Comment: First Amendment Rights of Prisoners to Have Access to the News Media in Relation to Administrative Policy Bans Upon Such Access

Sharon Hass

Follow this and additional works at: https://digitalcommons.pepperdine.edu/plr

Part of the First Amendment Commons, and the Law Enforcement and Corrections Commons

Recommended Citation
Sharon Hass Comment: First Amendment Rights of Prisoners to Have Access to the News Media in Relation to Administrative Policy Bans Upon Such Access, 1 Pepp. L. Rev. Iss. 3 (1974)
Available at: https://digitalcommons.pepperdine.edu/plr/vol1/iss3/4

This Comment is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.
Comment: First Amendment Rights of Prisoners to Have Access to the News Media in Relation to Administrative Policy Bans Upon Such Access

No doubt prison administrators sense that to permit the media and the public access to their domain would result in stripping away a major justification for their existence: that they are confining depraved, brutal creatures. As The New Yorker's Talk of the Town column put it, during the Attica uprising, millions of Americans were brought face to face with convicted criminals for the first time. Most of us were wholly unprepared for what we saw... the crowd we saw on television was not a mob but a purposeful gathering, and the men we saw were not brutalized, although they may have suffered brutality—they were unmistakably whole men. We saw men acting with dignity, not men stripped of their pride.¹

That the press and electronic media have long been destroyers of myth is no revelation. Yet the willingness, or unwillingness in the case of America's penal system, of society to observe such destruction hinges upon how sincere we are in our desire to get at the truth. To give lip service to first amendment rights of the press and prisoners to have access to one another for purposes of getting at some degree of truth, while simultaneously upholding the arbitrary rights of prison administrators to deny access under the umbrella of security, is to deny ourselves the realization that our penal system is failing.

The aim of this comment is to provide an overview in light of recent court cases dealing with the right of the press to have access to prisoners, particularly those incarcerated in maximum security institutions. These new cases, arising out of both state and federal jurisdictions, reflect the vacillating state of the law of prisoners' rights in general, while also attempting to come to grips with the particular issue of first amendment rights of prisoners to have access to the press. Also, there is a conflict between administrative standards designed to maximize administrative efficiency, and the constitutional right to allow free access which carries with it the inherent risk of destruction of that efficiency.

Examining the rights of prisoners within any context, particularly as they relate to first amendment rights, must be done from multiple sides. This article will look first to the problem as the courts view it and what the sudden change in judicial attitude has brought. Secondly, it will view the administrative attitude regarding issues as they relate to those people who are in charge of the penal system on a day-to-day basis and whose concerns revolve around more pragmatic issues than those of a constitutional nature, namely security.

The article will also attempt to examine the problem from the press' viewpoint, with an eye towards the cause and effect issues which access to prisons might have. Throughout the article, the problem will be viewed as the prisoners see it, concentrating substantially on the question of why access is so desperately wanted by prisoners as a means of circumventing the administrative procedure for airing their grievances.

Reluctant Judicial Intervention and the Need for It

Court Attitude

Traditionally, the courts have displayed a ready willingness to disregard what occurs behind the closed doors of prisons, concentrating more readily upon the rights of citizens before they become incarcerated. Yet with the increase in jailhouse lawyers and prison uprisings, the courts have been forced to abandon their "hands off" approach realizing that judicial intervention is needed to either clarify or reform administrative policies. What has, however, emerged out of this reluctant intervention has been a series of con-
flicting judicial edicts on the subject of prisoners' rights after incarceration.

Two of the earliest cases reflecting the conflict were *Price v. Johnston* ² and *Coffin v. Reichard.* ³ The theory behind *Price* was that "Lawful incarceration brings about the necessary withdrawal . . . of many privileges and rights, a retraction justified by the considerations underlying our penal system." ⁴ In actuality, this theory is dicta from the court rather than a pronouncement of law. Yet, this has not stopped later courts from using this theory as a springboard for further cases.

In the case of *United States ex rel. Morris v. Radio Station WENR,* ⁵ the court stated that "We think that it is well settled that it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined." ⁶ There again, the overriding concern for due process for the innocent who may have been mistakenly incarcerated rather than for the guilty who attempt to assert an otherwise fundamental right, is present.

The *Coffin* case, however, presented an alternate theory, one whereby "[a] prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law." ⁷ It was a theory which placed the burden upon the administrative officials to show adequate cause for denial of a fundamental right.

While recognizing all the legitimate arguments of *Price* and *Morris,* arguments which revolve around the belief that guilt carries with it some constitutional denial as a penalty, the federal court added further confusion by its holding in *Brown v. Peyton.* ⁸ In *Brown* the court stated that:

(while) the judgments of prison officials are entitled to considerable weight because they are based upon first-hand observance of the events of prison life and upon a certain expertise in the functioning of a penal institution, prison officials are not judges. They are not charged by law and constitutional mandate with the responsibility for interpreting and applying constitutional provisions, and they are not always disinterested persons in the resolution of prison problems. We do not denigrate their views but we cannot be absolutely bound by them. ⁹

---

2. 334 U.S. 266 (1948).
3. 143 F.2d 443 (6th Cir. 1944).
5. 209 F.2d 105 (1953).
6. Id., at 107.
7. 143 F.2d 443, 445 (1944).
8. 437 F.2d 1228 (1971).
9. Id., at 1232.
The courts, then, have been faced with this dilemma: whether to grant complete discretion to correction officials and risk a possible abrogation of constitutional rights of prisoners; or whether to recognize that while prisons may punish by incarceration, all fundamental rights should not be denied to prisoners. Just what denials lawful incarceration carries with it as a penalty is a basic question which must be approached through a realistic appraisal of three elements: jailhouse security; prisoners' rights; and, the public right to know.

