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Orange is the News Blackout: The First Amendment and Media Access to Jails

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ORANGE IS THE NEWS BLACKOUT: THE FIRST AMENDMENT AND MEDIA ACCESS TO JAILS

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I. INTRODUCTION

As the COVID-19 pandemic struck the United States in 2020, cases multiplied rapidly within the confines of county jails. By mid-June 2020, two hundred ten inmates and two hundred staff members at Detroit's Wayne County Jail had tested positive for the deadly virus,[1] which was blamed for at least four employee deaths.[2] In Chicago, one in every six cases of COVID-19 has been linked to the Cook County Jail, where every infected inmate goes on to infect approximately two other people, many of them outside of the facility.[3] Reliable data on the virus's spread in correctional institutions proved elusive; the Reuters news agency found that official statistics from the federal Centers for Disease Control "dramatically" understated the number of cases in prisons and jails, possibly as much as threefold.[4]

The novel coronavirus crisis starkly underscores how little the public is informed about the inner workings of county jails that, as of the most recent federal count, housed 738,000 people at any given time, more than three out of every one thousand adults in the country.[5] By one estimate, 4.9 million people—2.3% of the adult population—cycle through county jails in a given

1. Ross Jones, *'We Don't Have Enough People.' Wayne County Jail Nurses Warn of Understaffing*, WXYZ (June 15, 2020, 4:48 PM), https://www.wxyz.com/news/local-news/investigations/we-dont-have-enough-people-wayne-county-jail-nurses-warn-of-understaffing [https://perma.cc/Q4JY-RJ4C].

2. Peter Eisler, Linda So, Ned Parker & Brad Heath, *Across U.S., COVID-19 Takes A Hidden Toll Behind Bars*, REUTERS (May 18, 2020, 11:00 AM), https://www.reuters.com/investigates/special-report/health-coronavirus-usa-jails/ [https://perma.cc/J6JF-UCSZ].

3. Matt Masterson, *Report: 1 in 6 Chicago COVID-19 Cases Can Be Tied to Cook County Jail*, WWTW (June 4, 2020, 6:33 PM), https://news.wttw.com/2020/06/04/report-1-6-chicago-covid-19-cases-can-be-tied-cook-county-jail [https://perma.cc/AE43-G882].

4. *See* Eisler, So, Parker & Heath, *supra* note 2 (commenting that "scant testing and inconsistent reporting from state and local authorities have frustrated efforts to track or contain [the virus's] spread, particularly in local jails").

5. BUREAU OF JUST. STAT., OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST., JAIL INMATES IN 2018 (2020), https://www.bjs.gov/content/pub/pdf/ji18_sum.pdf [https://perma.cc/8S5N-WLZ9].

year.[6] Yet the public's ability to scrutinize the operations of jails is largely left to the grace of the agencies that operate them, as federal courts have hesitated to recognize any constitutionally guaranteed right of access.

The select few who are discretionarily admitted to visit and tour jails get an officially circumscribed view. The Supreme Court has not recognized a First Amendment right for journalists to insist on any particular degree of access, and in the absence of a constitutional imperative, jails commonly reserve broad discretion to refuse to admit reporters or to reject requests to speak with specific inmates, even those who are not dangerous or are in jail on temporary holds awaiting trial.[7]

Over the past forty years, an evolving body of First Amendment case law has solidified the public's right of access to essential phases of the criminal justice process. The public has a clearly established right to record the activities of police doing official business in publicly viewable places,[8] and to attend criminal court proceedings, including not just the trial itself but also jury selection, motion hearings, and sentencing.[9] That may be where the First Amendment right of access ends—even though the need for public oversight assuredly does not.

This Article suggests that it is time for the Supreme Court to clarify the confusion resulting from its fractured 1978 ruling in *Houchins v. KQED, Inc.*,[10] refusing to recognize a constitutional right for journalists to visit jails and speak with willing interviewees. *Houchins*, which produced no opinion garnering more than three votes, is part of a perplexing body of First Amendment case law in the correctional setting that fails to provide clear safeguards against abuse and overreach. Absent clear safeguards, counties have widely assumed that they may refuse to admit journalists to inspect jails and speak with detainees, even for arbitrary or content-discriminatory reasons. One of the nation's largest jails, in Orlando, Florida, tells reporters that interview requests

6. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/8NPQ-Z5YE].

7. *See infra* Section IV (reporting findings of nationwide survey of jail policies).

8. *See* Nicholas J. Jacques, Note, *Information Gathering in the Era of Mobile Technology: Toward a Liberal Right to Record*, 102 CORNELL L. REV. 783, 796–98 (2017) (collecting recent circuit-level First Amendment cases).

9. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980).

10. 438 U.S. 1, 16 (1978).

may be rejected "for any reason" and limits interviews to topics "external to the jail system."[11]

Exclusionary jail policies harm more than just journalists. When inmates are constrained from giving interviews, they are more vulnerable to mistreatment and neglect. The public is deprived of the information needed to evaluate the performance of jail authorities and, where necessary, to seek changes in management practices.

Recalibrating First Amendment doctrine in the jail setting will require the courts to rethink the near-ironclad deference that, in recent decades, has made correctional policies all but impervious to constitutional scrutiny.[12] The prevailing understanding—that speech-restrictive policies will be reviewed merely for a justification in the general vicinity of reasonableness—inadequately protects the interests not just of those incarcerated, who concededly surrender some constitutional liberties at the jailhouse gate, but also of those listening on the other side of the barbed wire.

While First Amendment jurisprudence regarding access to correctional facilities largely focuses on prisons, this Article concentrates instead on jails because they are distinguishable from prisons in ways that alter the constitutional calculus. Jails house considerably more people than prisons, and those people stay for significantly shorter periods,[13] including those convicted of infractions as insignificant as trespassing or driving with a suspended license[14]—and those who have not been, and may never be, convicted of a

11. ORANGE CNTY. DEP'T OF CORR., CORRECTIONS DEPARTMENT MEDIA RELATIONS GUIDE, https://www.orangecountyfl.net/Portals/0/Library/Jail-Judicial/docs/Media%20Relations%20Guide%20revised%202-10-17%20CERT.pdf [https://perma.cc/7CER-3DM2].

12. *See* Daniel J. Solove, *Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons*, 106 YALE L.J. 459, 470 (1996) (criticizing the Supreme Court's minimally rigorous review of prison authorities' justification for regulations curbing religious freedom, "scrutiny so meager and deferential that it approximated the 'hands off' doctrine"); *see also id.* at 483 (observing that "[w]hen courts do not demand substantial evidence to justify prison regulations, there is no way to distinguish the prison's claims from mere speculation").

13. *See* ZHEN ZENG, U.S. DEP'T OF JUST., JAIL INMATES IN 2016 (2018), https://www.bjs.gov/content/pub/pdf/ji16.pdf [https://perma.cc/9VR3-QNDN] (Jail inmates spend an average of 25 days in jail); DANIELLE KAEBLE, U.S. DEP'T OF JUST., TIME SERVED IN STATE PRISON, 2016 (2018), https://www.bjs.gov/content/pub/pdf/tssp16.pdf [https://perma.cc/WY4F-L54M] (In comparison, the average state prisoner serves 2.6 years behind bars); *Jail Statistics*, AM. JAIL ASS'N (2021), https://www.americanjail.org/jail-statistics [https://perma.cc/EY9R-8BM6].

14. *See* Alexandra Natapoff, *How A Simple Misdemeanor Could Land You in Jail for Months*, N.Y. POST (Feb. 2, 2019, 10:36 AM), https://nypost.com/2019/02/02/how-a-simple-misdemeanor-could-land-you-in-jail-for-months/ [https://perma.cc/FXE2-ZYSW] (summarizing author's research concluding that the justice system overzealously punishes misdemeanor offenses, with outsized

crime.[15] They are frequently administered not by trained corrections professionals but by local elected officials with credentials no greater than a high school diploma,[16] scarcely the "experts" who are owed impenetrable deference.

In Section II, this Article explains how First Amendment doctrine does, and does not, protect the right to gather information as a necessary extension of the right to publish and distribute it, in particular information about the workings of the criminal justice system. Drawing on that background, Section III focuses specifically on the correctional setting and the Supreme Court's confounding *Houchins* decision—what led to it and how it has been applied to deny journalists meaningful access to jails and the people held there. Section IV presents the results of a nationwide survey of county jails' media-access policies conducted by the Brechner Center for Freedom of Information, which identifies significant constitutional defects even under a deferential standard of review. Section V explains why, as a matter of sound public policy as well as First Amendment law, counties should be affording people in jail some uncensored opportunity to share information with the news media, including blowing the whistle on deficiencies in jail practices. The discussion takes note of the perils of unchecked judicial deference to the purported superior expertise of correctional authorities and how the judiciary has historically been willing to second-guess correctional management practices when supervening constitutional interests are at stake. Finally, Section VI concludes with recommendations for policymakers to consider to improve the transparency of detention facilities in light of contemporary events that heighten the public's already significant interest in the health and safety of incarcerated people.

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consequences for those jailed); *see also* Dave Boucher, *'Purpose of Jail Has Gotten Muddled': Michigan Lawmakers Propose Changes to Justice System*, DETROIT FREE PRESS (July 22, 2020, 12:33 PM), https://www.freep.com/story/news/politics/2020/07/22/michigan-justice-reform-bills/5485255002/ [https://perma.cc/G8EK-XFL7] (reporting on proposed legislation to decrease penalties for motor vehicle offenses, which are largely blamed for swelling jail populations as people struggling to pay fines lose their licenses).

15. *See Jail Statistics*, *supra* note 13.

16. *See* Tony Bartelme & Joseph Cranney, *SC Sheriffs Fly First Class, Bully Employees and Line Their Pockets with Taxpayer Money*, POST & COURIER (Mar. 16, 2019), https://www.postandcourier.com/news/sc-sheriffs-fly-first-class-bully-employees-and-line-their-pockets-with-taxpayer-money/article_bed9eb48-2983-11e9-9a4c-9f34f02f8378.html [https://perma.cc/6YE3-X6AC] ("In 1988, South Carolina voters approved a change in the state's constitution requiring sheriffs to be free of felonies and have at least five years of law enforcement training and a high school diploma."). Florida does not require any particular degree of training or education. M. H. HALL, PROFESSIONAL STANDARDS AND CRITERIA TO HOLD THE OFFICE OF SHERIFF IN THE STATE OF FLORIDA (1993), https://www.fdle.state.fl.us/FCJEI/Programs/SLP/Documents/Full-Text/Hall_MH.aspx [https://perma.cc/S63Y-UQ6T] (recommending that Florida join Georgia in requiring at least a high school diploma to qualify to hold sheriff's office).

II. THE FIRST AMENDMENT GOES TO JAIL

A. The Uncertain "Right" to Gather News

Perhaps no principle of First Amendment law is more venerated or firmly established than the right to be free from governmentally imposed "prior restraints" that prevent ideas from being heard.[17] Any government restraint on the ability to disseminate information comes with a heavy presumption of unconstitutionality,[18] especially if the restraint is based on content or viewpoint. "Strict scrutiny" applies to any regulation that proscribes or punishes speech based on content, meaning the government must show that the regulation "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end."[19]

The right to gain access to information, while perhaps logically implicit in the right to publish, is far less well-developed, and to the extent that the right exists at all, its boundaries are ill-defined.[20] There is, for example, no constitutionally guaranteed right to compel the government to make its records available for inspection, so the public must look to statutory law to protect the right to know.[21]

While legal scholars have long advocated for the courts to recognize a heightened right to observe and record news grounded in the First Amendment's press clause, that position has yet to gain traction with the Supreme Court.[22] The Court came closest to recognizing a journalistic right to

17. *See* Near v. Minnesota, 283 U.S. 697, 711, 713, 722–23 (1931) (stating, in striking down state statute empowering judges to enjoin publication of newspapers deemed "scandalous," that "it has been generally, if not universally, considered that it is the chief purpose of the [First Amendment] guaranty to prevent previous restraints upon publication").

18. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

19. Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987).

20. "The Supreme Court and lower courts have developed this First Amendment right to gather information in a patchwork of cases over the past forty years, but the Court has never explained its exact origins or rationale." Jacques, *supra* note 8, at 785 (footnote omitted).

21. *See* McBurney v. Young, 569 U.S. 221, 232 (2013) (rejecting claim that Virginia's refusal to afford nonresidents access to government documents violated requesters' constitutional rights: "This Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by [freedom-of-information] laws.").

22. *See* Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1042–43 (2011) (observing that, while the Supreme Court has acknowledged as a general principle that news-gathering must be constitutionally protected, "the Court rarely has supported these statements through actual safeguards for the process of seeking or obtaining information. It has furthermore never protected the rights of the press qua press to gather the news"); Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 935 (1992) (arguing that "[w]hile it is certainly proper that the press have access rights that are as great as the general public's, it hardly follows that press

gather news in its fractured and confusing set of opinions in *Branzburg v. Hayes*, involving a prosecutor's demand for a reporter to testify before a criminal grand jury.[23] But the discussion in the Court's 5–4 majority opinion was fleeting and unhelpfully vague: "We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."[24]

Absent contrary guidance from the Supreme Court, it is widely held that journalists enjoy no greater right to access government property or information than the general public and can be held liable for trespass, even on public property, in pursuit of news if the property is not open to public entry.[25] Nor are journalists immune from tort liability for trespassing or for gaining entry based on false representations.[26] For example, the Ninth Circuit found no actionable First Amendment violation when police cited a photojournalist who stopped his car behind a highway pileup and refused police orders to return to his car and move it out of the way.[27] The court held that the photographer could not bring a constitutional claim because he "fail[ed] to present any evidence that members of the public generally had a right to park on Interstate 880 and exit their cars to take pictures of the accident scene."[28]

This principle applies equally to correctional institutions. The Fifth Circuit explored this in *Garrett v. Estelle*, when reporters brought suit after being allowed to view an execution but barred from filming or photographing the procedure.[29] Reasoning that the right to speak and publish does not mean that journalists have an unrestrained right to gather information,[30] the court declared

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access should be no greater than the public's," and noting the unique public-dissemination and "sifting" functions that journalists discharge).

23. Branzburg v. Hayes, 408 U.S. 665, 669 (1972).

24. *Id.* at 681.

