court finds

In 1982, the Supreme Court again looked into the right of access to trial proceedings. *Globe Newspaper Co. v. Superior Court*[84] involved a challenge to a statute that allowed automatic trial closure for sexual offense cases involving minor victims.[85] Citing *Richmond Newspapers*,[86] the Court discussed the right of access to criminal trials in terms of its historical perspective and its structural role in the judicial process.[87] The Court specified that the right was qualified, not absolute. Again, using the *Richmond Newspapers* balancing test, the Court held that validation of the statute required the state to establish a compelling interest that demanded mandatory closure.[88]

Although the *Globe Newspaper* Court agreed that the state had a strong interest in protecting victims from additional trauma and in encouraging similar victims to come forward, the Court did not believe that mandatory closure would ensure either goal.[89] The press was not barred from publishing information from transcripts. Furthermore, the Court indicated that not every victim or case

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> that the total exclusion of television representatives from White House pool coverage denies the public and the press their limited right of access, guaranteed by the First Amendment . . .

Id.

[84] 457 U.S. 596 (1982).

[85] *Id.* at 598 n.1. The following represents the pertinent part of the law:

> At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, . . . the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case.

MASS. GEN. L. ch. 278, § 16A (1981).

[86] For a discussion of the *Richmond Newspapers* case, see *supra* notes 62-74 and accompanying text.

[87] *Globe Newspaper*, 457 U.S. at 605-06. Specifically, the Court viewed access as an integral part of the judicial process. That is, "[p]ublic scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact finding process. . . . Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process." *Id.* at 606.

[88] *Id.* at 605-07. The Court held that for a state to deny access rights to prevent the disclosure of sensitive information, the state must establish that the exclusion is the result of a "compelling governmental interest" and tailor the restriction narrowly to protect that interest.

[89] *Id.* at 607.

warranted automatic, total exclusion. The closure rule, therefore, was held too restrictive and violative of First Amendment guarantees.[90]

Chief Justice Burger, in a strongly worded dissent, indicated that the Court should confine its review to whether the restrictions were reasonable and whether the state's interest exceeded the incidental effects to First Amendment rights.[91] In Burger's view, the interests of the state in protecting child victims were clearly more compelling than a right of access because the information was available through other sources, such as transcripts.[92]

The Court has also recognized a right of access in other instances. *Press-Enterprise Co. v. Superior Court*[93] involved a writ of mandate compelling the release of a voir dire transcript and vacating an order closing the voir dire proceedings of a rape and murder trial.[94] The Court again reviewed the essential role that the public has historically played in the trial process and reiterated its position that a presumption of openness can only be overcome by showing a substantial state interest.[95] Since the trial judge

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[90] *Id.* at 607-11. The court, however, repeated that the holding was considered only in the narrow mandatory closure context.

> In individual cases, and under appropriate circumstances, the First Amendment does not necessarily stand as a bar to the exclusion from the courtroom of the press and general public during the testimony of minor sex-offense victims. But a mandatory rule, requiring no particularized determinations in individual cases, is unconstitutional.

Id. at 611 n.27.

[91] *Id.* at 616 (Burger, C.J., dissenting).

[92] *Id.* Chief Justice Burger stated:

> Neither the purpose of the law nor its effect is primarily to deny the press or public access to information; the verbatim transcript is made available to the public and the media and may be used without limit. We therefore need only examine whether the restrictions imposed are reasonable and whether the interests of the Commonwealth override the very limited incidental effects of the law on First Amendment rights.

Id.

[93] 464 U.S. 501 (1984).

[94] *Id.* at 505-06.

[95] *Id.* at 504. "Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness." *Id.* at 509.

failed to consider alternatives that would avoid sealing the transcripts and closing the proceedings, the Court held that the presumption of openness had not been overcome.[96] Justice Marshall, in his concurring opinion, further stressed that closure or sealing should only be granted if it would be the least restrictive mode of protection available.[97]

In *Publicker Industries, Inc. v. Cohen*,[98] the Third Circuit expanded the right of access to civil proceedings.[99] The trial court closed proceedings related to a proxy fight involving a publicly traded corporation. Several news organizations unsuccessfully sought to have the proceedings opened.[100] By analyzing the cases confirming a right of access to criminal proceedings, the court came to the conclusion that the same First Amendment rights were available in civil proceedings.[101] Again, the court viewed the right of access as a presumption subject to rebuttal by showing both an overriding governmental interest and a

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[96] *Id.* at 513. In analyzing the lower court's holding, the Court specified:

> [T]he trial judge provided no explanation as to why his broad order denying access to information at the voir dire was not limited to information that was actually sensitive and deserving of privacy protection. Nor did he consider whether he could disclose the substance of the sensitive answers while preserving the anonymity of the jurors involved.

Id.

[97] *Id.* at 520-22. Justice Marshall's concurrence expressed the view that "prior to issuing a closure order, a trial court should be obliged to show that the order in question constitutes *the least restrictive means available* for protecting compelling state interests." *Id.* at 521 (emphasis in original).

[98] 733 F.2d 1059 (3d Cir. 1984). For other circuit court cases holding that a right of access to civil proceedings exists, see Westmoreland v. Columbia Broadcasting System, 752 F.2d 16 (2d Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

[99] *Publicker Industries*, 733 F.2d at 1071.

[100] *Id.* at 1063.

[101] *Id.* at 1067-71. The court summarized its analysis as follows:

> From the foregoing discussion it becomes clear that the public and the press possess a First Amendment and a common law right of access to civil proceedings; indeed, there is a presumption that these proceedings will be open. The trial court may limit this right, however, when an important countervailing interest is shown.

Id. at 1071.

lack of viable alternatives.[102] The district court's closure without an articulation of countervailing interests or the exploration of alternatives was ruled an abuse of discretion.

A New York District Court also addressed the press' First Amendment right of access. In *WPIX, Inc. v. League of Women Voters*,[103] an independent producer sought a preliminary injunction to prohibit the use of a mandatory press pool for coverage of a presidential debate.[104] The financial barriers of buying into the pool effectively reduced the opportunity for independent producers to provide first-hand coverage.[105]

After addressing whether the "state action" requirement was sufficiently satisfied, the court turned to the press' right of access.[106] Although the court ultimately denied the injunction because WPIX did not show that the preliminary relief was necessary, workable, or fair, the court did recognize a potential injury stemming from a permanent violation of the independent producers' First Amendment right to provide additional and unique coverage.[107] That is, the court affirmed that the press had a limited right of access to events in their capacity as agents for the public as well as on their own behalf as press members. Further, the court held that the only acceptable limits on that right were reasonable restrictions as to time, place, and manner of coverage that did not unnecessarily curtail guaranteed freedoms.[108]

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[102] *Id.* at 1070.

