COMMENT

THE RIGHT OF THE PRESS TO GATHER INFORMATION AFTER *BRANZBURG* AND *PELL*

This Comment will examine the constitutional basis for a right of the press to gather information in the face of government restrictions. It will attempt to show that such a right is consistent both with the understanding of freedom of the press in the early United States and with traditional first amendment interpretation. The tentative recognition of that right in *Branzburg v. Hayes*[1] and its limitation in *Pell v. Procunier*[2] will then be analyzed, and a more expansive formulation of the right will be proposed.

I. THE RIGHT TO GATHER INFORMATION

Constitutional rights specific to the press derive from the "freedom of the press" clause of the first amendment.[3] The Supreme Court has explicitly recognized rights to publish without prior restraint[4] and with anonymity,[5] to circulate[6] and personally distribute literature,[7] and to receive printed communications.[8]

---

[1] 408 U.S. 665 (1972).

[2] 417 U.S. 817 (1974). Saxbe v. Washington Post Co., 417 U.S. 843 (1974), is a companion case.

[3] U.S. CONST. amend. I: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." The freedom of the press was applied to the states through the fourteenth amendment in Gitlow v. New York, 268 U.S. 652, 666 (1925).

[4] New York Times Co. v. United States, 403 U.S. 713 (1971); Near v. Minnesota, 283 U.S. 697 (1931).

[5] Talley v. California, 362 U.S. 60 (1960).

[6] Grosjean v. American Press Co., 297 U.S. 233 (1936); *cf. Ex parte* Jackson, 96 U.S. (6 Otto) 727, 733 (1878).

[7] Marsh v. Alabama, 326 U.S. 501 (1946); Martin v. City of Struthers, 319 U.S. 141 (1943); Schneider v. State, 308 U.S. 147 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938).

[8] Lamont v. Postmaster General, 381 U.S. 301 (1965); *Id.* at 307-08 (Brennan, J., concurring). *See also* Stanley v. Georgia, 394 U.S. 557, 564 (1969); Thomas v. Collins, 323 U.S. 516, 534 (1945); Martin v. City of Struthers, 319 U.S. 141, 143 (1943).

A related concept is the "public right to know," a phrase associated with Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). That case held constitutional the "fairness doctrine" that broadcasters have a duty to discuss controversial issues of public importance fully and fairly. As articulated in *Red Lion*, however, this duty arises only because of the scarcity of transmission frequencies. The limited scope of the general "public right to know" apparently has been affirmed in Kleindienst v. Mandel, 408 U.S. 753 (1972). *But*

Before *Branzburg*,[9] however, the Court had never explicitly acknowledged that "freedom of the press" includes a right to gather information.[10] On the other hand, neither had it denied the existence of such a right.

A. *Historical Validity*

The absence until recently of judicial consideration of a news-gathering right in the face of governmental restrictions is not surprising. Prior to World War II governmental secrecy was minimal, thereby rendering conflict unlikely. Today, governmental secrecy has reached vast proportions.[11] This sudden growth in governmental secrecy is directly traceable to the security orders of Presidents Truman[12] and Eisenhower[13] in the

---

see Branzburg v. Hayes, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting).

The *Red Lion* right to a full and fair discussion of issues differs from the right to receive specific communications of information and ideas in that the latter is an individual right of the person to whom the specific communication is addressed, whereas the former is a right of the public generally. For a discussion of the distinction between these concepts, see Note, *Public and Press Rights of Access to Prisoners after Branzburg and Mandel*, 82 YALE L.J. 1337, 1344-45 (1973).

[9] The four dissenters in *Branzburg* wholeheartedly endorsed the right to gather information, but the degree of its acceptance by the majority is open to differing interpretations. *See* text accompanying notes 63-113 *infra*.

[10] Note the lack of direct authority in the endorsements of news gathering by all the opinions in *Branzburg*, 408 U.S. at 681, 707 (opinion of the Court), at 709 (Powell, J., concurring), at 721-23 (Douglas, J., dissenting), and at 725-28 (Stewart, J., dissenting).

The closest the Supreme Court came to recognizing an information-gathering right prior to *Branzburg* was in Zemel v. Rusk, 381 U.S. 1, 17 (1965): "The right to speak and publish does not carry with it the *unrestrained* right to gather information." (emphasis supplied). This case is discussed in text accompanying notes 96-102 *infra*.

In two cases involving prejudicial publicity, the Court did not reach the question of a right to gather news. In Estes v. Texas, 381 U.S. 532 (1965), the Court ruled that televising the trial over the defendant's objections denied due process, but noted:

> It is true that the public has the right to be informed as to what occurs in its courts, but reporters of all media, including television, are always present if they wish to be and are plainly free to report whatever occurs in open court through their respective media.

381 U.S. at 541-42. In Sheppard v. Maxwell, 384 U.S. 333 (1966) (reversing a conviction because of prejudicial publicity), the Court had strong things to say about controlling press abuses that had created a "carnival atmosphere at trial." 384 U.S. at 358. The right of the press to attend the trial in an orderly manner, however, was not questioned. *Id.* at 350.

For an excellent discussion of judicial treatment of press rights to gather information written shortly before *Branzburg* was decided, see Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838 (1971).

[11] *See generally* B. LADD, CRISIS IN CREDIBILITY (1968); W. SWINDLER, PROBLEMS OF LAW IN JOURNALISM 77-83 (1955).

[12] Exec. Order No. 10,290, 3 C.F.R. 789 (1949-53 comp.).

[13] Exec. Order No. 10,501, 3 C.F.R. 979 (1949-53 comp.). *See also* Letter from

1950's.[14] Issued against the background of the cold war, these directives authorized classifications by all executive departments and agencies. In contrast, the prominent American political theorist Francis Lieber wrote in 1853: "The principle of publicity so pervaded all the American politics, that the framers of our constitution probably never thought of it, or if they did, they did not think it worth while to provide for it in the constitution, since no one had doubted it."[15]

It may be stated with confidence that the framers believed[16] that freedom of the press, at a minimum, forbade government licensing. Freedom from "restraints in advance of publication" was an accepted press liberty in late 18th century America.[17] Beyond this, there is little evidence as to the framers' understanding of freedom of the press; indeed, there is evidence that they were unclear about its meaning.[18] In *The Federalist*, Hamilton wrote that freedom of the press is a concept that defies definition; its meaning is to be given content by "the general spirit of the people and of the government."[19]

The absence of recorded debate over a news-gathering right as a concept inherent in the freedom of the press clause may be

---

Dwight D. Eisenhower to Secretary of Defense, May 17, 1954, in H.R. REP. No. 2947, 84th Cong., 2d Sess. 64-65 (1956).

[14] During the Civil War, the press had substantial access to military information. *See* J. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 477-510 (1926). Congress declined to authorize security classification during World War I. *See* New York Times Co. v. United States, 403 U.S. 713, 733-34 (1971) (White, J., concurring). For some concrete examples of access problems arising in the 1940's, and an interesting discussion, see Note, *Access to Official Information: A Neglected Constitutional Right*, 27 IND. L.J. 209 (1952).

[15] F. LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT (1853), *excerpted in* FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT 381 (H. Nelson ed. 1967) [hereinafter cited as LIEBER, with pagination to the Nelson excerpt].

