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Slamming the Prison Doors on Media Interviews: California's New Regulations Demonstrate the Need for a First Amendment Right to Access to Inmates

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Slamming the Prison Doors on Media Interviews: California's New Regulations Demonstrate the Need for a First Amendment Right of Access to Inmates

Daniel Bernstein*

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* J.D., University of the Pacific, McGeorge School of Law, to be conferred 1999; B.A., State University of New York at Buffalo, 1978. I would like to thank my wife, Jill Estroff, whose love, support and understanding made possible this piece, and my entire legal education.

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I. INTRODUCTION

An inmate in a California prison writes a letter to a newspaper reporter saying that guards have staged “mock executions” during which they have beaten and terrified inmates.¹ He is afraid to provide additional details because his mail is screened, but he promises to do so in an interview.² The reporter tries to pursue the story, but is told by prison officials that media interviews with chosen inmates are forbidden.³ He is told that the only way for him to meet with the inmate is by getting on the visitation list for family and friends, which he does.⁴ Weeks later, the reporter enters the prison to see the inmate.⁵ But he is prohibited from taking with him a pen, notebook or tape recorder.⁶ Moreover, the inmate is now reluctant to talk about the incidents because of recent fears of retribution.⁷ Discouraged, the reporter drops the story, and the public never learns of the cruel conditions.⁸

Scenarios such as the above hypothetical are possible under regulations adopted in 1997 by the California Department of Corrections (“the Department”).⁹ The

1. Mock executions were conducted at the Sacramento County Jail in 1996. *See* Andy Furillo, “Prankish” Deputies Stage Mock Executions of Inmates, SACRAMENTO BEE, Aug. 31, 1996, at A1 (reporting that on three occasions, Sacramento County sheriff’s deputies strapped jail inmates into a so-called “prostraint” chair and told the inmates they were about to be electrocuted).

2. *See infra* notes 120-23 and accompanying text (describing the chilling effect on written communications when prison officials can read inmates’ mail).

3. *See* CAL. CODE REGS. tit. 15, § 3261.5(a)(2) (1998) (prohibiting “specific-person face-to-face interviews” between inmates and reporters).

4. *See infra* Part III.B.3 (explaining that reporters may visit inmates during family visitation periods).

5. *See infra* Part III.B.3 (stating that it could take weeks to visit an inmate under regular visitation procedures).

6. *See infra* Part III.B.3 (noting that the Department of Corrections prohibits such transcription items during inmate visitation periods).

7. Some California prison inmates have faced disciplinary action for blowing the whistle on alleged prison abuses. *See, e.g.*, Andy Furillo, *Inmates Transferred for Alleged Media Ties Suspected of Tipping Reporters to Controversy*, SACRAMENTO BEE, Sept. 11, 1997, at A4 (reporting that two inmates of the R.J. Donovan Correctional Facility near San Diego were placed in administrative segregation and then transferred to another prison for making public allegations that workers in a prison clothing manufacturing facility had taken materials imported from Honduras and placed “Made in U.S.A.” labels on them).

8. *See infra* note 129 (explaining that newspapers are reluctant to publish stories based solely on allegations contained in letters).

9. *See infra* Part II (discussing provisions of Title 15, sections 3141 and 3261.5 of California Code of Regulations).

regulations abruptly reversed a policy that had been in place for more than twenty years which allowed reporters to conduct face-to-face interviews with selected inmates.¹⁰ They also removed reporters from the list of persons with whom inmates could correspond confidentially—a list that still includes elected officials, probation officers, attorneys and legal service organizations.¹¹

In written comments filed during the rule-making process, the Department said the media restrictions were based on valid penological objectives, including reducing security risks and promoting the rehabilitation of inmates.¹² Department officials cited no specific security threats or incidents within the past twenty-five years.¹³ Instead, officials relied heavily on *Pell v. Procunier*,¹⁴ a 1974 United States Supreme Court decision holding that neither inmates nor the press have a constitutional right to in-person interviews.¹⁵ That case arose out of a legal challenge to restrictions imposed under very different circumstances than those that prompted the current regulations.¹⁶

Public statements by state officials made clear that the driving force behind the new regulations was a distaste for certain types of news stories featuring well-known inmates.¹⁷ That motivation was underscored by Governor Pete Wilson when he vetoed a bill in 1997 that would have restored the former level of media access to inmates.¹⁸ The governor asserted that the media treated inmates as “celebrities,” which, he said, tended to “glamorize criminal activity and criminals at the cost of pain to crime victims.”¹⁹

By focusing entirely on human-interest stories about inmates while ignoring stories about prison conditions, the Department has severely hampered the ability of the press to be an effective watchdog of California’s prison system.²⁰ That system

10. See *infra* notes 39-42 and accompanying text (explaining the passage and effects of the so-called Inmate Bill of Rights).

11. See CAL. CODE REGS. tit. 15, § 3141 (1998) (listing various categories of persons with whom inmates can correspond confidentially, not including members of the news media); see also *id.* § 3141 (1995) (showing that members of the news media formerly were among those with whom inmates could correspond confidentially).

12. See Final Statement of Reasons, submitted by Department of Corrections to Office of Administrative Law (Sept. 16, 1996), at 1, referenced by Cal. Regulatory Notice Reg. 96, No. 15-Z, pp. 791-92 (copy on file with the *McGeorge Law Review*) [hereinafter Final Statement of Reasons] (“Present policies granting liberal media access to inmates have created heightened risks of operational and security problems in prison facilities as well as attitudinal problems in inmate conduct which has slowed their progress towards rehabilitation.”).

13. *Id.*

14. 417 U.S. 817 (1974).

15. See *Pell*, 417 U.S. at 828 (rejecting inmates’ claim of a First Amendment right of access to reporters); see also *id.* at 835 (denying the media’s claim of a First Amendment right of access to inmates).

16. See *infra* notes 35-38 and accompanying text (describing the background behind the restrictions at issue in *Pell*).

17. See *infra* note 53 and accompanying text (citing complaints by Department officials about media stories featuring inmates Charles Manson and Rick James).

18. *Governor’s Veto Message to Senate on SB 434*, SENATE J., Oct. 12, 1997, at 3287-88.

19. *Id.*

20. See *infra* Part III.B (discussing the shortcomings of the remaining methods of communication between inmates and reporters).

houses approximately 154,000 inmates,²¹ costs California taxpayers nearly \$4 billion a year,²² and is one of the fastest growing areas of state government.²³

That California's prisons warrant close scrutiny was illustrated by two recent criminal cases involving corrections officers at Corcoran State Prison.²⁴ In February 1998, a federal grand jury indicted eight officers who worked at the prison on charges that they staged fights among inmates, one of whom was shot to death by a guard during a prison yard melee.²⁵ In October 1998, a Kings County grand jury returned an indictment against five other corrections officers at the prison on charges that they set up two inmates to be raped by a fellow inmate.²⁶

State officials can hardly be counted on to root out misconduct and bring it to the public's attention. The *Los Angeles Times* reported in July 1998 that the Wilson administration had "whitewashed" an investigation into allegations of brutality by prison guards.²⁷ Blocking access to inmates who could blow the whistle on such abuses makes it harder for the public to learn of those abuses, and thus undermines the foundations of representative democracy.²⁸

This Comment illustrates that the regulations imposed by the Department discourage effective reporting of state prisons, but likely are not unconstitutional under the First Amendment.²⁹ As a result, this Comment proposes that the time is ripe for the Supreme Court to establish a qualified First Amendment right for

21. See LITTLE HOOVER COMMISSION, *BEYOND BARS: CORRECTIONAL REFORMS TO LOWER PRISON COSTS AND REDUCE CRIME* 29 (1998) (copy on file with the *McGeorge Law Review*) (stating that the state's prison population has risen from 64,000 in 1987 to 154,000 in 1997, and is projected to rise to 202,000 by 2002).

22. See CALIFORNIA LEGISLATIVE ANALYST'S OFFICE, *MAJOR FEATURES OF THE 1998 CALIFORNIA BUDGET* 18 (1998) (copy on file with the *McGeorge Law Review*) (reporting that the 1998-99 budget provides \$3.9 billion for the Department of Corrections, an increase of \$216 million from the 1997-98 budget).

23. See CALIFORNIA LEGISLATIVE ANALYST'S OFFICE, *THE 1997-98 BUDGET: PERSPECTIVES AND ISSUES* 112 (1997) (copy on file with the *McGeorge Law Review*) (stating that during the past decade, the budget of the Department of Corrections has grown at an average annual rate of about 11 percent—among the fastest rates of growth in state government).

24. See *infra* notes 25-26 and accompanying text (discussing these cases).

25. See Andy Furillo, *Eight Guards at Prison Indicted*, SACRAMENTO BEE, Feb. 27, 1998, at A1 (reporting on the indictment by a federal grand jury in Sacramento, and quoting U.S. Attorney Paul Seave as saying that the prison guard defendants engaged in "blood sport").

26. See Andy Furillo, *5 Corcoran Guards Indicted in Inmate Rapes*, SACRAMENTO BEE, Oct. 9, 1998, at A4 (stating that the Kings County Grand Jury charged the officers, including two sergeants, with providing two rape victims to a sexually predatory inmate nicknamed the "Booty Bandit" in 1993).

27. See Mark Arax & Mark Gladstone, *State Thwarted Brutality Probe at Corcoran Prison*, *Investigators Say*, L.A. TIMES, July 5, 1998, at A1 (reporting that investigators assigned to a special corrections team said that top state officials blocked their efforts to investigate brutality by guards and complicity by officials in the Department); see also Andy Furillo, *Corcoran Guards Hide Misconduct*, *Prison Report Says*, SACRAMENTO BEE, June 26, 1998, at A1 (discussing a Department report concluding that officers at Corcoran State Prison, who were investigating themselves for wrongdoing, frequently covered up allegations of excessive force against inmates).

28. See, e.g., *Houchins v. KQED, Inc.*, 438 U.S. 1, 32 (1978) (Stevens, J., dissenting) ("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.").

29. See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press."); *infra* Part IV (discussing analysis of the restrictions under current First Amendment law).

journalists to interview prison inmates.³⁰ Part II outlines the background of the Department's regulations.³¹ Part III shows that the Department's restrictions on media access to prisons ignore the practical realities of news gathering.³² Part IV discusses the current framework for analyzing speech restrictions in nonpublic forums such as prisons, and explains why a legal challenge to California's regulations probably would fail.³³ Finally, Part V traces the evolution of the Supreme Court's view of the press, and argues that the reasons supporting a First Amendment right of media access to criminal court proceedings should apply with equal force to prisons.³⁴

II. BACKGROUND OF THE NEW REGULATIONS

California's desire to restrict reporters' access to inmates dates back to 1971, when an escape attempt at San Quentin Prison turned into a violent rampage, leaving three corrections officers and two inmates dead.³⁵ The Department believed that the incident was attributable, at least in part, to the publication and broadcast of numerous interviews with an inmate who advocated resistance toward corrections officials.³⁶ Following the incident, the Department enacted regulations prohibiting press-requested interviews with individual inmates.³⁷ Those regulations were challenged by both inmates and the press, and were upheld in 1974 by the U.S. Supreme Court in *Pell v. Procunier*.³⁸

The following year, Governor Edmund G. Brown Jr. signed legislation vastly expanding the civil rights of state prison inmates.³⁹ The law revised California Penal Code section 2600 to grant inmates the same rights as other citizens, except those

30. See *infra* Part V.B (describing how the Supreme Court could establish such a right based on past treatment of the press).

31. See *infra* Part II (explaining the history and circumstances behind the Department's regulations).

32. See *infra* Part III (analyzing the written justifications provided by the Department for the regulations).

33. See *infra* Part IV (concluding that a First Amendment challenge would be futile largely because of the setting in which the restrictions were imposed).

34. See *infra* Part V (noting that the Court's finding of a First Amendment right of access to criminal courtroom proceedings came in the decade following the *Pell* decision).

35. See *Pell v. Procunier*, 417 U.S. 817, 832 (1974) (discussing the incident, and stating that it was viewed by corrections officials as stemming from the department's "liberal posture with regard to press interviews" (quoting *Hillery v. Procunier*, 364 F. Supp. 196, 198 (N.D. Cal. 1973))).

36. *Id.*

37. See *Hillery*, 364 F. Supp. at 198 (stating that the media restrictions were implemented two days after the prison uprising).

38. See *Pell*, 417 U.S. at 828 (holding that California's regulations on media interviews did not abridge any First Amendment rights of prison inmates); see also *id.* at 835 (holding that the regulations did not abridge the First and Fourteenth Amendment rights of the press).

39. 1975 Cal. Stat. ch. 1175, sec. 3, at 2897-98 (amending CAL. PENAL CODE §§ 2600, 2601). The author of the measure, Assemblyman Alan Sieroty (D-Los Angeles), argued that it "will help prisoners tend to their personal affairs without the degrading and unnecessary obstacles that are erected by the present paternalistic system." See Letter from Assemblyman Alan Sieroty to Governor Edmund G. Brown, Jr., at 2 (Sept. 13, 1975) (copy on file with the *McGeorge Law Review*) (urging the governor to sign AB 1506).

necessary to provide for the reasonable security of prisons and for the reasonable protection of the public.⁴⁰ It also amended California Penal Code section 2601 by listing several enumerated rights to be retained by inmates, including the rights to marry, receive a variety of mail, file lawsuits and have personal visits.⁴¹ Among other consequences, the so-called "Inmate Bill of Rights" revoked the ban on media interviews that had been imposed in 1971 and subsequently upheld in *Pell*.⁴²

In 1994, however, Department officials complained that the law had allowed inmates to receive hard-core pornographic materials in the mail, file frivolous lawsuits and ignore grooming standards.⁴³ Reacting to those complaints, state lawmakers passed a bill to further amend California Penal Code sections 2600 and 2601⁴⁴ with the intention of halting those practices.⁴⁵ The amendments allowed prison officials to impose restrictions on inmates as long as they were "reasonably related to legitimate penological interests."⁴⁶ The legislative record contains no evidence that supporters of the measure were concerned about media access to inmates.⁴⁷ Indeed, a co-author of the law later said it was never intended to eliminate face-to-face interviews with the press.⁴⁸

Nevertheless, about a year after Governor Wilson signed the bill into law, the Department quietly took advantage of it to do just that.⁴⁹ No advance notice was provided to the media, inmates or the public, as evidenced by the fact that the first

40. CAL. PENAL CODE § 2600 (West 1982).

41. *See id.* § 2601 (West 1982).

42. *See* ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE, COMMITTEE ANALYSIS OF AB 1506, at 3 (May 14, 1975) (explaining the bill's intent to follow the recommendations of the National Commission on Criminal Justice Standards and Goals, which included giving inmates authority to "grant confidential and uncensored interviews to representatives of the media").

43. *See* Dana Wilkie, *Door May Slam on Rights of Prisoners*, SAN DIEGO UNION-TRIB., Feb. 23, 1994, at A1 (reporting that Department officials said they "can only look the other way at such inmate activities" because of the Inmate Bill of Rights).