The policy of the courts until recently has been dubbed one of "federal abstention or a hands off doctrine"10 with occasional entrances into the area when there were "exceptional circumstances."11 Yet, hand written pleas discovered to be requests for adjudication of gemlike legal questions in the manner of Gideon, questions which have grown more imperative in light of prison uprisings, have prompted judicial response. The courts could not bear to resist cases and controversies which revolved around administrative indiscretions and arbitrary disciplinary rulings.

No longer could prisons and their inmates be considered a closed society with every internal disciplinary judgment to be blissfully regarded as immune from the limelight that all public agencies ordinarily are subject to.12

Court Access

Fundamental to any issue of prisoner-press access is, of course, the rights of prisoners to have access to the courts themselves, for once this right was acknowledged, the possibility of additional access could be rested upon an analogous legal foundation. Once the courts were willing to open the door to pleas of those behind prison walls, judicial intervention in the administrative correctional area became an integral part of post conviction litigation. Appeals from death row were considered alongside of appeals for injunctive relief from administrative discipline. "Reasonable access to the courts is basic to all other rights . . . , for it is essential to their enforcement."13

11. Id., at 8.
The judiciary has traditionally been reluctant to act as a remedial arbiter, preferring instead to remind legislatures of their duty to enact sufficient safeguards to prevent arbitrary standards. Yet, prison uprisings combined with the preferred position of the first amendment has forced some degree of intervention. Despite the obvious need for adjudication, however reluctant, there are still many problems related to court access by prisoners which need to be resolved before a concise declaration regarding fundamental rights of prisoners can be achieved.

One problem has been that judicial intervention is never regarded kindly by administrators.

Even where the courts do intercede, the effects of judicial intervention may not always be salutary. Prison officials may view judicial involvement as a serious threat to their authority. Moreover, a decision adverse to the prison administration may create a new assortment of disciplinary problems by undermining inmate respect for prison officials. Inmates, having the court's sympathy, may think that the ultimate arbiter of the disciplinary process is the court and not the prison officials. Consequently, inmate discipline as well as staff morale may decline substantially.14

There is also a problem of inconsistency as it relates to access between the state and federal courts and those prisoners confined to state or federal facilities. While it is true that "a prisoner of a state does not lose all his civil rights during and because of his incarceration and that in particular, he is protected by the Due Process and Equal Protection Clauses which follow him through the prison doors,"15 his right of access to state courts is more limited than those of his counterparts in a federal prison. Therefore, his first amendment rights are not as readily enforceable in state prisons since access to court is, of course, fundamental to enforcing those rights.

The inconsistency in relief is apparent when the treatment of a prisoner's petition for relief is examined in relation to the differences in manner of handling between state and federal courts. For example, a prisoner in a California state facility must base his first amendment challenges, procedurally, either by way of Section 1983 of the U.S. Civil Rights Act or by habeas corpus. Even assuming a procedural survival of his petition to the federal courts, there is still no guarantee that his claim will be adjudicated since

“the principal obstacle confronting a prisoner is that whether he
proceeds by way of habeas corpus or under the Civil Rights Act,
he must allege and prove that his mistreatment at the hands of
prison officials has violated one or more of his federal constitu-
tional rights; anything short of that will not support federal juris-
diction no matter how malicious or harmful the mistreatment may
have been.”

Prisoners in federal penitentiaries, of course, have fewer proce-
dural obstacles to overcome. This accounts for why the majority
of cases relating to prisoners' constitutional rights have their origin
in federal institutions. This often results in a discrepancy between
the way in which state and federal correctional agencies admini-
ster to their prisoners. Added to “the threshold obstacle concern-
ing the existence of a constitutional question . . . are the consid-
erations of delay, distance, unfamiliarity, and natural judicial re-
luctance, all of which militate against the usefulness of a federal
forum in a prisoners' conditions case.” This is especially true
when the petition evolves out of a state facility.

Yet, despite the obvious deficiencies involved in traditional meth-
ods of prisoners' petition for relief, a recent court decision which
has opened a new route for prisoners to assert first amendment
rights via the fourteenth amendment guarantees of due process and
equal protection. This case recognizes the right of prisoners to
try and establish rights not yet in violation but rather in a decla-
laratory form.