[16] Determining the framers' intent is often an exercise in futility. *See* C. CURTIS, LIONS UNDER THE THRONE 2-8 (1947). *See generally* M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (1911); tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction* (pts. 1-5), 26 CALIF. L. REV. 287, 437, 664 (1938), 27 CALIF. L. REV. 157, 399, 405-06 (1939); Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964). This is especially so where, as here, there is little evidence. Moreover, such a determination, if possible, would not necessarily be dispositive of the issue. *See* Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955). Nevertheless, early commentary on the freedom of the press clause can provide insights useful in interpreting its current role. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 273-76 (1964).

[17] *See* FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON lv-lvi (L. Levy ed. 1966) [hereinafter cited as FREEDOM].

[18] *See* L. LEVY, LEGACY OF SUPPRESSION 183, 200, 214-16 (1960) [hereinafter cited as LEGACY]; Chafee, Book Review, 62 HARV. L. REV. 891, 898 (1949).

[19] THE FEDERALIST No. 84, at 535 (B. Wright ed. 1961) (A. Hamilton).

attributed to a number of factors. First, there was no institutionalized executive bureaucracy;[20] hence there was no organized attempt to withhold information. Second, newspapers were poorly staffed and not highly organized, and thus were not in a position to gather news assertively. Finally, it is unlikely that the press was hampered in obtaining information. The rampant partisanship of the early Republic extended into the executive branch, because the President and Vice-President were of different parties, and information detrimental to one side was often handed to the partisan printer by the other. It was a common occurrence, for example, for newspapers to publish the results of cabinet meetings.[21]

Although there is no record of public debate in the early Republic over secrecy of information, there was a great deal of controversy about the law of seditious libel.[22] After extensive debate truth was recognized as a defense in seditious libel prosecutions.[23] The rejection of the prior doctrine that truth heightened the crime by bringing the government into greater disrepute[24] indicates a belief that government should not be permitted to keep embarrassing secrets out of print. This suggests an outlook consistent with a press right to gather information.

One contrary indication of the availability of information during this time was the Senate's closed door policy. It was not until February, 1794, that the Senate opened its galleries to the press.[25] But this was merely a short-term holdover of the

---

[20] *Cf.* 1 ANNALS OF CONG. 454 (1789) (remarks of James Madison, June 8, 1789): "In our Government it is, perhaps, less necessary to guard against the abuse in the executive department than in any other; because it is not the stronger branch of the system, but the weaker . . . ."

[21] *See* J. DANIELS, ORDEAL OF AMBITION (1970).

[22] The debate is now carried on by historians. *Compare* LEGACY, *supra* note 18, *with* I. BRANT, THE BILL OF RIGHTS (1965).

[23] *See* FREEDOM, *supra* note 17, at lxxi, 147-53; LEGACY, *supra* note 18, at 130-31, 197-98.

[24] *See* FREEDOM, *supra* note 17, at xxv; LEGACY, *supra* note 18, at 130.

[25] 1 ANNALS OF CONG. 15-16 (1789) (parenthetical remark by reporter). Some congressional secrecy clearly was contemplated by the framers of the Constitution. *See* U.S. CONST. art. I, § 5.

Charles Pinckney later stated: "It is important here to remind you, of the anxiety of the State Legislatures in insisting upon the doors of the Senate being thrown open, and their legislative proceedings exposed, like the other branch, to public view." 10 ANNALS OF CONG. 79 (1800).

Whether the first amendment was invoked in the debates to open the Senate galleries is, for obvious reasons, unreported.

colonial legislatures' assertions of "parliamentary privilege."[26] Shortly after independence most states rejected this doctrine and required open debates by their legislatures.[27] Debates in the House of Representatives were open from the start.[28]

Political theorists of the early Republic provide some support for the existence and necessity of a press right to gather information.[29] Madison wrote that both information and the means for acquiring it are essential to a popular government.[30] Tunis Wortman, a Jeffersonian political theorist, wrote in 1800 that because all men are eligible for public office in a representative commonwealth,

> [t]he idea of Secrecy is peculiarly repugnant to the theory of Representative Institution, except in those solitary instances which render temporary concealment necessary. . . .
>
> Secondly, The liberty of investigation is equally indispensible to the judicious exercise of the elective right. . . .
>
> Thirdly, It is to be observed, That the Representative System unavoidably implies an absolute right to investigate the conduct of all public officers. . . .
>
> . . . .
>
> For this purpose it is indispensibly requisite that

---

[26] *See generally* M. CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES (1943); WITTKE, THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE (1970). The concept of parliamentary privilege, however, is appropriate only to the British and colonial systems where political theory held that sovereignty rested in the legislative body. *Cf.* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 523-32 (1969). It has been reported that the first case of authorized publicity of the deliberations of a pre-revolutionary American legislative body was in 1766 in Massachusetts. LIEBER, *supra* note 15, at 381-83.

[27] *See, e.g.*, N.Y. CONST. art. XV (1777), *reproduced in* THE FEDERAL AND STATE CONSTITUTIONS 2632 (Thorpe ed. 1909); PA. CONST. art. IX, § 7 (1790), *quoted in* note 53 *infra*; *cf.* LIEBER, *supra* note 15, at 381-82; Junius, *Addresses to the Honorable, the Members of the House of Assembly of the State of New York, quoted in* FREEDOM, *supra* note 17, at 168.

[28] It can be inferred from the reporter's apology for the Senate's closed doors, *see* note 25 *supra*, that the House was open. The same inference can be drawn from the full account of the debates. As early as June 8, 1789, a member remarked that the debates "are offered to the public view, and held up to the inspection of the world." 1 ANNALS OF CONG. 460 (1789) (remarks of Representative Jackson). Later in 1789, one Representative moved to censure reporters for unfair reporting of the debates of the House. *Id.* 952 (remarks of representative Burke). The motion evoked the response from another Representative that the question involved "an attack upon the liberty of the press." *Id.* 954 (remarks of Representative Hartley). It is unclear how widely this sentiment was shared, for the debate was short and ambiguous; but the motion was withdrawn. *Id.*

[29] *See generally* LEGACY, *supra* note 18, at 128, 130, 176-77.

[30] 9 THE WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910).

> political measures should be published in circumstantial detail, and also that Investigation should remain entirely unrestricted.[31]

And in 1789, John Adams wrote of the Massachusetts free press clause:

> Our chief magistrates and Senators &c are annually eligible by the people. How are their characters and conduct to be known to their constituents but by the press? If the press is stopped and the people kept in Ignorance we had much better have the first magistrate and Senators hereditary.[32]

Despite the scarcity of evidence, it is apparent that a press right to gather information is compatible with the concept of freedom of the press understood by many politicians and political theorists of the early American Republic.

B. *Consistency with Traditional First Amendment Interpretation*

Although the Supreme Court has often recognized that informing the public is an important interest underlying the guarantees of freedom of speech and freedom of the press, the Court's expressions of that purpose have usually emphasized the dissemination of already acquired information rather than the acquisition of information that is to be disseminated. For example, in a 1945 Supreme Court opinion Justice Black declared that the first amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ."[33] Such expressions of the interests underlying freedom of the press are not confined to the "absolutist" interpretation of the first amendment, of which Justice Black has been the foremost proponent.[34] In the same case Justice Frankfurter,

---

[31] T. WORTMAN, A TREATISE CONCERNING POLITICAL ENQUIRY, AND THE LIBERTY OF THE PRESS (1800), *excerpted in* FREEDOM, *supra* note 17, at 266-68.