44. 1994 Cal. Stat. ch. 555, sec. 1, at 902 (amending CAL. PENAL CODE §§ 2600, 2601).

45. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1260, at 5 (Apr. 4, 1994) (stating that the most likely effects of the bill would be to allow Department officials to enforce inmate grooming standards and restrict inmates' access to pornography and "hate" mailings).

46. CAL. PENAL CODE § 2600 (West Supp. 1998).

47. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1260, at 7 (Apr. 4, 1994) (discussing visitation rights only in the context of overnight family visits with inmates); *see also* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1260, at 3 (June 28, 1994) (citing several California appellate court decisions pertaining to inmates' rights between 1984 and 1993, none of which involved media interviews).

48. *See* Letter from State Senator Quentin Kopp to James Gomez, Director of California Department of Corrections (June 12, 1996) (copy on file with the *McGeorge Law Review*) (relating that he was "utterly astonished" to learn that the Department had relied on SB 1260 to ban face-to-face media interviews).

49. *See, e.g.*, Jan Ferris, *Prison Access Limited/Officials Reviewing Policy on Media Interviews*, SACRAMENTO BEE, Dec. 29, 1995, at B3 (reporting that the California Youth and Adult Correctional Agency had two months earlier halted face-to-face media interviews with individual prisoners pending further review); *see also* Michael Taylor, *Prison Media Ban Draws Criticism/State's Motives Questioned*, S.F. CHRON., Dec. 29, 1995, at A25 (stating that the corrections agency decided two months earlier to impose the ban while it reviewed its news media guidelines).

news stories on the ban were written two months after it took effect.⁵⁰ Although the new policy represented a departure from then-existing regulations,⁵¹ the Department did not seek to amend those regulations until five months later.⁵²

Department officials said the new policy was put into place as a result of stories that appeared on television and radio programs featuring high-profile inmates, such as cult leader and mass killer Charles Manson and rock-and-roll singer Rick James.⁵³ According to officials, those stories increased the sale of books written by inmates as well as the sale of other merchandise featuring them.⁵⁴

Representatives of the media denounced the new policy, saying it would curtail the public's knowledge about what goes on inside the state's thirty-three prisons, and would hurt efforts to improve medical and psychiatric treatment of inmates.⁵⁵ Some newspapers argued that the media restrictions actually could threaten prison safety by prompting more reporting based on rumors and innuendo.⁵⁶

In March 1996, the Department proposed amending state regulations to reflect the new policy.⁵⁷ It acted pursuant to a statute allowing new regulations to take effect immediately for up to 160 days under the Department's emergency powers.⁵⁸ The Department proposed amending Title 15 of the California Code of Regulations

50. Ferris, *supra* note 49, at B3; Taylor, *supra* note 49, at A25.

51. See CAL. CODE REGS. tit. 15, § 3261.5(a) (1995) ("Media representatives may be permitted random or specific person face-to-face interviews with inmates.") (repealed by CAL. CODE REGS. tit. 15, § 3261.5(a) (1998)).

52. See Cal. Regulatory Notice Reg. 96, No. 15-Z, pp. 791-92 (Apr. 12, 1996) (providing official notice of action by the Department to amend California Code of Regulations, Title 15, sections 3141 and 3261.5, pertaining to media interviews with specific inmates and the confidentiality of inmate-media correspondence).

53. See Ferris, *supra* note 49, at B3 (reporting that Charles Manson and Rick James had become two of the most sought-after interview subjects, according to a Department official who was quoted as saying that inmates are "sent to prison to serve time, not to be on prime time"); see also James H. Gomez, *Celebration of Deviancy*, SACRAMENTO BEE, June 28, 1996, at B7 (lamenting that "requests from the media have focused on personality stories on inmates" and opining that "the media often show little restraint in glamorizing crime and criminals").

54. See Final Statement of Reasons, *supra* note 12, at 6-7 (stating that inmate Kody "Monster" Scott "has used the media to promote" his autobiography; that frequent television interviews with Charles Manson have resulted in increased sales of T-shirts and recordings featuring him; and that Rick James has used media interviews "to promote an upcoming album").

55. See Andy Furillo, *Media: Allow Interviews in State Prison*, SACRAMENTO BEE, June 14, 1996, at A6 (quoting media lawyer Kelli L. Sager as saying that the regulations would shield the Department from "any meaningful public scrutiny"); see also Michael Taylor, *New Plea to Lift Prison Media Ban/Broadcasters Call It Censorship*, S.F. CHRON., Dec. 30, 1995, at A13 (reporting that organizations which campaign for better medical and psychiatric treatment of prisoners complained that the ban would hurt their efforts).

56. See *Let Some Light Into the Prisons/State Should Lift the Near-Ban on Media Interviews with Convicts*, L.A. TIMES, Apr. 4, 1997, at B8 (arguing that the new policy of eliminating face-to-face interviews of prisoners by the press encourages "tabloid journalism" which in turn threatens prison safety because "nothing stokes prison trouble more effectively than rumors").

57. See California Department of Corrections, Submission of Regulations, Office of Administrative Law File No. 96-0329-07E, Mar. 29, 1996 (proposing to amend CAL. CODE REGS., tit. 15, §§ 3141, 3261.5), referenced in Cal. Regulatory Notice Reg. 96, No. 15-Z, pp. 791-92 (Apr. 12, 1996) (copy on file with the *McGeorge Law Review*) [hereinafter Submission of Regulations].

58. See CAL. PENAL CODE § 5058(e)(2) (West Supp. 1998) (authorizing the Department to adopt emergency regulations upon a written statement to the Office of Administrative Law, certifying that the regulations are warranted based on the Department's "operational needs").

section 3261.5 to remove language permitting face-to-face interviews with consenting inmates and replace it with language explicitly prohibiting such interviews.⁵⁹ At the same time, it proposed another restriction that had not been previously disclosed: screening of all future mail between reporters and inmates.⁶⁰ Specifically, the Department proposed amending Title 15 of the California Code of Regulations section 3141, which deals with correspondence rights of inmates.⁶¹ Subsection (c) of section 3141 listed eight categories of persons with whom an inmate can correspond confidentially, including a category for full-time reporters for daily newspapers, radio or television programs, or general coverage news magazines.⁶² The Department proposed the simple deletion of that category.⁶³ The restrictions on media access to inmates, which had been in place for the past five months, now had the force of law. Final approval of the regulations was given in April 1997.⁶⁴

III. DEPARTMENT'S JUSTIFICATIONS FOR THE RESTRICTIONS

In its "Final Statement of Reasons" justifying its regulations, the Department asserted that past media access policies had created "heightened risks of operational and security problems" and had caused "attitudinal problems in inmate conduct"

59. See Submission of Regulations, *supra* note 57 (proposing to delete former language of California Code of Regulations, Title 15, section 3261.5(a)(2), and replace it with a new sentence: "Inmates may not participate in specific-person face-to-face interviews.")

60. See Michael Taylor, *Prisoners' Missives to Media Restricted/State Bans Confidential Inmate Letters*, S.F. CHRON., Mar. 30, 1996, at A16 (quoting Department officials as saying prisoners' outgoing letters to news organizations would be unsealed and inspected "from a security standpoint").

61. *Supra* note 57 and accompanying text.

62. See CAL. CODE REGS. tit. 15, § 3141(c) (1995) (partially repealed in 1997) (listing the following categories of persons with whom inmates could correspond confidentially:

(1) All state and federal elected officials; (2) All state and federal officials appointed by the governor or the President of the United States; (3) All city, county, state and federal officials having responsibility for the inmate's present, prior or anticipated custody, parole or probation supervision; (4) All state and federal judges; (5) An attorney at law listed with a state bar association; (6) A representative of the public news media defined as a full-time reporter for a daily newspaper, daily radio or television programs, and recognized general coverage news magazines; (7) The director, chief deputy director, deputy directors, assistant directors, executive assistant to the director, and the chief, inmate appeals, of the Department; and (8) Legitimate legal service organizations including, but not limited to: the American Civil Liberties Union, the Prison Law Office, the Young Lawyers Section of the American Bar Association, and the national Association of Criminal Defense Lawyers).

63. See Submission of Regulations, *supra* note 57, at 1 (striking through text of subsection (6) of California Code of Regulations, Title 15, section 3141(c) and re-numbering other subsections accordingly).

64. See Notice of Approval of Regulatory Action, Office of Administrative Law, State of California, OAL File No. 97-0303-03 R, Apr. 14, 1997 (approving amendments to California Code of Regulations, Title 15, sections 3141 and 3261.5, after finding that the regulations met "all applicable legal requirements"), *noticed in* Cal. Regulatory Notice Reg. 97, No. 17-Z, p. 902 (Apr. 25, 1997). Approval of the regulations was delayed because the Department initially failed to adequately respond to written public comments. Notice of Disapproval of Regulatory Action, Office of Administrative Law, OAL File No. 96-0913-01 C (Oct. 28, 1996).

which interfered with their rehabilitation.⁶⁵ Although it cited no specific security risks or disciplinary problems linked to media exposure, the Department concluded that its media interview policy of the past twenty years was a “failure.”⁶⁶

The Department then proceeded to analyze the restrictions under the framework adopted in *Turner v. Safley*,⁶⁷ a 1987 Supreme Court case holding that a prison regulation which impinges on inmates’ constitutional rights is valid if it is “‘reasonably related’ to legitimate penological interests.”⁶⁸ The *Turner* Court listed four factors to determine such reasonableness: (1) a valid, rational connection between the prison regulation and the legitimate governmental interest put forth to justify it; (2) whether there are “alternative means of exercising the right that remain open to prison inmates;” (3) the impact that accommodation of the asserted right will have on guards, other inmates and prison resources generally; and (4) the practicality of establishing the right.⁶⁹

By analyzing its own regulations under the four-part framework set out in *Turner*,⁷⁰ the Department focused entirely on whether the media restrictions violated the First Amendment rights of inmates, not whether they infringed on the First Amendment rights of the press.⁷¹ Consequently, the Department skirted the tougher issue of whether the policy furthers the interests of the public, rather than the narrow interests of the Department itself.⁷²

To properly assess the Department’s justifications requires examination of the three leading Supreme Court cases on media access to prisons: *Pell v. Procunier*,⁷³ *Saxbe v. Washington Post Co.*,⁷⁴ and *Houchins v. KQED, Inc.*⁷⁵ Although the Supreme Court upheld restrictions on the press in all three cases, the Department’s regulations differ from the restrictions at issue in those cases in three key respects:

65. Final Statement of Reasons, *supra* note 12, at 1.

66. *See id.* (describing the long-standing policy as an “experiment”).

67. 482 U.S. 78 (1987).

68. *Turner*, 482 U.S. at 89. Using that standard, the Supreme Court upheld a ban on written correspondence between most prison inmates in Missouri. *Id.* at 91. However, the Court struck down a separate regulation prohibiting inmates from getting married while in prison, finding that that restriction constituted “an exaggerated response to [prison officials’] rehabilitation and security concerns.” *Id.* The *Turner* standard of upholding restrictions on inmates’ rights if they are “reasonably related to legitimate penological interests” was later adopted by the California Legislature in 1994. CAL. PENAL CODE § 2600 (West Supp. 1998).

69. *Turner*, 482 U.S. at 89-90.

70. *See* Final Statement of Reasons, *supra* note 12, at 2-7 (discussing the regulations under headings corresponding with each of the four *Turner* factors).

71. In *Turner*, unlike other prisoner free-speech cases, the media was not a party, nor was communication with the press an issue. *See supra* note 68 and accompanying text (discussing the holding of the *Turner* case).

72. *See Saxbe v. Washington Post Co.*, 417 U.S. 843, 860 (1974) (Powell, J., dissenting)

(At some point official restraints on access to news sources, even though not directed solely at the press, may so undermine the function of the First Amendment that it is both appropriate and necessary to require the government to justify such regulations in terms more compelling than discretionary authority and administrative convenience.).

73. 417 U.S. 817 (1974).

74. 417 U.S. 843 (1974).

75. 438 U.S. 1 (1978).

application of the “big wheel” theory;⁷⁶ availability of alternate channels of communication;⁷⁷ and consideration of the impact on victims.⁷⁸ Each is discussed separately below.

A. The “Big Wheel” Theory

To justify the ban on media interviews, the Department relied heavily on the “big wheel” theory, which posits that when certain inmates achieve “celebrity” status through media exposure, they are able to persuade normally well-behaved inmates to band together for illicit purposes.⁷⁹ However, some courts have found that not all inmates who gain high visibility are capable of disruptive influence.⁸⁰ Justice Powell shared that view, saying in his dissenting opinion in *Saxbe* that if a cooperative inmate is interviewed by the press, that should not cause any security problems.⁸¹

In applying the “big wheel” theory in *Pell*, the Court looked to the actual, not speculative, results of the past policy of unlimited access to inmates for interviews.⁸² The Court said that extensive media attention on certain inmates, one of whom had been interviewed sixty-six times during a six-month period,⁸³ had provided them with a “disproportionate degree of notoriety and influence among their fellow inmates.”⁸⁴ As a result of this notoriety, the Court said, inmates who had publicly advocated noncooperation with prison authorities became the “source of severe disciplinary problems” prior to the violence at San Quentin Prison in 1971.⁸⁵

By contrast, the Department in 1996 failed to point to any specific incident or disciplinary problem during the past twenty-five years that allegedly was caused by

76. See *infra* Part III.A (discussing application of the “big wheel” theory).

77. See *infra* Part III.B (analyzing the effectiveness of alternate channels of communication, including written correspondence, telephone interviews, random interviews and regular visitation periods).

78. See *infra* Part III.C (exploring the constitutional problems that arise when restrictions are based on how crime victims and their families might react to speech by prison inmates).

79. See Final Statement of Reasons, *supra* note 12, at 4 (arguing that media interviews tend to make inmates “celebrities,” and that such status can easily foster a gang mentality, leading to mass disobedience and violence).

80. See *Washington Post Co. v. Kleindienst*, 357 F. Supp. 779, 781 (D.D.C. 1972) (qualifying the big wheel theory by stating that “[n]ot all prominent offenders or prison leaders fall in this category.”), *rev’d sub nom.* *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974).

81. See *Saxbe*, 417 U.S. at 868 (Powell, J., dissenting) (stating that the big wheel phenomenon is “not a problem at all” when publicity enhances the profile of generally cooperative inmates).

82. *Pell v. Procunier*, 417 U.S. 817, 831-32 (1974).

83. See *Hillery v. Procunier*, 364 F. Supp. 196, 204 (N.D. Cal. 1973) (discussing the chain of events leading up to the 1971 uprising at San Quentin Prison), *aff’d sub nom.* *Pell v. Procunier*, 417 U.S. 817 (1974).

84. *Pell*, 417 U.S. at 831-32.