Goodwin v. Oswald, involved an attempt by inmates of Green
Haven, a maximum security facility in Stormville, New York to
contact attorneys to aid in establishing a prisoners' union. The
case itself revolved around the issue of the attorney-client relation-
ship and the protection of confidentiality of mailings involving that
relationship. The court, of course, dealt with the traditional first
amendment questions and the whole concept of which preferred
rights are retained by prisoners. Yet, the court did not wholly
rely upon a first amendment analysis, seeing that as too narrow
and too abstract a concept to base a general question of access
to attorneys and courts upon.

16. B. E. Bergesen III, California Prisoners: Rights Without Remedies,
25 STAN. L.R. 1, 8 (1972).
17. Id., at 9.
18. 462 F.2d 1237 (2d Cir. 1972).
Rather, the court turned to the fourteenth amendment and a due process analysis, thereby providing a wider range of judicial intervention.

Prior to Goodwin, fourteenth amendment rights were not available to an inmate who did not have a grievance about the legality or conditions of his incarceration, one which constituted a cause of action and a claim for relief based on a right that was already established and secure. In Goodwin, the court asserted that it was sufficient that the attorneys were trying to establish certain rights.10

The new analysis supplied by the Goodwin court, if accepted by all federal courts, will surely increase the volume of litigation that arises from prisons. It runs the danger, in the view of some, of taking much needed authority from administrators by allowing prisoners to attempt to have the courts pronounce standards of discipline and the like rather than leaving that power in the hands of correctional agencies.

Yet, the court has traditionally stopped short of becoming a monolithic legislature, and it is obvious by virtue of the enormous increase in prison revolts that something is wrong in the way in which prisons are being run. Requests for access to courts, attorneys and the press from prisoners beyond the appellate stage has usually been grounded in a deep seated need for relief of some kind. The warden's office is not the proper forum to adjudicate these constitutional questions; the proper forum lies in the courtroom.

Access to courts and attorneys has therefore been established to a large degree. It remained for the courts to produce a broad ruling regarding the press, thereby formulating a triumvirate of access which might ultimately allow for the free flow of expression within the prison system. In this manner, the possibility of arriving at the root causes of penal system failure would increase.

However, in the most recent of court cases, the United States Supreme Court chose to be anything but liberal in its view of the press, or the need for prisoners to have increased access to the press. Despite the opportunity to provide complete access, the court decided to uphold the constitutionality of certain state and federal bans on specific inmate interviews, using prison security as the catchall rationale.20

20. The United States Supreme Court recently decided that a California prison regulation which limits access to specific prison inmates for the purpose of interviews was constitutional. Earlier, a three-judge panel for the ninth circuit had ruled that the ban was unconstitutional and arbitrary.
The Administrative View: Press Access Equals a Security Threat

To understand the reasons behind the administrative reluctance to provide press access to prisoners, one must look to the conceptual problems involved in man seeking to imprison not only a criminal's physical being but his emotional and intellectual being as well. Mental incarceration is obviously harder to obtain and any force which might disrupt containment, is a threat to those in whom such responsibility is entrusted. It is not so much from the pressures of physical confinement that prison uprisings ensue, but rather from the pressures of mental atrophy which the penal environment produces. Witness prisoner demands for increased library and vocational facilities rather than for total physical release as evidence of this situation.

Recognizing that it is the delicate balance of mental tranquility which could be disturbed by press access, the prison administrators have used the guise of prison security as the means to limit journalistic forays into penitentiaries. Citing political and racial dissension as by-products of any well publicized interview when circulated behind prison walls, prison officials have greatly limited the extent to which a reporter may investigate a story related to a criminal once incarcerated or a story related to conditions in a prison itself.

The lower court contended that prisoners had a right to request personal interviews, however, that journalists themselves did not warrant such an absolute right. The state appealed the court ruling on the issue of prisoners' rights, while representatives of the California journalistic community appealed the matter of reporter limitations. The regulation involved was Calif. Dept. of Corr. Manual § 415.071 (1973), dealt with by the lower court in Hillery v. Procunier, U.S.D.C. N. Cal. 8/16/73, 13 CR. L. 2550.

On June 24, 1974, the United States Supreme Court overturned the lower court's decision in Hillery. The high court split the case into two separate issues. In a 5-4 ruling, the court found that the constitution made no provision for journalists to have access to information not readily available to the public. The vote was 6-3 against the prisoners' having a right to complete access, with the court going so far as to say that other means of communication such as letters to families was adequate. Institutional security was cited as the primary reason for upholding the limitations.

The high court also overturned a lower court decision in Washington Post v. Kleindeinst, Civil No. 72-1382 (D.C. Cir., Sept. 6, 1972), 1 Prison L. Repn. 337 (1972), thereby reinstating as constitutional a federal ban on interviews with specific inmates. For a brief explanation of these cases see 87 Los Angeles Daily Journal 126 at 1.
This security argument was attempted by prison officials even against attorney access in *Goodwin v. Oswald*\(^2\) and the effects of uncensored correspondence between attorney and prison client.