25. *See* New Mexico v. McCormack, 682 P.2d 742, 746 (N.M. Ct. App. 1984) (holding that a journalist's conviction for trespass for entering a government construction site while covering a protest was valid).

26. *See* Frederick v. Biography Channel, 683 F. Supp. 2d 798, 802 (N.D. Ill. 2010) (finding that media organizations could be held liable for a Fourth Amendment violation for filming arrestees as part of a staged tableau arranged by police); Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 516–17 (4th Cir. 1999) (ruling that television reporters who obtained employment at a grocery store under false pretenses to sneak hidden cameras into nonpublic food-preparation areas could be held liable in tort for breach of duty and trespass).

27. Chavez v. City of Oakland, 414 F. App'x 939, 941 (9th Cir. 2011).

28. *Id.* at 940.

29. Garrett v. Estelle, 556 F.2d 1274, 1275 (5th Cir. 1977).

30. *Id.* (citing Zemel v. Rusk, 381 U.S. 1 (1965)).

the protections afforded by the First Amendment to gathering news do not extend into matters unavailable to the general public, such as the ability to film executions.[31]

The rights of the journalist and the source are of obvious importance in a First Amendment analysis, but perhaps less obvious are the First Amendment interests of the audience that might be denied information. The Supreme Court has acknowledged the fuzzy outlines of a "right to receive information" that exists separate and apart from the interests of the speaker in being heard.[32] While the metes and bounds of the right are ill-defined, it has proven decisive in invalidating overzealous government attempts to regulate what minors may view or read.[33] For instance, in finding that key content-regulatory portions of the federal Communications Decency Act of 1996 were unconstitutionally broad, the Court invoked both the speaker's and the listener's rights in equal measure: "In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another."[34]

Perhaps the clearest recognition of a First Amendment-based right to receive information distinct from the rights of the speaker came in *Stanley v. Georgia*, in which the Court categorically pronounced: "It is now well established that the Constitution protects the right to receive information and ideas."[35] In a unanimous outcome, the Court threw out the conviction of a Georgia man whose collection of pornographic films was found during an unrelated police search of his home, declaring that "the mere private possession of obscene matter cannot constitutionally be made a crime."[36]

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31. *Id.* at 1276.

32. Stanley v. Georgia, 394 U.S. 557, 558 (1969).

33. *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 794 (2011) (stating, in striking down state law against sale of violent video games to minors, that the state's interest in protecting children's safety does not include "a free-floating power to restrict the ideas to which children may be exposed"); Erznoznik v. City of Jacksonville, 422 U.S. 205, 212–13 (1975) ("[M]inors are entitled to a significant measure of First Amendment protection and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." (citation omitted)).

34. Reno v. ACLU, 521 U.S. 844, 874 (1997).

35. *Stanley*, 394 U.S. at 564.

36. *Id.* at 558–59; *see also* Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1965) (acknowledging right to receive mailed literature in invalidating a statute that required post offices to interdict transmittal of mail identified as communist political propaganda); Tiffani B. Figueroa, Note, *"All Muslims Are Like That": How Islamophobia is Diminishing Americans' Right to Receive Information*, 41 HOFSTRA L. REV. 467, 473–74 (2012) (analyzing *Stanley* and concluding that the audience's right to receive "is integral to the spread of ideas and discussion regardless of whether ideas may be controversial").

The "right to receive" cases generally involve information that already exists (films, books, video games) as opposed to information that might come into existence in the future, so extending the right into a generalized newsgathering right may require leaping an intermediate analytical step. Nevertheless, in the context of detention facilities, the public's interest in receiving candid information is profound, though it seldom receives meaningful judicial consideration when the information is coming from behind bars.

B. The Evolving "Right of Oversight" in the Criminal Justice System

There are two prevailing views of journalists' First Amendment right to seek interviews: the structural and the functional.[37] The structural approach looks at protecting the press as an institution and its rights as the only collective group mentioned in the First Amendment.[38] The functional approach looks to protect the press as news gatherers, its ability to disseminate information, and how this function encourages the free and open flow of information in society.[39] The approach each court chooses to adopt in its First Amendment jurisprudence sets the stage for further decisions and affects how courts choose to protect or limit the press and its functions.

Although the First Amendment is not generally understood to confer an affirmative right to observe news as it happens, one governmental function—criminal justice—is so uniquely important that courts have recognized a constitutional right not just to distribute information but to gather it.

In *Richmond Newspapers, Inc. v. Virginia*, the Court held that journalists have a right to attend criminal trials, as the media is an important link between the court system and the public.[40] The public needs to know that "society's responses to criminal conduct are underway" to keep unrest and outrage from manifesting in a "form of vengeful 'self-help,'" as it would in the "activities of vigilante 'committees' on our frontiers."[41] The media serves as an independent check to be sure that justice is being carried out in the court system by reporting on the proceedings inside courthouses that interested members of the public may not be able to attend themselves. A journalist's presence in court is a symbol to the justice system that the public is watching and will hold the participants accountable for irregularities or abuses.

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37. Roberta L. Cairney, *Sunlight in the County Jail:* Houchins v. KQED, Inc. *and Constitutional Protection for Newsgathering*, 6 HASTINGS CONST. L.Q. 933, 943 (1979).

38. *Id.* at 943.

39. *Id.*

40. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569, 580 (1980).

41. *Id.* at 571.

Richmond Newspapers was rooted in the history of openness of criminal trials to spectators, which, in the Court's view, served societally valuable functions, including deterring criminality and reinforcing confidence that the judicial system dispenses justice fairly.[42] A series of cases known as *Press-Enterprise I* and *Press-Enterprise II* solidified the right of journalists to access court proceedings even further.

In *Press-Enterprise I*, news organizations were excluded from an extraordinary six-week jury selection proceeding in a high-profile murder trial and denied access to the written transcripts afterward.[43] The Court found that the trial judge violated the journalists' First Amendment rights and that closure frustrated the "community therapeutic value" of openness.[44] The public has a right to know that justice is being carried out, even if they cannot witness the proceedings in person. The Court observed: "When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided" for the public's understandable feelings of shock, anger, and injustice.[45]

The value of allowing the media to inspect hearing transcripts comes from the fact that those unable to attend in person "can have confidence that standards of fairness are being observed" and know that "established procedures are being followed and that deviations will become known."[46] Openness serves the purpose of enhancing "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."[47]

Two years later, *Press-Enterprise II* established a more concrete test for whether a presumptive right of media access existed, applying it to journalists' ability to attend pretrial hearings.[48] The Court held that a right of access must be justified by "experience" (examining whether access was traditionally allowed) and "logic" (asking whether access plays a salutary role in the judicial process).[49] The Court answered both questions affirmatively: the public and press have been permitted to watch preliminary hearings dating back to the nation's earliest days (including the 1807 treason prosecution of Aaron Burr), and openness gives the public confidence that justice is being carried out

42. *Id.* at 576.
43. Press-Enterprise I, 464 U.S. 501, 504 (1984).
44. *Id.* at 509 (quoting *Richmond Newspapers*, 488 U.S. at 570).
45. *Id.*
46. *Id.* at 508.
47. *Id.*
48. Press-Enterprise II, 478 U.S. 1, 8–9 (1986).
49. *Id.* at 9.

legitimately.[50] But the right to access court proceedings is not absolute. Trials can be closed to the media in the interests of fairness and justice if holding public proceedings would result in substantial prejudice.[51]

The question of whether the *Richmond Newspapers* and *Press-Enterprise* reasoning extends beyond the courtroom and into the correctional system has been put to the test repeatedly in the context of media access to executions. The Ninth Circuit, while accepting that there is no general First Amendment right to insist on being admitted to a prison, nevertheless found a First Amendment right for journalists to watch the entire process by which execution drugs are administered,[52] and to hear as well as see the process.[53] Conversely, in a 2020 case, a federal district court in Virginia decided that there was no public, and hence no journalistic, right to view procedures taking place before the curtain is opened at an execution.[54] The court called it "quite a reach" to infer a right to observe prison activities from the right to observe criminal trials, as they "do not occur in the adjudicatory process. If that chasm is to be breached, the Supreme Court must be the court to make the leap."[55] While many states admit journalists as part of a delegation of official execution witnesses as a matter of statute, claims of a constitutional entitlement to be present (or to have any specific degree of access) have generally faltered on *Pell/Saxbe/Houchins* grounds, with courts finding that journalists cannot claim a right superior to that of the general public to be present in the death chamber.[56]

In recent years, federal courts have explicitly recognized a First Amendment right to gather information about the criminal justice system in the context of police conducting official business in public view.[57] These cases

50. *Id.* at 10–13.

51. *Id.* at 9–10.

52. Cal. First Amendment Coal. v. Woodford, 299 F.3d 868, 885–86 (9th Cir. 2002).

53. First Amendment Coal. of Ariz., Inc. v. Ryan, 938 F.3d 1069, 1075 (9th Cir. 2019).

54. BH Media Grp., Inc. v. Clarke, 466 F. Supp. 3d 653 (E.D. Va. 2020).

55. *Id.* at 662.

56. *See* Garrett v. Estelle, 556 F.2d 1274, 1278–79 (5th Cir. 1977) (upholding Texas's refusal to admit television cameras to the death chamber); *see also* John D. Bessler, *Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to State Executions*, 45 FED. COMMC'NS L.J. 355, 373–82 (1993) (collecting cases unfavorable to media access claims).

57. *See* Fields v. City of Phila., 862 F.3d 353, 355–56 (3d Cir. 2017) (holding that citizens have a right to film police in public because there is a First Amendment right of access to information about how public servants conduct their jobs in public); Turner v. Lieutenant Driver, 848 F.3d 678 (5th Cir. 2017) (finding that filming the exterior of a police station from a public sidewalk is a constitutionally protected activity that may not be the basis for detention and arrest); Gericke v. Begin, 753 F.3d 1, 10 (1st Cir. 2014) (deciding that state wiretapping law could not constitutionally be applied to prosecute motorist who videotaped police officer making roadside traffic stop); ACLU v. Alvarez, 679 F.3d 583

have typically arisen in the context of challenges to statutes that criminalize eavesdropping or nonconsensual recording of conversations.

The right to film police officers conducting their jobs in public spaces has been acknowledged since the ownership of devices capable of recording became commonplace.[58] Some jurisdictions, such as the Seventh Circuit, have enjoined statutes criminalizing the audio recording of police in public as well, reasoning that said statutes abridge the right of free speech because "[t]he right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of making the recording is wholly unprotected."[59] The right to record police in public is not absolute, however. The Fifth Circuit stated in *Turner* that the right to videotape police is subject to reasonable restrictions on the time, place, and manner of recording.[60]

Instructively, these right-to-record cases have specifically recognized policing as a matter of unique public concern. While the courts in cases such as the Third Circuit's *Fields* and the Fifth Circuit's *Turner* could simply have pointed out that videography is a lawful activity in a public space, they went further, focusing on the affirmative right to record police officers in particular.[61] This suggests that it is the heightened public interest in police oversight that elevated the plaintiffs' activity to a First Amendment concern.

The now-overwhelming consensus that the public has a clear constitutional right to record the activities of police in public spaces is instructive in two respects. First, these cases recognize that the act of *gathering* news—not just distributing it—is protected expression for purposes of the First Amendment. Second, these decisions highlight the uniquely sensitive role that law enforcement plays in society and the public's profound interest in having confidence that police powers are being used responsibly.

(7th Cir. 2012) (deciding that Illinois eavesdropping law cannot constitutionally be applied to making audio recordings of police doing official business in public); Glik v. Cunniffe, 655 F.3d 78, 79 (1st Cir. 2011) (holding that bystander was arrested without probable cause for filming police arresting another man in public to document what bystander suspected was excessive use of force); Fordyce v. City of Seattle, 55 F.3d 436 (9th Cir. 1995) (recognizing First Amendment right to gather news in case of amateur filmmaker who was prevented from filming protest march by police).

58. *See* Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000).

59. *ACLU*, 679 F.3d at 595 (emphasis omitted).

60. *Turner*, 848 F.3d at 688.

61. *See Fields*, 862 F.3d at 359 ("Access to information regarding public police activity is particularly important because it leads to citizen discourse on public issues, 'the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.'" (quoting Snyder v. Phelps, 562 U.S. 443, 452 (2011))); *Turner*, 848 F.3d at 688 ("Filming the police contributes to the public's ability to hold the police accountable, ensure that police officers are not abusing their power, and make informed decisions about police policy.").

Taken together with *Richmond Newspapers* and the *Press-Enterprise* line of cases, this body of law implies that *some* information gathering is protected under the First Amendment in the criminal justice context. The question then becomes how much, if at all, the same philosophy might apply to part of the justice system that takes place behind bars.