85. See *id.* at 832 (stating that the lack of cooperation by certain inmates had “erod[ed] the institutions’ ability to deal effectively with the inmates generally”).

media attention to any inmate.⁸⁶ Instead, the Department said the regulations could be justified based on intense media interest in a small number of inmates, regardless of their propensity to promote violence or unrest.⁸⁷ According to the Department:

Face-to-face specific inmate interviews with the media interfere with the rehabilitative process by distracting inmates from their prison programs. It keeps them looking back to their previous criminal activities and lifestyles. It tends to put them on a soapbox, feeling unique so as not to be bound by ordinary laws.⁸⁸

The Department did not cite any actual incidents of inmates who had displayed disciplinary problems or who had abandoned rehabilitative programs after gaining press attention. Instead, it named several well-known inmates with whom the media requested numerous interviews because of their high-profiles before entering prison.⁸⁹ They include Charles Manson, infamous cult leader and murderer, who has fascinated criminologists for decades; Rick James, a popular singer who was convicted of drug charges; Ellie Nessler, who made national headlines when she entered a courtroom and shot the man accused of molesting her son; Kody "Monster" Scott, a gang leader in South Central Los Angeles who wrote an autobiography about his violent past; and Elmer "Geronimo" Pratt, a former leader of the Black Panthers who has maintained that his 1972 murder conviction was part of a set-up by the FBI under a program designed to neutralize African-American groups and their leaders in the 1960s and 1970s.⁹⁰

Pratt was the only one of those inmates who allegedly caused security problems. The Department stated that media interviews with Pratt "have fanned the flames of dissension within the Department's facilities."⁹¹ However, the Department did not provide any details of those interviews.⁹² Although Pratt had faced

86. See Final Statement of Reasons, *supra* note 12, at 1 (citing only the 1971 uprising that led to the regulations at issue in *Pell*).

87. See *id.* at 8 (arguing that California "need not wait for another tragedy to reinstate the previously upheld prohibitions nor need it continue to allow hardened criminals to become instant celebrities").

88. *Id.* at 5.

89. California Department of Corrections, Amendment to Final Statement of Reasons, attached to Resubmission of Regulations, Office of Administrative Law File No. 96-0329-07E, Mar. 3, 1997, at 4 (copy on file with the *McGeorge Law Review*) [hereinafter Amendment to Final Statement of Reasons].

90. *Id.* at 4-6.

91. *Id.* at 4.

92. *Id.* Nevertheless, Pratt's prison experience is well-documented in case law. He was transferred to Mule Creek State Prison in 1994 after he gave a television interview in which he proclaimed his innocence. See *Pratt v. Rowland*, 856 F. Supp. 565, 568 (N.D. Cal. 1994) (stating that Pratt was removed from a single cell at R.J. Donovan Correctional Facility and placed in a double cell at Mule Creek State Prison shortly after KXTV in Los Angeles aired a three-part series about his case). A federal judge found the move to be retaliatory. *Id.* at 571. The Ninth Circuit Court of Appeals reversed, finding that Pratt was transferred to be closer to his family, and that the transfer was requested by California Assembly Speaker Willie Brown, D-San Francisco. *Pratt v. Rowland*, 65 F.3d 802, 809 (9th Cir. 1995).

disciplinary action,⁹³ the Department cited no evidence that he was a leader of the dissidents.⁹⁴

Besides claiming that face-to-face media interviews create an indirect security problem under the “big wheel” theory, the Department contended that the mere presence of media representatives in prisons created a heightened security risk and an opportunity for inmates to smuggle contraband in or out of prison.⁹⁵ However, the Department offered no evidence of past problems in this regard. Indeed, such security concerns would seem to apply with equal force to tours involving random interviews with inmates, which are still permitted,⁹⁶ and with even greater force to public group tours,⁹⁷ which are also still permitted.⁹⁸ Moreover, the labor union for the state’s corrections officers went on record in 1997 as stating that the media’s presence in prisons did not pose security problems because reporters are “clearly responsible individuals.”⁹⁹

B. Alternate Channels of Communication

The Department argued that because face-to-face interviews are simply one method of contact between inmates and the press, banning them would not eliminate communication between the two groups.¹⁰⁰ The Department cited alternatives to face-to-face interviews: written communication between reporters and inmates,¹⁰¹ telephone interviews by reporters of consenting inmates,¹⁰²

93. See *No Parole For Ex-Panther*, SACRAMENTO BEE, Mar. 15, 1996, at B2 (quoting Liz Tanaka, spokeswoman for the state Board of Pardons, as saying that Pratt’s latest bid for parole was refused partly because he had “six disciplinary problems,” which were not specified).

94. See Amendment to Final Statement of Reasons, *supra* note 89, at 4 (saying only that media interviews with Pratt have “fanned the flames of dissension” within prisons, but offering no details of his alleged leadership role).

95. See Final Statement of Reasons, *supra* note 12, at 3 (“The physical security would be directly threatened by the intrusion of many persons and equipment into the prison.”).

96. See CAL. CODE REGS. tit. 15, § 3161.5 (1998) (“Media representatives may be permitted random face-to-face interviews with inmates . . . housed in facilities under the jurisdiction of the department.”).

97. See *KQED, Inc. v. Houchins*, 546 F.2d 284, 286 (9th Cir. 1976) (arguing that public tours require more supervision by corrections officers than a single reporter who enters a prison), *rev’d*, 438 U.S. 1 (1978).

98. See CAL. CODE REGS. tit. 15, § 3263 (1998) (allowing group visits as long as they do not pose a security or safety threat).

99. See Letter from Jeff Thompson, Director of Government Relations for the California Correctional Peace Officers Association, to State Sen. Quentin Kopp regarding SB 434 (May 5, 1997) (copy on file with the *McGeorge Law Review*) (supporting the legislation and the right of the press to have “full access” to prisons as long as security is not threatened).

100. See Final Statement of Reasons, *supra* note 12, at 5 (asserting that inmates continue to have “several effective alternative means” of communicating with reporters).

101. See *id.* at 6 (arguing that eliminating confidential mail privileges between inmates and reporters will not stifle the flow of written information because “the content of the correspondence with media is only impeded where a threat to safety or security is identified”).

102. See CAL. CODE REGS. tit. 15, § 3282(b) (1988) (requiring that inmates in the general population be given access to telephones, from which they may place collect calls to persons outside the prison).

utilization by the press of general visiting periods,¹⁰³ and random interviews of inmates during authorized media tours.¹⁰⁴ However, as explained below, none of these alternate methods of communication are sufficient to allow the media to learn of prison conditions.¹⁰⁵

1. Written Correspondence

In *Pell*, the Court stressed that although reporters could not conduct face-to-face interviews with inmates, they could still receive uncensored mail from those behind bars.¹⁰⁶ Other courts have interpreted the *Pell* decision as permitting a ban on face-to-face media interviews *only* if inmates can communicate with the press through confidential written correspondence.¹⁰⁷ For instance, in *Guajardo v. Estelle*,¹⁰⁸ the Fifth Circuit Court of Appeals said unrestricted correspondence between reporters and inmates was a “practical alternative” to a ban on face-to-face interviews.¹⁰⁹ A federal district court in Michigan agreed, saying that unrestricted correspondence “is important to protect the First Amendment rights of [inmates] and the media.”¹¹⁰ Because the Department has eliminated the possibility of confidential written correspondence between inmates and reporters while simultaneously banning face-to-face media interviews,¹¹¹ the current regulations appear to undermine a central premise of *Pell*.

In proposing the mail regulation, the Department said inmates would remain protected by other regulations which prohibit corrections officers from censoring

103. See Final Statement of Reasons, *supra* note 12, at 5 (stating that reporters “may visit specific inmates under regular visiting conditions”).

104. See CAL. CODE REGS. tit. 15, § 3261.5(a) (1998) (providing that such interviews are subject to restrictions on “time, place and duration”).

105. See *infra* Part III.B.1-4 (discussing the shortcomings of authorized methods of communication between reporters and inmates).

106. See *Pell*, 417 U.S. at 824 (asserting that such correspondence “affords inmates an open and substantially unimpeded channel for communication” with reporters). The Court concluded that “in light of the alternative channels of communication that are open to prison inmates, we cannot say . . . that this restriction [on face-to-face interviews] is unconstitutional.” *Id.* at 827-28.

107. See *infra* notes 108-10 and accompanying text (providing examples of cases construing *Pell* as allowing bans on face-to-face press-prisoner interviews when inmates are allowed to write confidential letters to the press).

108. 580 F.2d 748 (5th Cir. 1978).

109. See *Guajardo*, 580 F.2d at 759 (stating that allowing unrestricted correspondence between reporters and inmates was “the alternative that supported the *Pell* restriction”). Based on this interpretation of *Pell*, the Fifth Circuit held that the Texas Department of Corrections could not inspect outgoing mail from inmates to the press without a search warrant. *Id.* The Fifth Circuit said that because “[a]n informed public depends upon accurate, effective reporting by the news media,” its decision protected “not only the interest of the inmates, but that of the public at large.” *Id.*

110. See *Burton v. Foltz*, 599 F. Supp. 114, 117 (E.D. Mich. 1984) (holding that the Michigan Department of Corrections could not inspect mail sent to reporters from inmates in administrative segregation).

111. CAL. CODE REGS. tit. 15, §§ 3141, 3261.5 (1998).

inmates' outgoing mail for the ideas or values it contains.¹¹² The Department said it merely wanted to ensure that inmates would not smuggle contraband or escape plans from prison.¹¹³ As further justification for the mail restriction, the Department pointed to an incident that occurred after the screening of mail began. On April 19, 1996, an unidentified journalist reportedly "mailed pornographic photographs to an inmate at San Quentin State Prison in return for information about the prison and other events."¹¹⁴ However, none of these justifications are persuasive.¹¹⁵

Prison officials have the authority to read inmates' outgoing letters in their entirety.¹¹⁶ Critics say this has discouraged inmates from using the mail to raise allegations of misconduct or mistreatment.¹¹⁷ Although inmates still write letters to reporters, allegations of wrongdoing tend to be too general to prompt meaningful investigation, partly because reporters have no chance to establish a rapport with inmates.¹¹⁸ In fact, one newspaper reporter who covers prisons said that after the mail restrictions were imposed, an inmate asked him to suggest an attorney who could serve as an intermediary for any letters the inmate might send the reporter as a method of ensuring confidentiality.¹¹⁹

Courts have recognized the chilling effect of screening inmates' outgoing mail. In *Procunier v. Martinez*,¹²⁰ a case invalidating a California prison regulation,¹²¹ Justice Marshall wrote that an inmate's expression "will surely be restrained by the knowledge that his every word may be read by his jailors."¹²² More recently, a federal district court in Michigan observed that when it comes to prison officials

112. See Final Statement of Reasons, *supra* note 12, at 8 (reflecting provisions of the California Code of Regulations, Title 15, section 3135(b), which state that disagreement with a letter writer's "apparent moral values, attitudes, veracity, or choice of words will not be used by correctional staff as a reason for disallowing or delaying mail").

113. See *id.* at 4 (stating that removing confidentiality of mail to reporters is a "necessary step" toward ensuring prison security).

114. *Id.*

115. See *infra* notes 116-29 and accompanying text (discussing the flaws in the Department's justifications for mail restrictions).

116. See CAL. CODE REGS. tit. 15, § 3138(a) (1998) (providing that all nonconfidential mail may be read "in its entirety or in part" by designated prison employees before it is mailed or delivered to an inmate).

117. See Taylor, *supra* note 60, at A16 (quoting Ben Bagdikian, former Dean of the Graduate School of Journalism at the University of California at Berkeley, as saying that the restrictions appeared to be motivated by a desire to protect officials "from criticism, and from exposure of unjustified conditions").

118. Telephone Interview with Peter Sussman, former Editor of the San Francisco Chronicle and immediate past president of Society of Professional Journalists, Northern California Chapter (Mar. 29, 1998) (notes on file with the *McGeorge Law Review*) (stating that he has received letters from inmates with crucial information omitted, such as the names of guards involved in alleged abuses); see also Deborah Yaffe, *Locking Down the Media*, THE RECORDER, Apr. 17, 1996, at 1 (reporting that Sussman said face-to-face interviews are key to establishing rapport between reporters and inmates).

119. Telephone Interview with Andy Furillo, Staff Writer for the *Sacramento Bee* (Mar. 23, 1998) (notes on file with the *McGeorge Law Review*).

120. 416 U.S. 396 (1974).

121. See *Procunier*, 416 U.S. at 418-19 (striking down a regulation that authorized censorship of inmates' written statements complaining about prison conditions).

122. *Id.* at 423 (Marshall, J., concurring).

reading outgoing mail, there is no real difference between "inspection" and "censorship."¹²³ It seems reasonable to conclude that without confidentiality, inmates who write letters to reporters to alert them to poor prison conditions will be reluctant to provide specific information.

Moreover, the incident cited by the Department of a reporter mailing pornographic materials to an inmate at San Quentin Prison hardly justifies the inspection of inmates' mail to reporters. It must be stressed that this incident involved *incoming* mail to an inmate¹²⁴ while the stated purpose of the Department's restrictions is to detect *outgoing* mail that might present a security threat.¹²⁵ The Department currently is authorized to open and inspect incoming mail from attorneys and public officials to search for contraband.¹²⁶ Yet, inmates' outgoing mail to those persons cannot be opened.¹²⁷ The Department could treat inmate-reporter correspondence the same way: inspect incoming mail for contraband, while allowing outgoing mail to remain confidential.

Even if the Department were to provide inmates confidentiality in written communication with reporters, this would not be an effective substitute for face-to-face interviews. As Justice Powell pointed out in his dissenting opinion in *Saxbe*, allowing inmates to communicate with the press only in writing handicaps inmates who are illiterate or simply do not write well.¹²⁸ Furthermore, as Justice Powell noted, newspapers are reluctant to print information based solely on letters from sources that cannot be independently confirmed.¹²⁹

123. See *Burton v. Foltz*, 599 F. Supp. 114, 116 (E.D. Mich. 1984) ("Unless department personnel intend to stop certain kinds of communications from going out, inspection would hardly be necessary.").

124. Final Statement of Reasons, *supra* note 12, at 4.

125. *Id.*

126. See CAL. PENAL CODE § 2601(b) (West Supp. 1998) (permitting prison inmates "[t]o correspond, confidentially, with any member of the State Bar or holder of public office, provided that the prison authorities may open and inspect incoming mail to search for contraband").

127. See CAL. CODE REGS. tit. 15, § 3141(c)(1)-(5) (1998) (listing categories of public officials and attorneys with whom inmates can confidentially correspond).

128. See *Saxbe v. Washington Co.*, 417 U.S. 843, 854-55 (1974) (Powell, J., dissenting) (arguing that because of the "prevalence of functional illiteracy" among inmates, many of them cannot communicate effectively in writing).

129. See *id.* at 854 (Powell, J., dissenting) ("[E]thical newsmen are reluctant to publish a story without an opportunity through face-to-face discussion to evaluate the veracity and reliability of [inmates]. Those who do publish without interviews are likely to print inaccurate, incomplete, and sometimes jaundiced news items."); see also *Washington Post Co. v. Kleindienst*, 357 F. Supp. 779, 781 (D.D.C. 1972) ("Ethical newspapers rarely publish articles based on unconfirmed letter communications [from inmates]."), *rev'd sub nom. Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974).