The state argued that the correspondence would undermine discipline by promoting an alternative authority structure within the prison, provoke hostilities between pro-union prisoners with the possibility of violent reaction when they were informed that the union could never exist. The danger that injudicious communications from attorneys might have an inflammatory effect on relations between groups of inmates or between inmates and corrections officers was perhaps the most persuasive argument supporting the state's position that prison security requires a reading—and perhaps censoring—attorney's letters to clients. Such a danger might be especially pronounced when there have been recent disturbances at the prison related to the matter upon which the attorney is advising inmates.\(^2\)

When the right which a prison petitioner has attempted to assert has been in relation to the first amendment, prison administrators usually have advanced certain standard arguments for preventing such access which upon analysis seem to have little merit.

They are:

1. To assure compliance with prison rules.
2. The administrative costs . . .
3. Prisoners will enter into illegal outside activities or conspiracies.
4. To prevent escape plans from being made.
5. To protect sensibilities of persons outside and to prevent criticism of the institution.
6. To keep out pornography which causes perverse sexual behavior.
7. To prevent the introduction of contraband and weapons into the prison.
8. To screen out inflammatory writing that could incite the prisoners.\(^3\)

Critics of these arguments generally point to the one which relates to protecting sensibilities of people and preventing criticism of the institution as the one which is fundamental to the entire problem. It relates to the whole concept of locking prison doors to forget about that which we either abhor or can do little about. Criticism of the institution might foster criticism of the agency which administers it, and a let sleeping dogs lie attitude is preferred. Officials point to the lack of constructive alternatives available and, as such, criticism if circulated in prisons only adds to an already abnormal environment.

\(2\) 462 F.2d 1237 (2d Cir. 1972).
Too few incidents of prison revolt have been found which have any direct correlation to a reporter's detailing of prison conditions to substantiate arguments regarding security. No sustainable, or at least reported, evidence appears to exist to show that a reporter has smuggled contraband weapons or pornography into a prison, nor that one has aided or abetted an escape. All that has been offered has been mere speculation based upon sensational incidents such as that of inmate George Jackson of Soledad prison in California.

Jackson was a controversial prisoner, labeled by his advocates as a militant black who had been incarcerated more for his political views than for any other reason. Officials, however, saw him as a disruptive force, particularly after the press began to demonstrate an interest in him and requested personal interviews.

Until the late 1960's, such interviews were relatively infrequent and resulted in little burden upon or danger to the institutions. With the manifested discontent within the prisons and the consequent arousal of public concern and curiosity, however, the number of requests for media interviews increased substantially. The Department (of California Corrections) accommodated this influx despite the accompanying increased demands on its personnel and facilities.

It was against this background that the tragic events of August 21, 1971 took place. During an escape attempt at San Quentin, three staff members and two inmates (one of whom was Jackson) were killed. This was viewed by the officials as the climax of mounting disciplinary problems caused, in part, by its liberal posture with regard to press interviews.24

As a result, the Department of Corrections of California instituted a policy ban on interviews, Section 415.071.25 In arguing for the validity of the interview ban, the officials persisted in their attitude that violence within the prisons had a direct correlation to the increase in interviews. They especially attempted to show this correlation as it related to George Jackson.

Mr. Guthrie (a representative of the California Department of Corrections) described the prisoner as a "big wheel" and stated he believed the August 21 violence arose, in part, out of the theretofore liberal interview policy. However, when questioned further, he admitted that the prisoner has, in fact, only a limited rep-

---

25. Id., at 2550.
ution outside prison and had not achieved "celebrity" status within it prior to August 21. Such status was attained only after his death.* * * 

But when asked to explain the nature of the connection between interviews and the violence, neither Mr. Guthrie in his testimony, nor defense counsel in his argument, nor Mr. Procunier (head of the California Department of Corrections) in his affidavit, could specify facts showing a direct relationship between the two. 26

The increase in prison revolts appears to be putting pressure upon administrators to attempt to try and contain what could be a potentially uncontrollable situation. Yet what might be at the root of the pressure, the seeming desire to prevent access in the name of security, is the inability of the internal prison hierarchy to comprehend the sudden rise in revolts along with the sudden failure of traditional methods of confinement and discipline.

No longer is an indeterminate sentence in solitary confinement a useful method of forcing submission when a prisoner need only emerge from solitary and petition the court for relief. The thought then, of a prisoner granting an articulate interview to the press on such internal procedures causes the officials to utilize more often the traditional procedures of incarceration.

Yet, the sudden problem lies not so much in the attitude of the officials which appears to be a constant, but in the change in the type of prisoner which is capable of attracting press attention. This was evident at Attica State Prison where revolt by inmates caused both death as well as public attention. An excerpt from the official report on the uprising reflects this sociological change in prisoner characteristics, as well as the lack of change in internal prison correctional staff.

But the new Attica was increasingly populated by a new kind of inmate. Attica, like most of our prisons, had become largely a black and Spanish-speaking ghetto, and the new inmate was shaped by the same experiences, expectations, and frustrations that culminated in eruptions in Watts, Detroit, Newark and other American cities. The young inmate was conscious of the changes in attitudes in the black and Puerto Rican communities, on the campuses, in the churches, and in the antiwar movement that had touched him. Names like Malcolm X, George Jackson, Eldridge Cleaver, Angela Davis had special meaning to him.

