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First Amendment; Freedom of the Press; Access of News Media to County Jail; Houchins v. KQED, Inc.

Thomas W. Renwand

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CONSTITUTIONAL LAW

First Amendment • Freedom of The Press • Access of News Media to County Jail

Houchins v. KQED, Inc., 98 S. Ct. 2588 (1978).

THE UNITED STATES SUPREME COURT in *Houchins v. KQED*¹ ruled that the press enjoys no greater first amendment rights than the public itself. A four to three majority of the Court held that newsmen have no constitutional right to greater access to state institutions, specifically prisons, than that of the general public.² Mr. Chief Justice Burger, speaking for the majority, stated:

Neither the First nor Fourteenth Amendment guarantees the news media the right of access to government information or sources of information beyond that available to the public generally and thus the federal district court abused its discretion by enjoining jail officials from denying news media representatives access to jail facilities at reasonable times for purposes of interviewing inmates and making sound recordings, films and photographs.³

Although United States history is replete with struggles over the rights and prerogatives of the press, until recently these disputes rarely made their way to the nation's highest court.⁴ In the last several years the Supreme Court has been confronted with a number of important, complex questions dealing with the role of a free press in a free society.⁵

First amendment rights of free speech and freedom of the press have historically been given the greatest protection by the courts.⁶ The protection given these rights has been fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.⁷ After the enactment of the fourteenth amendment, the "consti-

¹ 98 S. Ct. 2588 (1978).

² *Id.*

³ *Id.* at 2595.

⁴ Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 632 (1975).

⁵ See *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Bradenburg v. Ohio*, 395 U.S. 444 (1969); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Time, Inc. v. Hill*, 385 U.S. 374 (1969); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

⁶ Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731, 752 (1977); See also Rehnquist, *The First Amendment: Freedom, Philosophy, and the Law*, 12 GONZAGA L. REV. 1, 2 (1976); A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821 (1962).

⁷ *Roth v. United States*, 354 U.S. 476, 484 (1957).

tutional framework was modified, and by the 1920's the Court had established that the protections of the first amendment extend against all government—federal, state, and local."⁸ Furthermore, in such recent cases as *Pell v. Procunier*,⁹ *Saxbe v. Washington Post Co.*,¹⁰ *Procunier v. Martinez*,¹¹ and *Branzburg v. Hayes*,¹² the Court has endeavored to delineate specific constitutional guidelines for the press to follow in obtaining news stories. In the eyes of the Burger majority, the Court has only reaffirmed these decisions with the *KQED* decision.

The case originated when in late March, 1975, a public television station, *KQED*, reported the suicide of an inmate in the Greystone section of the Santa Rita Jail in Alameda County, California. The newscast concluded with a statement by a psychiatrist employed by the facility that the conditions in the Greystone section were responsible for mental illnesses of inmates and a denial by Sheriff Houchins that prison conditions were in any way responsible for the prisoners' mental problems.¹³

The jail is located in a remote section of the county. It had previously been a barracks before being converted into a prison facility in 1947. In 1972, five inmates brought suit against the former sheriff, charging that confinement in the Greystone section of Santa Rita Jail constituted cruel and unusual punishment in violation of the eighth amendment. District Judge Zirpoli personally visited the facility and declared:

[t]he Greystone section violated basic standards of human decency . . . and shocked the conscience of the court. The heating, ventilation, plumbing and sanitation were obviously and grossly substandard. . . . The conditions at Greystone were truly deplorable and the shocking and debasing conditions which prevailed there constituted cruel and unusual punishment for man or beast as a matter of law.¹⁴

KQED requested permission from Sheriff Houchins to visit and film

⁸ Stewart, *supra* note 4, at 632.

⁹ 417 U.S. 817 (1974).

¹⁰ 417 U.S. 843 (1974).

¹¹ 416 U.S. 396 (1974).

¹² 408 U.S. 665 (1972).

¹³ 98 S. Ct. at 2591.

¹⁴ *Brenneman v. Madigan*, 343 F. Supp. 128, 130 (N.D. Cal. 1972). It was argued in *Houchins* that:

After the district court's ruling many necessary improvements were made to alleviate the cruel and unusual conditions of imprisonment that had prevailed at Greystone. Nevertheless, the conditions are still far from ideal. Consequently, plans for new and expensive construction of county jail facilities are being debated and considered by the elected officials and the people of Alameda County.

Brief for Respondent at 23, *Houchins v. KQED, Inc.*, 98 S. Ct. 2588 (1978).

the Greystone area but the latter refused to grant his necessary permission.¹⁵ The Santa Rita Jail was, for all practical purposes, closed to both the media and the general public. Limited visitation was allowed to attorneys, clergy, relatives and friends of the inmates. However, these visits included access only to specifically designated areas of the jail.