2. Telephone Interviews

The Department contends that reporters can still effectively interview selected inmates by telephone.¹³⁰ However, telephone communications with inmates contain several limitations not present in face-to-face interviews.¹³¹ First, any outgoing call can be recorded and monitored by prison officials,¹³² which can discourage inmates from divulging sensitive information.¹³³ Second, inmates are permitted to stay on the telephone for approximately ten minutes.¹³⁴ This amount of time may not be enough for a reporter to learn of key details, especially when an inmate is not accustomed to dealing with the press.¹³⁵ Third, a telephone interview does not provide a reporter with an opportunity to show documents to an inmate that might help refresh his recollection of specific events.¹³⁶ In addition, not being able to videotape inmate interviews will discourage much television reporting of prisons because television coverage usually depends on the availability of subjects to be interviewed on-camera.¹³⁷

Finally, and perhaps most importantly, a reporter conducting a telephone interview is not able to look an inmate in the eyes to observe his body language. Because such visual observations assists a reporter in gauging an interviewee's credibility, journalism textbooks encourage face-to-face interviews whenever possible.¹³⁸ Reporters say they often learn much more when they meet with their

130. See Final Statement of Reasons, *supra* note 12, at 5 (explaining that "telephone interviews of any consenting inmate will still be permitted").

131. See *infra* notes 132-39 and accompanying text (discussing the limitations of telephone communications).

132. See CAL. CODE REGS. tit. 15, § 3282(e) (1998) (stating that all inmate calls "may be subject to monitoring and recording at any time by institution staff"); see also *id.* § 3282(i) (1998) (providing that all outgoing calls shall be accompanied by announcements at "random intervals" during the call stating that the call is from an inmate at a state prison and is being recorded).

133. One reporter recalled that when he interviewed inmates by telephone in 1997 about new prison grooming policies for a story for KQED radio in San Francisco, several inmates told him they did not feel comfortable answering questions about whether the new policy had prompted any disturbances or plans for protests. Telephone Interview with Peter Sussman, former Editor of the *San Francisco Chronicle* (Mar. 29, 1998) (notes on file with the *McGeorge Law Review*).

134. Telephone Interview with Andy Furillo, Staff Writer for the *Sacramento Bee* (Mar. 23, 1998) (notes on file with the *McGeorge Law Review*).

135. Telephone interview with Peter Sussman, former Editor of the *San Francisco Chronicle* (Mar. 29, 1998) (notes on file with the *McGeorge Law Review*).

136. *Id.*

137. See, e.g., HERBERT J. GANS, DECIDING WHAT'S NEWS: A STUDY OF CBS EVENING NEWS, NBC NIGHTLY NEWS, NEWSWEEK, AND TIME 158 (1979) ("[A]ll suggested [television news] stories are automatically judged for whether they lend themselves to filming; and when top producers compile their lists of selected stories, they always begin with, and give most thought to, the films they hope to run that day."); TED WHITE, BROADCAST NEWS WRITING, REPORTING, AND PRODUCING 248 (1996) ("TV reporters use the phone only as a last resort because interviews without pictures are weak.").

138. See, e.g., DAVID ANDERSON & PETER BENJAMINSON, INVESTIGATIVE REPORTING 111 (1976) ("Gestures, facial expressions, and body contact are important in establishing relationships; physical presence is important in discouraging the premature termination of a conversation."); JOHN BRADY, THE CRAFT OF INTERVIEWING 174 (3d ed. 1978) (quoting a reporter as saying, "How do you observe the twinkle in the eye, the glint of anger, or the

subjects in person.¹³⁹ Forcing a reporter to interview inmates on the telephone thus compromises news gathering, and increases the risk that a reporter will be misled and that the resulting story will not be accurate or balanced.

3. Regular Visitation Periods

The Department suggested that reporters seeking to interview inmates in person visit the inmate during regular visiting hours, as family and friends are currently required to do.¹⁴⁰ There are two basic problems with this alternative, however. First, it takes weeks to visit an inmate under these procedures,¹⁴¹ a delay that can diminish the news value of reporting on a timely prison event. Second, and more significantly, reporters, like all other visitors, are prohibited from bringing cameras, tape recorders, or even pens and paper into a prison.¹⁴² This presents a serious hardship on the press, which the Department has acknowledged.¹⁴³ Not only is it hard to remember quotes from a lengthy interview, but without a tape recorder a reporter is deprived of the best means of proving the accuracy of those quotes, should they be challenged.¹⁴⁴ These handicaps could discourage even the most dogged reporter from pursuing a prison interview on a controversial topic.

4. Random Interviews During Media Tours

The Department also said reporters would be able to conduct face-to-face interviews of inmates during tours as an alternative to arranged interviews with selected inmates.¹⁴⁵ However, these random interviews are of limited value to reporters seeking information about prison conditions and management because

reflective glance of a defense mechanism going into gear?"); MELVIN MENCHER, *NEWS REPORTING AND WRITING* 77 (7th ed. 1997) ("The telephone is a basic tool of the trade but it cannot substitute for the face-to-face interview.").

139. See MENCHER, *supra* note 138, at 265 (quoting one reporter as saying, "There's no substitute for face-to-face reporting. . . . I want to be able to sense how best to approach the person and the subject I'm interested in. You can only get that sense, that feeling, by dealing directly with people."); see also BRADY, *supra* note 138, at 174 (offering one reporter's observation that "I have found that I get only about 50 percent of what I need when I phone or write").

140. See Final Statement of Reasons, *supra* note 12, at 5 (stating that reporters "may visit specific inmates under regular visiting conditions").

141. See Taylor, *supra* note 60, at A16 (reporting that getting on an inmate's visitation list is "a cumbersome process that takes weeks and restricts reporters to the same visiting hours" as the inmate's family and friends).

142. See Final Statement of Reasons, *supra* note 12, at 5 (noting that reporters may not bring into prisons any "tools of their trade").

143. See Yaffe, *supra* note 118, at 1 (quoting Department spokeswoman Christine May as saying that reporters would "have to have a pretty good memory" to write reports based on inmate interviews).

144. See BRADY, *supra* note 138, at 141 (stating that tape recording interviews minimizes the chance that an interviewee will claim he or she was misquoted, thereby reassuring an editor who is concerned about publishing a controversial story).

145. Final Statement of Reasons, *supra* note 12, at 5.

prison officials can restrict the areas available to the press.¹⁴⁶ Department officials have incentives to keep reporters away from inmates with grievances or those who espouse views the officials do not wish to be made public.¹⁴⁷ Furthermore, a reporter investigating an incident of alleged abuse by prison officials might not encounter witnesses during a tour.¹⁴⁸ Even if a reporter touring a prison encountered an inmate with a grievance, it would be unrealistic to expect such an inmate to speak openly in the presence of his jailers.¹⁴⁹ For these reasons, it is clear that random interviews of inmates during media tours are a poor alternative to reporters seeking specific information from specific inmates.

C. Impact on Victims

Another reason advanced by the Department for prohibiting inmates from being interviewed by the news media is the potential harm to victims and their families from seeing the perpetrator on television.¹⁵⁰ The Department argued that preventing such exposure protects the "emotional well-being" of crime victims which, the Department contended, is as important as protecting their physical well-being.¹⁵¹

There is a major problem with this approach, however: it runs counter to a central tenet of First Amendment law that speech cannot be restricted because it offends the sensibilities of the listener.¹⁵² In the context of broadcasting, the Supreme Court has carved out an exception to protect children from indecent speech; this exception allows the Federal Communications Commission to restrict

146. See CAL. CODERECS. tit. 15, § 3263 (1998) (stating that, for security and safety reasons, "[v]isitors shall be escorted through the facility as specified by the institution head").

147. See *Houchins v. KQED, Inc.*, 438 U.S. 1, 22-23 (1978) (Stevens, J., dissenting) (citing evidence that inmates were largely kept out of sight during tours of a county jail which had been the subject of criticism, "preventing the tour visitors from obtaining a realistic picture of conditions" at the jail).

148. See *Saxbe v. Washington Post Co.*, 417 U.S. 843, 855 (1974) (Powell, J., dissenting) (observing that "not every inmate is equally qualified to speak on every subject").

149. See *id.* at 855 n.6 (Powell, J., dissenting) (relating testimony of Arthur L. Liman, General Counsel to the New York State Special Commission on Attica, who stated that in group interviews regarding conditions at that prison, inmates "tended to give us rhetoric, rather than facts").

150. See Final Statement of Reasons, *supra* note 12, at 3 (arguing that such broadcasts "would likely be upsetting to victims and their families, even if they attempt to avoid being directly exposed to the broadcast"). The Department also stated that it has received "complaints and objections from victims, witnesses, and/or victims' groups" regarding televised interviews with certain inmates, and that it has denied "live media access" to certain inmates in the past because of those complaints. *Id.*

151. See *id.* ("[P]rotection of the emotional well-being of victims and individuals close to them should also be asserted as a valid penological objective.")

152. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); see also *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it.")

such broadcasts to late-night hours when children presumably are not listening.¹⁵³ But the courts have been unwilling to extend this rationale to protect adults from offensive television programs during late-night broadcasts.¹⁵⁴ In one case, the Court of Appeals for the District of Columbia explained that viewers could use program guides to screen out programs they did not wish to watch.¹⁵⁵ If the portrayal of an inmate on television offends crime victims, they have an option available to all other viewers—turning the channel. Just because they do not want to hear what an inmate has to say, the rest of the viewing public should not be denied the opportunity.

Taken to its logical conclusion, restricting an inmate's speech because his words might offend a crime victim could be used as a basis for prohibiting free speech in other ways. For instance, a convicted felon could be prohibited from discussing his crimes with a reporter even after his release from prison. The same rationale also could be used to prohibit the press from covering a wide assortment of courtroom proceedings based on the paternalistic fear that the news would be disturbing to crime victims and their families. Such a prior restraint clearly would be an unconstitutional restriction of free speech rights.¹⁵⁶

The Department sought to bolster the argument that crime victims deserve protection from inmates' speech by putting forth a novel interpretation of the state's so-called "Son of Sam" law.¹⁵⁷ Under that law, criminals are prohibited from profiting from their crimes through the sale of books, videotapes, sound recordings and any paid interviews.¹⁵⁸ The Department said such "profit" included the "intangible profit that certain inmates acquire by receiving the attention they crave

153. See *Pacific Found.*, 438 U.S. at 750-51 (upholding an FCC fine against a radio station for airing a satiric monologue by comedian George Carlin, entitled "Filthy Words," at 2 p.m. when children easily could hear it).

154. See, e.g., *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991) (holding that a federal statute prohibiting the broadcast of indecent materials 24 hours a day was unconstitutional); *Alliance for Community Media v. FCC*, 10 F.3d 812 (D.C. Cir. 1993) (holding that the FCC could not authorize a cable television operator to ban indecent materials from access channels), *vacated*, 15 F.3d 186 (D.C. Cir. 1994), *aff'd and rev'd in part sub nom. Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996); *Gillett Communications of Atlanta, Inc. v. Becker*, 807 F. Supp. 757 (N.D. Ga. 1992) (ruling that a television station could not refuse to broadcast between the hours of 12 a.m. and 6 a.m. a political commercial depicting an abortion procedure).

155. See *Action for Children's Television v. FCC*, 11 F.3d 170, 176 (D.C. Cir. 1993) (explaining that viewers' "occasional exposure to offensive material" on television "is of roughly the same order that confronts the reader browsing in a bookstore"), *vacated en banc.*, 15 F.3d 186 (D.C. Cir. 1994), *and superceded*, 58 F.3d 654 (D.C. Cir. 1995).

156. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (establishing a First Amendment right for the press and public to attend criminal trials). This case is discussed more fully in Part V.

157. See CAL. CIV. CODE § 2225 (West Supp. 1998) (allowing crime victims and the state Attorney General to petition the court to establish an "involuntary trust" for any profits made by the perpetrator in connection with stories about their crimes).

158. See *id.* § 2225(a)(6) (West Supp. 1998) (defining "materials" by which criminals may profit as "books, magazine or newspaper articles, movies, films, videotapes, sound recordings, interviews or appearances on television and radio stations, and live presentations of any kind").

and the attendant opportunity for a public forum in which they can espouse their often sociopathic philosophies.”¹⁵⁹

That theory, however, finds no support in the language of the statute, which defines both “proceeds” and “profits” in purely monetary terms.¹⁶⁰ A broader definition of the term “profit” as suggested by the Department could be used to prohibit the press from publishing or broadcasting any statements by convicted criminals regarding their crimes, whether or not they are in prison. Such a prohibition would constitute a prior restraint on speech.¹⁶¹

The Supreme Court has stated that prior restraints carry a presumption of unconstitutionality,¹⁶² and will be upheld only under the most extraordinary circumstances, such as when national security is at risk.¹⁶³ In this situation, protecting a crime victim’s sensibilities likely would not qualify as an interest of such magnitude. Therefore, prohibiting the media from publishing statements by criminals regarding their crimes would be an unconstitutional prior restraint.

IV. FIRST AMENDMENT ANALYSIS

Despite imposing severe hardships on the press,¹⁶⁴ the Department’s regulations probably could withstand a legal challenge under current First Amendment law. That conclusion is based on an analysis of the nature of the restrictions, the setting in which they were imposed, and the stated reasons for them.¹⁶⁵ The analysis begins with an outline of pertinent legal doctrines.

159. Final Statement of Reasons, *supra* note 12, at 7.

160. See CAL. CIV. CODE § 2225(a)(9) (West Supp. 1998) (listing “proceeds” as “all fees, royalties, real property, or other consideration of any and every kind or nature received by or owing to a felon”); see also *id.* § 2225(a)(10) (West Supp. 1998) (defining “profits” as “all income from anything sold or transferred, including any right, the value of which is enhanced by the notoriety gained from the commission of a felony for which a convicted felon was convicted”).

161. A prior restraint is defined as “any scheme which gives public officials the power to deny use of a forum in advance of its actual expression.” BLACK’S LAW DICTIONARY 1194 (6th ed. 1990).

162. See *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (“Any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity.” (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963))); see also *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931) (“[T]he chief purpose of the guaranty [of the First Amendment] is to prevent previous restraints upon publication.”).

163. See *New York Times Co.*, 403 U.S. at 730 (Stewart, J., concurring) (indicating that prior restraints will be upheld only where the government can show that publication will result in “direct, immediate, and irreparable damage to our Nation or its people”); see also *Near*, 283 U.S. at 716 (stating that the government could justify a prior restraint to “prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops”).

164. See *supra* Part III (discussing the impediments to effective reporting caused by the Department’s restrictions).

165. *Infra* Part IV.