[32] LEGACY, *supra* note 18, at 195. For the complete correspondence between Adams and Chief Justice Cushing of Massachusetts, see FREEDOM, *supra* note 17, at 147-53. For similar sentiments expressed by Chief Justice McKean of the Pennsylvania Supreme Court, see Respublica v. Oswald, 1 U.S. (1 Dall.) 319, 325 (1788).

[33] Associated Press v. United States, 326 U.S. 1, 20 (1945).

[34] *See* Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960). *See also* Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245.

the noted advocate of "interest balancing,"[35] adopted Judge Learned Hand's observation that

> the newspaper industry . . . serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment . . . .[36]

1. General Theories of First Amendment Adjudication

The importance of the informational aspect of freedom of the press has unfortunately been overlooked in some cases. This commonly has happened where courts apply the currently popular theory of the first amendment as a guarantee of "freedom of expression."[37] When used to replace the constitutional language, this otherwise useful phrase invites unwary judges to leave the entire informational element behind in the transition to a higher level of generality.[38] An example is *Tribune Review Publishing Co. v. Thomas*,[39] in which the Third Circuit declared:

> Realizing that we are not dealing with freedom of expression at all but with rules having to do with gaining access to information on matters of public interest, . . . we think that this question of getting at what one wants to know, either to inform the public or to satisfy one's individual curiosity is a far cry from the type of freedom of expression, comment, criticism so fully protected by the first and fourteenth amendments of the Constitution.[40]

---

[35] *See, e.g.*, Dennis v. United States, 341 U.S. 494, 524-25 (1951) (Frankfurter, J., concurring).

[36] 326 U.S. at 28 (Frankfurter, J., concurring). While it is commonly asserted that "absolutists" in fact engage in a balancing process to reach their definition of what is protected by the first amendment, *e.g.*, Note, *The Speech and Press Clause of the First Amendment as Ordinary Language*, 87 HARV. L. REV. 374, 380-81 (1973), it should be equally clear that "balancers" must engage in a definition of interests before they can strike the balance. The Frankfurter quotation illustrates a balancer including in the first amendment a right to disseminate information.

[37] This phrase appears in opinions at least as early as 1925. *See* Gitlow v. New York, 268 U.S. 652, 664 (1925).

[38] The transition does not *require* the omission. For example, the relevance of information to the first amendment was not ignored in a Supreme Court opinion which may have attained the highest level of generality ever, Griswold v. Connecticut, 381 U.S. 479 (1965): "[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Id.* at 482.

[39] 254 F.2d 883 (3d Cir. 1958).

[40] *Id.* at 885.

This language suggests a constitutional distinction between "informing the public" and "freedom of expression"; it is at least a concept of "freedom of expression" that lacks a right to gather information. A more thoughtful analysis, however, recognizes that the concept of freedom of expression should include an information-gathering element.[41] A right of free expression loses much of its force if the facts relevant to forming a judgment are unavailable.

The more traditional theory of free speech and free press rests on the conviction that the "mature free discussion of the ultimate public forum [will] yield truth . . . ."[42] A number of Supreme Court opinions have expressed this idea with the image of the "uninhibited marketplace of ideas in which truth will ultimately prevail . . . ."[43] This theory clearly contemplates that ideas will be formed from, and tested against, facts. It assumes the availability of information necessary for the truth-finding process.[44]

2. The Distinction Between Freedom of Speech and Freedom of the Press

Turning from general theories of the first amendment and following Justice Black's admonition to look to the constitutional language forces one to consider the differences between freedom of speech and freedom of the press.[45] The striking characteristic of Supreme Court opinions in this area is that one freedom is seldom distinguished from the other.[46] For example,

---

[41] T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1970).

[42] W.E. HOCKING, FREEDOM OF THE PRESS 91 (1947).

[43] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); New York Times v. Sullivan, 376 U.S. 254, 270 (1964); Associated Press v. United States, 326 U.S. 1, 20 (1945); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[44] On the dangers of restricted access to fact under this theory, see HOCKING, *supra* note 42, at 157-60. Meiklejohn, who rejected an abstract pursuit of truth but gave the theory vitality by emphasizing effective self-government, recognized its informational basis: "[T]he spreading of information and opinion bearing on [public] issues must have a freedom unabridged by our agents." Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 257. *See also* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 209 (arguing that the Court, at least in the opinion's rhetoric and sweep, adopted the Meiklejohn view). For a view that the purpose of the first amendment is to protect communication "essential to the process of modifying beliefs," which communication is also based on the presence of information, see DuVal, *Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 GEO. WASH. L. REV. 161, 207 (1972).

[45] For an interesting discussion of this subject, see HOCKING, *supra* note 42, at 79-87.

[46] For a more detailed account of the Supreme Court's collapsing free press into free

in *Schenck v. United States*,[47] a case that involved the distribution of pamphlets, the Court spoke only of "free speech"; freedom of the press was not mentioned.

This view of freedom of the press as a particularized version of free speech omits an information-gathering element; but all of the other specific rights accorded to the press by the Supreme Court interpretations of the first amendment[48] can be derived from free speech and assembly, if speech is taken to include written and printed speech. Thus, publishing without prior restraint corresponds to not being prohibited from speaking;[49]anonymity is the written counterpart of associational privacy;[50] and rights of circulation, distribution, and reception would appear to be the equivalent of free assembly. If this view is accepted, the free press clause serves only to apply the free speech clause to printed matter.

However, there may be other rights peculiar to the functions of the press, not derivable from the free speech clause, which should be recognized. If so, the exercise of these rights should rest exclusively in the press, while rights of free speech, whatever the mode of communication, rest in the public.[51] This notion is implicit in James Madison's first articulation of what eventually became the first amendment: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."[52]

---

speech, partly by use of the phrase "freedom of expression," see Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838, 840-43 (1971). *See also* Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?* 26 HASTINGS L.J. 639 (1975) (arguing that speech and press are distinguishable and that the Supreme Court has failed to recognize this distinction in cases as recent as Pell v. Procunier, 417 U.S. 817 (1974), and Saxbe v. Washington Post Co., 417 U.S. 843 (1974)).

[47] 249 U.S. 47 (1919). *See also* Gitlow v. New York, 268 U.S. 652 (1925); Patterson v. Colorado, 205 U.S. 454 (1907). Each of these cases cited both clauses without distinction, even though only printed matter was involved. More recently Justice Clark, in a dissent, referred to "one who exercises his right of free speech through writing or distributing handbills . . . ." Talley v. California, 362 U.S. 60, 71 (1960) (Clark, J., dissenting).

[48] *See* text accompanying notes 3-10 *supra*.

[49] *See* Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971).

[50] *See* Shelton v. Tucker, 364 U.S. 479 (1958); NAACP v. Alabama, 357 U.S. 449 (1960).

[51] *See* Saxbe v. Washington Post Co., 417 U.S. at 863-64 (Powell, J., dissenting).