KQED brought the action against Sheriff Houchins under 42 U.S.C. section 1983 claiming deprivation of its first amendment rights.¹⁶ The county thereafter liberalized its visitation policy by conducting regular monthly tours, open both to the public and news media. Nevertheless, the tours did not include the Little Greystone section of the jail, interviews with inmates, or the use of cameras and tape recorders.¹⁷

KQED contended that such restrictions failed to "provide any effective means by which the public could be informed of conditions prevailing in the Greystone facility or learn of the prisoners' grievances."¹⁸ Sheriff Houchins argued, however, that unregulated access by the news media to the jail would infringe inmate privacy and tend to create "jail celebrities," who consequently would tend to generate internal problems and undermine security. Houchins also feared that administration of the jail would become aggravated and disoriented through unscheduled media tours.¹⁹ Furthermore, he asserted that the visitation program in effect met constitutional requirements imposed by the first amendment.²⁰

The district court preliminarily enjoined petitioner from denying KQED and other responsible members of the press reasonable access to all areas of the jail. Furthermore, the media was not to be restricted in its use of video or audio equipment or from conducting inmate interviews.²¹ The Ninth Circuit Court of Appeals affirmed the lower court's ruling.²²

¹⁵ KQED v. Houchins, 546 F.2d 284, 285 (9th Cir. 1976).

¹⁶ 98 S. Ct. at 2591.

¹⁷ *Id.* at 2592.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Oddly, Sheriff Houchins' beliefs on the presence of the news media in jail facilities contrasted sharply with those of then neighboring San Francisco County Sheriff, Richard D. Hongisto. In an affidavit introduced by KQED, Hongisto stated that he had allowed KQED to do a ninety minute live program from San Francisco County Jail at San Bruno on February 2, 1972. Hongisto found no difficulty in protecting the privacy of the inmates nor did the media's presence create any need for increased security. Consequently, Hongisto later authorized interior shots and filming of four other correctional facilities in San Francisco County. Hongisto summed up his position on the situation as follows: "In my opinion jails are public institutions and the public has a right to know what is being done with their tax dollars that are being spent on jail facilities and programs." Brief for petitioner at 14-15, Houchins v. KQED, Inc., 98 S. Ct. 2588 (1978).

²¹ 546 F.2d at 285.

²² *Id.* at 284.

Mr. Justice Rehnquist, in his role as circuit justice, stayed the mandate and in his opinion on the stay application stated:

The legal issue to be raised by applicant's petition for certiorari seems quite clear. If the "no greater access doctrine" of *Pell* and *Saxbe* applies to this case, the Court of Appeals and the District Court were wrong, and the injunction was an abuse of discretion. If, on the other hand, the holding in *Pell* is to be viewed as impliedly limited to the situation where there already existed substantial press and public access to the prison, then *Pell* and *Saxbe* are not necessarily dispositive, and review by this court of the propriety of the injunction, in light of those cases, would be appropriate, although not necessary.²³

Consequently, the majority in *KQED* adopted Rehnquist's first view of the issue while the dissent believed that the second set of circumstances was controlling.

While recognizing the maxim that conditions in jails and prisons are clearly matters "of great public importance,"²⁴ Chief Justice Burger declared that the "media are not a substitute or an adjunct of government . . . and are ill-equipped to deal with problems of prison administration."²⁵ Burger contended that the press enjoys no constitutional rights of access to either prisons or any other sources of governmental information.

The majority saw the issue not as a right to receive ideas and information but as a claim of special privilege to access. Ironically, Chief Justice Burger sought to fortify his opinion by quoting liberally from *Zemel v. Rusk* in which a noted protector of free speech, former Chief Justice Warren stated:

[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information.²⁶

However, Chief Justice Warren's decision dealt with a completely different, and only vaguely related legal problem. *Zemel* upheld the denial of a United States citizen's request to have his passport validated for travel to Cuba as a tourist to study the effects of American foreign policy on the Cuban people. The first amendment argument was ancillary to the decision.

²³ 429 U.S. 1341, 1344 (1977).

²⁴ *Pell v. Procunier*, 417 U.S. at 830 n.7.

²⁵ 98 S. Ct. at 2594.

²⁶ *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965).

The Court, in upholding the Secretary of State's right to deny the passport, based its decision mainly on the constitutionality of the Passport Act of 1926.²⁷ The Court saw the issue as involving the powers of the executive branch to conduct foreign affairs and ruled accordingly.

Furthermore, Chief Justice Burger's decision affords a very narrow reading of *Pell* and *Saxbe*. The prisons in those cases permitted liberal media access that was sufficient to insure against concealment of conditions or events of public concern.²⁸ The restriction attacked in *Pell* was a rule prohibiting face-to-face interviews between news media representatives and individual inmates.