[103] 595 F. Supp. 1484 (S.D.N.Y. 1984).

[104] *Id.* at 1485.

[105] *Id.* at 1486.

[106] *Id.* at 1487-89. The court used the public nature of the debates, the substantial public campaign funds involved, and the institutionalization of the League of Women Voters' role in organized debates to establish sufficient state action to enable the review of the First Amendment access issue. *Id.*

[107] *Id.* at 1493.

[108] *Id.* at 1489-90. The court discussed the press' right of the access in the following statement: "Under the [F]irst [A]mendment, press organizations have a limited right of access to newsworthy events in their capacity as representatives of the public and on their own behalf as members of the press. . . ." *Id.* at 1489. The court continued its analysis of the qualified nature of the access right as follows:

The League presented no overriding governmental interest that would compel the restriction of a right of access guarantee.[109] None of the evidence indicated that space limitations necessitated preclusion of additional camera crews.[110] Additionally, the mere availability of the network's coverage may not have sufficiently provided an opportunity for WPIX's own unique style of coverage.[111] The reasons for exclusion, therefore, failed to outweigh the value of the protected access rights, particularly when alternative solutions were available.

Another step in the general development of the press' right of access occurred in *Society of Professional Journalists v. Secretary of Labor*,[112] which recognized a right of access to

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> While the Supreme Court has held that access by the press or public to public places such as streets and courts can be [reasonably] restrict[ed], 'the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge . . . the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places.'

Id. at 1490 (citations omitted) (quoting Cox v. New Hampshire, 312 U.S. 569, 574 (1941) (holding that the right of assembly was not unnecessarily infringed upon by a state statute prohibiting processions without a license)).

[109] *WPIX*, 595 F. Supp. at 1489-90.

[110] *Id.* at 1490-91. Insufficient governmental interests as well as the availability of alternatives prevented the court from deciding that the balance was in favor of the League. Specifically, the court summarized its evaluation of the government's interests as follows:

> No reason has been advanced at this point as to why it was necessary or appropriate for the major networks to take turns broadcasting the debates, when several broadcasters could have operated simultaneously; and no reason has been suggested as to why the League and networks did not devise a pool in which all the reasonably available camera space could be utilized.

Id. at 1490.

[111] *Id.* at 1491. WPIX contended that its style was unique because previous network coverage was more conservative and less candid than the viewpoint that WPIX would provide with camera techniques not used by the networks. Specifically, the intensity of the debate, revealed through split screens, candid reaction shots and close-ups, and a focus upon the dynamism of the event would create a visual perspective designed to convey the actual point of view of the participants. WPIX asserted that the networks' more conservative methods and coverage would affect the editorial product provided to the public. Therefore, by restricting access, WPIX argued that the public would not receive all of the information and visual perspectives to which it was entitled. *Id.*

[112] 616 F. Supp. 569 (D. Utah 1985).

administrative proceedings.[113] After a mining accident, the Secretary of Labor closed the investigatory hearings exploring the cause of the accident. Although no statutory requirement to conduct open hearings existed, the court reviewed whether a right of access was required under the First Amendment.[114]

The *Society of Professional Journalists* court extended the public's First Amendment right of access from the already established criminal and civil processes to administrative fact-finding hearings.[115] Initially, the court stated that difficulties arise upon acknowledging that the press has a right of access even when the public is excluded. The difficulties discussed included determining whether a person is a member of the press,[116] preventing a decrease in the benefits of a right of access when it is limited to the press,[117] and establishing guidelines that comply with previous Supreme Court rulings that refused a right of access

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[113] *Id.* at 578-79.

[114] *Id.* at 572. Statutory provisions empower the Secretary to hold public hearings but do not require him to do so. 30 U.S.C. § 813(b)(1982).

[115] *Society of Professional Journalists*, 616 F. Supp. at 573-74. The court noted that, although legislatures have traditionally more actively promoted open access, the courts have also found rights of access, particularly in the area of criminal trials. *Id.*

[116] *Id.* at 573. When a special right of access is granted, distinguishing between the press and the public becomes a problem.

> The difficulty of identifying members of the press has been made more difficult by the expansion of methods of reporting the news. The term 'press' can refer to the traditional media such as newspaper, magazine, television, and radio news reporters, as well as the non-traditional press such as writers of non-fiction books or articles and the creators of documentary films.

Id. at 573 n.3.

[117] *Id.* at 573. The Court viewed admitting the press preferentially as a potential problem.

> If members of the general public cannot attend a hearing, then the only information they can receive will have been filtered through the press. Although one might expect that the press would report fully on all matters of public interest, that is frequently not the case . . . . A press right of access is often an inadequate substitute for a right of access for all interested members of the public. Allowing the press to decide what the public will hear is subject to the same abuse, and perhaps to a greater degree, as the government itself deciding what the public and press will hear.

Id. (citations omitted).

based solely upon the freedom of the press guarantee.[118]

The court reviewed the Supreme Court cases allowing access to various phases of criminal proceedings and recognized that several circuit courts had also extended access rights to civil trials.[119] Additionally, the court discussed the *Cable News Network* decision granting a right of access to presidential debates.[120] Although the federal district court stated that the *Cable News Network* holding was too broad in its protection of access to a range of governmental activities,[121] the court approved of the *Richmond Newspapers* analysis,[122] as adopted in the *Globe Newspaper* decision.[123] Therefore, the *Society of Professional Journalists* court extended access to nonjudicial proceedings.[124]

The court reviewed the historical significance of the investigative hearing as well as the "procedural importance of openness" to determine whether access to administrative hearings was warranted.[125] The court found that ad-

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[118] *Id.* The court stated that the Supreme Court rulings in *Pell* and *Houchins* precluded basing a right of access solely upon the First Amendment. *Id.* For a discussion of the *Pell* decision, see *supra* notes 22-28 and accompanying text. For a discussion of *Houchins*, see *supra* notes 42-55 and accompanying text.

[119] *Society of Professional Journalists*, 616 F. Supp. at 574. For a discussion of circuit court cases involving access to civil proceedings, see *supra* note 98.

[120] *See supra* notes 75-83 and accompanying text.

[121] *Society of Professional Journalists*, 616 F. Supp. at 574-75. The acknowledgment of the extension beyond judicial proceedings to an administrative setting was critical to the overall development of the press' right of access. The court expressed reservations as to the broadness of the right and expected subsequent limitations. That is, the court stated that the "rather broad statement that the right applies to 'news or information concerning the operations and activities of government' will undoubtedly be limited in subsequent cases." *Id.* at 575 (quoting Cable News Network, Inc. v. American Broadcasting Cos., 518 F. Supp. 1238, 1244 (N.D. Ga. 1981)).