[52] 1 ANNALS OF CONG. 452 (1789) (remarks of James Madison); *cf.* PA. CONST. art. IX, § 7 (1790), *reproduced in* 5 THE FEDERAL AND STATE CONSTITUTIONS 3100 (Thorpe ed. 1909), which stated: "[T]he printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any branch of the government, . . ." *and* that "every citizen may freely speak, write and print on any subject . . . ."

Two distinct concepts can be detected in this phraseology: one corresponding to free speech, including written and printed speech; another corresponding to a different freedom, associated only with the press. In associating the distribution of handbills with free speech, the Court has recognized the first concept. But to go no further—to refuse to recognize the second concept—is effectively to read "freedom of the press" out of the Constitution.

A free press, as provided for in the first amendment, occupies an important place in the American political system. The special role of the press is to provide citizens with the information necessary to make decisions about public policies and public officials. The collection and dissemination of such information cannot be accomplished effectively by individuals acting on their own behalf; some degree of professionalism and organization is required. Adams recognized this when he asked, "How are [the] character and conduct [of public officials] to be known to their constituents but by the press?"[53] As society has become more complex, and government more institutionalized, this quality of the press has assumed even more importance. Its role as collector, as well as disseminator, of the information necessary for effective self-government qualifies the press, as an institution, for first amendment protection.

Characterization of the press as a separate institution would appear to conflict with the Supreme Court doctrine that freedom of the press is a fundamental personal right.[54] The Court traditionally has disregarded the institutional nature of the press in this context, and has extended the freedom of the press guarantee to all who have chosen to distribute printed matter.[55] However, this doctrine arises from cases concerning interference with printed expression,[56] and it therefore does not control the information-gathering cases, where the institutional nature of the press assumes greater importance. The Supreme Court has recognized the institutional needs of the press in

---

[53] LEGACY, *supra* note 18, at 195.

[54] Lovell v. City of Griffin, 303 U.S. 444, 450 (1938); *see* W. SWINDLER, PROBLEMS OF LAW IN JOURNALISM 77-83 (1955).

[55] Branzburg v. Hayes, 408 U.S. 665, 704 (1972); Mills v. Alabama, 384 U.S. 214, 219 (1966); Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943); Lovell v. City of Griffin, 303 U.S. 444, 450 (1938). The Court in *Lovell* stated: "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Id.* at 452.

[56] *See* text accompanying notes 48-50 *supra*.

other contexts.[57] Extending to the press a right of access to information would neither increase nor diminish the purely personal rights heretofore recognized by the Supreme Court.

C. *Supreme Court Recognition of Information Gathering as a Part of "Freedom of the Press"*

Although the Supreme Court has never articulated a first amendment right to gather information, some support for that right has appeared in dicta. In *Grosjean v. American Press Co.*,[58] for example, the Court recalled that British "taxes on knowledge" imposed on the colonies were intended

> to prevent, or curtail the opportunity for, the acquisition of knowledge by the people in respect of their governmental affairs. . . . The aim of the struggle was not to relieve taxpayers from a burden, but to establish and preserve the right of the English people to full information in respect of the doings or misdoings of their government.[59]

More recently, concurring in *New York Times Co. v. United States*,[60] Justice Black declared:

> The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam war, the newspapers nobly did

---

[57] *See, e.g.*, Grosjean v. American Press Co., 297 U.S. 233 (1936); *cf.* Stewart, *"Or of the Press,"* 26 Hastings L.J. 631, 633-34 (1975).

[58] 297 U.S. 233 (1936).

[59] *Id.* at 246-47 (1936). *See also* Garrison v. Louisiana, 379 U.S. 64, 77 (1964), where the Court spoke of "the paramount public interest in a free flow of information to the people, concerning public officials, their servants."

[60] 403 U.S. 713 (1971).

> precisely that which the Founders hoped and trusted they would do.[61]

A majority of justices in this case believed they were applying the first amendment against the federal executive and judiciary, setting an important precedent for press access claims against the federal government.[62]

A right to gather information was first actively explored in the Supreme Court by the dissenting opinions in *Branzburg v. Hayes*.[63] The majority and concurring opinions, however, while explicitly recognizing the right's existence, did not explore it enough to clarify their conceptions of its scope.

Branzburg denied a claim that newsmen have a constitutional right to refuse to reveal their confidential sources[64] to grand juries.[65] The reporters claimed that forced disclosure would inhibit news gathering by causing sources to become more cautious in the future[66] and thus based their case upon

---

[61] *Id.* at 717 (1971) (Black, J., concurring).

[62] *Id.* at 718 (Black, J.); 720 (Douglas, J.); 724 (Brennan, J.); 730 (Stewart, J.); 732 (White, J.); 741 (Marshall, J.). Under the fourteenth amendment, all state (as distinguished from federal) action abridging freedom of the press is barred. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (common law libel action). *See also* Smith v. California, 361 U.S. 147, 156-59 (1959) (Black, J., concurring).

[63] 408 U.S. 665, 727-28 (1972) (Stewart, J., dissenting); *id.* at 720-24 (Douglas, J., dissenting).

[64] Branzburg had written an article describing a "hashish factory" in Kentucky. Pappas had been inside a Black Panther headquarters in Massachusetts as it was preparing to defend itself from a police raid. Caldwell had gained the confidence of Black Panther Party leaders in California. In all three cases the newsmen were subpoenaed before a grand jury for questioning about these sources.

[65] This was a question of first impression for the Court. Newsmen's arguments for a common law privilege had been rejected consistently by lower courts; assertions of a constitutional privilege fared little better. *See, e.g.*, Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U.L. REV. 18 (1969); Comment, *The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 CALIF. L. REV. 1198 (1970); Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317 (1970).

A number of courts recognized a first amendment interest, but in most cases considered it outweighed, usually by the obligation of all citizens to give evidence, when the opposing interests were balanced. *E.g.*, Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958); *In re* Goodfader, 45 Haw. 317, 367 P.2d 472 (1961) (the dissenting opinion is informative); *cf.* State v. Buchanan, 250 Ore. 244, 436 P.2d 729, *cert. denied*, 392 U.S. 905 (1968).

[66] Justice White characterized the reporters' claims as follows:

> [T]o gather news it is often necessary to agree either not to identify the source of information published or to publish only part of the facts revealed, or both; . . . [and] if the reporter is nevertheless forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other

the proposition that news gathering is protected by the first amendment.

The Court considered at length the empirical issue of the extent to which news gathering is burdened by the denial of a testimonial privilege to reporters.[67] Writing for the Court, Justice White pointed out that this burden is indirect: The government does not forbid the use of confidential sources, nor does it control the information.[68] He further stated that the extent of the burden is highly speculative;[69] indeed, the Court plainly believed that the restriction would be minimal: "[T]he evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior . . . rule . . . ."[70] Moreover, Justice White observed that by claiming a privilege reporters actually impede a flow of information to the grand jury, another agent of the public.[71] From this perspective, the burden on total information flow from a ruling adverse to the reporters would be of little consequence.

Thus, although recognizing that some burden on news gathering would result from refusing to grant reporters a testimonial privilege before the grand jury, the Court found that burden uncertain, indirect, and of little magnitude.

But is this burden on news gathering—albeit minimal—a burden on first amendment rights? On this point the opinion is brief. Early in his discussion Justice White states, "Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."[72] At the end of his opinion he states, "Finally, as we have earlier indicated, news gathering is not without its First Amendment protections,

---

reporters will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment.