C. Guarded Conditions: Diminished Constitutional Rights Behind Bars

Though most rulings on inmate rights come from cases originating in prisons rather than jails, those rulings set the standard for all penal institutions; thus, they are relevant in determining where the First Amendment begins and ends in county jails. The Supreme Court has long held that constitutional freedoms can be limited inside prisons and jails because of countervailing safety concerns: "Lawful incarceration brings about the necessary . . . limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."[62] In an illustrative case, the Ninth Circuit decided that a prisoner in California's storied Alcatraz Penitentiary could be held to "reasonable" limits in his business correspondence with the outside world (in that case, efforts to market a book).[63] The inmate was limited in what business he could conduct from his prison cell because writings attached to his business papers were "calculated to arouse antagonism" in recipients.[64]

In the 1974 landmark case *Procunier v. Martinez*, the Supreme Court ruled in favor of inmates who brought a class action suit challenging the vague standards used to censor their mail.[65] While the Court found that First Amendment freedoms were subject to limitations posed by the "special characteristics of the [institutional] environment," the Justices ultimately decided the case not out of concern for the inmates' rights but for the rights of those in the outside world who sought to exchange information with them.[66]

The Court set out a two-part test for justifying the censorship of inmate mail, known as the *Martinez* test.[67] The first prong requires that the regulation "further an important or substantial governmental interest" unrelated to limiting expression.[68] Specifically, such a regulation must advance the security, order,

62. Price v. Johnston, 334 U.S. 266, 285 (1948).
63. Stroud v. Swope, 187 F.2d 850, 851 (9th Cir. 1951).
64. *Id.* at 852.
65. Procunier v. Martinez, 416 U.S. 396, 413–14 (1974).
66. *Id.* at 409 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).
67. *Id.* at 413–14.
68. *Id.* at 413.

or rehabilitation of inmates.[69] The second prong requires that the limitation on First Amendment freedoms be "no greater than is necessary or essential to the protection of the particular governmental interest" at issue.[70] Therefore, a restriction on inmate correspondence satisfying the first prong of the test can still be deemed invalid if it is overbroad.[71] Administrators have latitude in determining whether the "probable consequences of allowing certain speech in a prison environment" could cause issues in the facility, allowing for restrictions that would seem overly broad in the outside world but are justified due to the unique institutional setting.[72]

The *Martinez* level of protection was limited to only outgoing inmate correspondence by *Thornburgh v. Abbott*, in which inmates brought suit because of a blanket ban on certain publications coming into the prison.[73] The Court in *Thornburgh* reasoned that outgoing materials, which merely capture the grievances that inmates are already voicing amongst each other, pose a lesser risk of provoking disruption than materials introduced by outsiders.[74] In reaching its result, the Court acknowledged that subsequent cases had retreated from the *Martinez* level of scrutiny out of concern that rigorous or heightened scrutiny is "not appropriate for consideration of regulations that are centrally concerned with the maintenance of order and security within prisons."[75]

As the correspondence cases were being brought to court, a separate but related body of cases appeared in response to inmate and journalist communications and interview requests, building the foundation for modern limits on communication between journalists and those in correctional facilities.[76]

The First Circuit's *Nolan v. Fitzpatrick* involved a group of prisoners challenging the constitutionality of a blanket ban on exchanging letters with the media, specifically letters detailing the conditions of the correctional institution, treatment by correctional officers, and other personal grievances.[77] While inmates' right to address the media in general had not been addressed in the First Circuit before, the court had previously found that other First

69. *Id.*

70. *Id.*

71. *Id.* at 414.

72. *Id.*

73. Thornburgh v. Abbott, 490 U.S. 401, 413 (1989).

74. *Id.* at 411.

75. *Id.* at 410.

76. *See* Daniel M. Donovan, Jr., *Constitutionality of Regulations Restricting Prisoner Correspondence with the Media*, 56 FORDHAM L. REV. 1151, 1153 (1988) (discussing split of authority over level of constitutional protection afforded to prisoners' correspondence with journalists).

77. Nolan v. Fitzpatrick, 451 F.2d 545, 546 (1st Cir. 1971).

Amendment rights existed behind bars, such as the freedom of religion.[78] Relying primarily on the fact that the conditions of the correctional system are important matters of public interest, of which inmates are peculiarly knowledgeable, the court held that inmates had a right to send letters to the media detailing these conditions.[79]

A few years later, the Fifth Circuit held in *Guajardo v. Estelle* that inmates had a right to correspond with the media, largely free from censorship aside from reasonable limitations.[80] The court noted that by protecting inmate and journalist correspondence, the rights of not only inmates but also the public as a whole were being protected because decisions related to prison conditions remain a matter of public interest.[81] In an attempt to curb abuses of this newfound right, prison authorities were given a "reasonable time" to verify that the addressees to which inmates were sending media mail are, in fact, members of a media organization and not members of the general public.[82] The Seventh Circuit, however, has been less protective. In *Gaines v. Lane*, the court found that mail from journalists was entitled to no greater protection than any other mail and could be searched like any other "nonprivileged" correspondence.[83]

While inmates enjoy some right to correspond with journalists, not all journalists are equal in the eyes of the courts. The Eleventh Circuit, in *Jersawitz v. Hanberry*, held that independent journalists unaffiliated with an FCC-licensed broadcasting outlet have fewer rights when interviewing inmates.[84] Jersawitz, an independent journalist, argued that he had a right to seek interviews with inmates like any other journalist would and should not have been denied entry based on his employment status.[85] The court applied the "traditional rational relationship test" and concluded that the "compelling state interest" standard proposed by Jersawitz was inappropriate because the case "neither involved a suspect class nor implicated fundamental constitutional rights."[86] In other words, the court viewed the case not as an infringement on Jersawitz's First Amendment rights so much as the institution's ability to manage the flow of requests by enforcing content-neutral access standards.

78. *Id.* at 547.
79. *Id.* at 547–48.
80. Guajardo v. Estelle, 580 F.2d 748, 759 (5th Cir. 1978).
81. *Id.*
82. *Id.*
83. Gaines v. Lane, 790 F.2d 1299, 1307 (7th Cir. 1986).
84. Jersawitz v. Hanberry, 783 F.2d 1532, 1533 (11th Cir. 1986).
85. *Id.*
86. *Id.*

The court in *Jersawitz* found that the need for maintaining the security of the institution outweighed the interest of independent journalists in accessing inmates for interviews.[87] By allowing only representatives of an FCC-licensed news outlet into the facility, prison officials can easily "identify those persons who are not likely to pose any threat to security without the facility having to conduct extensive individual investigations of each applicant."[88] Restricting who enters the prison helps ensure the facility's security, which was paramount in this case, as Jersawitz was attempting to enter a maximum security prison.[89]

More recently, attention has turned to inmates' ability to use electronic means to communicate with the outside world.[90] The ability to use the Internet raises new and different analytical questions because, while mail clerks may scrutinize each outgoing envelope, there is no comparably effective safeguard for instantaneous online messaging. Inmates convicted of certain offenses, such as soliciting child pornography online, embezzlement, or hacking into other prisoners' records when granted Internet access, have been denied the right to use email after wardens have shown they would pose a risk if allowed to access the system.[91] This limitation is just: inmates known to be dangerous when given Internet access should be denied access to cut them off from a potential avenue for further crime. However, an inmate's uncertain right to e-mail leaves it unclear as to whether journalists are able to access certain classes of inmates for online interviews or e-mail correspondence in an increasingly digital age.

III. THROWING AWAY THE KEY: NO RIGHT TO INTERVIEW?

A. Sentenced to Silence: Pell*,* Saxbe*, and Insurmountable Deference*

Journalists' right to interview inmates has historically been limited by the courts. A series of Supreme Court cases in the 1970s clarified the rights of inmates as speakers and journalists as news gatherers, including strict limitations on the privileges journalists can expect when pursuing leads inside a correctional institution.

In *Pell v. Procunier*, the Court held that security considerations justify limiting media access to correctional institutions as long as the restrictions are

87. *Id.* at 1534.

88. *Id.*

89. *Id.* at 1533.

90. *See* Brennen J. Johnson, *Jail (E)Mail: Free Speech Implications of Granting Inmates Access to Electronic Messaging Services*, 11 WASH. J.L. TECH. & ARTS 285, 286 (2016) (advocating a limited constitutional right of access to email services and noting limitations in other existing channels for inmate communication).

91. *Id.*

both content neutral[92] and provide prisoners with an alternative means of communication,[93] such as letter writing or phone conversations. *Pell* involved a group of writers, editors, and inmates alleging violations of inmates' right of free speech and journalists' right to the freedom of the press after a prison-wide ban on interviews with inmates selected by journalists had been instituted.[94] This ban was in the context of a recent escape attempt that had ended in the deaths of multiple inmates and correctional officers.[95] The prison found that the policy in effect prior to the objectionable restraint had resulted in press attention being concentrated on a small number of inmates who had played a role in the escape attempt, allowing those inmates to gain a degree of notoriety and influence among their peers (the so-called "big wheel" effect).[96] This degree of influence concerned the warden, resulting in a new policy that served as a blanket ban on journalists selecting specific inmates to interview.[97]

A blanket ban satisfies content neutrality in that all content, and not one specific topic, is off limits.[98] The Court found that the second prong of the test, a viable alternative means of communication, was satisfied because all inmates enjoyed an unrestricted ability to communicate to the press through their families, attorneys, or clergy who visited them in the institution.[99] The Constitution does not afford journalists special privileges to access information that is not generally available to the public,[100] and thus they have no special privilege to access correctional facilities and inmates, as the general public is barred from wandering in to ask questions.

The Court noted, however, that the regulation under scrutiny was "not part of an attempt by the State to conceal the conditions in its prisons or to frustrate the press' investigation and reporting" of what they may find there.[101] Journalists were still allowed to tour the facility and ask questions of any inmate they came across, as well as afforded the opportunity to interview selected inmates or sit in on prison program group meetings.[102] Placing limits on

92. Pell v. Procunier, 417 U.S. 817, 829 (1974).

93. *Id.* at 823.

94. *Id.* at 819.

95. *Id.* at 831.

96. *Id.* at 831–32; Daniel Bernstein, Comment, *Slamming the Prison Doors on Media Interviews: California's New Regulations Demonstrate the Need for a First Amendment Right of Access to Inmates*, 30 MCGEORGE L. REV. 125, 134 (1998).

97. *Pell*, 417 U.S. at 817.

98. *Id.* at 825.

99. *Id.* at 825.

100. *Id.* at 834.

101. *Id.* at 829.

102. *Id.* at 830.

scheduled interviews to prevent journalists from focusing on a handful of inmates, and thus preventing these inmates from gaining influence in the prison system, served legitimate interests and did no harm to either inmates' or journalists' First Amendment rights.[103]

Pell was accompanied on the same day by *Saxbe v. Washington Post Co.*, which challenged the constitutionality of a Federal Bureau of Prisons policy that stopped journalists from interviewing individual federal inmates at any institution more secure than a minimum security prison.[104] In a short opinion relying largely on *Pell*, the Court held that this limit did not abridge the journalists' right to the freedom of the press, following the test laid out in *Pell* and stressing that, while interviews were limited, correspondence was virtually unlimited.[105] All outgoing correspondence between inmates and the media went uninspected, and incoming correspondence was only opened to check for contraband or statements inciting illegal acts.[106]

In his dissent, Justice Powell raised the issue of the public's right to know, stating that the public, which is largely barred from accessing correctional facilities, "must therefore depend on the press for information concerning public institutions."[107] The press is the representative of the public's interest, and this absolute prohibition "substantially impairs the right of the people to a free flow of information and ideas on the conduct of their Government."[108] Powell's view is significant because it recognizes, as the majority did in *Martinez*, that constitutional interests other than those of the inmate speaker are at stake when communications are constrained.

The *Pell* approach inverted well-settled First Amendment principles in the government's favor. Instead of inquiring whether the government could employ less restrictive means, the Court instead focused on whether the information could reach the public through alternative means, which relieves the government of the burden of showing that its restriction is a well-tailored response to a perceived problem.[109] The Court's approach has been criticized for failing to adequately consider whether the alternative means of

103. *Id.* at 827–31.

104. Saxbe v. Wash. Post Co., 417 U.S. 843, 844 (1974).

105. *Id.* at 847.

106. *Id.*

107. *Id.* at 864 (Powell, J., dissenting).

108. *Id.*

109. *See* Robert N. Brailas, *Press Access to Government-Controlled Information and the Alternative Means Test*, 59 TEX. L. REV. 1279, 1295–96 (1981) (criticizing *Pell* approach because it "shifts the burden of proof" to the speaker and "thereby reverses the law's normal solicitude for first amendment rights").

communication (such as mail and phone calls) were an effective substitute for the unique value of in-person interviews.[110]

Pell and *Saxbe* left uncertain what level of scrutiny the Court regarded as appropriate in analyzing restraints on speech in the institutional setting.[111] Though the Court focused on the availability of alternative channels of communication—normally a feature of "intermediate scrutiny"—other elements of the *Pell*/*Saxbe* analysis were more deferential than that.[112] The lack of a clear standard was noted in the Court's subsequent 1977 prisoner-rights ruling, *Jones v. North Carolina Prisoners' Labor Union, Inc.*, in which the majority afforded extraordinary deference to prison regulators' assessment that allowing inmate laborers to unionize would cause disruption: "It is enough to say that [prison officials] have not been conclusively shown to be wrong . . . ."[113] In his dissent, Justice Marshall accused the majority of "blindly" deferring to the prison's rationale and observed that the Court's analysis departed from both the First Amendment standards that would apply anywhere else and the Court's history of independently scrutinizing the reasonableness of justifications offered by authorities.[114]

In a 1987 case involving restrictions on inmate-to-inmate correspondence, *Turner v. Safley*, the Court emphatically answered *Pell*'s unanswered question in favor of full-throated deference: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[115] In other words, a regulation need only "reasonably relate" to a legitimate objective; it need not be essential to advance that objective, or be well-tailored to do so.

B. Houchins *Leaves Jail Detainees Locked in Limbo*

Only once has the Supreme Court directly confronted the issue of inmate media communications in the setting of a jail rather than a prison—and that case, *Houchins v. KQED, Inc.*, produced no clear consensus.[116] KQED was denied the right to tour and photograph a housing unit where an inmate

110. *See id.* at 1299 (noting the Court failed to take account of the importance of face-to-face contact in enabling journalists to evaluate credibility and in assuring inmates they could speak without being surveilled).

111. *See* Seth L. Cooper, *The Impact of* Thornburgh v. Abbott *on Prisoners' Access to the Media, and on the Media's Access to Prisoners*, 16 NEW ENG. J. CRIM. & CIV. CONFINEMENT 271, 276 (1990) (characterizing the standard employed by the *Pell* Court as "in essence, intermediate scrutiny").

112. *Id.* at 284; CompassCare v. Cuomo, 465 F. Supp. 3d 122, 160 (N.D. N.Y. 2020).

113. Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 132 (1977).

114. *Id.* at 141, 143 (Marshall, J., dissenting).