[122] For a discussion of the *Richmond Newspapers* case, see *supra* notes 62-74 and accompanying text.

[123] For a discussion of the *Globe Newspaper* decision, see *supra* notes 84-92 and accompanying text.

[124] *Society of Professional Journalists*, 616 F. Supp. at 574.

[125] *Id.* at 575-76. The court justified its extension of access rights in a statement that "[e]ven though it is unclear whether a majority of the Supreme Court would find such a right in this case . . . this court must merely try to follow the analysis adopted by the Supreme Court in similar cases and examine the same policy considerations the Supreme Court would examine." *Id.* at 575.

ministrative fact-finding hearings were akin to legislative proceedings and civil trials such that openness was a critical element of the disaster investigation.[126] The court reasoned that the hearings not only provided an emotional outlet to the public but also ensured that the proceedings were conducted so as to avoid future disasters.[127]

The court then evaluated viable alternatives and the government's interest in closing the investigative hearings.[128] Although transcripts were suggested as an alternative, the court found that transcripts were inadequate because of untimely information, a filtered end product, a potential loss of data, and the inability to duplicate in print the emotional impact of live hearings.[129] The court then reviewed the government's interest in closure to determine if it limited or completely outweighed the recognized right of access.[130] According to the court, a limit on attendance might be justifiable, but the mere possibility of unfounded rumors, which was the explanation offered by the Secretary, insufficiently established a reason for clo-

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[126] *Id.*

[127] *Id.* at 575-76. Specifically, the court theorized:

> Openness is crucially important to the type of hearings . . . conducted. . . . An investigation into the causes of the disaster can create an emotional catharsis that soothes the community sorrow. If someone is responsible, people become aware of that. If no one is at fault, people can become reassured of that. Access to the proceedings, where feasible, ensures that people realize that justice is being done.
>
> Moreover, openness ensures that [the agency] properly does its job.

Id. at 576. As discussed below in section V, this emotional outlet function of access may also be important in formulating guidelines that ensure press access to air crash sites. The severe shock combined with the usual magnitude of the disaster necessitates some means of allowing the victims' relatives and friends to acknowledge the occurrence of the crash, verify that the cause of the accident will be determined, and ultimately deal with the shock of the event. Because the general public closely identifies with the passenger victims and their families, an emotional outlet may also be important for the public.

[128] *Id.* at 577-78.

[129] *Id.* "Much of what makes good news is lost in the difference between a one-dimensional transcript and an opportunity to see and hear testimony as it unfolds." *Id.* at 578.

[130] *Id.* at 578-79.

sure.[131] In summary, the *Society of Professional Journalists* court held that both the press and public had a constitutional right of access to the hearings. The government had not established a compelling interest, such as confidentiality or security, that outweighed the access right, and no reasonable alternative means of securing the information was available.[132]

The cases reviewed above show the direction in which the courts have been moving over a fifteen year period in terms of the press' access rights. Initially, there was no recognized right to gather news or information. Currently, however, courts generally acknowledge the newsgathering right as a First Amendment guarantee. The press' right of access was originally equated to the rights of the general public.[133] This narrow view, however, has experienced continuous inroads.[134] Several of the concurring and dissenting opinions of the Supreme Court as well as lower court holdings suggest a recognition that the press may, in some circumstances, have a greater right of access than the general public.[135]

Courts have also refined the method of analysis to a balancing test that includes an evaluation of the alternative sources of information. That is, while considering the availability of the news from comparable methods, the test is whether the governmental interest outweighs the value

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[131] *Id.* at 579. "Administrative difficulties such as those advanced by the Secretary are a small price to pay to entrench the procedural safeguards that keep our society from creeping even slightly closer to totalitarianism. Such difficulties pale in the light of the constitutional rights of free speech and a free press." *Id.*

[132] *Id.*

[133] For a discussion of the *Branzburg* view, see *supra* notes 13-20 and accompanying text.

[134] For a discussion of the underlying development of access rights, see *supra* notes 62-74 and accompanying text regarding the *Richmond Newspapers* decision on criminal proceedings; *supra* notes 98-102 and accompanying text regarding the *Publicker Industries* case on access to civil proceedings; *supra* notes 112-132 and accompanying text regarding the *Society of Professional Journalists* holding on access to administrative proceedings.

[135] *See* Note, *supra* note 11, at 1313. "[B]oth the language and logic of *Richmond* indicate that the Court may be willing to take the next step and hold that in certain circumstances the press is constitutionally entitled to a greater degree of access than is the general public." *Id.*

of the right of access necessary to secure the information.[136] In judicial-type proceedings, the analysis also includes a review of the historical tradition and the procedural importance of openness.[137]

The role of a free press within the structure of our governmental system was initially discussed to provide a framework by which to review the development of the press' right of access and to aid in assessing what the right should be in terms of aviation accidents. Before identifying the broad concepts applicable to analyzing a special right of access by the press to aviation crash sites, however, a review of several cases that have applied some or all of these principles to accidents or disasters is presented.

III. DISASTER AND ACCIDENT ACCESS CASES

A. *Pre-Richmond Newspapers Decisions*

In *State v. Lashinsky*,[138] the Supreme Court of New Jersey upheld the disorderly conduct conviction of a press photographer who was arrested for his failure to obey a police officer's order to move back from the scene of an automobile accident.[139] The court recognized that the press may be entitled to special access beyond that accorded to the general public. Specifically, the court suggested that the public's need to be optimally informed may warrant access by the press when it would be reasonable to exclude the general public.[140] The court emphasized, however, that the press' right of access could be limited by reason-

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[136] For a discussion of the *Richmond Newspapers*' balancing test, see *supra* notes 62-74 and accompanying text.

[137] For a discussion of the function of access to proceedings, see *supra* notes 65, 73, 86, and 127 and accompanying text.

[138] 81 N.J. 1, 404 A.2d 1121 (1979).

[139] *Id.* at 1, 404 A.2d at 1131.

[140] *Id.* at 1, 404 A.2d at 1128. "[T]he First Amendment's concern that the public be optimally informed could in some instances render unreasonable restraints upon the scope of access to members of the press even where it would not be unreasonable to exclude the general public." *Id.*

able restrictions formulated to protect important governmental interests.