A. Summary of the Law

It is a cornerstone of First Amendment jurisprudence that restrictions based on the content of speech generally are subject to heightened judicial scrutiny, and will be struck down absent a compelling government interest.¹⁶⁶ There are a handful of narrow exceptions to this rule, including when the content of speech presents a “clear and present danger” to public safety.¹⁶⁷ In those cases, the regulations will be subject to reduced scrutiny.¹⁶⁸

The setting in which the restrictions are established also is crucial. If content-based regulations are imposed in a public forum, such as streets, parks and sidewalks, they are subject to strict scrutiny.¹⁶⁹ However, if content-based regulations are put in place in a facility under government control—a so-called nonpublic forum—then low-level scrutiny typically is applied.¹⁷⁰ An exception is made when restrictions in a nonpublic forum are based on the viewpoint of the speaker, or if they are unreasonable.¹⁷¹ In addition, courts will continue to apply heightened scrutiny if the government has designated a nonpublic forum as a public forum,¹⁷² or if a nonpublic forum has developed into a public forum with tacit government approval.¹⁷³

166. See RODNEY A. SMOLLA & MELVILLE B. NIMMER, *SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT* § 3.02[1][a] (1994) (“Content-based laws generally trigger heightened scrutiny in one of its manifestations, and when heightened scrutiny is applied, the odds are quite high that the law will be struck down.”); see also *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (explaining that the Court applies “the most exacting scrutiny” to content-based regulations, and that such regulations will be upheld only if “necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end”).

167. See SMOLLA & NIMMER, *supra* note 166, § 3.04[2][b] (stating that “there is a very narrow range of categories in which [the Supreme Court] has reduced the level of First Amendment protection solely on the basis of the subject matter”); see also *id.* §§ 4.01, 4.02 (discussing the development, refinement and application of the “clear and present danger test”).

168. See *id.* § 3.04[1] (explaining that when speech regulation falls into one of these narrow categories “reduced levels of protection for speech are warranted”).

169. *Id.* § 3.04[3]. The Court has explained that parks, streets and sidewalks are governed by heightened scrutiny because historically they have been held in trust for the public and have been used for “purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Perry Educ. Ass’n*, 460 U.S. at 45 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

170. See SMOLLA & NIMMER, *supra* note 166, § 10.02[1][c] (stating that content-based regulation of speech in a nonforum is governed by a “reasonableness” standard because such publicly owned facilities have “never been designated for indiscriminate expressive activity by the general public”).

171. See *Perry*, 460 U.S. at 46 (asserting that the government can control speech in a nonpublic forum provided that the regulation “is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view”); see also *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985) (“The existence of reasonable grounds for limiting access to a nonpublic forum . . . will not save a regulation that is in reality a facade for viewpoint-based discrimination.”).

172. See SMOLLA & NIMMER, *supra* note 166, § 10.02[1][b] (stating that strict scrutiny is applied whenever the government “treats a piece of public property as if it were a traditional public forum”).

173. See *id.* § 10.02[3][c][ii] (discussing the “critical mass” doctrine, in which a nonpublic forum is converted into a public forum when the government permits an “increasing array of speech” in a nonpublic forum to the extent that officials “forfeit control of the facility”).

B. Whether the Department's Regulations are Content-based

There is strong evidence that California's restrictions on media access were based on the content or anticipated content of news reports featuring inmates.¹⁷⁴ As previously noted, Governor Wilson and top corrections officials strongly objected to the "glamorization" of inmates by certain television programs.¹⁷⁵ In stating their desire to prevent the media from turning inmates into "celebrities,"¹⁷⁶ Department officials in effect were saying that they did not want any stories that portrayed inmates as fascinating people.¹⁷⁷ In written comments, the Department said it did not want state prisons to become "a stage [for inmates] to promote an agenda,"¹⁷⁸ nor a "public forum in which they can espouse their often sociopathic philosophies."¹⁷⁹ It also complained about the "focus" of news stories featuring inmates.¹⁸⁰ This language strongly suggests that the Department wanted to control, if not quash, the message contained in certain stories about inmates.¹⁸¹

Professor Laurence H. Tribe, a premier constitutional law expert, has defined content-based regulations as those which are aimed at the "communicative impact" of speech.¹⁸² In promulgating its regulations, the Department said it was concerned, among other things, with the impact of news reports on crime victims and their

174. See *infra* Part IV.B (discussing statements of Department officials to justify the restrictions imposed on inmate communications with the press).

175. See *supra* notes 18-19 and accompanying text (discussing Wilson's veto message on SB 434); see also *supra* note 53 and accompanying text (quoting Department officials as protesting the portrayal of certain inmates in the media).

176. Final Statement of Reasons, *supra* note 12, at 4.

177. Webster's defines "glamorous" as "full of glamour; fascinating; alluring." WEBSTER'S NEW WORLD DICTIONARY 572 (3d College ed., 1988). "Glamour" is defined as "seemingly mysterious and elusive fascination or allure, as of some person, object, scene, etc." *Id.* A "celebrity" is defined as "a famous or well-publicized person." *Id.* at 225.

178. Final Statement of Reasons, *supra* note 12, at 6.

179. *Id.* at 7.

180. See, e.g., *id.* at 6-7 (stating that in news stories about Kody "Monster" Scott, "[t]he focus has invariably been his book . . . [which] is devoted solely to describing his criminal exploits and the methods used to kill his victims").

181. California is not the only state that has imposed restrictions on media access to prison inmates based on the anticipated content of news reports. See Charles N. Davis, *Access To Prisons*, QUILL (Society of Professional Journalists, Greencastle, Inc.), May 1998, at 19, 20 (copy on file with the *McGeorge Law Review*) (reporting on the results of a survey of media policies of state corrections departments and concluding that access to inmates is "virtually impossible" in several states and "extremely rare" in others). For example, in Hawaii, corrections officials prohibit media interviews with inmates on specific topics, including their trial, alleged crime or any related matter. *Id.* at 23. In Connecticut, journalists seeking to interview prison inmates must make a written request for access including "a statement of any perceived benefit to law-enforcement agencies." *Id.* at 24. And corrections officials in Mississippi grant interviews only when the media can demonstrate to their satisfaction a public benefit from the interviews. *Id.*

182. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 790-94 (2d ed. 1988) (stating that a regulation aimed at the "communicative impact of an act" of speech is a "content-based abridgment" that qualifies for so-called "track one" analysis in which a regulation will be held unconstitutional absent certain narrow exceptions).

families.¹⁸³ The Department also said it was concerned about how inmates would react to seeing their peers featured on television news reports.¹⁸⁴ Because the Department objected to the message contained in news reports featuring inmate interviews, as well as the “communicative impact” of those news reports on victims and the other inmates, the regulations thus would appear to be content-based.

Content-based regulations on speech can escape heightened scrutiny if the subject matter of the speech to be regulated falls within a few narrow categories, including obscenity, commercial speech and speech that is likely to result in immediate physical harm.¹⁸⁵ The latter category is guided by the modern “clear and present danger test,” as set forth in *Brandenburg v. Ohio*.¹⁸⁶ In that case, the Court held that the government could restrict advocacy only where it “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”¹⁸⁷ Because the Department relied heavily on security concerns to justify its regulations,¹⁸⁸ the relevant inquiry is whether face-to-face media interviews with inmates would constitute a “clear and present danger” as defined in *Brandenburg*.

In justifying the restrictions, the Department offered no evidence of imminent lawlessness stemming from inmate interviews with the media.¹⁸⁹ Indeed, the Department’s “big wheel” theory of harm is based on the mere possibility of some unspecified action stemming from increased notoriety given to certain inmates.¹⁹⁰ Under those circumstances, it is hard to see how the Department’s regulations would satisfy the *Brandenburg* test.¹⁹¹ Therefore, absent other considerations, the Department’s regulations would appear to face strict scrutiny.

183. See Final Statement of Reasons, *supra* note 12, at 3 (arguing that the Department’s restrictions were justified partly to protect the “emotional well-being” of crime victims).

184. See *id.* at 4 (explaining the “big wheel” theory and the Department’s concerns about “celebrity” inmates gaining influence among their peers).

185. SMOLLA & NIMMER, *supra* note 166, § 3.04[2][b].

186. 395 U.S. 444 (1969).

187. *Brandenburg*, 395 U.S. at 447.

188. See *supra* Part III.A (discussing the “big wheel” theory, and the Department’s contention that inmates featured in news reports pose a greater threat to the security of prisons than they would otherwise).

189. See Final Statement of Reasons, *supra* note 12, at 1 (citing no specific threats to prison security or safety other than the 1971 uprising at San Quentin State Prison).

190. See *id.* at 4 (stating that a media interview with inmates “tends to make such inmates celebrities” which increases the danger that he or she will advocate violence in the prison).

191. The Supreme Court has made it clear that *Brandenburg* presents an extremely high hurdle for officials who wish to stifle speech because they believe it is inciting. See, e.g., *Hess v. Indiana*, 414 U.S. 105, 107 (1973) (reversing the conviction on disorderly conduct charges of an anti-war demonstrator who said to a passing sheriff’s deputy, “We’ll take the fucking street later.”); see also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 902 (1982) (holding that an NAACP leader could not be prosecuted for telling potential boycott violators, “If we catch any of you going in any of them racist stores, we’re gonna break your damn neck.”).

C. *Whether a Prison is a Nonpublic Forum*

Although the Department's restrictions on media interviews seem to be based largely on content of speech,¹⁹² the setting in which they were imposed would appear to remove them from the arena of strict scrutiny.¹⁹³ Three years after deciding *Pell*, the Supreme Court stated unequivocally in *Jones v. North Carolina Prisoners' Labor Union, Inc.* that a prison is not a public forum.¹⁹⁴

In that case, North Carolina prison officials had prohibited inmates from soliciting other inmates to join a prison "labor union," barred union meetings and refused to distribute packets of union materials mailed in bulk to certain inmates for redistribution among prisoners.¹⁹⁵ The officials said they feared that the formation of a prison labor union could lead to work stoppages, as well as mutinies and riots.¹⁹⁶ Members of the union sued, claiming that the ban on labor union activities violated their First Amendment rights as well as their Fourteenth Amendment equal protection rights because other inmate groups were allowed to conduct meetings.¹⁹⁷ However, the Supreme Court upheld the ban on labor union activities, saying that it was based on the reasonable belief of prison administrators that the organization posed a threat to the order and security of the prison.¹⁹⁸

California's prisons have as much need for security as do those in North Carolina, given that both are chronically overcrowded and house tens of thousands of violent criminals.¹⁹⁹ As in California, the authorities in North Carolina acted without any specific threat to the security of any prison.²⁰⁰ Consequently, there is no reason to believe that *Jones* would not be controlling.

In some cases, courts have found that states created a "limited-purpose" or "designated" public forum by opening government property "for indiscriminate use as a place for expressive activity."²⁰¹ The Supreme Court generally requires that the government intend to open up a nonpublic forum for "public discourse."²⁰² For

192. *Supra* Part IV.B.

193. *See infra* notes 194-98 and accompanying text (discussing restrictions on speech in a prison setting).

194. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 136 (1977); *see id.* ("[A] prison is most emphatically not a 'public forum.'").

195. *Id.* at 121.

196. *Id.* at 127.

197. *See id.* at 122-23 (stating that inmate groups of the Jaycees and Alcoholics Anonymous had been permitted to have meetings and distribute mail).

198. *Id.* at 136; *see id.* ("There is nothing in the Constitution which requires prison officials to treat all inmate groups alike where differentiation is necessary to avoid an imminent threat of institutional disruption or violence.").

199. *See* LITTLE HOOVER COMMISSION, *supra* note 21, at 20 (stating that by Department standards, most of the state's new prisons are at 200 percent of design capacity); *see also id.* at 46 (containing chart showing that about 65,000 of the 154,000 inmates in state prison in 1997 had committed violent offenses).

200. *Jones*, 433 U.S. at 124.

201. SMOLLA & NIMMER, *supra* note 166, § 10.02[1][b].

202. *See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) ("The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.").

example, the Court has held that a public university which regularly provided facilities for the meetings of many organizations could not exclude a religious group.²⁰³ The Court also has suggested that a similar requirement might be applied to local school districts that open their property to some student groups.²⁰⁴

Applying this doctrine to California's prisons, however, is to strain it beyond the breaking point. Although the Department allowed reporters to enter prisons for more than twenty years to conduct in-person interviews with inmates,²⁰⁵ the prisons have not been open to members of the general public for a discussion of conditions.²⁰⁶ Instead, the "public discourse" that results from media interviews occurs after the information is reported, not during the reporting process. Therefore, prisons cannot fairly be considered "designated" public forums as the concept has been developed in cases involving school facilities.

D. *Whether the Restrictions are Viewpoint-based*

Even in a nonpublic forum, such as prisons, restrictions on speech can violate the First Amendment if they are based on the speaker's viewpoint.²⁰⁷ However, viewpoint discrimination is a narrower category than content discrimination: it restricts speech based not on the topic or subject matter, but on the position that the speaker espouses.²⁰⁸

While the Department's regulations targeted a specific class of speakers—prison inmates—there is no evidence that they were designed to suppress inmates' views on a particular topic.²⁰⁹ Indeed, the Department stated that it considered, but rejected, a total prohibition against inmate correspondence with the media, and a complete ban on face-to-face interviews with inmates, including random interviews.²¹⁰

203. See *Widmar v. Vincent*, 454 U.S. 263, 267-68 (1981) (holding that a public university may not exclude certain groups from a forum "generally open to the public").

204. See *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993) (invalidating the district's refusal to permit a church to use its facilities to show a religious film series on the basis that such a denial constituted viewpoint-based discrimination). Although the Court did not reach the issue of whether the school had converted its facilities into public forums, as argued by the church, it stated that the argument has "considerable force." *Id.* at 391.

205. See *supra* notes 39-42 and accompanying text (discussing the passage and effect of the Inmate Bill of Rights).

206. See CAL. CODE REGS. tit. 15, § 3262 (1998) (describing "public events" at prisons only in terms of "athletic games and other types of entertainment held at facilities").

207. *Supra* note 171 and accompanying text.

208. See SMOLLA & NIMMER, *supra* note 166, § 3.02[2][c][i] (asserting that viewpoint discrimination "goes beyond mere content-based discrimination"); see also *Amato v. Wilentz*, 753 F. Supp. 543, 553 (D.N.J. 1990) ("Content refers to the topic or matter treated in a particular work. Viewpoint refers to one's opinion, judgment or position on that topic.").

209. See Final Statement of Reasons, *supra* note 12, at 6 (stating that the Department believed that, even with the restrictions, "a substantially free flow of ideas" between inmates and reporters would continue).

210. *Id.* at 10.

It might be argued that inmates have unique viewpoints that will not be heard if they are not permitted to speak freely with reporters.²¹¹ However, the Supreme Court has stated that restrictions based on the status of a speaker are not subject to the same heightened review as viewpoint-based restrictions, at least in a nonpublic forum.²¹² Moreover, despite the ban on face-to-face interviews, inmates have other channels to express their opinions, even though they may feel inhibited when it comes to providing detailed information to support their views.²¹³

The problem is not that inmates' viewpoints will not be expressed, but that the press will not write or broadcast stories about them without the ability to interview inmates in person.²¹⁴ By controlling access to inmates, the government can thus effectively control the release of newsworthy information.²¹⁵

Yet stifling the flow of information is not tantamount to suppressing viewpoints. To conclude otherwise would prohibit the government from maintaining secrecy on any subject, which would compromise national security.²¹⁶ Therefore, even though restricting access to inmates can alter the content of reporting on prisons, it would not appear to constitute impermissible viewpoint discrimination.