115. Turner v. Safley, 482 U.S. 78, 89 (1987).

116. Houchins v. KQED, Inc., 438 U.S. 1, 3 (1978).

committed suicide and a prison psychiatrist stated that conditions were responsible for some of the illnesses of his patients.[117] These conditions included "alleged rapes, beatings, and adverse physical conditions" that went unaddressed.[118]

While the journalists' suit was pending, the county sheriff revised the jail's media policy so that periodic tours would be made available, although the wing where the suicide occurred—in which the journalists had the greatest interest because of its reputedly unsafe conditions—remained off-limits.[119] Notwithstanding the revised policy, a U.S. district court granted the news organization's petition for an injunction, and a divided panel of the Ninth Circuit affirmed.[120]

The Ninth Circuit viewed the jail's policies as a content-neutral constraint on the time, place, or manner of speech reviewable under the Supreme Court's *O'Brien* standard, which asks whether the restriction "furthers an important or substantial governmental interest unrelated to suppressing speech" and is narrowly tailored to achieve that interest.[121] The Ninth Circuit majority took note of the federal prison system's much more permissive standards for accommodating media visitors and concluded that the district court had legitimate grounds to grant relief to the news organization.[122] The court indicated that, while the press and public have no different level of constitutional entitlement to visit jails, "because of differing needs and administrative problems, common sense mandates that the implementation of those correlative rights need not be identical."[123] The county appealed to the Supreme Court.[124]

With Justices Blackmun and Marshall abstaining, a shorthanded Court produced a 4–3 plurality reversal, consisting of Chief Justice Burger's three-Justice lead opinion in the jail's favor and Justice Stewart's halfhearted concurrence.[125] Although the Burger plurality stated that the public maintains a right to know about prison conditions and that the media plays an important role in providing this information, there is no constitutionally protected right for the media to enter correctional institutions or to bring along recording

117. *Id.* at 3.
118. *Id.* at 5.
119. *Id.* at 4–5.
120. *See* KQED, Inc. v. Houchins, 546 F.2d 284, 286 (9th Cir. 1976), *rev'd*, 438 U.S. 1 (1978).
121. *Id.* at 286 (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)).
122. *Id.*
123. *Id.*
124. *Houchins*, 438 U.S. at 24.
125. *Id.* at 19.

equipment to document the conditions inside.[126] The First Amendment does not guarantee a right of access to government-controlled sources of information, Burger wrote, nor does previous jurisprudence create such a right.[127] Citing the *Zemel v. Rusk* holding that there is no First Amendment right to insist on being granted a passport for an information-gathering trip abroad,[128] the plurality observed that "the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right."[129] Most significantly, the Court agreed with the *Zemel* holding that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information."[130] In the view of the Burger plurality, under *Pell* and *Saxbe*, it was decisive that journalists were given no inferior level of access than the general public.

The Burger plurality noted that plenty of information could flow to the public through reports released by the investigation into the suicide and by the health and safety reports that were already required and released "at regular intervals."[131] Burger observed that other sources were accessible to journalists, including the detainees' lawyers, released detainees, and jail employees.[132] Burger also noted that journalists could gain access, just like any other social visitor, to inmates they knew personally or could obtain interviews with pretrial detainees by obtaining the consent of the judge and all parties to the case, so the opportunity to visit inmates was not zero.[133]

The force of *Houchins* is undercut by the Stewart concurrence that supplied the decisive fourth vote. While agreeing that there is neither a generalized public right to demand entry to penal institutions nor any superior right of access for journalists, Stewart was nonetheless prepared to give journalists some preferred degree of access based on "the practical distinctions between the press and the general public."[134] In Stewart's view, the tours arranged by the sheriff for the public's edification provided sufficient access for the public to do its job, but not for the press: "[T]erms of access that are reasonably imposed on individual members of the public may, if they impede effective

126. *Id.* at 9.
127. *Id.*
128. Zemel v. Rusk, 381 U.S. 1, 16 (1965).
129. *Houchins*, 438 U.S. at 12 (quoting *Zemel*, 381 U.S. at 16–17).
130. *Id.*
131. *Id.* at 15.
132. *Id.*
133. *Id.* at 6.
134. *Id.* at 16 (Stewart, J., concurring).

reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see."[135]

Justice Stevens, whose dissent drew two joiners, took issue with the plurality's framing of the question. To Stevens, the question was not whether journalists had the same level of access as members of the public but whether both the press and public could be kept out of the key living areas of the jail entirely.[136] The jail's "no-access policy," Stevens wrote, "could survive constitutional scrutiny only if the Constitution affords no protection to the public's right to be informed about conditions within those public institutions where some of its members are confined."[137] In the dissenters' view, that could not be the case: a jail is "an integral component of the criminal justice system" to which the public has a constitutional right of access, and society has a "special interest" in making sure that jails are not imposing punishment on pretrial detainees who may never be found guilty of anything.[138]

Given the equivocal Stewart concurrence, which might just as easily have been a dissent, *Houchins* leaves the state of the First Amendment as applied to county jails in considerable doubt. Counting Stewart and the three dissenters, there were four votes—enough to be decisive on a short bench—for the proposition that journalists could insist on a right to bring recording devices along on tours even though public visitors could not.

Case law applying *Houchins* to subsequent media requests for access to jail inmates is scarce. This likely reflects the reality that jail stays are sufficiently short that neither the detainees themselves nor news organizations are prepared for a multi-year fight in federal court over a point that will be practically, if not legally, moot by the time of resolution. A handful of subsequent cases have applied *Houchins* rather narrowly when the setting is anything other than a request for access to a specific inmate in jail. For example, lower courts have found that it does not apply to "quasi-judicial government administrative proceeding[s]."[139] Some courts have even entertained the idea that journalists have a right to access inmates who are under sentence as long as they are not physically in the jail at the time.[140]

The court in *Philadelphia Inquirer v. Wetzel* stated that *Houchins* did not apply to journalists seeking to view execution proceedings because the

135. *Id.* at 17.

136. *Id.* at 27–28 (Stevens, J., dissenting).

137. *Id.* at 30.

138. *Id.* at 36–38.

139. Detroit Free Press v. Ashcroft, 303 F.3d 681, 696 (6th Cir. 2002).

140. Phila. Inquirer v. Wetzel, 906 F. Supp. 2d 362, 369 (M.D. Pa. 2012).

execution in question was not being conducted inside a penal institution.[141] Under Pennsylvania law, all executions were to occur at the State Correctional Institute at Rockview, but at the time, the execution chamber had been moved outside of the prison's perimeter to a former field hospital.[142] Thus, journalists did not need to enter the prison to view the execution.[143] The court concluded that for this reason, their analysis could not be controlled by *Houchins*, as the execution chamber was state property but was not akin to the jail at issue in *Houchins*.[144] Similar to journalists enjoying access to courtrooms during trial, but being barred from the judge's chambers and jury room, the *Philadelphia Inquirer* was seeking access to the execution and the specially built execution chamber not the internal workings of the prison that journalists would see if they were to interview inmates on-site.[145] The court rejected the idea that *Houchins* applied because the journalists were not seeking the "unregulated access" discussed by the *Houchins* Court but rather an extension of privileges they already held.[146]

The *Inquirer* ruling shows the narrowness of the *Houchins* holding and offers journalists some potential workarounds. If, as the Third Circuit understands it, *Houchins* is about access to the physical facility rather than to inmates, there may be greater latitude to speak with an inmate who is on work release, appearing in court, or otherwise outside the confines of the jail.

Much like the restrictions on recording police procedures in public, restrictions on interviewing in correctional facilities have been added and clarified since the days of *Pell*, *Saxbe*, and *Houchins*. While journalists have been guaranteed the right to *some* access, the guarantee does not seem to extend to the right to insist on speaking in person with a specific inmate as long as alternatives, such as exchanging letters, remain available.

IV. ACCESS DENIED: HOW JAILS SCREEN INTERVIEW REQUESTS

A. Lessons from the Prison Setting

Studies have found that restrictions on journalists' access to prison inmates vary widely among states.[147] Some states, like Maine, allow journalists to

141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 370.
147. Jessica Pupovac, *FOI Toolbox*, QUILL (Aug. 7, 2012), https://www.quill.spjnetwork.org/2012/08/07/foi-toolbox-31/ [https://perma.cc/BKL9-ZLPN].

arrange for in-person interviews with inmates of their choosing, though facilities reserve discretion to end the interview if the conversation strays from pre-approved topics.[148] While this gives journalists discretion in who they interview, the facility's power to terminate the interview raises both constitutional issues (content or viewpoint discrimination) and ethical issues for journalists, who may not be comfortable accepting government intermediation of interview topics. Even stricter states, like Kansas and California, do not allow journalists to interview specifically requested inmates, requiring instead that sources be chosen by prison officials.[149] Correctional administrators justify this policy by saying that frequent interviews may give an inmate celebrity status and undue influence over their fellow inmates.[150]

States like Alabama, Arizona, Georgia, and Louisiana have relatively loose guidelines for determining how interview requests are granted or denied, leaving decisions up to the individual facility.[151] In practice, access is routinely denied to journalists.[152] Brian Corbett, a spokesman for the Alabama Department of Corrections, told an interviewer that he cannot remember "any times we've granted access in the last year and a half."[153] Additionally, some states strictly regulate the recording equipment journalists can bring into prisons. New York, for example, requires that journalists use prison-issued writing utensils that have been designed for safety.[154]

In the absence of a constitutional compulsion to do so, states have resisted allowing journalists to interview the inmates of their choosing about the topics of their choosing. This widespread practice spills over to the local level as well.

B. Rationing Face Time: A Survey of County Policies

Media access policies in county jails have received far less attention than those at the national and state levels. This may be because it is difficult to study so many scattered jurisdictions or because inmates move through the jail system relatively quickly. Researchers from the Brechner Center for Freedom of Information used open-records requests seeking to examine the interviewing policies at sixty-four county jails across the country, representing twenty-four states. The jails were selected to favor larger municipal areas where frequent

148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. N.Y. DEP'T OF CORR. SERVS., RELEASE OF INFORMATION TO THE NEWS MEDIA DIR # 0401 (2008).

media requests would be more probable and to avoid states where open-records laws from nonresidents are not honored.[155] Of the sixty-four agencies that received a public-records request, thirty-six agencies from a total of sixteen states responded with copies of written policies, while twenty-eight failed to provide responsive documents.[156]

Among the three dozen policies reviewed, obvious patterns emerged. First, in almost no jurisdiction can a journalist show up and expect to be admitted to conduct an interview. Jails commonly require advance notice and several levels of signoff before a journalist will be admitted, with the notable exception of the San Francisco County Jail, where journalists may present their press credentials on arrival for admittance with no advance approval.[157] Most counties interpose additional hurdles in addition to administrative approvals, including requiring that the inmates' counsel approve the interview.[158] Los Angeles, for example, has a policy of denying interviews with inmates represented by a public defender, unless the public defender approves an exception.[159] Orange County, Florida, requires approval forms to be mailed back and forth between inmates and journalists and then sent back for final approval by jail staff.[160] Many even require that the inmates sign waivers releasing the county from liability for any tort claims arising out of the consequences of the interview.

Many jails have strict policies against speaking with or photographing inmates who are on hold for other jurisdictions or are in federal custody.[161] Jails also commonly deny access to detainees who have yet to be arraigned,[162] which perhaps counterintuitively puts the tightest restriction on those who have not even been formally charged with a crime, let alone convicted.

A common restriction is to forbid journalists from interviewing specific inmates of their choosing, as opposed to incidentally encountering interview

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155. Public-records laws in Alabama, Arkansas, Delaware, Missouri, New Hampshire, New Jersey, Tennessee, and Virginia enable agencies to refuse requests from requesters without a local address. McBurney v. Young, 569 U.S. 221, 226 (2013).

156. Some of the twenty-eight non-responsive agencies imposed conditions on cooperation such as showing up in person to present a photo ID, but the vast majority of the twenty-eight simply failed to answer the request at all or answered only with an acknowledgement of receipt.

157. S.F. CNTY. SHERIFF'S OFF., CONTACTING INCARCERATED PERSONS, https://www.sfsheriff.com/whats-your-situation/i-am-member-media/media-requests [https://perma.cc/AC6E-KPNR].

158. E-mail from Casey Roebuck, Dir. of Pub. Info., Tulsa Cnty. Sheriff's Off., to Authors (Aug. 3, 2020, 4:58 PM) (on file with authors).

159. CUSTODY DIV., L.A. CNTY. SHERIFF'S DEP'T, NEWS MEDIA INTERVIEW REQUESTS 5-10/020.05 (2013).

160. ORANGE CNTY. DEP'T OF CORR., *supra* note 11, at 1.

161. CUSTODY DIV., L.A. CNTY. SHERIFF'S DEP'T, *supra* note 159.

162. *Id.*

subjects during a tour.[163] Like any other member of the public, a journalist may visit a family member or friend in jail, with the inmate's approval, but with no special degree of access.[164]

The vast majority of facilities will not allow recording or photographic equipment without specific approval. When these devices are approved, there are often strict limits on both what can be brought in and what can be photographed or recorded. For example, in Jacksonville, Florida, journalists are not allowed to film any locking mechanisms on doors or cellblocks, and they cannot film groups of inmates unless consent is received from each inmate or their faces are not shown in any of the footage.[165] Some facilities even specify the exact number of pens and pencils allowed behind bars for safety reasons.[166]

Commonly, a media interview is considered to count toward the maximum number of social visits that an inmate is allotted during the week, as contrasted with official visits from attorneys and investigators, which are unlimited.[167] This forces inmates to make tradeoffs between speaking with the media and speaking with family and friends. In the San Diego County Jail, for instance, an interview with a journalist counts as half of the social visits an inmate is allowed for the week.[168] Visits with journalists are often kept short. In San Diego County, inmates are allowed thirty minutes,[169] and in Orange County, Florida, inmates are given forty-five minutes.[170]

In sum, while the details of jail policies vary considerably, a few general patterns are discernible: advance approval, generally by one or more top officials such as the sheriff or chief jailer as well as the inmates' counsel, is required. Media visits are limited in time, deducted from the inmates' allotment of social visits, and likely to be limited to unrecorded pen-and-pad conversations only.

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163. EAST BATON ROUGE PAR. PRISON, COMMUNICATION WITH THE MEDIA (2010) (on file with authors) (produced in response to FOI request).

164. E-mail from Jeannine Buckner, Legal Dep't, St. Tammany Par. Sheriff's Off., to Adriana Merino, Brechner Ctr. for Freedom of Info. (June 30, 2020, 1:28 PM) (on file with authors); *see also* PALM BEACH CNTY. SHERIFF'S OFF., CORRECTIONS OPERATING PROCEDURES, INMATE VISITATION COP 930.00 (2018).

165. JACKSONVILLE SHERIFF'S OFF., CORRECTIONS FACILITY ACCESS AND VISITATION ORDER 601 (2019) (on file with authors) (produced in response to FOI request).