Mr. Justice Stewart, writing for a six-member majority, held that because alternative channels of communication existed, the rule did not abridge the inmates' freedom of speech.²⁹ In the second part of his opinion (expressing the views of five members of the Court) Stewart held that the rule did not interfere with the news media representative's freedom of the press since the regulation did not deny the press access to sources of information available to members of the general public.³⁰

Saxbe involved the constitutionality of a policy statement of the Federal Bureau of Prisons which prohibited interviews between members of the press and "individually designated federal prison inmates."³¹ The Supreme Court upheld the constitutionality of the policy statement since it did not deny members of the news media access to sources of information available to members of the general public. For example, unlike the situation at the Alameda jail, newsmen were permitted to photograph any prison facility on the tours of correctional institutions.³² They could conduct brief interviews with any inmates they might encounter and any mail between newsmen and prisoners was "neither censored nor inspected."³³

Chief Justice Burger concluded in *Houchins* by stating that it was essentially a legislative decision whether or not penal institutions should be opened to the press.³⁴ He also argued that a number of alternatives are available to prevent problems in penal facilities from escaping public attention. These include citizen task forces and prison visitation committees, grand juries, investigations conducted by a prosecutor or member of the judiciary, and

²⁷ *Id.* at 18.

²⁸ 417 U.S. at 829.

²⁹ *Id.* at 824-28.

³⁰ *Id.* at 833-34.

³¹ *Saxbe v. Washington Post Co.*, 417 U.S. 843, 844 (1974).

³² *Id.* at 847.

³³ *Id.*

³⁴ 98 S. Ct. at 2596.

investigation by the legislature.⁸⁵ In addition, California has a prison Board of Corrections that has the power to inspect prisons and jails and is required to make its findings available to the public.⁸⁶

Concurring, Mr. Justice Stewart agreed that the press has no greater right of access to information than the public but concluded that KQED should have been granted limited injunctive relief.⁸⁷ In effect, Justice Stewart declared that the press should be allowed to use the audio and visual equipment of their profession in order to convey the "jail's sights and sounds" to members of the public who cannot personally visit the place.⁸⁸ Nevertheless, Justice Stewart seemed to adopt the view that if the public is excluded from a right of access to a governmental source of information, then the press may constitutionally be excluded, too. He stated:

[i]n two respects, however, the District Court's preliminary injunction was overbroad. It ordered the Sheriff to permit reporters into the Little Greystone facility and it required him to let them interview randomly encountered inmates. In both these respects, the injunction gave the press access to areas and sources of information from which persons on the public tours had been excluded, and thus enlarged the scope of what the Sheriff and County Supervisors had opened to public view.⁸⁹

The newest member of the Court, Mr. Justice Stevens, with whom Mr. Justice Brennan and Mr. Justice Powell joined, delivered a vigorous dissent. He held that *Pell* and *Saxbe* were not controlling in the present case since the press already had liberal access to view the conditions in the prisons in those cases.⁹⁰ Justice Stevens voiced concern that the very limited access available to the press in *Houchins* would not adequately and constitutionally protect the public's first amendment rights of free speech. He pointed to the Court's past decisions in *Zemel* and *Branzburg* as implying that there is a right to acquire knowledge that merits protection from the first amendment:

[w]e do not question the significance of free speech, press or assembly to the country's welfare. 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.⁹¹

Justice Stevens argued that the full and free flow of information of a gen-

⁸⁵ *Id.* at 2597.

⁸⁶ *Id.* at 2596-97.

⁸⁷ *Id.* at 2598 (Stewart, J., concurring).

⁸⁸ *Id.*

⁸⁹ *Id.* at 2599.

⁹⁰ *Id.* at 2599-600 (Stevens, J., dissenting).

⁹¹ 408 U.S. at 681.

eral nature has long been recognized as a core objective of the first amendment of the Constitution:⁴²

Without some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance. For that reason information-gathering is entitled to some measure of constitutional protection.⁴³

He concluded by recognizing the differences between excluding the press from the confidential policy and decision-making groups gathered in executive session and the exclusion of the press from a public correctional facility. He pointed out that,

[w]hile prison officials have an interest in the time and manner of public acquisition of information about the institutions they administer, there is no legitimate, penological justification for concealing from citizens the conditions in which their fellow citizens are being confined.⁴⁴

A liberal or broad interpretation of the Supreme Court's decision may have a "chilling" effect on the ability of the press to investigate important governmental news stories. It seems likely under this construction of the decision that if a governmental body adopted a policy excluding both the public and the press from information within its control, such policy would be ruled constitutional by today's Court. The Court upheld a policy that needlessly limited inquiry into the official conduct and conditions in a local jail whose largest category of inmates were those charged with violations of the motor vehicle statutes.⁴⁵

The Court has seemingly ignored the maxim that first amendment protections for gathering and publishing the news "are not for the benefit of the press so much as for the benefit of all of us."⁴⁶ It is vital that the press possess strong investigatory powers so that the freedoms guaranteed by the Constitution may be preserved. In the words of one commentator:

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

⁴² 98 S. Ct. at 2605.