Even though *Richmond Newspapers* had not yet been decided, the New Jersey Supreme Court adopted a balancing of the competing public and governmental interests to assess the reasonableness of the restrictions imposed at the accident scene. The conviction was upheld because the officer's request to leave the immediate vicinity of the accident was reasonable. Factors considered sufficient to override the press' special right of access included a fear of fire, preservation of the scene for investigative purposes, and protection of the victim's personal effects.[141]

A dissenting justice, however, viewed the exclusion as unreasonable.[142] The dissenting judge stated that the purpose of a reporter or photographer at the scene of a crime or accident is to gather information for dissemination to the public, not for his personal edification.[143] This freedom to gather information is a constitutionally protected special right to acquire and publish the news. The State Police had issued a press card to the defendant identifying him as one who could proceed beyond the point normally allowed by the public, unless precluded by some overriding concern.[144] Therefore, since the only interfer-

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[141] *Id.* "[A] balancing of competing values is required in order to assess the reasonableness of a criminal statute or governmental sanction as applied to a member of the press engaged in his profession." *Id.*

[142] *Id.* at 1, 404 A.2d at 1131 (Pashman, J., dissenting). The dissent specified that "[he] part[ed] company with the majority . . . in its application of this 'reasonableness' test to the facts of this particular case. . . . As such, the 'special access rights' of the press to which the majority pays lip service are rendered meaningless." *Id.*

[143] *Id.* at 1, 404 A.2d at 1133. Justice Pashman viewed the free press clause of the First Amendment as designed to protect a newsgathering right:

> When on assignment, a journalist does not visit the scene of a crime or an accident simply for his own edification. He is there to gather information to be passed along to the public at large. It is precisely for this reason that the framers of the First Amendment accorded news media representatives a special right both to acquire and disseminate the news.

Id.

[144] *Id.* at 1, 404 A.2d at 1134. Testimony of the Chief of the State Police Information Bureau indicated:

ing conduct in which the defendant had engaged was photographing the scene, the dissenting judge stated that the officer's request to leave the scene was unreasonable in light of the press' special role in newsgathering.[145] Subsequent cases began using the analysis standards foreshadowed in *Lashinsky* and formalized in *Richmond Newspapers*.[146]

B. *Case Law Using a Richmond Newspapers Analysis*

In *Westinghouse Broadcasting v. National Transportation Safety Board*,[147] a federal district court held that a National Transportation Safety Board (NTSB) order limiting press access a crash site without establishing an overriding reason for the restriction violated the broadcasters' First Amendment newsgathering rights.[148] An airplane had crashed on public property, and contrary to initial reports that no lives had been lost, two passengers were missing and presumed dead.[149] Because of the loss of life as well as the delay in learning of the gravity of the accident, the crash received increased media attention. After a large

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> [The] press card identifies its possessor as a responsible individual engaged in a task deeply affected with the public interest, and thus 'as an individual who in the discretion of [a] police officer can proceed beyond that point where the public goes if it fits in with what is going on at the time.'

Id.

[145] *Id.* at 1, 404 A.2d at 1134-35. Justice Pashman described the expulsion from the scene as unreasonable for the following reason:

> The press card carried by defendant and shown to [the officer] identified [the] defendant as a responsible individual engaged in the important task of bringing a newsworthy event to the attention of the public at large. [The officer] therefore acted unreasonably in assuming that this responsible individual—as opposed to the non-media bystanders—might tamper with evidence lying about or abscond with the victims' personal property. In the absence of proof to the contrary, he should rather have presumed that defendant would attend only to his job of photographing the scene.

Id. at 1, 404 A.2d at 1135.

[146] For a discussion of the *Richmond Newspapers* balancing test, see *supra* notes 62-74 and accompanying text.

[147] 8 Media L. Rep. (BNA) 1177 (D. Mass. 1982).

[148] *Id.* at 1179.

[149] *Id.*

number of media personnel arrived on the scene, the NTSB restricted access to one camera crew and one reporter for one hour daily.[150] The crew restriction was subsequently removed, but the order retained the time limit.[151]

The protection of investigative evidence was the primary governmental interest asserted by the NTSB. Testimony indicated that nonmedia persons entered the crash site and removed "souvenirs." Media personnel, however, had apparently not interfered with any items at the scene.[152] Since the NTSB's only interest in the wreck through the point of the removal of the plane and its debris was in assuring that no tampering with the evidence occurred, the NTSB's role in controlling access was limited to monitoring the site. The primary responsibility for the scene rested with the airport.[153]

The NTSB also argued that the press had no greater right of access than the general public. The court reviewed the cases from *Branzburg*[154] to *Richmond Newspa-*

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[150] *Id.* To prevent interference with the investigation, the board member and investigator in charge issued restrictions to limit the number of media personnel at the scene. *Id.*

[151] *Id.*

[152] *Id.* at 1179-80. Testimony revealed the following:

> [P]ersons not connected with the media, persons who presumably were employees of . . . air-lines or office workers . . . were taken out to the scene, and . . . walk[ed] away with parts of the wreckage or possibly things that might be called, in a sort of gruesome sense, souvenirs of the tragedy, . . . but there is certainly no indication at all in the evidence that any news personnel were the persons who walked off with souvenirs or who otherwise tampered in any way with the remnants of the crash.

Id. at 1179.

[153] *Id.* at 1180. The judge summarized the parties' roles as follows:

> The only interest of the Safety Board in this wreck today and until it is removed, which is expected to be some days from now, is in assuring that there is no tampering with it, that its position is in no way changed, that everything is left just as it is. The Safety Board, thus, with respect to the scene itself, has only an indirect and supervisory or monitoring type interest. The responsibility is principally that of [the airport].

Id.

[154] For a discussion of the *Branzburg* case, see *supra* notes 13-20 and accompanying text.

pers[155] and *Cable News Network*[156] in reaching the conclusion that, upon balancing the interests of the government and the press and reviewing alternative sources of information, the press, as an agent of the public, may be allowed special access to places to gather news.[157] Even the NTSB's investigative manuals acknowledged that a crash is a newsworthy event to which the disclosure of information would be advantageous in the prevention of "premature speculation" and avoidance of injecting controversy. Further, the manual mandated media permitted access, unless concerns such as order, security, or spatial limits required closure of the scene.[158]

In sum, the *Westinghouse Broadcasting* court held that the time restrictions were contrary to the press rights that had developed over a decade. The media should have been allowed to photograph the scene and to secure news about the aircraft salvaging operations and the search for

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[155] For a discussion of the *Richmond Newspapers* decision, see *supra* notes 62-74 and accompanying text.

[156] For a review of the *Cable News Network* case, see *supra* notes 75-83 and accompanying text.