166. CAL. CODE REGS. tit. 15, § 3261.5 (2020).

167. SAN DIEGO CNTY. SHERIFF'S DEP'T, MEDIA GUIDE, https://www.sdsheriff.gov/home/showpublisheddocument/542/637432951658230000 [https://perma.cc/5AGY-92QS].

168. *Id.*

169. *Id.*

170. ORANGE CNTY. DEP'T OF CORR., *supra* note 11, at 1.

C. Pushing the Envelope: Jail Policies Test Constitutional Boundaries

Even under the deferential level of review afforded to management of detention facilities, at least some of the policies in force around the country raise constitutional red flags for three primary reasons. First, some jail policies require journalists to surmount additional hurdles beyond what is required of non-journalist public visitors, which seems irreconcilable with the core holdings of *Pell*, *Saxbe*, and *Houchins*. Second, jails commonly reserve unfettered discretion to deny inmates and journalists an opportunity to speak face-to-face for any reason, without safeguards to prevent selective enforcement. And third, at least a few jails impose content- or viewpoint-discriminatory conditions that purport to control the topics that inmates may discuss or that journalists may publish.

The most clearly constitutionally problematic policies are those in the latter category, purporting to dictate the content of interviews. In Florida, inmates in Orlando's Orange County Jail are forbidden from discussing matters related to the jail.[171] A government policy that purports to ration the ability to speak based on content or viewpoint is presumed to be unconstitutional.[172] Once a policy like Orange County's is found to prohibit discussion of certain topics, the policy will be invalidated unless it is as narrowly tailored as possible to satisfy a compelling governmental interest.[173] Keeping inmates from complaining to the press about the conditions of their confinement would not, if challenged, qualify as a compelling governmental interest for purposes of First Amendment analysis. By cutting off an inmate's ability to discuss problems in the facility with outsiders, jail administration is also cutting off any ability of the press and public to keep the jail accountable for how it treats those in its care. A policy like Orange County's is almost certainly facially unconstitutional and would be readily voided if challenged.

Perhaps the most bizarre and extreme set of media restrictions belong to jails in Georgia's Dougherty County and North Carolina's Gaston County, where policies purport to restrict news organizations' freedom to publish what they learn by interviewing inmates. The two policies are nearly identical in their operative terms. Both sheriff's departments insist that journalists must agree to "make reasonable attempts to verify any allegations" made by inmates and provide the sheriff or jail administrator "with an opportunity for written or

171. *Id.*

172. *See* Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

173. *See* Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987).

verbal response to any allegation" prior to broadcast or publication.[174] The Supreme Court has held that a statute requiring news organizations to give people accused of wrongdoing an opportunity to respond to the accusations is unconstitutional because it compels speech.[175] The Dougherty rule goes on to say that a journalist "will not obtain and use personal information from only the primary source nor from one (1) inmate concerning another inmate who refuses to be interviewed."[176] The Gaston policy similarly provides that a journalist "may obtain and use personal information from the primary source only and may not obtain information from one inmate regarding another inmate who refuses to be interviewed."[177] These are classic "prior restraints" of the sort that federal courts have unhesitatingly struck down for nearly a century.[178] A government agency may not dictate the content of news coverage or limit journalists' use of lawfully gathered information.[179] Indeed, it is entirely foreseeable that one prisoner may mention another in connection with a matter of public concern, such as identifying a well-connected inmate who is receiving improper preferential treatment.[180]

New Jersey's Passaic County enforces exceptionally strict controls. It requires approval from three different officials, after which a Public Information Officer must accompany the journalist throughout the interview and must be allowed to look over any photos or videos taken during the visit.[181]

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174. DOUGHERTY CNTY. SHERIFF'S OFF., STANDARD OPERATING POLICY & PROCEDURE POLICY 9.30 (on file with authors) (produced in response to FOI request); GASTON CNTY. SHERIFF'S OFF., OPERATIONAL PROCEDURES 5.08 (2005) (on file with authors) (produced in response to FOI request).

175. Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974).

176. DOUGHERTY CNTY. SHERIFF'S OFF., *supra* note 174.

177. GASTON CNTY. SHERIFF'S OFF., *supra* note 174.

178. *See, e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150–51 (1969) ("[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.").

179. *See Mia. Herald Publ'g Co.*, 418 U.S. at 256; *see also* Bartnicki v. Vopper, 532 U.S. 514, 527 (2001) (concluding that the First Amendment foreclosed criminally prosecuting a radio journalist for receiving a tape recording unlawfully made by an eavesdropper and then broadcasting its contents).

180. *See, e.g.*, Martha Ross, *Did Felicity Huffman Get Special Privileges with Early Family Visit at Dublin Prison?*, MERCURY NEWS (Oct. 21, 2019, 9:00 AM), https://www.mercurynews.com/2019/10/21/did-felicity-huffman-get-special-privileges-with-early-family-visit-at-dublin-prison/ [https://perma.cc/W9G3-8YVP] (reporting that Emmy-winning actress who pled guilty in college admissions scandal received expedited approval for family visit and other perquisites); Marla Lehner, *Did Paris Hilton Get Special Treatment in Jail?*, PEOPLE (July 13, 2007, 1:00 PM), https://people.com/celebrity/did-paris-hilton-get-special-treatment-in-jail/ [https://perma.cc/QG89-XK5M] (reporting allegations that Los Angeles County sheriff's deputies improperly gave celebrity heiress use of a cellphone and other special privileges).

181. 2 PASSAIC CNTY. SHERIFF'S OFF., POLICIES AND PROCEDURES § 5 (2008) (on file with authors) (produced in response to FOI request).

This undermines the longstanding federal statutory protection from the Privacy Protection Act, which forbids government employees from compelling journalists to submit to the seizure or search of their unpublished work product, with narrow exceptions.[182] It is questionable whether a journalist can be compelled to waive the benefit of the Privacy Protection Act as a condition of admittance to a government facility. Additionally, the prospect of mandatory governmental review poses a risk of chilling constitutionally protected speech, as the policy implies that there may be circumstances under which the prison would seize or erase a journalist's work.

A larger set of jail policies exist in a constitutional gray area because jail authorities have reserved unlimited discretion to deny an interview request for any reason, without even the obligation to specify a reason or provide an opportunity to challenge the decision.[183] Equally doubtful are policies that purport to reserve total discretion to refuse, or end, an interview with or without cause.[184] When a government agency acts as a gatekeeper, obstructing a speaker from reaching the intended audience without permission, the First Amendment is understood to require objective standards to cabin the decision-maker's discretion.[185] Policies that enable government officials to subjectively decide case by case which speaker may be heard are strongly disfavored.[186] Statutes that lack neutral criteria to guide the exercise of official discretion are regularly struck down as unconstitutional.[187] Even if the reason for obstructing an interview need not be especially compelling, some rationale beyond the decision-maker's subjective biases must exist. A wholly discretionary policy would invite suppression of known whistleblowers, or the selective exclusion

182. 42 U.S.C. §§ 2000aa(a)(1), 2000aa(b)(1) (1996).

183. In a notable exception, the rules of the Norfolk Sheriff's Office provide that, if a news organization's request for an interview is refused, the organization is entitled upon request to a written explanation for the rationale. *See* NORFOLK SHERIFF'S OFF., MEDIA/INTERAGENCY RELATIONS POLICY AND PROCEDURE § 131.11 (on file with authors) (produced in response to FOI request).

184. *See* PASSAIC CNTY. SHERIFF'S OFF., *supra* note 181.

185. *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151–52 (1969).

186. *See supra* note 180; *see also* Hague v. Comm. for Indus. Org., 307 U.S. 496, 516 (1939) (striking down statute that empowered municipal public safety director to refuse a permit on his mere opinion that refusal will prevent "riots, disturbances or disorderly assemblage").

187. *See* Thomas v. Chi. Park Dist., 534 U.S. 316, 323 (2002) ("Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content."); City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 761 (1988) (striking down a permitting system that gave the city manager unfettered discretion to permit or deny the placement of newspaper racks on city property); *see also* Trey Hatch, *Keep on Rockin' in the Free World: A First Amendment Analysis of Entertainment Permit Schemes*, 26 COLUM. J.L. & ARTS 313, 320–21 (2003) (explaining that, to be constitutional, a licensing system "must not grant unbridled discretion to decision-makers, but rather must incorporate narrow, objective, and definite standards or limits to guide their decision").

of investigative reporters known to be pursuing unflattering stories hurtful to the institution's reputation. A policy empowering jailers to withhold or withdraw approval for interviews at any time for any reason is even arguably defensible only if there is never a constitutional entitlement to an interview in county jails, which would be a questionably aggressive interpretation of First Amendment rights post-*Houchins*.

Finally, many of the policies produced by county jail authorities raise First Amendment questions because they impose greater constraints on journalist visitors than on non-journalists, such as by requiring proof of authorization by the inmate's lawyer or requiring additional layers of signoffs from a public-relations officer. While journalists may not be entitled to any greater access than public visitors, there is no basis for consigning reporters to a differentially disfavored class with diminished access.[188] Seeking approval from all attorneys and judges involved in the case—as is the policy in Harris County, Texas, where Houston is located[189]—disadvantages journalists and discourages them from seeking interviews, as the additional steps take up limited time and resources that ordinary visitors do not have to expend.

Whether additional hurdles only for news-media visitors are or are not constitutional under prevailing legal standards will depend on whether courts view the proper comparison as "journalists versus members of the general public" or "journalists versus other authorized visitors." Many jails allow only a select few members of the public (family, lawyers, clergy) to make an appointment to see a specific inmate, so arguably a journalist who is given that opportunity is already getting greater access than the average citizen. For example, the county jail in Tulsa, Oklahoma, allows in-person visits only by inmates' parents, grandparents, spouses, and children.[190] The fact that meetings with journalists require additional formalities—the inmate must sign a waiver, and the inmate's counsel must receive advance notice[191]—could be viewed as putting journalists in a disfavored position as compared with family visitors or could be viewed as putting journalists in a preferred position as to non-family members of the public.

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188. *See* Pell v. Procunier, 417 U.S. 817, 834 (1974) (stating that journalists "have no constitutional right of access to prisons or their inmates beyond that afforded the general public"); *see also* Houchins v. KQED, Inc., 438 U.S. 1, 16 (1978) (Stewart, J., concurring) ("The Constitution does no more than assure the public and the press equal access once government has opened its doors.").

189. HARRIS CNTY. SHERIFF'S OFF., MEDIA RELATIONS, https://www.harriscountyso.org/AboutUs/ContactUs/newsroom.aspx [https://perma.cc/LV2Y-K4CQ].

190. TULSA CNTY. SHERIFF'S OFF., JAIL INFORMATION, http://tcso.org/jailinformation/ [https://perma.cc/5WHS-Y89K].

191. E-mail from Casey Roebuck, *supra* note 158.

The lack of clear guidance from federal courts undoubtedly emboldens county jailers to enact overreaching policies. The ability to exercise First Amendment rights may not be conditioned on a compulsory waiver,[192] so the constitutionality of onerous jail preconditions ends up circling back to the same core question: is there a First Amendment right to speak to people incarcerated in a county jail? If the answer is "yes"—as it must be—then journalists' constitutionally protected access may not be made contingent on accepting conditions that compel or restrain speech.

V. ACCESS UNLOCKED?

A. Diluting Deference

Though deference to wardens and their experience has long been recognized by the courts, the very same people deciding whether to grant an interview are the ones with the greatest interest in suppressing unfavorable information coming to light. There is a rich tradition of courts interceding in correctional management when fundamental rights, especially inmate safety, are at stake. Contrary to the contemporary "hands-off" philosophy that prevails throughout the federal judiciary, courts historically have not hesitated to second-guess the management of prisons and jails and, when necessary, to assume ongoing supervisory roles.

The Louisiana State Penitentiary at Angola (LSP Angola) has a long history of violent and often deadly conditions.[193] Failed reforms in the late-1800s and early-1900s left the prison in an unparalleled state of disrepair and unchecked brutality.[194] Inmates took drastic measures to protest the brutal working conditions, lack of food, deplorable housing conditions, and prison mismanagement, with a group of inmates famously slashing their own Achilles tendons to disable themselves from working on "The Farm."[195] By the 1960s, stabbings and inmate murders became so common that LSP Angola earned its infamous nickname "the bloodiest prison in the South."[196] Federal courts

192. *See* G & V Lounge, Inc. v. Mich. Liquor Control Comm'n, 23 F.3d 1071, 1077 (6th Cir. 1994) (stating, in a case involving constitutional challenge to state restrictions on exotic dancing, that "a state actor cannot constitutionally condition the receipt of a benefit, such as a liquor license or an entertainment permit, on an agreement to refrain from exercising one's constitutional rights, especially one's right to free expression"); *see also* Agency for Int'l. Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205 (2013) (holding that government cannot insist on broad waiver of First Amendment rights even as a condition of receiving a wholly discretionary grant to which there is no entitlement).

193. *See generally History of Angola*, ANGOLA MUSEUM AT THE LA. STATE PENITENTIARY, https://www.angolamuseum.org/history-of-angola [https://perma.cc/YNZ5-62P7].

194. *Id.*

195. *Id.*

196. *Id.*

mandated reform in the early-1970s,[197] but after these reforms failed, the Fifth Circuit saw a suit regarding conditions in the prison yet again, in *Williams v. Edwards*.[198]

In *Williams*, the court heard allegations of prison overcrowding, a lack of adequate security leaving inmates in danger, an unchecked rape problem, sanitation and health concerns, and a widespread rat infestation.[199] Although the court recognized the federal judicial philosophy of minimal intrusion into the affairs of state prisons, it held that judicial restraint must not encompass valid constitutional issues, including the inhumane conditions that inmates were alleging.[200] Finding that the Eighth Amendment prohibition against cruel and unusual punishment applied to the general conditions of the prison,[201] the court in *Williams* delivered an important victory for prison reform, brought to light and redressed only because the court set aside "deference" and decided to step in.