The new inmate came to Attica bitter and angry as the result of the experiences in the ghetto streets and in the morass of the criminal justice system. Very likely, he already did, or would soon see himself as a "political prisoner"—a victim, not a criminal. For all its changes, Attica was still a prison, the very symbol of authoritarianism, and in the summer of 1971, it was caught up in an era of decline and rejection of authority.

26. Id., at 2551.
Attica's all-white correctional staff from rural western New York State was comfortable with inmates who "knew their place," but unprepared and untrained to deal with the new inmate, much less to understand him. Unused to seeing their authority challenged, officers felt threatened by the new inmate. Viewing the recent relaxation of rules and discipline, the intervention of the courts, and the new programs for inmates, they felt that their authority was being undermined by Albany and that their superiors were not backing them up. The officers became increasingly resentful and insecure. The result was, inevitable, daily confrontations between the new inmate and the old style officer.27

Many prison officials contend that much of the recent tension lies in the influx of prisoners who were aligned with politically or racially oriented causes prior to incarceration. Press attention and sympathy is often aroused and prison administrators see this as merely serving to produce internal conflict.

The political prisoner phenomenon does, of course, attract the press, but to assert that the press' interest in a potentially important story does more than call attention to the public to the story, or to provide a source by which prisoners might vent their intellectual or emotional tension, appears to be unsupported. Yet, officials persist in assertions that outside influences, including representatives of the press, are indeed responsible for the dissension.

Thus, in 1913, Ralph E. Smith, president of the Wisconsin Association of Governing Boards, told his colleagues in the American Prison Association, "In spite of the fact that great advancement has been made in methods of reform, it is also undoubtedly true that in no corresponding length of time have there been more serious outbreaks and revolts in prison." The cause, he believed, was "the agitation of so-called social workers. Their misrepresentations of the conditions of prisons and prison life have led prisoners living under admirable prison conditions to believe that they are treated worse than the worst, and that their condition is nothing more nor less than that of abject slavery. They are today not only causing unrest within prisons but, are contributing a great deal to the development of lawlessness without."

More than half a century later, at the 1969 American Correctional Association Congress, Warden R.W. Meier of McNeil Island Federal Penitentiary expanded on the same point: "We can without question blame some of our problems on outside influences. I think you know what I mean . . . there is the problem of well-organized disturbances brought on by the resisters, draft dodgers, professional agitators, Communists, hippies and revolutionaries.

. . . Former prisoners, militants, far-out liberals, subversives, and even a few clergymen, educators, and social workers, on the outside seem to delight in fomenting unrest in prisons."

Again, in 1971, in response to a question by Congressman Charles B. Rangel about the causes of the peaceful demonstration of convicts at Raiford, Florida, in which scores were injured by guard's gunfire, Director of Corrections Louie Wainright said he thought Jack Anderson "contributed to the disturbance" by his columns about conditions in that prison. Which caused Congressman Rangel to declare, "The last warden we had testify said it was a Communist conspiracy. Now we have another warden saying that Jack Anderson has created a major part of the problem. How can you have faith in a system like that?" 2

Only in one notable case, Yarish v. Nelson 29 which involved militant activist Ruchell Magee, does the apparent threat to security by allowing press access appear to have been justified. 30

Magee was a survivor of an escape attempt in which a Marin County judge was killed. Appellant requested an interview with Magee prior to his trial. The interview was scheduled to occur August 23, 1971, two days before the death of George Jackson and the outbreak of violence at San Quentin prison. Respondents, along with the Attorney General, denied the interview, setting up Section 415.071, which banned individual prisoner interviews under potentially explosive circumstances, as a defense.

The court sustained the respondents' position of the possible adverse effects of pre-trial publicity, citing Sheppard v. Maxwell 31 as ample precedent for such precautions. Nevertheless, the undercurrent running through the court's analysis was the potential threat to security that Magee posed, given his past alleged conduct. Here was a man that might provoke harm to either himself or those given free access to him. Given the circumstances of Marin County, coupled with the San Quentin incident, extraordinary precaution appears to have been justified rather than reactionary or overprotective.

29. 104 Cal. Rptr. 205 (1972).
30. It was the same rationale of threats to institutional security and efficiency which led to the overturning of a lower court ruling in Hillery v. Procunier, U.S.D.C. N. Cal. 8/16/73, 13 Cr. L. 2550 (1973), a case which tested the constitutionality of the ban which was used in Yarish. The United States Supreme Court in its most recent ruling on the matter of access found the ban to be proper and in no way an abridgement of prisoners' rights to communicate with the outside world. 87 Los Angeles Daily Journal 126 at 1.
THE PRESS' VIEW OF THE RIGHT TO KNOW EQUALING A RIGHT TO INVESTIGATE

The early cases which deal with access and the media were ones which originated from within the prison, generally involving a dispute over an administrative refusal to allow a particular publication from being circulated to inmates. One of the landmark cases in this area was *Fortune Society v. McGinnis*[^32] which concerned prisoner access to a publication devoted to detailing prison conditions, written predominantly by former inmates.