408 U.S. at 679-80. This argument was accepted by the dissenters.

[67] At one point in the opinion, Justice White appeared to say that denial of a testimonial privilege would not burden news gathering. 408 U.S. at 698. Other language, however, indicates that this was not intended to deny entirely the existence of such a burden. *E.g.*, 408 U.S. at 690. For empirical studies of this question, see Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229 (1971); Guest & Stanzler, *supra* note 65.

[68] 408 U.S. at 681-82.

[69] *Id.* at 693-94.

[70] *Id.* at 693.

[71] *Id.* at 697.

[72] *Id.* at 681.

and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment."[73]

Branzburg's recognition of a right to gather news is evidenced not simply by stray sentences scattered through the opinion, but also by the opinion's overall content. That the Court balances the burden on news gathering against the government's interest in disclosure suggests that the statements quoted above are part of the holding in the case; and subsequent lower court decisions and commentators have understood *Branzburg* to establish that the collection of news involves rights of constitutional dimension, however poorly defined.[74] In fact, the Court went to great lengths to show that certain tests of the constitutionality of burdens upon first amendment rights were satisfied in this situation. After discussing the history and importance of the grand jury,[75] the Court concluded that a "compelling" state interest[76] had been demonstrated:

> The requirements of those cases . . . which hold that a State's interest must be "compelling" or "paramount" to justify even an indirect burden on First Amendment rights, are also met here. As we have indicated, the investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen, and it appears to us that calling reporters to give testimony in the manner and for the reasons that other citizens are called "bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification." *Bates v. Little Rock* [361 U.S. 516 (1960)] at 525. If the test is that the government

---

[73] *Id.* at 707. Justice Powell was the fifth justice to join the majority opinion, thereby making it the opinion of the Court. His concurring opinion is similarly brief and tentative on this point: "The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news . . . ." 408 U.S. at 709 (Powell, J., concurring).

[74] *See, e.g.*, United States v. Liddy, 478 F.2d 586, 587 (D.C. Cir. 1972); Baker v. F & F Investment, 470 F.2d 778 (2nd Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); Significant Developments, *Constitutional Law—Newsmen's Privilege: A Challenge to Branzburg*, 53 B.U.L. REV. 497, 500-01 (1973); *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 137 (1972).

[75] 408 U.S. at 686-90.

[76] *See, e.g.*, DeGregory v. Attorney Gen., 383 U.S. 825, 829 (1966); NAACP v. Button, 371 U.S. 415, 438-39 (1963); NAACP v. Alabama, 357 U.S. 449, 463-65 (1958); Thomas v. Collins, 323 U.S. 516, 530 (1945); Schneider v. State, 308 U.S. 147, 161 (1939).

> "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest," *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 546 (1963), it is quite apparent [that the test has been met].[77]

The Court also concluded[78] that this state interest was not being achieved by means having an unnecessarily broad impact on first amendment rights.[79]

That the Court engaged in these tests indicates it considered first amendment rights to be involved in this case. However, the Court's language permits the argument that since the state met the compelling interest test, the question of which test was appropriate was irrelevant and therefore not decided. Although this is possible, the compelling interest test is traditional in this area, as the Court notes;[80] and less rigorous tests are not even mentioned.

The better view, then, is that the Court held that there is a right to gather news, and that even an indirect burden on this right[81] can be justified only by a compelling government interest not effectuated by unnecessarily broad means.[82] The Court's failure to clarify the scope of protection may be partly attributed to its view that the balance was so one-sided: The news gathering interest was implicated indirectly and minimally; the government interest was perceived as overwhelming. Indeed, this

---

[77] 408 U.S. at 700-01.

[78] *Id.* at 699-700.

[79] *See, e.g.*, Freedman v. Maryland, 380 U.S. 51, 56 (1965); NAACP v. Alabama, 377 U.S. 288, 307 (1964); Sherbert v. Verner, 374 U.S. 398, 407 (1963); Schneider v. State, 308 U.S. 147, 161 (1939). *See also* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

[80] 408 U.S. at 680. Additional language in the opinion supports the conclusion that the Court felt a compelling interest test was required. In discussing the problems that would result if a case-by-case balancing approach to a reporter's testimonial privilege was adopted the Court stated: "[B]y considering whether enforcement of a particular law served a 'compelling' governmental interest, the courts would be inextricably involved in distinguishing between the value of enforcing different criminal laws." *Id.* at 705-06.

[81] Although it could have been contended that first amendment rights of the sources were also involved in this case, the Court declined to take that conceptual leap from Talley v. California, 362 U.S. 60 (1960) (anonymity of handbills). Instead, the Court noted that "the privilege claimed is that of the reporter, not the informant," 408 U.S. at 695, and declined to consider the possibility that rights of the source might be involved. Thus, only the right to gather information is on the first amendment side of the Court's balance.

[82] At least one lower court interpreted *Branzburg* to require a compelling state interest in this area. *See* Baker v. F & F Investment, 470 F.2d 778, 784 (2d Cir. 1972).

case is properly characterized more as a grand jury case than as a free press case. The Court left no doubt of its view that the grand jury was performing an "important, constitutionally mandated role" in "a fundamental function of government,"[83] and that every citizen has an obligation to testify about crimes.[84]

II. Access to Government Controlled Information After *Branzburg*

From *Branzburg*'s tentative recognition that the press enjoys a first amendment news-gathering right, the courts must proceed to define its scope and precise content. This news-gathering right will need especially careful definition in the sensitive area of press efforts to obtain information held or controlled by the government.[85] The following paragraphs attempt to suggest the appropriate parameters of a news-gathering right covering efforts by the press to obtain such information. The Supreme Court's approach to this issue in *Branzburg* and in *Pell v. Procunier*[86] will be discussed and criticized.

A. *Special Access*

If the virtue of the press lies in its ability, through its institutional nature, to gather and disseminate news to the public, and if a freedom of the press, distinct from freedom of speech, is guaranteed because of this virtue,[87] then it follows that in some situations the journalist may appropriately be granted special access to information controlled by the government.

Specifically, when the government wishes to impose restrictions on access to information, three situations are possible. First, there may be a valid content-related reason for the restriction which outweighs any public right to be informed;[88]

---

[83] 408 U.S. at 690.

[84] *Id.* at 697.

[85] *Branzburg*, of course, involved alleged government interference with the ability of newsmen to obtain information from non-governmental sources.

[86] 417 U.S. 817 (1974).

[87] *See* text accompanying notes 53-57 *supra*.

[88] The concept of a public right to know, associated with Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969), has never been used by the Supreme Court to further access to information in the face of government restrictions. *Cf.* Kleindienst v. Mandel, 408 U.S. 753 (1972). Conceptually, recognition of an information-gathering element in the freedom of the press clause is a prerequisite to the use of a "public right to know" to gain access against a content-related defense.

in that situation no question of special access arises. At the other extreme, there may be no valid government reason sufficient to justify the restriction, in which case equal access should be given to both press and public. In between these two situations is the case where the content of the information does not call for secrecy, but where valid administrative reasons necessitate denial of access to the general public. In such a situation, special priority should be given to the press for efficiency reasons.[89] The journalist can disseminate information with minimal disruption to those controlling it. Further, a journalist will have undertaken, or possibly may have imposed upon him, the affirmative duty of making the information obtained available to the public.[90] Press access should be guaranteed precisely because of the institutional and professional nature of the press, the value which is at the base of the proposed information-gathering right.