Widely publicized as a positive step on the road to prison reform, *Williams* inspired other prisoners to speak up and bring suit over the harsh conditions they faced.[202] Suits like *Williams* continue to inspire reform even into the twenty-first century.[203] Unfortunately, not much has changed in some institutions despite the decades since *Williams*. For example, the Supreme Court heard similar issues in *Brown v. Plata* in 2011.[204] *Brown* addressed unsanitary and unsafe conditions in California prisons that violated inmates' Eighth Amendment right to be free from cruel and unusual punishment.[205] The evidence showed that overcrowding reduced prisoners' access to basic medical care and mental health services.[206] The Court ultimately held that a mandated maximum population was needed to remedy prisoners' constitutional issues.[207]

In the setting of county jails, judicial intervention has repeatedly been required to remedy deficiencies in medical care, access to legal services, and other basic needs. In New York, the notoriously dangerous and squalid Rikers Island jail was placed under federal court oversight—and ultimately earmarked

197. *Id.*
198. 547 F.2d 1206, 1210 (5th Cir. 1977).
199. *Id.* at 1211.
200. *Id.* at 1212.
201. *Id.*
202. *See, e.g.*, Palmigiano v. Garrahy, 599 F.2d 17 (1st Cir. 1979); Doe v. District of Columbia, 701 F.2d 948 (D.C. Cir. 1983); Birrell v. Brown, 867 F.2d 956 (6th Cir. 1989); Bugge v. Roberts, 430 F. App'x 753 (11th Cir. 2011).
203. *Id.*
204. Brown v. Plata, 563 U.S. 493 (2011).
205. *Id.* at 502.
206. *Id.* at 504.
207. *Id.* at 502.

for closure[208]—after a federal civil-rights lawsuit, joined by the U.S. Justice Department, alleging that inmates were subjected to "an epidemic of brutality" by guards.[209] In Los Angeles, the nation's largest jail system by occupancy was placed under the supervision of a court-appointed panel in 2014 as part of a settlement to a class action lawsuit alleging that guards beat inmates.[210] Over the past half-century, similar regimes of court-ordered oversight have been imposed in jails from Boston to Chicago to New Orleans to Phoenix after judges found unsafe levels of overcrowding, inadequate medical care, or brutality by jail employees.[211] Judicial intervention, in other words, has repeatedly proven to be necessary because jails allowed conditions to deteriorate to a point of unconstitutionally cruel and unusual conditions—hardly a resume justifying unreviewable deference.

To be sure, there is a role for judicial deference when on-the-ground specialists are performing time-sensitive duties that require individualized, fact-sensitive judgment calls. Deference is owed when a jail administrator decides, for instance, that a particular day would be an unsafe day to admit visitors because the facility is boiling over with violence. But that is different from saying that courts owe deference to jails' *policymaking* decisions,

208. Rosie Blunt, *Rikers Island: Tales from Inside New York's Notorious Jail*, BBC NEWS (Oct. 20, 2019), https://www.bbc.com/news/world-us-canada-50114468 [https://perma.cc/5UPM-AWRR].

209. John Riley, *City Agrees to Terms of Rikers Island Pact with Feds*, NEWSDAY (June 22, 2015, 11:32 PM), https://www.newsday.com/news/new-york/city-agrees-to-terms-of-rikers-island-pact-with-feds-1.10569754 [https://perma.cc/P3RU-XNG4].

210. Curtis Skinner, *Court-Appointed Panel to Monitor Los Angeles County Jails*, REUTERS (Dec. 17, 2014, 1:20 AM), https://www.reuters.com/article/us-usa-sheriff-california/court-appointed-panel-to-monitor-los-angeles-county-jails-idUSKBN0JV0J320141217 [https://perma.cc/2LPC-LQKX].

211. *See* Inmates of the Suffolk Cnty. Jail v. Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir. 1974), *cert. denied*, 419 U.S. 977 (1974) (finding widespread constitutional deficiencies in multiple Boston jails, including rodent infestation, unaddressed fire hazards, failure to provide physical examinations, limited access to meetings with counsel, and other defects requiring judicial redress); Steve Schmadke, *Cook County Jail Exits Federal Oversight of More Than 40 Years*, CHI. TRIB. (June 12, 2017, 6:11 PM), https://www.chicagotribune.com/news/breaking/ct-cook-county-jail-consent-decree-20170612-story.html [https://perma.cc/G7FJ-EKVS] (stating that Chicago's jail was under court oversight since 1974 as a result of documented problems in medical care, detainee safety, and excessive force and that the jail hospital would remain under judicial oversight); Matt Sledge, *Federal Judge Replaces Lead New Orleans Jail Monitor in Personnel Switch During Grim Period*, NEW ORLEANS ADVOC. (Nov. 17, 2017, 4:45 PM), https://www.nola.com/news/courts/article_2ee97861-7157-5b30-ac0a-61ef9705d10b.html [https://perma.cc/73CU-SLNF] (reporting that Orleans Parish jail has been under supervision by a seven-member, court-ordered panel since 2013); Uriel J. Garcia, *Federal Judge Ends 42-Year-Old Lawsuit Over Maricopa County Inmate Care*, ARIZ. CENT. REPUBLIC (Oct. 18, 2019, 4:23 PM), https://www.azcentral.com/story/news/local/phoenix/2019/10/18/federal-judge-ends-42-year-old-lawsuit-against-maricopa-county-sheriffs-office-over-inmate-care/4024790002/ [https://perma.cc/5YWS-55FP] (reporting that Phoenix jails were under court supervision for more than forty years resulting from lawsuit over overcrowding and inadequate access to counsel, which grew to also include insufficient medical and mental-health services).

particularly where those decisions implicate the fundamental civil liberties not just of those jailed but also of those in the outside world as well. It is possible to craft a narrower and less speech-restrictive standard that enables jail authorities to make situational safety judgments—with adequate factual support, not speculation—without allowing unfettered discretion to categorically deny journalists access.

B. Transparency as a Safety Measure

Journalists are often the first to uncover constitutional failings that correctional institutions work to keep under wraps.[212] Journalists have exposed systemic issues in correctional facilities that may not have been addressed otherwise. While restrictions on media access often are justified by invoking "safety," the ability to call attention to harmful conditions inside correctional facilities is itself a safety matter.

The internal grievance system within jails is widely perceived to be ineffective because the employees the inmates are complaining about are often the same people who process the complaints.[213] Because complaining through in-house channels is unlikely to produce meaningful change—particularly in jails, where high turnover means that the institution can simply "wait out" the complainant—it is imperative as a matter of safety for those held in jail to have access to external communication channels.

County jails are plagued by violence and overcrowding.[214] They are often understaffed and do not have adequate resources to provide basic support services up to the standards expected of state prisons.[215] Inadequate medical

212. *See, e.g.*, Anemona Hartocollis, *Polk Awards in Journalism Are Announced, Including Three for The Times*, N.Y. TIMES (Feb. 15, 2015), https://www.nytimes.com/2015/02/16/nyregion/fourteen-george-polk-awards-in-journalism-are-given-including-three-to-the-times.html [https://perma.cc/Q8NT-CTHG] (reporting that three reporters from the *Miami Herald* and *New York Times* shared the prestigious George Polk Award for investigative reporting for revealing the hidden abuse of prisoners in New York and Miami jails, prompting the U.S. Justice Department to bring a civil-rights suit against the city of New York).

213. *See* Blake Ellis & Melanie Hicken, *'Please Help Me Before It's Too Late'*, CNN (June 25, 2019), https://www.cnn.com/interactive/2019/06/us/jail-health-care-ccs-invs/ [https://perma.cc/J8B9-99KS] (reporting on instances of preventable deaths throughout the country attributable to inadequacies of privatized medical services in county jails); Kevin Rector, *City Jail Grievance System Broken, Inmates, Advocates Say*, BALTIMORE SUN (July 6, 2013, 4:59 PM), https://www.baltimoresun.com/maryland/baltimore-city/bs-md-bcdc-grievances-20130706-story.html [https://perma.cc/94LX-LAT6] (quoting inmate-rights lawyer calling grievance process in Baltimore jail "a complete joke and fiasco," because complaints of serious wrongdoing go unaddressed and delay inmates' ability to proceed to court by imposing administrative exhaustion hurdles).

214. Jason Pohl & Ryan Gabrielson, *There Has Been an Explosion of Homicides in California's County Jails. Here's Why.*, PROPUBLICA (June 13, 2019, 8:00 AM), https://www.propublica.org/article/explosion-of-homicides-in-californias-county-jails-heres-why [https://perma.cc/UYP9-W3DT].

215. *Id.*

and mental health treatment is a habitual problem,[216] predictably helping fuel a troubling rate of suicides.[217] Indeed, people in jail commit suicide at a rate four times higher than that of the general public, and suicide is the leading reason people die in jail, accounting for thirty-one percent of fatalities.[218] A 2018 review of public records by Norfolk's *Virginian-Pilot* newspaper documented that 404 people diagnosed with mental illness had died in jail since 2010, "many under horrific circumstances," though the number is almost certainly far higher because of shortcomings in federal recordkeeping.[219] Unpopular with taxpayers and elected officials, underfunded jails often lack funding to repair their facilities, such as in Nowata County, Oklahoma, where "holes in the jail's walls, black mold, loose electrical wires, fire hazards and surfaces inmates could use to hurt themselves and others" create health hazards for inmates and employees.[220] Four Nowata County Jail employees were treated for suspected carbon monoxide poisoning as a result of deteriorating jail conditions.[221]

Those behind bars are uniquely vulnerable to harm and exploitation because of the inherent power imbalance that comes with being held in custody. Inmate complaints about conditions, even those putting their own health at risk, are often shrugged off by those in authority.[222] Reporters with Boston-based WBUR found that at least one-third of the inmates who died in custody at the Worcester County, Massachusetts jail had brought up allegations of poor medical care before their deaths.[223] Even federal officials were rebuffed in their oversight efforts; the county repeatedly denied federal consultants access to the jail's mortality records, citing attorney–client privilege in pending litigation.[224] Because of such cases, the director of the ACLU's National Prison Project calls

216. *See* Steve Coll, *The Jail Health-Care Crisis*, NEW YORKER (Mar. 4, 2019), https://www.newyorker.com/magazine/2019/03/04/the-jail-health-care-crisis [https://perma.cc/6762-NWQP] (observing that many jails are too small and rural to hire qualified in-house medical staff and struggle to maintain safety when detainees are experiencing withdrawal from opioids).

217. Maurice Chammah & Tom Meagher, *Why Jails Have More Suicides than Prisons*, MARSHALL PROJECT (Aug. 4, 2015, 10:00 AM), https://www.themarshallproject.org/2015/08/04/why-jails-have-more-suicides-than-prisons [https://perma.cc/8SJF-V2EG].

218. *Id.*

219. Gary A. Harki, *Horrific Deaths, Brutal Treatment: Mental Illness in America's Jails*, VIRGINIAN-PILOT (Aug. 23, 2018, 11:31 AM), https://www.pilotonline.com/projects/jail-crisis/article_5ba8a112-974e-11e8-ba17-b734814f14db.html-2 [https://perma.cc/GJ5J-8HCQ].

220. Quinton Chandler, *Sheriff Revolt Over County Jail Conditions Shines Spotlight on Low Funding*, STATEIMPACT OKLA. (Apr. 11, 2019, 3:58 PM), https://stateimpact.npr.org/oklahoma/2019/04/11/sheriff-revolt-over-county-jail-conditions-shines-spotlight-on-low-funding/ [https://perma.cc/R5BG-NNDD].

221. *Id.*

222. Christine Willmsen & Beth Healy, *When Inmates Die of Poor Medical Care, Jails Often Keep It Secret*, WBUR (Mar. 23, 2020), https://www.wbur.org/investigations/2020/03/23/county-jail-deaths-sheriffs-watch [https://perma.cc/5MFR-R6WJ].

223. *Id.*

224. *Id.*

jails "perhaps the least accountable part of the government," adding that the combination of a lack of transparency and oversight with a marginalized and unpopular population is "a recipe for neglect and mistreatment."[225] The nonprofit Marshall Project interviewed more than fifty former inmates of Missouri's St. Francois County Jail for a searing exposé on abuse and neglect—evocatively titled "Your Local Jail May Be A House of Horrors"—which disclosed years' worth of filthy conditions, denial of medical treatment, and beatings and sexual assaults of prisoners by employees in a county that has re-elected its sheriff every four years since 1992.[226] Observing that fewer than half of states maintain a state oversight body over jails, reporter Maurice Chammah wrote: "America's 3,000-plus county jails . . . receive far less scrutiny than state and federal prisons, even as they have become catalysts for the spread of COVID-19."[227]

The federal Death in Custody Reporting Act requires the government to collect information on the more than one thousand inmates who die in jails each year.[228] However, compliance is mostly voluntary, and predictably, without meaningful enforcement mechanisms, the data is spotty.[229] Death rates in jails increased by nearly thirty-five percent between 2008 and 2019, with many of these deaths going unreported.[230] The majority of the deceased had not been found guilty, many of them not even reaching the charging stage of the criminal process.[231] Statistics on these deaths are often withheld, and reporting to many

225. *Id.*

226. Maurice Chammah, *Your Local Jail May Be a House of Horrors*, MARSHALL PROJECT (July 29, 2020), https://www.themarshallproject.org/2020/07/29/your-local-jail-may-be-a-house-of-horrors [https://perma.cc/LYH5-BR24]. The article's subhead was equally evocative: "But you probably wouldn't know it, because sheriffs rule them with little accountability." *Id.*

227. *Id.*; *see also* Willmsen & Healy, *supra* note 222; MICHELE DEITCH, ALYCIA WELCH, WILLIAM BUCKNALL & DESTINY MORENO, COVID AND CORRECTIONS: A PROFILE OF COVID DEATHS IN CUSTODY IN TEXAS (2020), https://repositories.lib.utexas.edu/bitstream/handle/2152/83635/Profile%20of%20COVID%20deaths%20in%20custody.pdf (stating that eighty percent of those who died from COVID-19 in Texas jails were being held pretrial in a dangerous environment despite not being convicted of a crime).

228. 34 U.S.C.A. § 12104 (West 2000); *see also* Ethan Corey, *How the Federal Government Lost Track of Deaths in Custody*, APPEAL (June 24, 2020), https://theappeal.org/police-prison-deaths-data/ [https://perma.cc/7EPW-6J4R].