In upholding a prisoner's right to receive such a publication under the first amendment, the court stated that, "[o]nly a compelling state interest centering about prison security, or a clear and present danger of a breach of prison discipline, or some substantial interference with orderly institutional administration can justify curtailment of a prisoner's constitutional rights."[^32]

This case came as the culmination of a long fight by prisoners to have free access to virtually any publication they chose. It also served as a reiteration of the long standing need for a clear showing of a state interest which was of a substantial nature. Use of a "clear and present danger" standard was not unexpected since it denoted the heavy burden a party has when seeking to abrogate a first amendment right.

Mere antipathy caused by statements derogatory of and offensive to the white race is not sufficient to justify the suppression of religious literature even in a prison. Nor does the mere speculation that such statements may ignite racial or religious riots in a penal institution warrant their prescription to justify the prohibition of religious literature, the prison officials must prove that the literature creates a clear and present danger of a breach of prison security or discipline or some other substantial interference with the orderly functioning of the institution.^[34]

In the past few years, demands for access have increasingly arisen from outside the prison from reporters attempting to obtain interviews. Many suits involve prisoners, in conjunction with reporters, in an attempt to further the rights of free expression. In order to understand the press' position, it is necessary to remember that the press has generally asserted that a basic right to know

[^33]: Id., at 904.
[^34]: Long v. Parker, 390 F.2d 816, 822 (3rd Cir. 1968).
hinges upon a basic right to investigate. While cases do exist which uphold the public right to know via press freedom, no clear-cut judicial edict on the right to free, unimpeded investigation appears to exist. While cases such as *Branzburg v. Hayes* which put limitations upon free investigatory practices do appear, this does not mean that access has been impossible to achieve.

In *Nolan v. Fitzpatrick*, the court granted the first amendment rights to prisoners to send letters to the news media, though the prison officials were not barred from reading and reviewing the letters before they were mailed. The court held that prison officials could only properly refuse to mail letters where evidence of contraband or escape could be plausibly demonstrated. It should be noted that the prisoner-plaintiff involved in the suit never contested the right of prison officials to have the authority to read the outgoing mail.

Plaintiff sued for the right to send letters referring to internal matters of the prison, in particular letters regarding reaction to an article on the state prison in which they were incarcerated. It was in essence a letter of appreciation for what they believed was a fair treatment of the problem of prisoner grievances. While refusing to provide for total first amendment freedoms while incarcerated, the court interestingly enough went to the right of the public to hear such complaints.

In so concluding, we rely primarily on the fact that the condition of our prisons is an important matter of public policy as to which prisoners are, with their wardens, peculiarly interested and peculiarly knowledgeable. The argument that the prisoner has the right to communicate his grievances to the press and through the press, to the public is thus buttressed by the invisibility of prisons to the press and public: the prisoner's right to speak is enhanced by the right of the public to hear.

The state offered the arguments relating to security, namely what effect inflammatory letters emanating from prison and later circulated in published form would have upon security. The court, however, in what appears to be both faith in the ability of prison officials to contend with such situations, along with a desire to protect the constitutional freedom which is related to mailing of letters, said that "In extreme cases, prison officials can cope with the situation by refusing to admit the dangerous issue of the newspaper to the prison rather than by refusing to mail the letter in the first instance."
On the heels of Nolan, came a case which, while dealing with the right of mailing personal correspondence in relation to the Due Process Clause of the fourteenth amendment, did discuss the issue of the first amendment as a "fundamental" right. The analysis set forth in the case by Justice Doyle offers insight into the problem of applying human dignity to the fundamental rights issue.

I anticipate that in the prisoners cases, considerable difficulty will attend the selection of individual interests to be characterized as "fundamental," so as to invoke the requirement that the state show a compelling governmental interest in the regulatory classification. With respect to the general population, such a selection has been made over the years. However, the most striking aspect of prison, in terms of fourteenth amendment litigation, is that prison is a complex of physical arrangements and of measures, all wholly governmental, all wholly performed by agents of government, which determine the total existence of certain human beings (except perhaps in the realm of the spirit, and inevitably there as well) from sundown to sundown, sleeping, waking, speaking, silent, working, playing, viewing, eating, working, reading, alone, with others. It is not so, with members of the general adult population. State governments have not undertaken to require members of the general adult population to rise at a certain hour, retire at a certain hour, eat at a certain hour, live for periods with no companionship whatever, wear certain clothing, or submit to oral and anal searches after visiting hours, nor have state governments undertaken to prohibit members of the general adult population from speaking to one another, wearing beards, embracing their spouses, or corresponding with their lovers. There has been no occasion to test the constitutionality of such measures as applied to members of the general population. New ground must be broken, therefore, in deciding which, if any, of the individual interests affected by such requirements and prohibitions are to be characterized as fundamental.59

The court has recognized the extraordinary circumstances of prison disturbances where the compelling state interest has been substantial and as such has refused access. As previously noted, access was refused in the case Yarish v. Nelson.40 The court upheld the ban on specific interviews with prisoners due to the state interest in containing inflammatory pre-trial publicity.