[157] *Westinghouse Broadcasting*, 8 Media L. Rep. at 1181-83. "[T]he law has advanced since . . . *Branzburg* . . . ." *Id.* at 1182. By that statement, the judge referred to his analysis of *Richmond Newspapers* and *Cable News Network* in which he determined that, although *Branzburg* had not been directly overruled, the cited decisions indicated that both the press and the public have a qualified right of access to information concerning governmental activities. *Id.*

[158] *Id.* at 1184. The court quoted the following passage from the NTSB's investigative manual dated April 25, 1980 from a section on page 10-10 entitled "Coordination with Office of Public Affairs":

> News reporters and photographers have a function and responsibility to carry out in the reporting of news, and an aircraft accident is a newsworthy event. The investigator in charge must reconcile cooperation with the press with NTSB policies on the disclosure of information. The NTSB gives out factual information which is accurate and substantiated. To do otherwise would possibly lend weight to premature speculation in the news and inject controversy into the investigation outside the realm of objective fact-finding.

Id.

NTSB regulations indicate that the release of information regarding the field investigation must be limited to factual developments and released only by a board member. 49 C.F.R. § 831.13 (1989). The manual provisions quoted above, however, emphasize that the release of factual information serves an important purpose in maintaining control and preventing controversial speculations.

missing persons.[159] The court held that no reasonable basis for the order existed because the press could obtain the information without touching the wreckage, the plane was in the open, and the runway was not in use.[160] Also, the press had no alternative means of acquiring the information. The order, therefore, was ruled an unconstitutional limitation on the press' right of access.[161] The Court instructed the airport to issue any future limits in writing, including justifications for all limitations.[162]

In *City of Oak Creek v. King*,[163] a recent airplane crash case, the court upheld a reporter's conviction for disorderly conduct.[164] After an air crash, the local sheriff's department secured the site to allow only emergency personnel and equipment onto the scene.[165] Significantly, only one route of direct access was available to emergency vehicles. An unauthorized television crew proceeded through the roadblock, and an officer instructed the crew to leave the area. Although three of the crew eventually complied with the officer's instructions, the fourth refused to cooperate, jumped a fence, and ran to the top of a hill. Upon his repeated refusal to leave, officials arrested the reporter. Less than thirty minutes after the unauthorized entry, the airport director held a news briefing and escorted media representatives to the site as required by the

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[159] *Westinghouse Broadcasting*, 8 Media L. Rep. at 1184.

[160] *Id.* More specifically, the judge said:

> In this instance, where the runway is not in use, where there is a fusilage [sic] of an airplane out in the open, where cameramen and news reporters can fulfill their functions without touching the wreckage or stepping upon it or moving upon it, where the board's investigation with respect to an inspection of the wreckage is temporarily suspended, there is, in my view, no basis for the order that still remains in effect limiting the access of the plaintiff's camera-men and reporters to a one-hour-per-day period.

Id.

[161] *Id.*

[162] *Id.* at 1185. The court also admonished the parties for failing to negotiate a cooperative arrangement without resorting to legal avenues and the need for constitutional principles.

[163] 148 Wis. 2d 532, 436 N.W.2d 285 (1989).

[164] *Id.* at 532, 436 N.W.2d at 293.

[165] *Id.* at 532, 436 N.W.2d at 286.

airport's operating guidelines.[166]

Relying upon *Branzburg*,[167] *Pell*,[168] and *Houchins*,[169] the Wisconsin Supreme Court held that the reporter, as a member of the press, had no right of access beyond that of the public—the right to *lawfully* gather information.[170] The court specifically refused to recognize that *Richmond Newspapers* might afford the press any special access rights. The court interpreted *Richmond Newspapers* as merely confirming a right of access for the public and the press to criminal proceedings or courtrooms.[171] The court distinguished an emergency site from a courtroom setting that can be closely monitored and controlled.[172]

The majority's reasoning, however, appeared inconsistent in some areas. Although the decision stated that no special right of access exists, the court emphasized that a right of access had not been denied because other reporters were escorted to the scene shortly after the disorderly conduct incident. Moreover, despite the court's insistence that no constitutionally protected right existed, the court conducted a balancing test in ruling that the government's interest in maintaining order and attending to the

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[166] *Id.* at 532, 436 N.W.2d at 286-87. The court noted that the airport's "Media Guide For Airport Emergencies" provided that "no representatives of the media will be permitted to enter non-public/restricted areas of the airport without an authorized escort." The guide also indicated that the airport's rationale for such regulations was to "accommodat[e] between the news media's primary responsibility to cover situations at the county's airport that at times are dramatic and of major interest to the public and the airport staff's primary responsibility to control the situation and render emergency services as needed." *Id.* at 532, 436 N.W.2d at 287.

[167] For a discussion of the *Branzburg* case, see *supra* notes 13-20 and accompanying text.

[168] For a discussion of the *Pell* decision, see *supra* notes 22-28 and accompanying text.

[169] For a discussion of the *Houchins* case, see *supra* notes 42-55 and accompanying text.

[170] *City of Oak Creek* at 532, 436 N.W.2d at 291-93.

[171] *Id.* at 532, 436 N.W.2d at 292. For a discussion of the *Richmond Newspapers* decision, see *supra* notes 62-74 and accompanying text.

[172] *City of Oak Creek* at 532, 436 N.W.2d at 292-93. "[T]here is a difference between an institution allowing news gatherers priority of access on its own accord, in a setting in which the institution may closely control and monitor access, and this court mandating access in an emergency situation." *Id.*

needs of the injured outweighed the reporter's interest in "beat[ing] out his competition" and meeting his deadline.[173]

The three-justice dissent, however, concluded that reporters may function as representatives for the public in limited access situations.[174] The dissent stated that, in this case, the defendant's conduct did not obstruct the state's interests in safety, law enforcement, and medical attention.[175] The dissent further recognized that the defendant did not seek an unqualified right of access to the accident scene. Rather, he sought access to an observation vantage point that would allow the gathering of information about the accident and government operations without interfering with emergency personnel's efforts to protect the lives and property of the victims.[176] Further, the dissent cited *Richmond Newspapers* for the implicit proposition that the media could, in circumstances of limited seating or space, act as surrogates for the public.[177] Rely-

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[173] *Id.* The court further stated:

> The defendant, here, chose to disregard the government's efforts to establish order, set himself and his interest above the law, diluted law enforcement efforts to assist those in need, and by so doing elevated his own interest and concerns above the welfare of the persons involved in the tragic accident and the government's efforts in its law enforcement concerns.

Id. at 532, 436 N.W.2d at 293.

[174] *Id.* at 532, 436 N.W.2d at 296 (Abrahamson, J., dissenting).

[175] *Id.* at 532, 436 N.W.2d at 294. The dissent recognized:

> The state has a significant interest in keeping people away from the site of an accident or crime to expedite assisting victims, to preserve evidence or to protect the public from injury. . . [but] the defendant was not interfering with or obstructing emergency personnel and that neither he nor other observers were in danger.

Id.