E. *Whether the Restrictions are Unreasonable*

The only other way that speech restrictions in a nonpublic forum can be invalidated is if they are unreasonable.²¹⁷ In *Cornelius v. NAACP Legal Defense and*

211. See, e.g., Geoffrey Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 248-49 (1983) (acknowledging that there is often a "close correlation between speaker identity and viewpoint" in that restrictions based on a speaker's identity "may have clear viewpoint-differential effects"); see also TRIBE, *supra* note 182, at 803 (describing a "troublesome correlation" between speaker-based restrictions and viewpoint-based restrictions).

212. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983) (stating that, while speaker-based restrictions "may be impermissible in a public forum," they are permissible in a nonpublic forum if "they are reasonable in light of the purpose which the forum at issue serves").

213. See *supra* Part III.B (discussing various alternative channels of communication between inmates and reporters, and explaining the shortcomings of each of those alternatives in terms of providing newsworthy information).

214. See *supra* note 129 and accompanying text (noting that newspapers are reluctant to publish information based solely on letters from inmates).

215. See Steven Helle, *The News-Gathering/Publication Dichotomy and Government Expression*, 1982 DUKE L.J. 1, 43-45 ("The power to establish conditions and limitations on access is tantamount to the power to dictate the content of the news. . . . By controlling news gathering the government can effectively both proscribe and prescribe news dissemination.").

216. See, e.g., Cass R. Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 894-96 (1986) (describing five sets of circumstances in which the government has a legitimate need for secrecy: protecting military plans; facilitating negotiations with foreign nations; facilitating uninhibited deliberations within government; avoiding interest group pressures; and avoiding distrust and suspicion among allies and adversaries alike).

217. E.g., *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

Education Fund, Inc.,²¹⁸ the Court said for a restriction to be reasonable “it need not be the most reasonable or the only reasonable limitation.”²¹⁹ Furthermore, the Court said, the reasonableness of the restrictions “must be assessed in light of the purpose of the forum and all the surrounding circumstances.”²²⁰

In a prison setting, this would appear to be an enormously flexible standard. The purpose of incarceration is to segregate convicted criminals from the rest of society for punishment, deterrence and rehabilitation.²²¹ To accomplish those aims, corrections officials must maintain firm control over the prison environment.²²² As the Supreme Court stated in *Jones v. North Carolina Prisoners’ Labor Union, Inc.*:²²³ “Because the realities of running a penal institution are complex and difficult, we have . . . recognized the wide-ranging deference to be accorded the decisions of prison administrators.”²²⁴

More recently, the Supreme Court has shown great deference to authorities seeking to restrict speech in forums with fewer security demands than prisons.²²⁵ For example, in *United States v. Kokinda*,²²⁶ the Court in 1990 upheld a postal service regulation banning solicitation on a sidewalk adjacent to a post office in a Maryland suburb.²²⁷ The Court said the ban was reasonable based on the Postal Service’s past problems with solicitation of customers *inside* postal buildings.²²⁸

Two years later, in another nonpublic forum case, *International Society for Krishna Consciousness Inc. v. Lee*,²²⁹ the Court held that it was reasonable for the Port Authorities of New York and New Jersey to ban solicitation activities inside terminals at three major airports in the New York City area.²³⁰ The Court reasoned that in the congested setting of a terminal, face-to-face solicitations can be disruptive, coercive and fraudulent.²³¹

218. 473 U.S. 788 (1985).

219. *Cornelius*, 473 U.S. at 808.

220. *Id.* at 809.

221. See MARVIN E. WOLFGANG, PRISONS: PRESENT AND POSSIBLE 11-12 (1979) (describing the various “philosophies of imprisonment” and stating that, because these goals often conflict, prison wardens often must choose among them).

222. See *id.* at 11 (characterizing a prison warden’s duties as “paternalistic, autocratic, and dictatorial,” and stating that because “the inmates are wards of the state, control over them beyond the mere obligation to protect society has been deemed appropriate”).

223. 433 U.S. 119 (1977).

224. *Jones*, 433 U.S. at 126.

225. *Infra* notes 226-31 and accompanying text.

226. 497 U.S. 720 (1990).

227. See *Kokinda*, 497 U.S. at 737 (“It is clear that this regulation passes constitutional muster under the Court’s usual test for reasonableness.”).

228. *Id.* at 735.

229. 505 U.S. 672 (1992).

230. See *International Soc’y for Krishna Consciousness Inc.*, 505 U.S. at 683 (“We have no doubt that under this [reasonableness] standard the prohibition on solicitation passes muster.”).

231. *Id.* at 683-84.

If postal officials and transit authorities can restrict speech in nonpublic forums based on speculative fears of adverse effects on customers and passengers, it is almost certain that prison officials in California would be given leeway to restrict inmates' speech based on purported concerns about prison security and safety.

In sum, because the Department's restrictions probably would not be deemed by a court to be either viewpoint-based or unreasonable in the context of a prison setting, a First Amendment challenge to those restrictions likely would fail.

V. CREATING A FIRST AMENDMENT RIGHT OF ACCESS TO PRISONS

The Supreme Court has long recognized that the press has a special role in the constitutional scheme, and it has found that reporters are entitled to some protection for gathering news.²³² In the 1980s, the Court interpreted that news-gathering right to guarantee the press access to a wide range of proceedings in criminal courts.²³³ One federal district court has extended the rationale for press access to courtroom proceedings to find a right of the press to view executions.²³⁴ With similar persuasiveness, the Supreme Court could look to the special role of the press and the justifications for opening criminal court proceedings to reporters to find a First Amendment right of media access to prison inmates.²³⁵

A. Past Treatment of the Press

In the past, the Supreme Court has recognized that the press has a special role under the First Amendment, and that the media should be allowed access to criminal court proceedings.²³⁶ This treatment of the press is based largely on its unique ability to help citizens carry out the responsibilities of self-governance.²³⁷

1. Special Role of the Press Under the First Amendment

As long ago as 1936, in *Grosjean v. American Press Co.*,²³⁸ the Court called the free press a "vital source of public information" which "stands as one of the great interpreters between the government and the people."²³⁹ Thirty years later, in *Mills*

232. *Infra* Part V.A.1.

233. *Infra* Part V.A.2.

234. *Infra* Part V.A.3.

235. *Infra* Part V.B.

236. *Infra* Part V.A.2.

237. See *infra* notes 260-65 and accompanying text (discussing Justice Brennan's views of the First Amendment).

238. 297 U.S. 233 (1936); see *id.* at 244-45 (invalidating a state license tax on certain newspapers in Louisiana on the grounds that it was intended to curtail the circulation of those newspapers).

239. *Grosjean*, 297 U.S. at 250.

v. Alabama,²⁴⁰ the Court proclaimed that the Constitution “specifically selected the press . . . to play an important role in the discussion of public affairs.”²⁴¹ In 1978, the Court reiterated that view in *First National Bank of Boston v. Bellotti*.²⁴² In that case, the Court said the press has a “special and constitutionally recognized role . . . in informing and educating the public, offering criticism and providing a forum for discussion and debate.”²⁴³

From this position, the Court has extrapolated a right of the press to gather information. One of the strongest statements of that right came in *Branzburg v. Hayes*,²⁴⁴ in which the Court stated: “[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.”²⁴⁵ Nevertheless, the Court held that reporters may be required to testify before a grand jury, even if that means revealing confidential sources.²⁴⁶ Justice Stewart, who authored the Court’s opinions in *Pell v. Procunier*²⁴⁷ and *Saxbe v. Washington Post Co.*,²⁴⁸ wrote a dissenting opinion in *Branzburg* in which he chided the majority for taking a “crabbed view” of the role of the press under the First Amendment.²⁴⁹ “News must not be unnecessarily cut off at its source,” Justice Stewart wrote, “for without freedom to acquire information the right to publish would be impermissibly compromised.”²⁵⁰ Such a statement would seem to imply that for the press to perform its constitutional role as a watchdog of government, it must have access to certain information within the government’s control.²⁵¹

However, Justice Stewart refused to find such a right of access to information in the prison setting. In *Pell*, he held that the press has no right of access to inmates beyond that of the general public.²⁵² Justice Stewart elaborated on his reasoning in

240. 384 U.S. 214 (1966); *see id.* at 220 (striking down a state law criminalizing the publication of editorials on election day urging people to vote a certain way).

241. *Mills*, 384 U.S. at 219.

242. 435 U.S. 765 (1978); *see id.* at 795 (declaring unconstitutional a Massachusetts statute which prohibited corporations from spending money to defeat an income tax proposal before state voters).

243. *Bellotti*, 435 U.S. at 787.

244. 408 U.S. 665 (1972).

245. *Branzburg*, 408 U.S. at 681.

246. *See id.* at 692 (“[W]e cannot seriously entertain the notion that the First Amendment protects a newsmen’s agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it.”).

247. 417 U.S. 817 (1974).

248. 417 U.S. 843 (1974).

249. *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting).

250. *Id.* at 728 (Stewart, J., dissenting); *see id.* (concluding that “a right to gather news, of some dimensions, must exist”).

251. *See, e.g.*, Timothy B. Dyk, *News Gathering, Press Access, and The First Amendment*, 44 STAN. L. REV. 927, 937 (1992) (arguing that reporters cannot rely on government officials who possess newsworthy information “to risk prosecution or disciplinary action and leak material or provide unauthorized access to the press”).

252. *See Pell v. Procunier*, 417 U.S. 817, 834 (1974) (“The Constitution does not . . . require government to accord the press special access to information not shared by members of the public generally.”).

an address at the Yale Law School five months after the case was decided.²⁵³ He said the press should be free to publish stories critical of government and to rail against “secrecy and deception in government.”²⁵⁴ But he maintained that the protection for news gathering is indirect, saying, “The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.”²⁵⁵

2. Access of the Press to Criminal Courts

Six years after deciding *Pell*, the Supreme Court in 1980 began to recognize a special role for the press in covering certain courtroom proceedings. In *Richmond Newspapers, Inc. v. Virginia*,²⁵⁶ the Court held that the press could not be excluded from a criminal trial.²⁵⁷ Although the decision pertained to both the press and the general public, its principal beneficiary was the news media.²⁵⁸ Writing for the majority, Chief Justice Burger based the right to access on a long history of public access to criminal trials dating back to the American colonies.²⁵⁹

Yet the most enduring part of *Richmond Newspapers* was the concurring opinion of Justice Brennan,²⁶⁰ who stressed that the First Amendment “has a structural role to play in securing and fostering our republican system of self-government.”²⁶¹ While Chief Justice Burger’s opinion relied solely on the tradition of open trials to find a constitutional right of access, Justice Brennan added a second factor: whether public access to a particular government process is important to furthering that process.²⁶² In terms of criminal trials, Justice Brennan said openness plays a “fundamental role” in assuring both a fair trial for the defendant²⁶³ and for building public confidence in the criminal justice system.

253. See Potter Stewart, “*Or of The Press*,” 26 HASTINGS L.J. 631 (1975) (containing excerpts of an address delivered on Nov. 2, 1974, at the Yale Law School Sesquicentennial Convocation, New Haven, Connecticut).

254. *Id.* at 636.

255. *Id.*

256. 448 U.S. 555 (1980).

257. See *Richmond Newspapers*, 448 U.S. at 576 (explaining the holding in part in terms of the right to gather news: “Free speech carries with it some freedom to listen.”).

258. See *id.* at 586 n.2 (Brennan, J., concurring) (stating that the press is the “likely, and fitting, chief beneficiary of a right of access” because of its role in informing the public about trial proceedings); see also *id.* at 581-82 n.18 (explaining that when the number of persons wishing to attend a trial exceeds courtroom capacity, media representatives should have preferential seating).

259. See *id.* at 573 (“From this unbroken, uncontradicted history, supported by reasons as valid today as centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice.”).

260. See, e.g., Eugene Cerruti, “*Dancing in the Courthouse*”: *The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237, 280 (1995) (crediting Justice Brennan with developing a “new structural theory” that has expanded the doctrine of public access to government proceedings).

261. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring) (stating that the First Amendment protections for a free press rest on the “antecedent assumption that valuable public debate—as well as other civic behavior—must be informed”).

262. *Id.* at 589 (Brennan, J., concurring).

263. *Id.* at 593 (Brennan, J., concurring).

“Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for the law,” he wrote.²⁶⁴ “Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice.”²⁶⁵

The Court embraced the same line of reasoning two years later in *Globe Newspaper Co. v. Superior Court*.²⁶⁶ In an opinion written by Justice Brennan, the Court invalidated a Massachusetts statute that, in an attempt to protect the psychological well-being of children, excluded the press and public from trials during the testimony of minor rape victims.²⁶⁷ In the 1984 case *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*,²⁶⁸ the Court took this First Amendment right a step further, holding that the press and public could not be excluded from the jury selection phase of a trial.²⁶⁹ Finally, in *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*,²⁷⁰ the Court held that the press and public have a qualified First Amendment right to attend preliminary hearings.²⁷¹

3. Access of the Press to View Executions

In 1997, a federal district judge in California relied on Justice Brennan’s two-part analytical framework developed in *Richmond Newspapers* to find that the press has a qualified First Amendment right to witness state-sponsored executions.²⁷² Although the decision was reversed by the Ninth Circuit Court of Appeals,²⁷³ it shows that Justice Brennan’s analysis can be applied to proceedings and

264. *Id.* at 595 (Brennan, J., concurring).

265. *Id.*

266. 457 U.S. 596 (1982).

267. See *Globe Newspaper Co.*, 457 U.S. at 606 (“Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact finding process, with benefits both the defendant and to society as a whole.”).

268. 464 U.S. 501 (1984).

269. See *Press-Enterprise I*, 464 U.S. at 510-11 (ruling that closing the courtroom during six weeks of jury selection was unconstitutional because the court made no findings that an open proceeding would have threatened the defendant’s Sixth Amendment right to a fair trial, and because it failed to consider alternative methods of protecting the privacy of jurors).

270. 478 U.S. 1 (1986).

271. See *Press-Enterprise II*, 478 U.S. at 12 (reasoning that even though a preliminary hearing does not occur before a jury and cannot result in a conviction, “these features, standing alone, do not make public access any less essential to the proper functioning of the proceedings in the overall criminal justice process”).

272. See *California First Amendment Coalition v. Calderon*, 956 F. Supp. 883, 890 (N.D. Cal. 1997) (directing state prison officials to allow witnesses to executions by lethal injection to view the procedure at least from when the condemned inmate is strapped to the gurney until just after he is pronounced dead), *rev’d*, 150 F.3d 976 (9th Cir. 1998).

273. See *California First Amendment Coalition v. Calderon*, 150 F.3d 976, 983 (9th Cir. 1998) (remanding to the district court with instructions to determine whether plaintiffs had presented “substantial evidence” that the procedure for limited viewing of lethal injections constituted an “exaggerated response” to the prison’s security and safety concerns). The Ninth Circuit originally instructed the district court to enter judgment for the state. *California First Amendment Coalition v. Calderon*, 138 F.3d 1298, 1304 (9th Cir. 1998). However, the court withdrew that opinion three months later, replacing it with another opinion identical in all respects except for the final paragraph.

circumstances outside the judicial branch of government. Therefore, it warrants attention.