Yet, the court is often faced with the problem that blanket bans present, even where there is a compelling state interest, as regards

40. 104 Cal. Rptr. 205 (1972).
situations which are fluctuating in nature. While the Yarish ruling relates to a specific ban as it was applied to a specific inmate in what was obviously an extremely tense circumstance, it also involved legal issues of pre-trial evidence. Blanket bans on a prison population in toto are apparently subject to changing factors.

Following the uprising at Attica State Prison in New York, prison officials imposed a blanket ban upon press interviews with inmates who were incarcerated at Attica during that time. In the first of its rulings in this particular case, the United States District Court for Western New York, ruled in *Burnham v. Oswald* (I)\(^{42}\) that individual reporters and Playboy magazine as a party litigant representing the press' position, could receive no federal relief from the ban against inmate interviews.

The court seemed convinced that the occurrences at Attica had not been sufficiently quelled so as to allow reporters access as might be afforded under reasonably normal circumstances. The circulation of potentially inflammatory news articles might have rekindled disturbances within the prison.

However, the court in *Burnham v. Oswald* (II),\(^{43}\) reevaluated its position, and upon further evidence, ruled that the New York State guidelines promulgating a blanket ban was, in fact, unreasonable and needed to be revised in order to prevent usurpation of inmates' constitutional rights.

Accepting the rationale presented in *Nolan v. Fitzpatrick*\(^ {44}\) regarding the retention of first amendment rights after incarceration, the court also noted that the state's interest in security was defeated. In this instance, it was overshadowed by the public right to know which was dependent upon the press' right to investigate news sources.

*Burnham* (II) did not offer unlimited access for newsmen nor did it restrict administrators to the point where policies regarding inmate interviews were meaningless. But, it offered an example of where the delicacy of the internal situation, which might possibly be upset by interviews, was outweighed by the need for public exposure to the prison crisis. The possibility of security problems was insufficiently shown. A clear and convincing showing was needed and the state failed in its evidentiary burden. The state revised its ruling to provide broader access.\(^ {45}\)

---

44. 451 F.2d 545 (1st Cir. 1971).
45. 12 Cr. L. 2275, 2276 (1972).
The partial dependence upon Washington Post by the court in Burnham (II) belies the crux of the press' argument. Granting the public a right to know is insufficient without a right for the public's agents, the press, to have an equally recognizable right to investigate. In Washington Post reporters argued for the right to in-depth interviews, interviews where they might be able to reach beneath the superficiality that is probable in restricted interviews where officials are always present or where fears of administrative reprisal is an undertone.

The right to investigate as a bona fide partner to the public right to know while admitted in Washington Post was not a uniformly recognized right and was subject to review. The case was reheard in District Court on the issue of how the ruling related to Branzburg v. Hayes.\(^46\) The lower court reaffirmed the unconstitutionality of the blanket ban on interviews with inmates in federal institutions which the Washington Post reporters were contesting.\(^47\)

Nevertheless, it should be remembered that the United States District Court for the District of Columbia circuit has traditionally ruled in a liberal manner regarding first amendment rights. Emanating from that court were the first rulings which spoke of a "paramount" public right to know\(^48\) and of the rights of citizens' groups to intervene in Federal Communications Commission licensing rulings for reasons of public necessity. The Washington Post ruling was ultimately reheard before the United States Supreme Court. It was not reviewed primarily on the issue of a blanket right to investigate as being naturally derivative from the right to a free press. Instead, the high court looked to the constitution-

\(^{46}\) 408 U.S. 665 (1972).

\(^{47}\) For the original ruling see Civil No. 467-72 (D.D.C., Apr. 5, 1972), 1 Prison L. Rptr. 141 (1972). The case was then stayed after the Branzburg decision, in 406 U.S. 912 (1972). The lower court then reconsidered the case in Washington Post v. Kleindeinst, Civil No. 72-1362 (D.C. Cir., Sept. 6, 1972), 1 Prison L. Rptr. 337 (1972), reaffirming the original decision. The Federal Bureau of Prisons decided to appeal the second ruling to the United States Supreme Court, contending that the ban was expressed in Bureau of Prisons, U.S. Dept. of Justice Penal Statement 1220.1A, Inmate Correspondence with Representatives of the Press and News Media (February 11, 1972), was a reasonable limitation. In a ruling consolidating this with other cases on access, the high court found the federal ban to be constitutional and non-violative of the first amendment. See 87 Los Angeles Daily Journal 126 at 1.

ality of the federal ban as it related to prison security. Finding the ban to be proper, the court noted that "the problems of deter-
rence, rehabilitation and maintenance of order in prisons outweigh any infringement of free speech." 49

Along with the Washington Post case, the high court also re-
viewed a California ban on access, found by a lower court to be unconstitutionaL in Hillery v. Procunier. 50 The United States Dis-
trict Court for Northern California had ruled that a Department of Corrections ban on specific prisoner interviews violated the first amendment rights of prisoners, though not necessarily those of journalists. The court found no legitimate evidence that inter-
views produced either a security problem or a "celebrity" situation such as the one which officials felt had occurred with George Jack-
son.