[176] *Id.* at 532, 436 N.W.2d at 296. The dissent suggested that the argument was not:

> that the government must always allow news gatherers access to an accident scene. Rather the defendant ask[ed] [the] court to hold that governmental personnel must give news gatherers access to a position at an accident from which they can observe emergency personnel in action unless exclusion of news gatherers from all locations is required to enable emergency personnel to perform their tasks.

Id.

[177] *Id.* The dissent also stated:

ing upon the press' role as the "eyes and ears" of the public, the dissent urged that a special right of access to limited space events, including accidents and disasters, should exist.[178]

The cases presented in this section demonstrate that courts generally concede that the press may have special access rights in accident and disaster circumstances. Most courts, however, tend to weigh governmental interests more heavily than this right of access to uphold official decisions made in emergency situations. As discussed below, a state may provide additional protections for the rights of the press.

C. *State Protections of Access*

In an apparently unique situation, California has enacted a statute that affords a special right of access for the press to accidents and disasters.[179] In *Leiserson v. City of San Diego*,[180] a television news cameraman filed an action

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> While the United States Supreme Court has not explicitly recognized a constitutional protection for news gatherers' access to an accident scene, the Court has recognized that media representatives serve as surrogates for the public. . . . Chief Justice Burger recognized in the *Richmond Newspapers* case that government authorities have allowed priority access to news gatherers in situations where public access is limited by circumstances.

Id. *See supra* notes 62-74 and accompanying text regarding the *Richmond Newspapers* acknowledgment of the press' right of access in limited space situations.

[178] *City of Oak Creek* at 532, 436 N.W.2d at 297.

[179] A review of state laws reveals a general right to free speech and press, usually under a constitutional provision. But, only California appears to have extended protection to a statutory right of access to disasters and accidents. The California statute sections pertinent to the discussion of statutory protections include the following:

> (a) Whenever a menace to the public health or safety is created by a calamity such as flood storm, fire, earthquake, explosion, accident, or other disaster, . . . [peace] officers . . . may close the area where the menace exists for the duration thereof by means of ropes, markers or guards to any and all persons not authorized by the . . . officer to enter or remain within the enclosed area. . . .
>
> (d) Nothing in this section shall prevent a duly authorized representative of any news service, newspaper, or radio or television station or network from entering the areas closed pursuant to this section.

CAL. PENAL CODE § 409.5(a),(d) (West 1990).

[180] 184 Cal. App. 3d 41, 229 Cal. Rptr. 22 (1986).

against the city and a police officer for violating the California statute, which protected his right of access to an air crash site that was closed to the public.[181] A jetliner and a small private plane had collided in midair, crashing into a residential area.[182] While filming the crash site, the cameraman was repeatedly told by officials to leave the scene. Upon his failure to comply, police arrested the cameraman.[183]

Although the officers were unaware of the statutory protection to which the press was entitled, officials had designated a special press area closer to the site than the area for nonpress bystanders. The officers knew of the cameraman's status as an authorized media representative, but none of the officers informed the defendant of the special area.[184] Additionally, the arresting officers were unaware that a question existed as to whether the crash was criminally caused, which was important to the court's ultimate holding.[185]

Safety was the only stated basis for the exclusion of the cameraman.[186] Since the statute implicitly recognizes a dangerous situation and still mandates access to the press, exclusion of media personnel on that basis, according to the court, represented an improper justification.[187] Exclusion, therefore, required some reason other than safety, such as a reasonable expectation that interference with emergency personnel would occur.[188] The city failed to establish that interference would have occurred or that access was restricted only to the extent necessary to prevent

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[181] *Id.* at 44-45, 229 Cal. Rptr. at 24.

[182] *Id.* at 44, 229 Cal. Rptr. at 24.

[183] *Id.* at 45-46, 229 Cal. Rptr. at 24-25. The arrest was subject to a local ordinance criminalizing a failure to comply with the lawful order of a police officer. *Id.*

[184] *Id.* at 44-46, 49, 229 Cal. Rptr. at 24-26, 28.

[185] *Id.* at 44-49, 229 Cal. Rptr. at 25-26, 28.

[186] *Id.*

[187] *Id.* at 50, 229 Cal. Rptr. at 28.

[188] *Id.* at 50-51, 229 Cal. Rptr. at 28-29. The court said that it did "not believe that in enacting section 409.5(d), the Legislature intended that media access be unrestricted when the presence of reporters or photographers actually interferes with the work of emergency crews." *Id.* at 51, 229 Cal. Rptr. at 29.

actual interference. The court, however, affirmed the decision for the city because the press legitimately could be excluded from the scene of a criminal investigation. The validity of the exclusion was not negated by the arresting officer's lack of personal knowledge as to the existence of the criminal investigation.[189]

A California Attorney General's opinion offered an additional interpretation of the statute. The opinion addressed whether California Highway Patrol officers could assist federal authorities in excluding all unauthorized persons, including the media, from the crash scene of a military airplane that possibly contained classified material.[190] The Highway Patrol requested the opinion after they were called upon to assist in securing the crash site of an Air Force B-52 bomber. The state officers did not independently decide to close the area but merely assisted the federal authorities in excluding the media.[191]

Under the Supremacy Clause,[192] federal statutory regulations controlled the ruling.[193] Arrests resulting from entry into a military crash site represent violations of federal laws that prohibit the unauthorized entry into designated military areas and the photographing of military equip-

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[189] *Id.* at 53, 229 Cal. Rptr. at 30-31. Although the court posed a question as to whether the scene of the crime exclusion was "a post hoc justification for an exclusion order which was in reality based on reasonable, but nonetheless legally erroneous, grounds," the court necessarily subjected the lower court ruling to a substantial evidence standard of review that required an affirmation. *Id.* at 53, 229 Cal. Rptr. at 30. Also, the court noted that, recognizing the chain of command within the police force, if a superior officer was aware of the criminal investigation and issued orders thereunder, the lack of knowledge as to the reason for the exclusion on the part of the arresting officer was irrelevant. *Id.*

[190] 66 Op. Att'y Gen. 497 (1983). After a military aircraft crash, military personnel are instructed to cordon off an appropriate area around the scene to protect any classified materials from being compromised. Also, the restriction of such site constitutes the establishment of a National Defense Area. 50 U.S.C. § 797 (1982). A statute also prohibits the photographing of vital military equipment. 18 U.S.C. § 795 (1982). The vital military or naval installations or equipment protected by the statutes are executively defined to include such items as aircraft, engines, tools, equipment, maps, charts, books, etc. Exec. Order No. 10,104, 15 Fed. Reg. 598 (1950).

[191] 66 Op. Att'y Gen. at 497.

[192] U.S. CONST. art. VI, § 2.