229. Corey, *supra* note 228.

230. Peter Eisler, Linda So, Jason Szep, Grant Smith & Ned Parker, *Why 4,998 Died in U.S. Jails Without Getting Their Day in Court*, REUTERS (Oct. 16, 2020, 11:00 AM), https://www.reuters.com/investigates/special-report/usa-jails-deaths/ [https://perma.cc/3GJM-PRRK].

231. *See id.*; *see also* Jerusalem Demsas, *80 Percent of Those Who Died of Covid-19 in Texas County Jails Were Never Convicted of a Crime*, VOX (Nov. 12, 2020, 2:50 PM), https://www.vox.com/2020/11/12/21562278/jails-prisons-texas-covid-19-coronavirus-crime-prisoners-death [https://perma.cc/7QEX-2YTC] (citing findings of University of Texas researchers who examined 231 deaths in custody between March and October 2020). It is worth noting that people who may not have committed any crime and may pose no danger to society are being placed at

federal oversight groups within the Department of Justice remains optional, with seventeen states having no oversight systems available even for optional reporting.[232]

Independent monitoring has long been recognized as a way of addressing unsafe or abusive conditions in penal institutions. As far back as the nineteenth century, New York authorities were admitting members of a citizen oversight group to the maximum-security Sing Sing Correctional Facility as a check on corruption and cruelty.[233] Despite the contemporary judicial perception of jails and prisons as impregnable to outsiders, centuries of history in the United States and abroad establish that, as one researcher has observed, "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."[234]

Some courts have recognized the value of uninhibited inmate whistleblowing in the context of cases challenging restrictions on mailings. In *Burton v. Foltz*, the court enjoined a prison from inspecting a segregated inmate's correspondence with the media.[235] The court found that residents in segregation, living with more severe restrictions than the general population, were more likely to criticize the conditions of the facility than the general population.[236] Indeed, the court observed, "The primary reason [inmates] communicate with the press is to criticize institutional conditions."[237]

The lack of clear constitutional protection for newsgathering in penal institutions puts journalists in needless peril. Consider the case of *Tallahassee Democrat* reporter Karen Olson, who during a 1988 visit to the Leon County Jail encountered an inmate who offered her information alleging prisoner abuse

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heightened risk of contracting a deadly virus specifically because of the decision to hold them in jail before trial and that the imposition of prohibitively unaffordable cash bonds is now being reconsidered in many jurisdictions. *See, e.g.*, Angie Jackson, *New Washtenaw County Prosecutor Will Stop Seeking Cash Bail*, DETROIT FREE PRESS (Jan. 4, 2021, 9:55 AM), https://www.freep.com/story/news/local/michigan/2021/01/04/cash-bail-end-michigan-prosecutor-washtenaw-county/4108736001/ [https://perma.cc/T5XJ-JENM] (quoting newly elected Michigan prosecutor promising not to seek cash bail because of the risk of jailing people because they are poor); Alexandra Meeks & Madeline Holcombe, *New Los Angeles DA Announces End to Cash Bail, the Death Penalty and Trying Children as Adults*, CNN (Dec. 8, 2020, 5:05 AM), https://www.cnn.com/2020/12/08/us/los-angeles-da-criminal-justice-reform/index.html [https://perma.cc/DL6N-GG9T] (reporting that newly inaugurated Los Angeles district attorney opened his term by declaring his office would no longer seek cash bail).

232. Eisler, So, Szep, Smith & Parker, *supra* note 230.

233. Leonard G. Leverson, *Constitutional Limits on the Power to Restrict Access to Prisons: An Historical Re-examination*, 18 HARV. C.R.-C.L. L. Rev. 409, 420 (1983).

234. *Id.* at 428.

235. Burton v. Foltz, 599 F. Supp. 114, 115 (E.D. Mich. 1984).

236. *Id.* at 117.

237. *Id.*

and substandard medical care.[238] Olson asked the inmate to write down his complaints so she could follow up, and when she attempted to leave the jail with the inmate's handwritten notes, she was confronted by jailers who accused her of possessing unauthorized materials.[239] When Olson refused to surrender the notes, she was arrested and charged with possession of "contraband articles," a third-degree felony carrying a possible five-year prison sentence.[240] Olson challenged the application of the contraband law to journalists carrying information provided by sources, but—citing *Houchins*—a state appeals court found no constitutional violation: "[T]he activity in question here, the receipt by a newspaper reporter of an unauthorized communication from a prison inmate, is simply not entitled to first amendment protection."[241] The takeaway from Olson's case—that jails have "virtually plenary authority" to interdict communications by inmates, even with reporters[242]—would be true nowhere else in the United States. Even when journalists receive leaked classified documents from people who have stolen them, some degree of First Amendment protection comes into play.[243] The outcome in Olson's case—that no First Amendment interests whatsoever are implicated when journalists receive "unauthorized communication" from inmates—puts penal institutions in an extreme, and lonely, category of government institutions that can make themselves impervious to whistleblowing.

C. The Special Access Case for Jails

While jails and prisons are often grouped together in constitutional jurisprudence, jails are factually and legally distinct from prisons in meaningful ways. Those distinctions provide an even stronger basis for arguing for a First Amendment right of access for news organizations.

238. State v. Olson, 586 So. 2d 1239, 1241 n.1 (Fla. Dist. Ct. App. 1991).
239. *Id.* at 1241.
240. *Id.* at 1241 n.3.
241. *Id.* at 1244.
242. *Id.* at 1243.
243. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (finding that First Amendment precluded enjoining newspaper from publishing classified Defense Department documents that a Pentagon contractor provided, without authorization, to a reporter); *see also* Bartnicki v. Vopper, 532 U.S. 514, 527 (2001) (concluding that the First Amendment foreclosed criminally prosecuting a radio journalist for receiving a tape recording unlawfully made by an eavesdropper and then broadcasting its contents); David E. Pozen, *The Leaky Leviathan: Why Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 525 (2013) ("As compared to the legal vulnerability of their government sources, journalists and other private actors who publish leaked information appear to occupy a privileged position.").

i. Access to Interviews with Jail Inmates Poses Fewer Dangers

First, jail populations significantly differ from prison populations, first and foremost because jails are for short-term sentences or pretrial detention.[244] By one estimate, two-thirds of those in jail at any given time are pretrial detainees, not sentenced inmates.[245] Many of these people will be found not guilty or have their charges dropped before trial.[246] Because so many people in jail have either committed minor nuisance offenses or will never be convicted at all, "rehabilitation" cannot justify cutting them off from communication with journalists in the same way that rehabilitative interests have been cited in the context of the very different populations in state and federal prison.

While jail authorities might argue that the short average stay means the loss of interviewing opportunities is an immaterial and fleeting deprivation, that argument runs into both legal and practical problems. Legally, there is no such thing as a "small" deprivation where First Amendment rights are concerned.[247] That access to the news media might be cut off for "only" a matter of weeks is less persuasive when those weeks encompass the inmate's entire incarceration, meaning there is no likelihood of enlisting help to improve conditions while improvement still matters to the speaker (for instance, an inmate confined in quarters where an infectious disease like COVID-19 is spreading).[248] It will take an unusually motivated speaker to continue pursuing improvements in conditions to which the speaker no longer anticipates being subject. Additionally, the typically brief stay means that an exchange of written letters via U.S. Mail is less likely to produce effective results than it might be in prison.

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244. *Jail Statistics*, *supra* note 13.

245. *See U.S. Jail Population Has Tripled Since the 1980s, Fueling Inequality*, EQUAL JUST. INITIATIVE (June 6, 2017), https://eji.org/news/jail-growth-fuels-racial-inequality/ [https://perma.cc/A39Y-GST4] ("Two-thirds of the 720,000 people in American jails on a given day have not been convicted and are legally innocent; the rest are serving sentences usually less than a year long, most often for misdemeanors.").

246. *See, e.g.*, HUMAN RIGHTS WATCH, "NOT IN IT FOR JUSTICE": HOW CALIFORNIA'S DETENTION AND BAIL SYSTEM UNFAIRLY PUNISHES POOR PEOPLE (2017), https://www.hrw.org/sites/default/files/report_pdf/usbail0417_web_0.pdf [https://perma.cc/HGM6-5VEQ].

247. *See* Maceira v. Pagan, 649 F.2d 8, 18 (1st Cir. 1981) ("It is well established that the loss of first amendment freedoms constitutes irreparable injury.").

248. *See* Noah Goldberg, *Inmate Thrown Into Solitary Confinement for Speaking to the Daily News About COVID-19 Conditions at Brooklyn Jail: Lawyers*, N.Y. DAILY NEWS (Dec. 21, 2020, 7:00 AM), https://www.nydailynews.com/new-york/ny-inmate-brooklyn-mdc-solitary-confinement-felix-collazo-20201221-2dmfw5xlfvenzdftpk3tjb3x2y-story.html [https://perma.cc/8T6X-MMBQ] (detailing how an inmate in a Brooklyn federal jail was throw into solitary confinement in retaliation for speaking out about the lack of medical care and preventative measures being taken in a unit hit hard by COVID-19, his lawyer has not heard from him despite scheduled phone calls, and the federal Bureau of Prisons declined to comment on any potential retaliatory treatment).

The dynamics of the jail population lessens the oft-stated concerns of prison administrators that inmates will use media access to acquire "big wheel" celebrity influence over other inmates, that they will profiteer off of their crimes, or that they will share gruesome details of violent crimes traumatic to survivors.[249] Many people occupying county jail beds are accused of offenses of no public significance, such as petty theft or public intoxication—and almost none held for any meaningful time are celebrities, who even if arrested, will have the means to obtain speedy release on bond. If institutions are concerned about the rare instance in which a notorious inmate may attempt to capitalize in unseemly ways, narrower alternatives are available other than forbidding all interviews. For instance, forty-five states and the federal government have implemented some form of law to prevent felons from profiting unduly by selling the rights to their stories—popularly known as "Son of Sam" laws for the nickname of serial killer David Berkowitz, whose case inspired the laws.[250] Many states include inmate interviews in their "Son of Sam" laws if there is potential for the inmate to profit from the media attention.[251] These laws illustrate that it is possible to craft more speech-permissive general policies while addressing targeted remedies to the one-in-a-million outlier cases (none of which will occur in county jail, as a jail sentence affords no time to publish a book).

However questionable the "big wheel" concern may be[252]—prisons already deal with well-known organized-crime figures, politicians, gang leaders, and other influential inmates—it is especially farfetched in the context of a county jail where inmates are coming and going within a matter of days. It will be the rare jail inmate who, without already having attained real-world fame, is deluged with so many interviews within a weeks-long stay that the inmate can attain "big wheel" status and use that status destructively. First Amendment

249. *See* Bernstein, *supra* note 96, at 142 (explaining that prison authorities have justified restraints on interviews by virtue of "the potential harm to victims and their families from seeing the perpetrator on television").

250. CAL. CIV. CODE § 2225(b)(1) (West 2021); David L. Hudson Jr., *'Son of Sam' Laws*, FREEDOM F. INST. (Mar. 2012), https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/arts-first-amendment-overview/son-of-sam-laws/ [https://perma.cc/B94H-5G5B].

251. *See* Bernstein, *supra* note 96, at 131, 135 (citing claims that interviews increase the sales of books or other merchandise created by, or featuring the likenesses of, well-known inmates, including murderous cult leader Charles Manson and funk artist Rick James convicted of kidnapping, torture, and sexual assault); Jack Whatley, *The Troubling Life of Funk Pioneer Rick James*, FAR OUT, https://faroutmagazine.co.uk/rick-james-profile-rape-torture-cocaine/ (last visited Apr. 25, 2021) (Rick James was convicted of kidnapping, torture, and sexual assault).

252. *See* Jordan v. Pugh, 504 F. Supp. 2d 1109, 1113 (D. Colo. 2007) (citing expert testimony from a retired warden and professor that "the 'big wheel' theory had been advanced in corrections literature during the 1970s, but since then has been largely abandoned by correction officials" because there is no evidence that being cited in the media creates a dangerous level of influence).

standards are sufficiently flexible to accommodate a decision to selectively deny media access to that rare "jailhouse celebrity" without also denying access to everyone else.

Additionally, the danger of an interview that discloses details traumatic to victims is diminished in the jail setting. As a practical matter, even if a person accused of luridly sensational crimes were being held in county jail to await trial, that person would be unlikely to confess the details of the crimes while still contesting the charges. The jail population consists largely of people sentenced for minor, victimless crimes or staying for a matter of days post-arrest, after which they are free to give as many "traumatizing" interviews as they wish. Preventing all jail inmates from speaking to journalists to avoid the exceptionally rare "traumatic" interview is a classically overbroad response.

ii. Jailers May Not Inflict "Punishment" for Crimes Yet to Be Adjudicated

The Constitution forbids imposing conditions on unconvicted pretrial detainees that constitute "punishment."[253] In discussing what constitutes punishment of a detainee, the Supreme Court looked to whether a deprivation of rights, such as the deprivation of channels of communication, "appears excessive" and if "less restrictive alternatives" are available.[254] These courts, by stating that strict limits on communication are still adequate and giving broad guidelines for what constitutes an excessive deprivation of a right, have left little in the way of policies that could actually be deemed too restrictive.

Reasonable restraints of speech and other rights in jails apply to pretrial detainees, although they have not been convicted of anything.[255] To ensure their presence at trial, some unconvicted persons can be incarcerated before they have been adjudicated.[256] A person in jail for pretrial detention has not been adjudicated but has a "judicial determination of probable cause as a prerequisite to [the] extended restraint of [his] liberty following arrest."[257] Those who are detained before trial are subject to the restrictions of the detention facility as long as the restrictions "do not amount to punishment, or otherwise violate the Constitution."[258]

The loss of some rights is inherent in confinement in any type of correctional institution. However, under the Due Process Clause, detainees cannot be punished before the adjudication of guilt.[259] "The fact that such

253. Bell v. Wolfish, 441 U.S. 520, 535 (1979).
254. *Id.* at 539; *id.* at 565 (Marshall, J., dissenting).
255. *Id.* at 527–28 (majority opinion).
256. *Id.* at 523.
257. *Id.* at 536 (alteration in original) (quoting Gerstein v. Pugh, 420 U.S. 103, 114 (1975)).
258. *Id.* at 536–37.
259. *Id.* at 535.

detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into 'punishment.'"[260] Therefore, a test to determine whether an act is punitive must be established to decide the constitutionality of limitations on the speech of pretrial detainees.