Instead, the court characterized such arguments as vague specu-
lations which were in need of a greater showing of a jeopardized compelling interest. The lower court ordered a revisal of the pol-
icy to allow for broader access and to bring it in line with the first amendment. The Supreme Court, however, found that the regulation was a proper means of keeping order in state facilities just as it was in federal ones.

Prisoner rights were maintained, the court contended, by virtue of their being able to correspond with journalists by mail or via visitors such as wives and ministers. According to Justice Potter Stewart writing for the majority, journalistic rights were similarly maintained by press tours which were regularly given and which did allow random interviews. 51

Two additional cases which relate to blanket bans are Seattle-
Tacoma Newspaper Guild, Local 82 v. Parker, 52 and Houston Chronicle Publishing Co. v. Kleindeinst. 53 In Seattle-Tacoma, the United States Court of Appeals for the ninth district found that a federal ban 54 on individual inmate interviews did not violate the first amendment rights of either the prisoners at McNeil Island Federal Penitentiary of Washington, or of the news media.

49. Time, July 8, 1974, at 58.
50. U.S.D.C. N. Cal. 8/16/73, 13 Cr. L. 2550 (1973), decided by the Su-
preme Court on June 24, 1974 in a consolidated ruling with the Washington Post case. See 87 Los Angeles Daily Journal 126 at 1.
51. 87 Los Angeles Daily Journal 126 at 15.
54. Federal Bureau of Prisons Policy Statement 1220.1A (1972), see supra note 48 for how this federal ban was treated by the Supreme Court.
McNeil is a maximum security prison which has been the scene of disturbances and a prisoner strike in 1971, during which the usual emergency precautions were taken. The news media wished to have access to the prison officials, employees, administrative directives on treatment and inmates and particularly strike leaders. The directive from the Federal Bureau of Prisons provided for general access but denied individual interviews on the grounds that individual interviews caused disciplinary problems to increase and created prison celebrities or "big wheels" which damaged the rehabilitation process.

The court, while recognizing the public interest involved in being informed of the prison situation, fell back on a rational basis test: whether or not the federal and state officials had a rational basis from which to refuse individual access. However, the court declined to impose a blanket constitutionality, limiting its ruling instead to McNeil Island and the situation at that prison. The court accepted the ban as being within the parameters of the prison system and found that it did not impede confidential relationships which a prisoner had a right to.

Houston Chronicle is probably of little precedential value to the issue since it relates to how the Federal Bureau of Prisons policy ban applied to contract jails. Contract jails hold potential inmates of federal prisons while awaiting trial and sentencing. In that case the court stated that the ban was inapplicable in relation to local jails and was in and of itself too broad. "The Chronicle's right to seek out news is a part of its first amendment right to publish news."55

CONCLUSION

What the cases in this area reflect is a desire on the part of the press to pursue a right to investigate in an atmosphere where concealment cloaked in the guise of security has been common. Similarly, they evidence a desire on the part of prisoners to air grievances beyond the prison walls. Yet despite supposed judicial concern for the maintenance of a free press as well as for certain rights which should naturally be carried even into prison, the compelling state and federal interest to preserve security seems to have

taken precedence. It is not surprising that the current United States Supreme Court has ruled in the manner described earlier. One need only look at the way in which the court has begun to widen the powers of law enforcement in the search and seizure area to recognize that the concerns for a more ordered society have prompted a highly conservative judicial approach.

No ruling or discussion of them would be just or complete without the realization that individual interviews with prisoners may at some time or place carry with it a risk. Some discretionary rules are needed. It is, of course, conceivable that an individual prisoner might attempt to utilize publicity he receives to his own advantage within the confines of the prison, just as it is conceivable that a prisoner might offer a critical view of conditions which is lacking in substance or validity.

Nevertheless, any lifting of bans upon individual freedoms carries with it the inherent risk of abuse and indiscretion. Perpetuating a system of confinement involves certain built-in resentments which must be recognized. There is resentment on the part of the prisoner who must adjust to the narrow walls within which his existence has been limited as a result of his crime. But there is also resentment on the part of officials whose job it is to maintain at least a semblance of peace in a tense situation.

The advantage of access which has few limitations attached is, of course, a clearer, more open picture of how our penal system operates. A closed society, such as has existed behind prison walls until the past few years, is an enigma in what is basically a society endowed with more press freedom than any other. One only need look at what the by-products of diligent investigatory reporting have given us, what exposés on society's ills have eventually produced, to realize that the probable result would be some reformation of the system.

To counteract the security arguments presented by administrative officials, who see access as a triggering mechanism to an already overblown, explosive circumstance, one need only look at the reverse side of the argument. Does not access to the press and the public via a press conduit provide an additional safety valve? It is a valve which can be tapped to alleviate some of the tension prisoners feel within when the administrative procedures are too slow or impersonal in responding.

Press abuses are possible along with prisoner abuses, the desire for a sensational story being a factor of the profession, but there are sufficient numbers in the news media who regard their job
as one of a trustee for the public's right to know what is occurring within its institutions. Access would hold greater advantages than disadvantages for a penal system which needs public understanding as an impetus to implementing change.

Sharon Hass