[193] For a discussion of the controlling statutory provisions, see *supra* note 190.

ment. Thus, the media could not demand access under the California statute that normally precludes their exclusion from accident sites.[194] Furthermore, the Attorney General stated that the governmental interest in protecting classified materials completely overrides any potential right of access under the First Amendment.[195] In short, if a Highway Patrol officer assisting federal authorities confronts a party who is unlawfully at a military crash site or photographing vital military equipment, the arrest would not violate the California special access statute.[196]

As originally stated, California's statutory right of access to accident and disaster areas appears unique. Even ignoring California's special protections, the state cases, at a minimum, support the proposition that the press may have special access rights to some accidents. The next section uses the concepts and analyses from these accident cases to establish some guidelines to determine when the press should be allowed access to air crash sites.

IV. SHOULD THE PRESS HAVE SPECIAL ACCESS RIGHTS TO CRASH SITES?

The above evolution of case law supports the proposition that the press has a right of access to air crash sites. This access right can be reasonably restricted, and the *Richmond Newspapers*[197] balancing test aids in determining the extent of that right. That is, by reviewing alternatives to exclusion and weighing the governmental interests in excluding the press from accident scenes against the value of press access, guidelines emerge as to if and when officials should permit such access. When access is allowed, officials must also assess whether all proposed restrictions are reasonable. Therefore, this section outlines (1) the

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[194] For a discussion of the California access protection statute, see *supra* note 179.

[195] 66 Op. Att'y Gen. at 497.

[196] *Id.*

[197] For a discussion of the *Richmond Newspapers* decision, see *supra* notes 62-74 and accompanying text.

governmental interests involved in sealing a crash site, (2) the reasons press access to the accident scene should be protected, (3) the possible alternatives to exclusion, and (4) whether various access limitations are reasonable.

A. *Governmental Interests*

An array of governmental interests exist. The protection of lives by ensuring prompt rescue and medical attention is one of the foremost reasons for excluding members of the press who may inadvertently interfere with the administration of aid. The safety of emergency personnel and bystanders also leads to a need for exclusion in cases in which fire, explosions, or related concerns may arise. Space constraints also become critical in the face of rendering aid to the injured when access routes are limited, necessitating the exclusion of all nonessential parties.

Security is also an important governmental interest. The protection of the passengers' and crew's personal property as well as any cargo may require restricted access. Since one of the goals of an investigation into the cause of a crash is the prevention of future accidents, preservation of the scene of the crash for investigatory purposes is a high priority governmental interest that may mandate limiting entry onto the site.[198]

To a certain extent, limiting access to the crash area may serve to protect the privacy and dignity of the victims and their families. As acknowledged for the prisoners in *Houchins*,[199] the privacy of air crash victims should not be overlooked in an effort to protect First Amendment access rights for the press. While newsgathering serves a very important function in our governmental system, the victims and their families are entitled to retain a certain level of dignity as they cope with the shocks and effects of the tragedy.

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[198] For a discussion of NTSB investigatory regulations and operating policies, see *supra* note 158 and accompanying text.

[199] For a discussion of *Houchins*, see *supra* notes 42-55 and accompanying text.

B. *Value of Press Access*

The press and the public, on the other hand, also have various interests in gaining a right of access to crash sites. For example, as explained in *Society of Professional Journalists*,[200] access to the scene can bolster confidence in the investigatory and corrective processes as well as provide an emotional catharsis for the families and friends of missing persons or victims. The magnitude of an air crash disaster and the sudden shock experienced by the victims' families and friends result in a need for an emotional outlet for a fairly large and widespread group. As the individuals cope with their grief, a strong need arises for information about the victims and facts surrounding the cause of the crash. Since a large portion of the general public frequently travels by air and may have also experienced the unexpected loss of a relative or friend, the public may closely identify with the crash victims and their families. Emotional outlets, therefore, may be important for the general public as well as for the victims' families and friends.

Other public interests in protecting a right of access for the press exist. Since spatial limitations will often preclude open access to all concerned parties, the press, recognized as the representatives of the public under such cases as *Richmond Newspapers*,[201] should receive access to fulfill the public's right to know. The NTSB, as explained in *City of Oak Creek*,[202] also advocates cooperation with the media to avoid speculation and controversy while rescue, salvage, and investigatory operations proceed.

Furthermore, courts recognize the public's increased reliance upon the media to provide the information necessary for them to ensure that no governmental abuses oc-

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[200] For a discussion of the *Society of Professional Journalists* decision, see *supra* notes 112-133 and accompanying text.

[201] For a discussion of the *Richmond Newspapers* decision, see *supra* notes 62-74 and accompanying text.

[202] For a discussion of the *City of Oak Creek* decision, see *supra* notes 163-177 and accompanying text.

cur.[203] Abuses could occur in the form of withheld information as to the number of victims or other basic information about the flight. The cause of the crash in terms of crew error, mechanical difficulties, or terroristic-type origins could also be improperly withheld.[204] Limited access will guard against abuses and serve to maintain confidence in the airline industry as a whole.

C. *Alternatives to Exclusion*

Strong interests exist for advocating some exclusionary practices by the government as well as for protecting the press' right of access. While balancing these interests against each other, alternatives must also be considered. Acceptable alternatives to exclusion, however, are few. The news decreases rapidly in quantity and significance as the scene is cleared of victims and wreckage, and the value of the information provided to the public to guard against abuses becomes minimal. Although access to investigatory hearings would provide information that might serve some of the purposes of access, other functions, such as emotional catharsis, prevention of speculation, and confidence in the on-site corrective procedures, are inadequately served with stale information from a hearing. The outcome of the balance will generally lie somewhere between total exclusion and unlimited access.

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[203] For a discussion of the public's reliance upon the media for information, see *supra* notes 28, 67, and 81 and accompanying text.

[204] It may be argued that crashes are sensationalized to increase newspaper sales or the size of the viewer or listener audience, but even if this contention were true, it does not negate the interests that support a need for access protections. First, the dramatic nature of a crash will substantially achieve audience increases without the use of misleading headlines or stories. Secondly, releasing information in a prompt manner will diminish the number of initial inaccurate reports regarding the cause of the crash. The NTSB acknowledges this control tactic by encouraging cooperation to avoid undue speculation and controversy. Finally, the control of governmental abuses is promoted by the press' independent investigation of official conduct. The potential for occasionally misleading headlines is insufficient to overcome the public's right to secure as much information as possible to evaluate governmental activities. The press can be adequately controlled through reasonable restrictions upon access in combination with the criminal and civil liabilities that normally restrain reporter conduct. Competition in the marketplace also discourages false or inadequate investigative reporting.