⁴³ *Id.* at 2606.

⁴⁴ *Id.* at 2608.

⁴⁵ See Brief for Respondent at 18, 98 S. Ct. 2588.

⁴⁶ *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967).

by individuals acting on their own behalf; some degree of professionalism and organization is required.⁴⁷

However, other constitutional experts may argue that the decision should be read narrowly in view of the facts of the case. A prison is a special facility requiring stringent security measures and press coverage must be tempered by this circumstance.⁴⁸ *Houchins* might also be viewed as simply a holding to prevent the press from exercising power in excess of that which it is granted by the Constitution. The power of a strong investigative press has constantly been revealed throughout the last decade.⁴⁹

Nevertheless, this rapid growth of the power of the news media is a matter of concern to some commentators. Many feel that the press has become "too big." Most Americans now receive their information from gigantic news organizations that rival major corporations in size.⁵⁰ Many also believe that the press has become too ruthless in uncovering the news.⁵¹

Thus, the Court's decision may be construed as a means to contain within the limits of the Constitution the rampant growth of the investigative powers of the press. This line of reasoning contends that our system of government has three official branches of power, and one unofficial branch — the press. When one branch gains too much power, it not only threatens the other branches but endangers our entire constitutional fabric of government.

In this fast-moving computerized time more and more people must depend upon the news media to discover what is happening in their complex world. The average person does not have either the time or the resources to personally investigate his government. He relies heavily on the press and increasingly on the electronic media to bring him the news. It has been reported in a recent study that sixty-four percent of the American people receive the bulk of their news from television.⁵²

Prisons are also unique among public institutions in that their function

⁴⁷ Comment, *Right of the Press to Gather Information After Branzburg and Pell*, 124 U. PA. L. REV. 166, 175 (1975).

⁴⁸ Comment, *Bans on Interviews of Prisoners: Prisoner and Press Rights After Pell and Saxbe*, 9 U.S.F.L. REV. 718, 720 (1975). See also D. DUFFEE, CORRECTIONAL POLICY AND PRISON ORGANIZATION (1975); H. BURNS, CORRECTIONS ORGANIZATION AND ADMINISTRATION (1975).

⁴⁹ The press played a major role in turning American public opinion against the war in Vietnam. Absent the diligence and veracity of the press, the evils of Watergate, which eventually destroyed a president, would never have been exposed. See BURNS, PELTASON, AND CRONIN, GOVERNMENT BY THE PEOPLE 270-271 (9th Ed. 1975); WORTON, FREEDOM OF SPEECH AND PRESS (1975). For an opposite view, see Epstein, *Did the Press Uncover Watergate?* COMMENTARY, July, 1974, at 21-24.

⁵⁰ MEDIA CASEBOOK, 48 & 49 (Sandman ed. 1972).

⁵¹ *Anti-press Backlash in Courts*, U.S. NEWS AND WORLD REPORT, June 12, 1978, at 40.

⁵² The Roper Organization, *Changing Public Attitudes Toward TV and other Mass Media 1959-1976* 3 (May, 1977).

is to involuntarily confine and isolate certain of society's members; these prisons' "invisibility presents the risk of the abuse of individual liberties."⁵³ The National Advisory Commission on Criminal Justice Standards and Goals has stated that: "[r]epresentatives of the media should be allowed access to all correctional facilities for reporting items of public interest consistent with the preservation of offenders' privacy."⁵⁴

In future access to information cases that the Court will most certainly be called upon to decide, the words of Mr. Justice White, writing for the Supreme Court in *Cox Broadcasting Corporation v. Cohn*,⁵⁵ should be remembered:

In the first place, in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations.⁵⁶

Finally, these few, but significant words of a newspaper editor must also be remembered: "Someone once said a free press is the price a democracy has to pay for freedom. Others, less eloquent, have described a free press as a necessary evil, something to be suffered and lived with, to attain a higher goal of individual and social freedom."⁵⁷

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⁵³ Brief for Respondent at 22, 98 S. Ct. 2588.

⁵⁴ *Id.* at 8.

⁵⁵ 420 U.S. 469 (1975).

⁵⁶ *Id.* at 491-92.

⁵⁷ *Akron Beacon Journal*, February 4, 1979, at G2.