This approach will require a definition of the press. Such a definition would be difficult under the current first amendment interpretation that freedom of the press is a fundamental personal right.[91] Under the proposed approach, however, the task would be considerably easier because the underlying policy for resting this right in the press rather than in the public provides some guidance. Such factors as intent to publish, previous journalistic experience, and access to means of distribution would be relevant.[92] Current Supreme Court doctrine would appear to indicate that diversity of viewpoint rather than mere circulation size should be considered in situations of

---

[89] Because questions of special access will not involve regulations based upon content, the correct standard for judging special access claims is that formulated in United States v. O'Brien, 391 U.S. 367, 377 (1968):

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

This approach was recently used by the Supreme Court to strike down prison mail censorship in Procunier v. Martinez, 416 U.S. 396 (1974).

[90] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), held that broadcasters, in spite of their first amendment protection and because of the limited number of broadcast frequencies, can be compelled to make additional information available to the public when a controversial issue has not been presented fully or fairly.

[91] *See* Branzburg v. Hayes, 408 U.S. 665, 704 (1972). *See also* text accompanying notes 54-59 *supra*.

[92] *See* Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317, 365-67 (1970).

limited access.[93] Further, the government already defines the press for allocating police passes, entrance to legislative galleries, news conferences, and the like.[94]

B. *Special Access in* Branzburg

The opinion of the Court in *Branzburg* recognized a first amendment protection for news gathering, but denied the existence of a right of special access for journalists. On both points the Court was taking hesitant steps into unfamiliar terrain. Its assertions were qualified and tentative; there was no exploration, even in dicta, of the scope or meaning of a news-gathering right; and no attempt was made to reconcile such a right with the denial of special access.

Specifically, Justice White's majority opinion stated: "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."[95] Although such a statement is not necessarily inconsistent with recognition of first amendment protection for news gathering, at the very least it reduces the scope of the protection. It is notable, however, that the authority cited for the assertion that the courts have "generally held" against special access is weak.

Of the four cases cited, only one, *Zemel v. Rusk*,[96] is a Supreme Court majority opinion. The plaintiff in that case was a private citizen seeking to have his passport validated for travel

---

[93] In another limited access area, broadcasting, the Supreme Court has held that the right of the public to be informed includes the right to presentation of diverse viewpoints. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). The existence of this right in the public was cited as one reason for denying individual members of the public a general right of access to the airwaves. Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973). Thus it would seem that in the area of free speech, special access to a method of speaking can be justified if the speaker undertakes the duty of presenting a diversity of views. This situation is somewhat analogous to the right of special access urged here.

[94] Comment, *Has* Branzburg *Buried the Underground Press?* 8 HARV. CIV. RIGHTS —CIV. LIB. L. REV. 181, 194 (1973). On the common practice of forming press pools, see Saxbe v. Washington Post Co., 417 U.S. 843, 874 n.17 (1974) (Powell, J., dissenting).

[95] 408 U.S. at 684. This statement may be viewed in two ways: as directly negating any first amendment protection for newsgathering and thus contradicting the earlier statement, or more probably, as recognizing that the press has a first amendment right of equal access, but no more. *See* Comment, *supra* note 94, at 184-85. A press right of equal access has been recognized by courts for many years. *See, e.g.*, Lee v. Hodges, 321 F.2d 480 (4th Cir. 1963); Providence Journal Co. v. McCoy, 94 F. Supp. 186, (D.R.I. 1950), *aff'd on other grounds*, 190 F.2d 760 (1st Cir. 1951).

[96] 381 U.S. 1 (1965).

to Cuba as a tourist.[97] He based his case primarily on assertions of his right to travel and a claim of improper delegation of congressional authority to the executive. Zemel further stated that the purpose of his trip was "to satisfy [his] curiosity about the state of affairs in Cuba and to make [himself] a better informed citizen."[98] The Court disagreed that a first amendment right was involved. Invoking a test designed to measure the scope of the freedom of speech clause—the "speech-action" dichotomy[99]—the Court noted that only action was inhibited[100] and concluded: "The right to speak and publish does not carry with it the unrestrained right to gather information."[101] This case simply does not speak to the proposition for which it is cited. Zemel claimed a right to travel to Cuba as a citizen and a member of the general public. He had no pretensions of being an information disseminator of any kind.[102] A ruling in his favor would have been a ruling that the public generally might travel to Cuba. The notion of "special access" was not present in the case.

The *Branzburg* Court also cited a concurring opinion in *New York Times Co. v. United States*,[103] where Justice Stewart discussed the right of the executive to classify certain information relating to government security. But the theory of special access articulated in this Comment[104] would allow the denial of access to both press and public where secrecy properly is required by the content of the information in question. Although this authority undercuts a claim for special press access to government information that would otherwise remain confidential, it is not apposite where the government's reason for the restriction is not content-related.

The third authority is a Third Circuit case[105] that did not

---

[97] *Id.* at 3.

[98] *Id.* at 4.

[99] *See, e.g.*, Street v. New York, 394 U.S. 576 (1969).

[100] 381 U.S. at 16-17. This test is inappropriate to an information-gathering claim. The active aspect of information gathering emanates from the press clause. To the extent that there is a (passive) right to receive information, of course, free speech and assembly are also involved. *Cf.* Kleindienst v. Mandel, 408 U.S. 753 (1972).

[101] 381 U.S. at 17.

[102] Note that current regulations on foreign travel to restricted areas provide an exemption for reporters, scholars, and private citizens with a demonstrated publisher. 22 C.F.R. §§ 51.73(b)(1), (b)(3) & (c)(1) (1973).

[103] 403 U.S. 713, 727 (1971) (Stewart, J., concurring).

[104] *See* text accompanying notes 87-94 *supra*.

[105] Tribune Review Publishing Co. v. Thomas, 254 F.2d 883 (3d Cir. 1958). Further

involve a special access claim; journalists, challenging a ban on the use of cameras and tape recorders in a courthouse, had conceded that point and were arguing for greater access for all.[106]

Finally, the Court cited a New York Court of Appeals case[107] in which the trial judge, on his own motion, had barred press and public from court during the prosecution's presentation because of the offensive nature of the material to be presented. The underlying issue in this case was whether total censorship in the name of public decency was justifiable.[108] In affirming the lower court's decision, the Court of Appeals failed to discuss the constitutional issue, declaring that none was involved[109] and citing an earlier decision[110] that had also failed to discuss the issue. Notice, moreover, that the reason given for excluding the press was content-related (the obscene nature of the evidence and testimony to be presented), so that this ruling is not dispositive of a claim of special access in non-content-related situations.

The *Branzburg* dictum,[111] therefore, is weakly supported. Only two of the cases involved claims of press access and these were not claims to special access. There is some support for the denial of access to everyone by content-related restrictions, but none for the denial of special access to the press by restrictions based upon the impracticality of affording access to all.[112] The

---

conceptual weaknesses of this opinion are discussed in text accompanying notes 38-41 *supra*.

[106] In *Tribune* the court stated:

> Nor do [the newspapers] deny outright the statement of the district court that the press here has no more right than any other member of the public although they do say that the district judge made more of this than he should have.