D. *Reasonable Restrictions*

Total exclusion may be reasonable in some circumstances. National security interests may be implicated in crashes involving military planes, such as the one described in the California case above.[205] Also, if extreme danger results from explosive cargo or similar conditions, exclusion may be appropriate. Finally, the location of the crash may be such that any admission of the media would cause unavoidable interference with emergency personnel, thereby justifying exclusion.[206] The normal crash site, however, should not require total exclusion but should only entail some limitations.

If total exclusion is not required, the next issue becomes whether any restrictions are necessary to reasonably protect governmental interests. For example, the number of individuals admitted may legitimately need to be limited. To determine who should be admitted, a satisfactory method by which to identify who should be classified as a member of the press would be necessary.[207] If the number of qualified press members seeking access exceeds the available space, possible solutions to ensure protection of press access rights include a standing press pool, alternating periods of admission between reporters,

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[205] For a discussion of the effect of special statutory protections in California upon military crash situations, see *supra* notes 190-196 and accompanying text.

[206] For example, an Avianca jetliner crashed into a secluded, wooded area of New York in January 1990. The area is served by only one road, which became clogged within 45 minutes by designated emergency vehicles, unrequested rescue companies, onlookers, and the press. Rescue operations were severely hampered until the traffic jam was brought under control. *See* N.Y. Times, Jan. 27, 1990, at 31, col. 5

The Avianca crash, however, highlights public involvement in the governmental process that may result from media coverage. The televised images of children injured in the crash increased public support for a Federal Aviation Administration proposed rule requiring airlines to allow parents to purchase a separate ticket for young children, enabling the use of a child-safety seat. The coverage also improved parental awareness of the need to purchase child-restraint seats certified for air travel. Most airlines have voluntarily allowed the purchase of separate tickets or the use of vacant seats to promote child safety. *See* N.Y. Times, Jan. 28, 1990, at 29, col. 1.

[207] For a discussion of the problems related to identifying members of the press, see *supra* note 116 and accompanying text.

or negotiating prearranged agreements between airports and local media personnel.

If access to the site must be confined to one area, the location of the observation area is crucial. As discussed in *City of Oak Creek*,[208] the press is not demanding admission to a point that would endanger lives by interference. A controversy arises, however, when the press is denied a sufficient vantage point from which newsgathers can compile information. Since the press is acting as the public's representative, the point should be closer than that allowed other bystanders but not so close that it results in interference.

Other governmental interests can also be protected without total exclusion. If geographic constraints give rise to an interference concern, the media could be excluded until aid has been rendered to those passengers and crew members that suffered life-threatening injuries. If a threat of fire or explosion exists, reporters could be denied access until emergency personnel have resolved the crisis.

The need to protect the privacy and dignity of the crash victims, however, presents one of the more difficult issues. As discussed above in *Cable News Network*,[209] the public increasingly relies upon television coverage to attain their information regarding governmental and other newsworthy activities. Therefore, although exclusion of video coverage would generally serve to protect the victims' privacy interests, it is doubtful that a court would uphold the isolation and exclusion of broadcast journalists when other reporters are admitted.[210] The interest in access would appear to outweigh the governmental interest in

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[208] For a discussion of the *City of Oak Creek* case, see *supra* notes 163-177 and accompanying text.

[209] For a discussion of the *Cable News Network* decision, see *supra* notes 75-83 and accompanying text.

[210] Notwithstanding any potential limits on televising criminal proceedings, increased reliance upon electronic media and the unique information provided by a visual perspective would seem to discourage exclusion of broadcast personnel from disaster scenes. *See supra* notes 81 and 111 and accompanying text.

protecting privacy. The competitive forces of the marketplace and viewer or listener demands for dignified coverage in combination with the usual criminal and civil liabilities governing press conduct must be relied upon to exert pressure upon the media to respect the rights and dignities of the victims and their families.

Finally, preservation of the investigation scene and protection of personal effects should not ordinarily require restrictive measures. The function of the press in gathering news for the public and the issuance of press credentials should result in a presumption that members of the media will not unwarrantedly interfere with rescue, salvage, or investigatory operations at an accident scene. Total exclusion or arrests should not occur unless the press member has demonstrated that they will not operate within this presumption. In short, although the Supreme Court has yet to expressly acknowledge a special right of access for the press, the case law seems to support a presumptive right of admission for the press under the First Amendment, unless compelling governmental interests require closing or limiting access to the accident scene.

V. CONCLUSION

Litigated cases of press exclusion from air crash sites have infrequently arisen. Generally, airport and airline personnel seek to disseminate information as rapidly as possible to reduce fear and panic among parties related to those on board the airplanes and to maintain confidence in the consumer and financial markets. Consequently, controversial exclusions are more likely when smaller aircraft and airports are involved because of the absence of sophisticated airline or airport media liaisons. In those situations, market confidence is a relatively insignificant factor and fewer passengers are involved.

The protection of the press' First Amendment rights, however, should be equally important regardless of the magnitude of the accident. A right to gather news under the First Amendment currently exists, and although not

yet acknowledged by the Supreme Court, a special implied right of access to the scenes of crime and disaster has been recognized by several lower courts. Furthermore, a method of analysis was established by *Richmond Newspapers*.[211] A balancing of the government's interests in excluding the media against the value of protecting the press' right of access is conducted in conjunction with a review of alternatives to exclusion.

Several observations result from an analysis of the interests in excluding the press from the scene of an air crash. Specifically, the government has an interest in protecting lives, property, and investigatory evidence. On the other hand, confidence in the investigation and airline industry, emotional catharsis for the victim's relatives, and ensuring that adequate information reaches the public to enable them to monitor against governmental abuses are some of the reasons for protecting the press' right of access as agents of the public.

A clear rule does not emerge indicating that the press should always be admitted. In fact, cases such as protection of military classified materials, avoidance of extreme danger to the media, and prevention of unavoidable interference with emergency personnel may warrant total exclusion. Generally, however, at least limited access should be provided.

Access must include admission to an observation point that allows sufficient newsgathering without interference, but other reasonable restrictions are permissible. Depending upon the circumstances, requiring press credentials and limiting the number of persons to be admitted are some of the restrictions that may be acceptable. Admission may also be delayed when geographic constraints or other short-term crises exist. Courts generally construe the reasonableness of these restrictions in favor of the officials because the decisions are made quickly and during dire emergency situations.

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[211] For a discussion of the *Richmond Newspapers* decision, see *supra* notes 62-74 and accompanying text.

In summary, the press has a right to gather news that is protected under the First Amendment as well as an implied right of access that has generally been extended to accident sites, and this right is qualifiable by reasonable restrictions that are essential to the promotion of governmental interests in protecting lives, property, and investigatory procedures.

Current Literature