The case stemmed from a 1996 California execution—the State’s first by lethal injection rather than the gas chamber.²⁷⁴ During that execution, reporters were not permitted to view condemned inmate William George Bonin until after he was strapped down on a horizontal chair with deadly chemicals already flowing into his veins through intravenous tubes.²⁷⁵

Ruling on a lawsuit brought by the media, U.S. District Judge Vernon Walker analyzed the case by asking whether access to executions existed historically and whether it serves an important function.²⁷⁶ First, Judge Walker noted the long history of public executions in the Anglo-American justice system.²⁷⁷ Second, he found that public viewing of executions served an important function because, like trials, they “implicate fundamental aspects of government and the legal process.”²⁷⁸ Therefore, he concluded, reporters and other witnesses to an execution by lethal injection had a right to view the entire procedure—starting from before the condemned inmate is strapped down until after he is pronounced dead.²⁷⁹

In reversing Judge Walker’s decision, the Ninth Circuit pointed to *Pell*, concluding it would not second-guess the Department’s procedures for ensuring the security of corrections officials.²⁸⁰ The appeals court stressed that its holding did not completely bar the press from viewing executions.²⁸¹ However, in strictly adhering to the Supreme Court’s pronouncements in prior prison access cases, the Ninth Circuit said any such right was dependent upon the public’s right of access.²⁸²

The appellate court’s ruling on inmate executions demonstrates the perils of *Pell*. By allowing prison officials to strictly limit the media’s access to a new method of execution in California, the state effectively prevented the public from

274. Nancy Vogel, *Press, Prisons at Odds over Execution Access*, SACRAMENTO BEE, May 5, 1996, at A3.

275. *Id.* Bonin never opened his eyes during the several minutes that witnesses were allowed to view the procedure, and the only signs of life were slight rises of his chest. *Id.* Only later did officials reveal that they had difficulty sticking a needle for the intravenous line into his arm. *Id.*

276. *California First Amendment Coalition*, 956 F. Supp. at 886.

277. *Id.* at 887-88.

278. *Id.* at 888.

279. *Id.* at 890.

280. See *California First Amendment Coalition*, 150 F.3d at 982-83 (“The procedures surrounding an execution ‘are peculiarly within the province and professional expertise of corrections officials. . .’” (quoting *Pell v. Procnier*, 417 U.S. 817, 827 (1974))). The Ninth Circuit also cited a 108-year-old Supreme Court case upholding a ban on media access to executions. See *Holden v. Minnesota*, 137 U.S. 483, 491 (1890) (holding that a new state law prohibiting reporters or other representatives of newspapers from witnessing an execution by hanging could be applied to offenses committed before the law because the provision did not affect the condemned’s “substantial rights”).

281. *California First Amendment Coalition*, 150 F.3d at 982.

282. See *id.* (“The Supreme Court has told us that the First Amendment does not protect the right of the press to gather news in prisons not available to the public, and we agree with the Fifth Circuit that ‘this holding is not predicated upon the importance or degree of interest in the matter reported.’” (quoting *Garrett v. Estelle*, 556 F.2d 1274, 1279 (5th Cir. 1977))).

determining whether that method is more humane than the gas chamber, and whether corrections officials had allowed the condemned to die with a modicum of dignity.²⁸³ While the Ninth Circuit said it was not holding that the media could be barred from attending executions, it offered little assurance that state officials could not further restrict public viewing of executions by lethal injection.²⁸⁴

The Department's key concern, shielding the identity of corrections officers involved in the procedure, could have been addressed by less restrictive alternatives, such as allowing those officers to wear surgical masks or drawing a curtain to hide those who insert needles into the condemned prisoner's arms.²⁸⁵ By not requiring the Department to show the feasibility of alternatives, the appellate court minimized the public's interest in one of the gravest government actions: taking a prisoner's life in the name of the people.

B. Application of First Amendment Principles to Prison Interviews

The special role carved out for the press by the Supreme Court can be extended to prisons which, like courts, play an integral role in the criminal justice system.²⁸⁶ By applying the two-step analysis established by Justice Brennan in *Richmond Newspapers*, the Court could find a qualified First Amendment right for reporters to conduct face-to-face interviews with selected inmates of their choice.²⁸⁷

1. Special Role of the Press in Prison Reporting

In *Pell*, the Court held that reporters have no greater right of access to prisons than the general public.²⁸⁸ This position not only departed from the Court's past treatment of the press,²⁸⁹ it also created the potential for blocking *all* media access

283. See Nancy Vogel, *Press, Prisons at Odds over Execution Access/View of Full Procedure Compromises Workers, Corrections Officials Say*, SACRAMENTO BEE, May 5, 1996, at A3 (quoting Jason Beaubien, a KQED-FM radio reporter who witnessed the deaths of Bonin and another inmate executed pursuant to Judge Walker's order, as saying that "compared to Bonin's execution, we could see this [subsequent inmate] was a human being put to death").

284. See *California First Amendment Coalition*, 150 F.3d at 982 ("Reading *Holden* and *Pell* in combination, whatever First Amendment right might exist to view executions, the 'right' is severely limited.").

285. See Vogel, *supra* note 283, at A3 (reporting that some attorneys seeking wider viewing of executions argued that prison workers could wear surgical masks to hide their faces if necessary, and that officials in Louisiana allow witnesses to see the condemned inmate being strapped down, but draw a curtain to hide those workers who insert the needles).

286. See *infra* Part V.B.1 (discussing the special role of the press in prison reporting).

287. See *infra* Part V.B.2 (applying Justice Brennan's two-part test to inmate interviews).

288. See *Pell*, 417 U.S. at 833-34 (noting that despite the hardships on news gathering, the press is excluded from grand jury proceedings, the meetings of private organizations, public agencies meeting in executive session, and the conferences of the Supreme Court itself).

289. See *supra* Part V.A.1 (discussing the Court's long-held view that the press has a special role under the First Amendment).

to prisons by simultaneously banning all public access.²⁹⁰ The Supreme Court did nothing to quell this concern four years later when it decided another prison case.²⁹¹

In *Houchins v. KQED, Inc.*,²⁹² the Court upheld a California sheriff's decision to prohibit reporters from entering part of a county jail where psychiatric patients were housed because that area was not open to the general public.²⁹³ In his plurality opinion, Chief Justice Burger described a television station's request to film that part of the jail as "a claimed special privilege of access."²⁹⁴ Not only did Chief Justice Burger deny the request, but he further suggested that neither the press nor the public has a right to know about the inner workings of prisons.²⁹⁵ Under this extreme view, the government could prevent the public from ever learning about inhumane conditions and the mismanagement of prisons.²⁹⁶ While a majority of the Court has never adopted this position, it demonstrates the hazards of equating the First Amendment rights of the press with those of the public.

Even Justice Stewart, who authored the majority opinion in *Pell*, recognized in *Houchins* the need to distinguish between the rights of the press and the general public in the prison setting.²⁹⁷ In a concurring opinion in *Houchins*, Justice Stewart said reporters should be able to use cameras and sound equipment when they tour a prison.²⁹⁸ Pointing out that a reporter "does not tour a [prison] simply for his own edification,"²⁹⁹ he concluded that restrictions on access to the general public "may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists."³⁰⁰

Justice Stewart's reasoning would seem to undermine the Department's decision to prohibit journalists in California prisons from using tape recorders, cameras, pens and paper during inmate visits.³⁰¹ Under his view, the restrictions would be "unreasonable" unless corrections officials have offered "sufficient

290. Justice Powell recognized the potential for abuse, saying that the Court's holding would permit "any governmental restriction" on the press "no matter how severe" as long as it was applied equally to the public. *Saxbe v. Washington Post Co.*, 417 U.S. 843, 857 (1974) (Powell, J., dissenting).

291. *Infra* notes 292-96 and accompanying text.

292. 438 U.S. 1 (1978).

293. *Houchins*, 438 U.S. at 15.

294. *Id.* at 12.

295. *See id.* at 14 ("We . . . reject the . . . assertion that the public and the media have a First Amendment right to government information regarding the conditions of jails and their inmates and presumably all other public facilities such as hospitals and mental institutions.")

296. *See* JEROME A. BARRON & C. THOMAS DIENES, *HANDBOOK OF FREE SPEECH AND FREE PRESS* 497 (1979) (describing Burger's opinion as "one of the most emphatic criticisms or rejections of a media right of access to the prisons in Supreme Court case law").

297. *Infra* notes 298-300 and accompanying text.

298. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (Stewart, J., concurring) (stating that the concept of equal access must be accorded some "flexibility" to reflect the "practical distinctions" between the press and the general public).

299. *Id.* at 17 (Stewart, J., concurring).

300. *Id.*

301. Final Statement of Reasons, *supra* note 12, at 5.

justification” for such a restriction.³⁰² Because Department officials offered no such justification,³⁰³ the prohibition appears to unnecessarily impede effective reporting of state prisons.

More generally, linking the media’s right of access to prisons to the public’s right is flawed in practice. It is unlikely that an average citizen would have the time or desire to visit a prison or interview inmates to learn about their living conditions.³⁰⁴ Instead, citizens depend on the press to keep them informed of what goes on behind prison gates.³⁰⁵ By contrast, citizens can keep themselves informed about local government issues with less reliance on the press because legislative bodies such as city councils and school boards conduct regularly scheduled public meetings.³⁰⁶ There is thus a major dichotomy between the consequences of keeping the press and the general public out of prisons which does not exist in other areas of government.³⁰⁷

2. Application of Justice Brennan’s Two-Part Test to Inmate Interviews

The two-part analysis developed by Justice Brennan for assessing whether the press should have access to criminal courtroom proceedings also can be applied to the media’s request for access to selected inmates.³⁰⁸ Under that analysis, the media should have such a right if prisons traditionally have been open to the public and press, and if allowing reporters to conduct face-to-face interviews with inmates of their choice would advance the functions of the penal system.³⁰⁹ Both of those elements can be satisfied.³¹⁰

302. *Houchins*, 438 U.S. at 17 (Stewart, J., concurring).

303. See Final Statement of Reasons, *supra* note 12, at 5 (stating that reporters were not permitted to use these “tools of the trade” while speaking to an inmate during regular visitation hours, but providing no rationale for the policy).

304. See *Pell*, 417 U.S. at 841 (Douglas, J., dissenting) (“The average citizen is most unlikely to inform himself about the operation of the prison system by requesting an interview with a particular inmate with whom he has no prior relationship.”); see also *Saxbe v. Washington Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting) (stating that because most citizens can’t become personally familiar with newsworthy events, they rely on the press to serve as their “agent”).

305. *Pell*, 417 U.S. at 841 (Douglas, J., dissenting).

306. See, e.g., CAL. GOV’T CODE § 54953(a) (West 1982) (“All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter.”).

307. See Melville B. Nimmer, *Is Freedom of the Press A Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 653-55 (1975) (discussing the “democratic dialogue function” of the press, and saying that the Court in *Pell* and *Saxbe* “ignored” that function, which is not present when prisoners speak with other members of the public).

308. *Infra* Part V.B.2.a-b.

309. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980) (Brennan, J., concurring) (outlining the two-step inquiry for determining public access to courtroom proceedings).

310. *Infra* Part V.B.2.a-b.

a. Tradition of Open Prisons

It is hard to imagine that prisons historically have been as open to the public as criminal trials. But academic research shows that jails and prisons in the late eighteenth and early nineteenth centuries largely were open to the general public and official inspectors.³¹¹ For example, at Newgate State Prison in New York's Greenwich Village in the early 1800s, visitors were admitted if they paid a small fee, and virtually no one was refused entry.³¹² The scene was similar later in the century at numerous other prisons in northern states, where thousands of visitors, including the press, were recorded at prisons each year.³¹³ In one commentator's view, it is no coincidence that some of the most egregious reports of inmate abuse in the modern era have occurred at prisons with limited public surveillance.³¹⁴

In a more limited context, it seems clear that prisons historically have been open to the news media for interviewing inmates. California had such a policy for decades before the imposition of the current restrictions in late 1995.³¹⁵ Notwithstanding these restrictions, the state continues to allow media and public tours of prisons.³¹⁶ And, contrary to the restrictions imposed by California,³¹⁷ the vast majority of states reports that they still allow face-to-face media interviews with inmates.³¹⁸

Based on the history of open prisons and modern-day media policies in most states, it is reasonable to conclude that prisons traditionally have been open to the public and press.³¹⁹ Thus, the first element of Justice Brennan's test is likely met.

311. See Leonard G. Levenson, *Constitutional Limits on the Power to Restrict Access to Prisons: An Historical Re-examination*, 18 HARV. C.R.-C.L. L. REV. 409 (1983) (citing historical references to support the proposition that prisons traditionally have been public institutions).

312. See *id.* at 415 (stating that visitors to the prison were admitted upon payment of a shilling, the equivalent of about 12 ½ cents, and that open access to jail was a "well-established" custom by the early 1800s).

313. See *id.* at 421 n.58 (citing, *inter alia*, sociologist Charles Henderson, who wrote in 1903: "Nowhere in the civilized world is admission to prisons so open and unconstrained as in most places in the United States. The reporters for the daily press are permitted to range at their will.").

314. See *id.* at 426-28 (discussing how inmates were tortured with electric shocks at Arkansas' Tucker Prison Farm and placed in isolation cells in Alabama prisons with large rocks embedded in the floor so inmates could not sleep, both of which occurred as recently as the late 1960s). "Prisons have traditionally been open to the public, both in England and America, and this tradition of openness has led to the exposure of prison abuses," Levenson concluded. *Id.* at 428.

315. See *supra* notes 35-42 and accompanying text (reviewing the background of California's regulations).

316. See CAL. CODE REGS. tit. 15, § 3263 (1998) (authorizing such tours provided that they do not jeopardize "facility security or the safety of persons").

317. See *supra* Part II (reviewing the enactment of the current media restrictions on access to inmates at California prisons).

318. See Davis, *supra* note 181, at 27 (listing results of a nationwide survey of media-access policies, which showed that 44 states and the District of Columbia report that they allow face-to-face interviews between reporters and inmates).

319. Levenson reached a similar conclusion. Based on the history of open prisons, he argued that the Supreme Court could find a right of public access to prisons in order to preserve inmates' First Amendment rights to petition for redress of grievances. Levenson, *supra* note 311, at 428-29. However, it would seem that a right to petition for redress of grievances could be found under California's new regulations through the existence of the alternate

b. Advancing the Function of the Penal System

The second step in finding a First Amendment right of access to prisons under Justice Brennan's analysis is to show that such access would advance the functioning of the penal system.³²⁰ While California officials argue that allowing reporters wide access to prisons would compromise prison security and hinder rehabilitation of inmates,³²¹ a stronger case can be made that limiting access harms the criminal justice system in the long run.