254 F.2d at 884. Thus, the issue was whether a ban encompassing both press and general public was justifiable.

[107] United Press Associations v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954).

[108] To the extent that the *Branzburg* dictum indicates that an absolute ban on attending or publicizing a trial is permissible, 408 U.S. at 685, the cited authority provides no support. Neither of the cited cases questioned the right of the press to attend trials in an orderly manner. *See* note 10 *supra*. In Craig v. Harney, 331 U.S. 367, 374 (1947), the Court stated: "A trial is a public event. What transpires in the Courtroom is public property. . . . There is no special perquisite of the judiciary which enables it . . . to suppress, edit, or censor events which transpire in proceedings before it."

[109] 308 N.Y. at 77, 123 N.E.2d at 778.

[110] Danziger v. Hearst Corp., 304 N.Y. 244, 107 N.E.2d 62 (1952).

[111] No claim of a right of special access was made in *Branzburg*, nor, indeed, could one have been made in that factual context.

[112] *Branzburg* goes on to say:

> Despite the fact that news gathering may be hampered, the press is regularly

Court's phrasing is explicable, however, in terms of the uncommon press claim before it: The newsmen in question were asserting a right to withhold information from the public (as represented by the grand jury).[113] Normally any constitutional right of "special access" will culminate in gathering *and disseminating* the same information; if the press is given access, the information will not remain "not available to the public." Therefore, even if this dictum denying the press a special right of access is accepted in the *Branzburg* context, it should not be read to restrict the right of the press to gather information generally.

C. *Special Access in* Pell *and* Washington Post

In *Pell v. Procunier*[114] and *Saxbe v. Washington Post Co.*,[115] journalists challenged state and federal regulations allowing random conversations but prohibiting all in-depth press-prisoner interviews.[116] The California regulation had been

---

> excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded . . . .

408 U.S. at 684-85. This statement also is largely irrelevant to a special access claim narrowed to non-content-related situations. Grand jury restrictions, court conferences, and executive sessions involve the exclusion of the press for reasons of content. Although in particular cases these content-related reasons may be challenged, a successful challenge would open the information to both press and public. The meetings of private organizations ordinarily do not involve state action and are therefore outside the scope of the first amendment. Restrictions of access to scenes of crime and disaster sometimes can be justified on content grounds; even in a non-content-related context, a press claim often would be outweighed by a "clear and present danger." It does not follow that in this and tamer situations a press access claim lacks constitutional dimensions. Moreover, Justice White provides no authority, either of law or custom, in support of his statement. Evidence of custom opposing Justice White's statement is the practice of allowing newsmen access to the scenes of riots in the late 1960's. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 207-09 (Government Printing Office ed. 1968).

[113] Of course, the newsmen claimed that the withholding would generate a greater flow of information from future confidential sources, but the Court rejected the argument. *See* notes 66-71 *supra* & accompanying text.

[114] 417 U.S. 817 (1974). This case also involved an unsuccessful challenge based on the rights of the prisoners, a subject which is outside the scope of this Comment.

[115] 417 U.S. 843 (1974). Since the Court found this case to be controlled by the holding in *Pell, see id.* at 850, references to both cases will be cited only to *Pell*.

[116] California Department of Corrections regulation § 415,071; U.S. Bureau of Prisons Policy Statement § 1220.1A (Feb. 11, 1972). The latter was amended after the grant of certiorari in *Washington Post*, to allow interviews at minimum security institutions, *see* 417 U.S. at 844, but the ban remains absolute with respect to the rest of the federal prison system. For the definition of "conversation" and "interview," see Washington Post Co. v. Kleindienst, 494 F.2d 994, 998 (D.C. Cir. 1974).

promulgated in 1971,[117] supplanting more open rules; the federal rule, however, was longstanding.[118] The journalists argued that only through interviews could they adequately report news from inside prisons. The government response was that there are other means of access; that administration, security, uniformity, discipline and rehabilitation warrant the prohibitions; and especially that interviews can help certain disruptive inmates attain negative leadership roles culminating in violence. These legitimate governmental interests were noted at the beginning of both opinions for the Court, apparently to show that no invidious discrimination against the press was involved. The substantiality of these interests was questionable in light of testimony by corrections officials from other jurisdictions that, on balance, interviews were helpful.[119] The Court, however, was not constrained to discuss them in depth, because it found no constitutional interest in opposition.[120]

This would have been a good case in which to argue the theory of special access advanced in this Comment. The journalists were seeking information to which the government controlled access, and the government was not contending the information that the prisoners might communicate required secrecy in and of itself. The government's argument that it could not handle the general public was persuasive, but could have been countered by asserting the efficiencies of allowing the press to conduct interviews as representatives of the public. The government's major argument against press interviews was that publicity gave power to certain disruptive inmates, known as "big wheels." This apparently was a legitimate concern, but it clearly could have been satisfied by less than an absolute prohibition. For example, the ban might have been applied only to prisoners whom prison officials considered

---

[117] 417 U.S. at 831.

[118] Brief for Petitioners at 3, Saxbe v. Washington Post Co., 417 U.S. 843 (1974).

[119] Saxbe v. Washington Post Co., 417 U.S. 843, 869-70 (1974) (Powell, J., dissenting); Washington Post Co. v. Kleindienst, 357 F. Supp. 779 (1972); Brief for Respondents at 18-23, Saxbe v. Washington Post Co., 417 U.S. 843 (1974).

[120] "In this case, however, it is unnecessary to engage in any delicate balancing of such penal considerations against the legitimate demands of the First Amendment." 417 U.S. at 849. A balancing is undertaken in the dissents of Justice Powell, 417 U.S. 850, and of Justice Douglas, 417 U.S. at 836, as well as in prior lower court considerations of this issue, *e.g.*, Washington Post Co. v. Kleindienst, 494 F.2d 994 (D.C. Cir. 1974), *aff'g* 357 F. Supp. 779 (D.D.C. 1972); Houston Chronicle Publishing Co. v. Kleindienst, 364 F. Supp. 719 (S.D. Tex. 1973). *See also* Seattle-Tacoma Newspaper Guild v. Parker, 480 F.2d 1062 (9th Cir. 1973); Hillery v. Procunier, 364 F. Supp. 196 (N.D. Cal. 1973).

potentially disruptive.[121] The journalists could have argued forcefully that the absolute prohibition placed an unnecessary burden on first amendment rights requiring some accommodation along special access lines.[122] Justice Powell's dissenting opinion in this case demonstrates the possibilities for such a special access approach.[123]

But the plaintiffs apparently were afraid openly to claim any special rights for the press. Instead they argued that an interview right would only equalize them with the rest of the public, many of whom (friends, family, clergy, attorneys) are allowed interviews with inmates.[124] No member of the Court accepted this argument;[125] Justice Stewart noted[126] that interviews are allowed only to those personally or professionally related to an inmate. Having rejected the "equalizing" perspective on the factual situation, the Court was faced with the question whether the journalists' interest in conducting individual in-depth inmate interviews, which the public was not allowed to conduct, is of constitutional dimensions. The resolution of this question involved a legal issue—whether in this context there is a constitutional right of special press access—and an empirical one—whether available modes of news gathering other than interviews satisfy this right, thereby rendering unnecessary recognition of constitutional protection for the specific interview technique.

Justice Stewart's discussion of special access is very brief. He quotes the special access remarks in *Branzburg* discussed above, adding: "[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the

---

[121] For an interesting criticism of *Pell* and its failure to employ a less restrictive alternative analysis see *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 43, 165 (1974).

[122] *See* note 89 *supra*.

[123] 417 U.S. at 850 (Powell, J., dissenting).

[124] Brief for Appellant at 6, Pell v. Procunier, 417 U.S. 817 (1974): "The press-appellants are seeking not 'special' privileges but visiting rights that are available to family, clergy, attorneys, and many others every day in the year." Brief for Respondents at 43-44, Saxbe v. Washington Post Co., 417 U.S. 843 (1974): "What respondents do claim is the same right to interview inmates that is enjoyed by relatives, friends, lawyers, clergymen, public officials, former and prospective employers, and other persons who are permitted by the Bureau of Prisons to have private conversations in depth with inmates."

[125] This perspective had been accepted by the Court of Appeals, 494 F.2d 994, 999 (D.C. Cir. 1974).

[126] 417 U.S. at 831 n.8. *See also id.* at 857 (Powell, J., dissenting); *id.* at 841 (Douglas, J., dissenting).

general public . . . . The Constitution does not . . . require government to accord to the press special access to information not shared by the public generally."[127] The proposition "that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally," Justice Stewart concludes, "finds no support in the words of the Constitution or in any decision of this Court."[128]

This language in *Pell* narrowly defines the scope of constitutional protection for news gathering which had been recognized in such vague terms in *Branzburg*. The main source cited by the Court in denying a right of special access is the *Branzburg* dictum discussed earlier.[129] Our analysis of that dictum showed that it lacked support even in the context of *Branzburg*. This is even more true in the *Pell* situation, where the reporters were not attempting to keep secret the information to which they sought access. The adoption of that dictum here without an analysis either of its supporting authority or of the different posture of the reporters' arguments was clearly unwarranted.

The holding in *Branzburg* certainly does not preclude a right of special access, as Justice Powell's dissent in *Pell* recognizes.[130] The Court in *Pell* also cited *Zemel v. Rusk*[131] and *New*

---

[127] *Id.* at 834. Technically, the phrasing of this sentence is misleading because the journalists claimed access in order to share the information with the public.

This assertion is followed by a footnote reference to Zemel v. Rusk, 381 U.S. 1 (1965), where the Court denied an "unrestricted right to gather information." This reference was apparently intended to express the Court's fears that a special access right, if granted, would get out of hand. Justice Powell's remarks about avoiding dry logic are sufficient answer to those fears. 417 U.S. at 860 (dissenting opinion). *See also id.* at 872. *Zemel* is discussed at text accompanying notes 96-102 *supra*.

[128] 417 U.S. at 834-35. The phrasing, "no affirmative duty," implies that the first amendment is inapplicable because it prohibits only restrictions. But the government posture in this case may be viewed as either negative or positive, depending on one's view of the proper scope of news gathering under our constitutional scheme. If one views the first amendment as supporting openness of information, the government would appear to be infringing upon that value by cutting off access to prisons. If one views the first amendment as merely protecting values of expression, then the government would appear to be maintaining a valid regulation and the effect of lifting that regulation would be to impose an affirmative duty. The Court seems to have adopted the latter view, but such a proposition is certainly not self-evident.

[129] 408 U.S. at 684; text accompanying notes 95-113 *supra*.

[130] To read *Branzburg* only to protect invidious discrimination against the press, as *Pell* appears to do, seems to confuse protections afforded by the first amendment with those afforded by the equal protection clause of the fourteenth.

[131] 381 U.S. 1 (1965).

York Times Co. v. United States[132] as tangential support for its denial of a right of special access.[133] Clearly, however, these cases require this conclusion no more than they support the dictum for which they are cited in *Branzburg*.[134] To the extent the Court indicates that the first amendment or precedent compels a ruling against special access, the opinion is unsupported. This is rather strikingly demonstrated by the very fact that four Justices dissented.[135]

Because the case law cited does not provide support, the holding in *Pell* comes down to the Court's perspective on the constitutional balance between the press and government. The Court's view of this balance is presented in a conclusory way, without inquiry into the historical foundations of the current situation. As a result, the Court ignores the crucial fact that the enormous growth in governmental secrecy since World War II has fundamentally altered the balance that previously existed.[136] Historical research indicates that the early Republic was characterized by a general openness of information, which lasted substantially, if decreasingly, into the present century.[137] Viewed in this light, the Court's conclusory acceptance of the present situation as constitutionally valid is unjustified.

Moreover, *Pell* was clearly not an appropriate case in which to decide the fate of special access as a general matter. First, the constitutional arguments for special access were not presented to the Court; the journalists tried to characterize the situation as involving only equal access problems.[138] Second, in the Court's view the press already enjoyed greater access to prisoners than did the public generally.[139] Finally, because of the "big wheel" phenomenon,[140] press access to certain pris-

---

[132] 403 U.S. 713 (1971).

[133] Pell v. Procunier, 471 U.S. 817, 834 (1974).

[134] *See* text accompanying notes 95-113 *supra*.

[135] "The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs." Mills v. Alabama, 384 U.S. 214, 219 (1966), *quoted in Pell*, 417 U.S. at 863 (Powell, J., dissenting).

[136] Notes 11-15 *supra* & accompanying text.

[137] Notes 11-32 *supra* & accompanying text.

[138] *See* note 124 *supra* & accompanying text.

[139] 417 U.S. at 830-31. Indeed, it could be argued that the broad constitutional proposition quoted above was actually narrowed by the Court's perceptions that the media already had more access than the public and that the interview technique would add little of importance to the access already afforded the press. *See* Nimmer, *supra* note 46, at 643-44.

[140] 417 U.S. at 831-32.

oners presented problems not created by public access generally. This seems contrary to the more usual situation in which the press will be especially well equipped to gather information with a minimum of disruption. For these reasons, *Pell* should not be considered invulnerable to being overruled or restricted to its facts in a later special access case.

III. CONCLUSION

When the government wishes to impose restrictions on access to information, it may offer a reason that is content-related or one that is not. Affirmative reasons such as national security or executive privilege,[141] in support of an assertion that the information demands secrecy, are equally valid against the press and the general public, and no question of special access is raised. A special access question arises only when the government reason is non-content-related; that situation may present administrative problems that properly make general public access impossible, but that are insufficient to compel exclusion of a manageable number of professionals who could disseminate the information to the general public. The efficiencies of this approach have led many official bodies to adopt policies permitting regular press access to information not generally made available to the public, such as police blotters, local government committee discussions, and even court chambers conferences. In other cases, however, press access to information deserving publicity is resisted because public access is not feasible and the government does not wish to accord the press a special privilege. The egalitarian argument is attractive and easily made—too easily made, for it effectively deprives the public of information not requiring secrecy.

In *Pell v. Procunier* the Court upheld prohibitions on press-prisoner interviews in broad language that rejected special access. When information-gathering cases arise in the future, the Court's unequivocal rejection of special access in *Pell* should be reconsidered.

---

[141] United States v. Nixon, 418 U.S. 683 (1974); EPA v. Mink, 410 U.S. 73 (1973).