Prisons are a vital part of the criminal justice system, housing more and more criminals even as the crime rate has dropped.³²² At the end of 1997, more than 1.2 million convicts were locked up in state and federal prisons throughout the United States, a 5.2% increase from a year earlier.³²³ California has one of the highest incarceration rates in the nation,³²⁴ and repeat offenders face longer prison terms than ever before under the state's "three-strikes" sentencing law.³²⁵

Just as the public needs assurance that criminal trials are fair and protective of individual rights so that it can have confidence in the criminal justice system, the

means of communication with reporters. *See Pell v. Procunier*, 417 U.S. 817, 823 (1974) (stating that in evaluating the constitutionality of a particular restriction on an inmate's free speech, that restriction "must be viewed in the light of the alternative means of communication permitted under the regulations with persons outside the prison"). As previously shown, however, those forms of communication are inadequate from a reporter's standpoint. *See supra* Part III.B (explaining the shortcomings of alternative methods of communicating with inmates). Thus, even though inmates might have the ability to contact news reporters, their grievances or allegations of misconduct will not be published or broadcast unless reporters are satisfied with the veracity and credibility of those allegations. *See, e.g., supra* note 129 (noting the reluctance of news organizations to publish information based solely on written communication from inmates). To find a First Amendment right of access to inmates which includes pre-arranged face-to-face interviews, the court must look to the rights of the press rather than the rights of the inmates. *See supra* text accompanying notes 67-72 (discussing the shortcomings of the Supreme Court's approach in *Turner v. Safley*, 482 U.S. 78 (1987)).

320. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980) (Brennan, J., concurring) (discussing the test for a First Amendment right of public access to proceedings in criminal courts).

321. Final Statement of Reasons, *supra* note 12, at 1.

322. *See* David Westphal, *Fewer Crimes, More Inmates*, SACRAMENTO BEE, Aug. 3, 1998, at A1 (reporting on a U.S. Department of Justice study, and quoting Allen Beck, Chief of Corrections Statistics for the Department, as saying the rise in inmate population could be attributed mostly to longer prison terms).

323. *Id.*

324. *See id.* (stating that California's incarceration rate of 475 inmates per 100,000 residents is the ninth highest in the U.S.).

325. *See* CAL. PENAL CODE § 667 (West Supp. 1998) (providing that convicted felons with a single prior violent or serious felony will have their normal prison sentence doubled, while those with two or more violent or serious felonies face a minimum prison term of 25 years to life in prison). Both before and after its enactment in 1994, this statute has been referred to as California's "three-strikes" or "three-strikes-and-you're-out" law. *See, e.g.,* Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395 (1997) (discussing the history and aftermath of California's multiple-offender statute, and pointing out that it, like many repeat-offender laws enacted throughout the U.S. during the 1990s, has been popularized by the "three strikes" slogan).

public also cares about how prisons are run.³²⁶ Without confidence in the penal system, jurors might be tempted to acquit defendants based on a fear of what awaits defendants in prison, just as some juries have done to spare defendants lengthy prison terms under the three-strikes law.³²⁷

The refusal to allow reporters broad access to inmates can result in a perception, if not the reality, that prison officials have something to hide. That, in turn, undermines public confidence in the entire criminal justice system. These are the same consequences Justice Brennan feared would result from closed trials.³²⁸ To borrow his words, preventing effective news coverage of the prison system, like preventing effective news coverage of criminal trials, could easily “breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for the law.”³²⁹

In *Houchins*, Justice Stevens recognized a similar public interest between news coverage of courtroom proceedings and reporting of prison conditions.³³⁰ In a dissenting opinion joined by Justices Brennan and Powell, Justice Stevens wrote that “the integrity of the [trial] proceeding . . . survives the judgment of conviction and appropriately carries over to an interest in how the convicted person is treated during his period of punishment and hoped-for rehabilitation.”³³¹

On another level, the perception that prisons are mismanaged can complicate efforts to build new prisons to accommodate the growing number of inmates.³³² California voters in 1990 rejected a bond measure to finance new prisons, and no new prison bond measures have been placed on the ballot since then.³³³ While the state has approved some lease-purchase revenue bonds to finance additional prisons without voter approval, none have been authorized since 1994.³³⁴ In 1996, the Department estimated that the state will have to build seventeen new prisons (in

326. For example, a 1980 survey of public attitudes in Maryland about that state's correctional system found that the vast majority of respondents were very interested in penal issues, with more respondents assigning a higher priority to the goals of rehabilitation and deterrence than to the goals of incapacitation and punishment. The study also found that while policymakers held the same views as the general public, they erroneously assumed that the public placed more emphasis on punitive goals than it actually did. See Stephen D. Gottfredson & Ralph B. Taylor, *Attitudes of Correctional Policymakers and the Public*, in *AMERICA'S CORRECTIONAL CRISIS* 57, 68-71 (1987) (“Contrary to general belief, we found the general public not to be especially punitive—rather, they stress more utilitarian goals, such as rehabilitation, deterrence, and incapacitation.”).

327. See Tony Perry & Maura Dolan, *Justice By Geography, How Three Strikes Add Up Depends on Where You Live*, *SACRAMENTO BEE*, July 7, 1996, at F1 (reporting that prosecutors in San Francisco are reluctant to bring three-strikes cases when the third strike is a non-violent offense for fear of jury nullification).

328. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 595 (1980) (Brennan, J., concurring).

329. *Id.*

330. *Houchins*, 438 U.S. at 36-37 (Stevens, J., dissenting).

331. *Id.* at 37 (Stevens, J., dissenting).

332. See *infra* notes 333-36 and accompanying text (providing an example of such voter disapproval resulting from negative perceptions of prison management).

333. See LITTLE HOOVER COMMISSION, *supra* note 21, at 24 (stating that California voters approved a total of about \$2.6 billion in general obligation bonds for prison construction between 1981 and 1990, but rejected another prison bond in November 1990, prompting the state to turn to alternative funding sources).

334. *Id.*

addition to the existing thirty-three) to keep up with inmate growth, at a projected cost of \$6.1 billion.³³⁵

If lawmakers and voters believe that prison officials are mistreating inmates or otherwise mismanaging the expensive facilities, they are not likely to approve new facilities.³³⁶ That would exacerbate existing overcrowded conditions and increase the likelihood of prison violence.³³⁷

In California, the press has played an important role in exposing official wrongdoing and questionable policies at state prisons. In just the past few years, newspapers have written about the alarming number of state prison inmates killed by guards,³³⁸ the substandard medical and mental health care of inmates,³³⁹ and the severe burning of an inmate at a prison infirmary.³⁴⁰ In addition, newspapers had detailed allegations of staged fights at the exercise yard at Corcoran State Prison years before any indictments were issued.³⁴¹

Face-to-face interviews between reporters and inmates were critical to some of those stories. For example, the co-author of a *San Francisco Chronicle* series on health care in prisons said that such access helped his reporting in a variety of ways.³⁴² Inmate interviews helped to reconstruct the story of the death of one

335. *Id.*

336. See Andy Furillo, *Pressures Building in State's 32 Prisons*, SACRAMENTO BEE, Jan. 19, 1997, at A1 (reporting that Senator Richard Polanco suggested that voters in Los Angeles rejected a local jail bond issue in 1996 partly because the public does not trust government officials to accurately project prison construction needs).

337. See LITTLE HOOVER COMMISSION, *supra* note 21, at 20 (relating that prison officials say that the consequences of severe overcrowding include "the heightened potential for rioting by inmates").

338. See Kim Christensen & Marc Lifsher, *Prison Guards: Licensed to Kill?*, ORANGE COUNTY REG., Oct. 23, 1994, at A1 (reporting that since 1989 California correctional officials have killed 27 convicts—more than three times as many as in all other U.S. prisons combined).

339. See Susan Sward & Bill Wallace, *Health Crisis Behind Bars/Ailing Prison Inmates Suffer From Lack of Care*, S.F. CHRON., Oct. 3, 1994, at A1 (exposing shortcomings in medical care at California's prisons, which have spawned federal lawsuits, critical state reports, and millions of dollars in legal claims paid by the Department on prisoners' medical claims).

340. See Robert D. Davila, *Inmate Accuses Guards of Burning Him in Bath*, SACRAMENTO BEE, June 24, 1992, at A1 (reporting that Vaughn Dortch, an inmate of Pelican Bay State Prison, said in an interview that prison guards forced him into a bathtub filled with hot water and chemicals while a medical technician scrubbed his body with a hard bristle brush, resulting in second- and third-degree burns over 30 percent of his body). Dortch filed a lawsuit over the incident, which the state settled for \$997,000. *Prison Scalding Suit Settled for \$997,000*, SACRAMENTO BEE, Mar. 1, 1994, at B4.

341. See, e.g., Royal Calkins & Sylvia Castro Uribe, *Shooting Death at Corcoran Prison Draws Inquiry*, FRESNO BEE, Oct. 28, 1994, at A1 (discussing the April, 1994 shooting of inmate Preston Tate by a prison guard); see also Mark Arax, *Tales of Brutality Behind Bars; Five Officers Claim Staging of 'Gladiator Days,' Other Abuses at Corcoran State Prison*, L.A. TIMES, Aug. 21, 1996, at A1 (reporting allegations that prison guards staged fights among inmates, "complete with spectators and wagering," and regularly beat shackled inmates arriving from other prisons).

342. See Letter from Bill Wallace, Staff Writer for the *San Francisco Chronicle*, to Tom Newton, General Counsel for the California Newspaper Publishers Association (Feb. 28, 1996) (copy on file with the *McGeorge Law Review*) (describing the process of reporting a series of stories on inmate mental health and medical care that ran in the *San Francisco Chronicle* between October 3 and October 5, 1994).

inmate, which provided a compelling anecdote to introduce the series.³⁴³ They also resulted in tips that were substantiated by subsequent reporting.³⁴⁴ Finally, they helped provide context for the entire series.³⁴⁵ "It is no exaggeration," wrote *San Francisco Chronicle* staff writer Bill Wallace, "to say that our series of stories about prison medical and mental health care could not have been written without direct access to prison inmates."³⁴⁶

In the realm of television, on-camera interviews with prison inmates can do more to illustrate the crux of a story than officials criticizing prison policy. For example, a story on the CBS *60 Minutes* television program on the lack of job training and alcohol and drug rehabilitation programs in California's prison system was told largely through the voices of inmates.³⁴⁷ Viewers likely will have a better understanding of an inmate's plight if they hear him speaking simple but powerful words such as, "I don't want to go out there and not know where my next meal is going to come from, not know where I'm going to sleep."³⁴⁸ If such stories lead to political pressure to increase job-training programs at prisons, they would serve to promote the rehabilitative function of prisons, which some experts argue is essential to ensuring public safety.³⁴⁹

For all the reasons cited above, allowing reporters to interview inmates of their choosing face-to-face will further the aims of the penal system. Therefore, the second element of Justice Brennan's two-part test can be satisfied.

None of this is to say that prison officials could never place restrictions on face-to-face inmate interviews if authorities are able to demonstrate that such interviews pose a specific threat to prison security.³⁵⁰ Under such circumstances, it might be appropriate to limit the number of interviews with a particular inmate or temporarily

343. See *id.* (recounting the circumstances surrounding the reporters' ability to gather evidence pertaining to Bruce Rizotto's death, which were reported on October 3, 1994).

344. *Id.*

345. See *id.* (explaining that information provided by inmates "helped shape our thinking about the problems we uncovered and suggested other topics for investigation").

346. *Id.*

347. See *60 Minutes: Crime & Punishment* (CBS television broadcast, Dec. 26, 1993) (transcript on file with the *McGeorge Law Review*) (depicting the plight of prisoners through direct interviews with inmates).

348. *Id.*

349. See, e.g., Thomas W. White, *Prisons Should Rehabilitate*, in *AMERICA'S PRISONS: OPPOSING VIEWPOINTS* 30, 37 (David L. Bender et al. eds., 5th ed. 1991) (arguing that the lack of rehabilitation programs in prisons "is reducing our ability to have an impact on the basic attitudes and values that put offenders in prison in the first place," and adding that without such programs "it is unrealistic to expect the offenders we do have incarcerated to change, even if they are sentenced for longer periods of confinement").

350. The Supreme Court has stated that the press's First Amendment right of access to criminal proceedings is a qualified right, which can sometimes be outweighed by a defendant's Sixth Amendment right to a fair trial or a juror's right to privacy. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 n.18 (1980) ("Just as a government may impose reasonable time, place and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic, . . . so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial.") (citation omitted); see also *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) ("Although the right of access to criminal trials is of constitutional stature, it is not absolute.").

ban all interviews during periods of prison unrest.³⁵¹ But a qualified First Amendment right of media access to inmates, as proposed in this Comment, would create a presumption of access that would have to be overcome every time prison officials wanted to prevent reporters from interviewing selected inmates.

VI. CONCLUSION

California prison officials banned in-person interviews between reporters and inmates in 1995 based on an aversion to certain types of news stories.³⁵² They later justified the action by saying they were concerned about prison security and public safety.³⁵³ The Department contended that reporters still have other avenues of communicating with inmates; however, none of those alternatives is as effective as face-to-face interviews for gathering information about prison conditions.³⁵⁴

Because inmates often are the best sources of information on prison conditions and programs, eliminating the most effective way of interviewing them will limit the public debate about the prison system.³⁵⁵ Yet because the restrictions were imposed in a nonpublic forum, and were not aimed at stifling inmates' views, they probably would survive a constitutional challenge under current First Amendment law.³⁵⁶

In the 1980s, the Supreme Court reasoned that the need for citizens to be able to govern themselves required that all aspects of a criminal trial be open to the public and the press.³⁵⁷ Prisons are another key component of the criminal justice system, and the same rationale for opening trials to the public supports a qualified First Amendment right to allow the press to conduct in-person interviews with inmates.³⁵⁸

Such interviews with prison inmates serve as a vivid reminder that, despite their often deplorable acts, inmates remain human beings. Most of them will be released, and how they are treated in prison will affect their behavior outside prison gates.

Of course, opening the prison gates to reporters who wish to effectively cover those institutions may require some administrative inconvenience and could result in embarrassment to prison officials.³⁵⁹ But the alternatives, including breeding

351. See *Saxbe v. Washington Post Co.*, 417 U.S. 843, 873 (1974) (Powell, J., dissenting) (stating that even if the press had a general right of access to inmates, prison officials still could "limit the number of interviews of any given inmate within a specified period," refuse to allow interviews with inmates in solitary confinement, or suspend all interviews during emergency periods).

352. *Supra* note 53 and accompanying text.

353. Final Statement of Reasons, *supra* note 12, at 1.

354. *Supra* Part III.B.

355. *Supra* Part V.B.1.

356. *Supra* Part IV.

357. *Supra* Part V.A.2.

358. *Supra* Part V.B.2.

359. See *supra* notes 338-41 and accompanying text (discussing various newspaper reports in recent years based on face-to-face interviews).

suspicion and contempt of the penal system, are potentially more harmful.³⁶⁰ If part of the purpose of the First Amendment is to help perpetuate a self-governing society, then such a purpose is served by allowing reporters to do their jobs well.

³⁶⁰. *See supra* Part V.B.2.b (showing how in-person interviews would advance the function of the penal system).