The Court in *Bell* construed a factor test originally set out in *Kennedy v. Mendoza-Martinez*, traditionally applied to determine if an act of the government constitutes punishment.[261] In *Kennedy*, the Court looked at the following factors:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.[262]

Absent any showing of an express intention to punish the detainee, the determination will turn on the purpose of the restriction and whether it appears to be excessive.[263] Restraints that are reasonably related to the facility's interests in security and order do not, without more, qualify as unconstitutional punishment, even if they are restrictions that the detainee would not have had to face had they been released into the community to await trial.[264]

While no court has apparently confronted whether a loss of interviewing opportunities is "punitive," a somewhat analogous "flip-side" claim arose in the case of infamous Arizona sheriff Joe Arpaio's attempts to humiliate inmates by live streaming webcams from the county jail.[265] Pretrial detainees challenged the 24/7 video stream as an invasion of their constitutional rights, and the Ninth Circuit agreed.[266] The court found that being placed on public display

260. *Id.* at 537.

261. *Id.* at 538 (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963)).

262. *Kennedy*, 372 U.S. at 168–69 (footnotes omitted).

263. *Id.*

264. *Bell*, 441 U.S. at 540.

265. Demery v. Arpaio, 378 F.3d 1020 (9th Cir. 2004). Arpaio became notorious for his disregard for the welfare of suspects and detainees, even incurring a criminal contempt conviction for defying a federal judge's order to refrain from using illegal profiling tactics in traffic stops. Colin Dwyer, *Ex-Sheriff Joe Arpaio Convicted of Criminal Contempt*, NPR (July 31, 2017, 4:08 PM), https://www.npr.org/sections/thetwo-way/2017/07/31/540629884/ex-sheriff-joe-arpaio-convicted-of-criminal-contempt [https://perma.cc/62MD-5AWW].

266. *Demery*, 378 F.3d at 1033.

"constitutes a level of humiliation that almost anyone would regard as profoundly undesirable and strive to avoid" and that public viewing served no legitimate safety objective because guards already had access to security camera images enabling them to keep watch over the jail.[267] While the Maricopa County jail case is in no way conclusive that loss of the opportunity to give an interview is "punitive" for due process purposes, the case at least stands for the proposition that pretrial detainees have some meaningful quantum of constitutional protection (in that case, privacy) and that when fundamental rights are taken away, courts will not always defer uncritically to the government's proffered rationale.[268]

iii. Jails Are Rarely Administered by Experts Owed Ironclad Deference

The pervasive notion that prison wardens are owed unquestioned deference to their unique expertise in managing correctional institutions simply does not match the reality that, in many jurisdictions, county jails are run by elected officials who may have only rudimentary training. While a state or federal correctional agency will likely be staffed by professionals selected in a merit-based hiring process, county jail policies are almost always made by locally elected sheriffs, who can qualify for office by meeting minimal standards.[269] State statutes commonly require no more than a high school education and a record clear of serious criminal convictions to serve as county sheriff.[270] Under Texas law, for instance, a sheriff need only be twenty-one years of age with a high school diploma or equivalency certificate and no record of felony convictions.[271] In California, if the candidate has four years of law enforcement experience (none of which must involve jail administration), only a high school diploma or a GED is needed to qualify for candidacy.[272] In Kentucky, where

267. *Id.* at 1029–30.

268. *See* Ian Wood, Note, *An Unreasonable Online Search: How a Sheriff's Webcams Strengthened Fourth Amendment Privacy Rights of Pretrial Detainees*, 35 GOLDEN GATE U. L. REV. 1, 21–24 (2005) (describing how the *Demery* majority discounted the government's stated safety and deterrence justifications).

269. *See, e.g.*, MD. CONST. art. IV, § 44 (stating must be twenty-five years old and have been a resident of the state for five years); MONT. CODE ANN. § 7-32-2133 (2019) (stating must be eighteen years old, have a high school diploma, and have not committed a crime for which they could have been imprisoned); N.J. STAT. ANN. § 40A:9-94 (2020) (stating must be an American citizen and a county resident for three years). Although there appears to be no comprehensive database or recent survey data specifying the qualifications to become a sheriff in every jurisdiction, a 1984 survey of more than 1,500 sheriffs nationwide found that eighty-one percent of sheriffs did not have a college degree and that forty-four percent reported no education beyond high school. Roger Handberg, *A Portrait of County Sheriffs in the United States*, 9 AM. J. CRIM. JUST. 79, 79–87 (1984), https://doi.org/10.1007/BF03373757 [https://perma.cc/E6Z7-BDNG].

270. *Id.*

271. TEX. GOV'T CODE ANN. § 85.0011 (West 2019).

272. CAL. ELEC. CODE ANN. § 24004.3 (LexisNexis 2020).

"jailer" is a separately elected office from sheriff, candidates need only be twenty-four years of age and satisfy minimal residency requirements.[273] It is eminently possible to attain the position of making policy for the county jail without ever having worked a day in a jail.

This position comes with great power and great potential for abuse. Most states have elected sheriffs, with the exception of only Alaska, Hawaii, and Connecticut (and in a few jurisdictions within Colorado and Florida).[274] Since municipally elected sheriffs answer only to voters, they often enjoy nearly unchecked control over county law enforcement, jails, and the lucrative contracts that come with running the jail system.[275] This combination of minimal qualifications and unchecked power opens up obvious potential for abuse.

State and federal prison policies are subject to multiple layers of oversight and accountability in ways that county jail policies are not. State Departments of Corrections operate under the supervision of the governor, the state legislature, and often an oversight board of gubernatorial appointees.[276] A "rogue" warden or corrections commissioner who made an indefensible policy choice could be held accountable by any of these supervisory authorities.[277] Few such safeguards exist with county sheriffs. In a 2019 series of investigative reports, Charleston's *Post and Courier* described how state law "hands sheriffs a license to operate as if they're above the law" by providing few checks on their authority, leading to decades' worth of misbehavior and scandal.[278] The reporters quoted a former deputy sheriff's stinging indictment of the lack of oversight: "There's a tremendous opportunity for criminal activity . . . . You have access to jail inmates, and you can use their labor. You have access to seized money and drugs. And everyone is obedient because they know they can get fired if they question anything you do."[279] As dramatized in Gilbert

273. R.G. Dunlop, *Meet the Man Who Took Grant County Jail from Bad to Worse*, KY. CTR. FOR INVESTIGATIVE REPORTING (Oct. 7, 2015), https://kycir.org/2015/10/07/meet-the-man-who-took-grant-county-jail-from-bad-to-worse/ [https://perma.cc/VD7U-K36Y].

274. *FAQ*, NAT'L SHERIFFS' ASS'N, https://www.sheriffs.org/about-nsa/faq [https://perma.cc/ZWV7-23CV]; *Office of Sheriff State-by-State Elections Information*, NAT'L SHERIFFS' ASS'N, https://www.sheriffs.org/sites/default/files/uploads/documents/GovAffairs/State-by-State%20Election%20Chart%20updated%2008.13.15.pdf [https://perma.cc/8BPS-4F3H].

275. Walt Bogdanich & Grace Ashford, *An Alabama Sheriff, a Mystery Check and a Blogger Who Cried Foul*, N.Y. TIMES (Dec. 14, 2017), https://www.nytimes.com/2017/12/14/us/ana-franklin-alabama-sheriff.html [https://perma.cc/YH8H-PQ6B].

276. Michele Deitch, *Independent Correctional Oversight Mechanisms Across the United States: A 50-State Inventory*, 30 PACE L. REV. 1754 (2010) (extensive review of corrections oversight bodies).

277. *See generally id.*

278. Bartelme & Cranney, *supra* note 16.

279. *Id.*

King's Pulitzer Prize-winning account of racist justice in 1950s central Florida, *Devil in the Grove: Thurgood Marshall, the Groveland Boys, and the Dawn of a New America*, sheriffs can keep their jobs for decades after engaging in criminal wrongdoing that would land other public officials in the unemployment line, if not prison.[280] If the courts refuse to exercise oversight, there is an excellent chance that no one else will.

D. No Way Out: Jail Inmates' Limited Communication Options

Courts have justified restricting face-to-face interaction between journalists and inmates by finding that inmates have adequate means of getting a message to an outside audience, which is all that the First Amendment requires.[281] The means need not be the most effective or the ones that the inmate (or journalist) might prefer, so long as they satisfy some baseline of constitutional adequacy. The cases setting the standard for prisoners' right to communicate with the news media—*Pell*, *Saxbe*, and *Houchins*—are all creatures of the 1970s, and communication options have changed enough to justify revisiting decades-old assumptions. This is doubly so in county jails, where communication alternatives are especially limited.

Even mailing a letter to a news organization may be beyond the reach of some jail inmates. Dozens of institutions around the country have attempted—with mixed results—to limit outgoing correspondence to postcards, enabling jailers to easily review the content of each message.[282] Courts are split on whether it is permissible to limit jail inmates to nothing more than a few sentences on an unsecured card.[283] Accordingly, in some jurisdictions, it is regarded as constitutional to allow inmates to correspond with the outside world by way of postcards only.

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280. *See generally* GILBERT KING, DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA (2012) (telling story of murderous Klansman Willis McCall, who served seven terms as sheriff of Lake County, Florida, surviving repeated threats by governors to suspend him from office for complicity in racial violence).

281. *See* Pell v. Procunier, 417 U.S. 817, 823–25 (1974) (finding that "the alternative means of communication permitted under the regulations with persons outside the prison," including mailing letters and passing messages through visiting family members, counsel, and clergy, was a factor making a prison restriction on media interviews more defensible).

282. *See* Leah Sakala, *Postcard-Only Mail Policies in Jail*, PRISON POL'Y INITIATIVE (Feb. 7, 2013), https://www.prisonpolicy.org/postcards/report.html#_ftnref22 [https://perma.cc/T4RJ-E4HP].

283. *See* Cox v. Denning, No. 12-02571-DJW, 2014 WL 4843951, at *15–16, 23 (D. Kan. Sept. 29, 2014) (collecting and analyzing cases applying *Turner* factors to jails' postcard policies and concluding that Kansas jail's policy was unconstitutional because it was inadequately justified by safety concerns and left inmates with inadequate alternative communication channels); *see also* Bennett v. Langford, No. 4:18-CV-0011-HLM-WEJ, 2019 WL 4248897, at *4 (N.D. Ga. Jan. 31, 2019) (concluding that no clearly established law counsels that a postcard-only jail policy is unconstitutional).

One communication option for those behind bars is telephone calls—though within jails, that alternative can come at an exorbitant cost. A 2019 study by the nonprofit Prison Policy Initiative found that jails charged as much as fifty times the per-minute rate for a phone call as the prisons within their states.[284] On average, the report found, a call from a jail costs three times as much as the same length call from within a prison.[285] In Michigan, for instance, a fifteen-minute call that would cost $2.40 if made from a state prison would cost $12.03 if made from the average county jail and depending on the jail, could cost as much as $22.56.[286] Considering how many people are incarcerated in county jail for what might be described as offenses of poverty—bouncing checks, inability to pay traffic fines, and so on[287]—a $22 telephone call is a prohibitively costly luxury.

While supportive friends and family members can send money to incarcerated people, that too comes at a high cost. JPay, the leading system for electronic money transfers in the correctional system, is widely criticized for its high service charges.[288] Some inmates' families pay transfer fees as high as forty-five percent when sending money to their loved ones through JPay.[289] The expense of phone calls can leave prisoners forced to choose between speaking with the outside world and purchasing basic toiletries, which often are not provided behind bars and must be bought in the commissary.[290] The idea that a jail inmate with no prior acquaintance with the news media or with any particular journalists will begin speculatively picking up the telephone in search of a sympathetic news outlet at an expense of several dollars per call seems fanciful for all but an elite handful of inmates.

Even e-mails, when inmates are allowed to access them, come at a price. To send an e-mail, an inmate must purchase virtual "stamps," with the price

284. Peter Wagner & Alexi Jones, *State of Phone Justice: Local Jails, State Prisons and Private Phone Providers*, PRISON POL'Y INITIATIVE (Feb. 2019), https://www.prisonpolicy.org/phones/state_of_phone_justice.html [https://perma.cc/KMJ5-5KKM].

285. *Id.*

286. *Id.*

287. *See* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME 115 (2018) ("[M]any low-level crimes are crimes of poverty: they punish people for being unable to afford car insurance, housing, or child care by making it a crime to drive without insurance, sleep in a public place, or leave a child briefly unattended.").

288. Ariel Schwartz, *Here's the Real Story Behind the Apple of Prison Tech*, BUS. INSIDER (July 29, 2015, 8:18 AM), https://www.businessinsider.com/apple-of-prison-techs-real-story-2015-7 [https://perma.cc/EWS2-PAV6].

289. Eleanor B. Fox & Daniel Wagner, *Time is Money: Who's Making a Buck Off Prisoners' Families?*, CTR. FOR PUB. INTEGRITY (Sept. 30, 2014), https://publicintegrity.org/inequality-poverty-opportunity/time-is-money-whos-making-a-buck-off-prisoners-families/ [https://perma.cc/U8JF-U4U2]; *see also* Johnson, *supra* note 90, at 288–89 (describing how prisons have partnered with JPay to offer paid email services).

290. Johnson, *supra* note 90, at 290.

fixed by the institution.[291] At the Texas Department of Criminal Justice's Byrd Unit, twenty stamps sell for $9.80.[292] While this may not seem like an astronomical price to those outside, being charged for every e-mail can mean sacrificing the purchase of basic hygiene items.

Phone calls and e-mails are substantial alternate means of communication, but this does not mean that they are always accessible or adequate because of the paywall that comes with them. Still, multiple jurisdictions have held that they are constitutionally adequate alternatives to in-person interviews or visitation by the press.[293] Reliance on these alternative means of satisfying inmates' need for communication with the outside world is complicated, however, by the fact that courts have declined to find a constitutional entitlement either to telephone access or to e-mail access.[294] In other words, the alternatives that are cited to justify withholding access to news media interviews are themselves precarious because there is no constitutional guarantee that these alternatives cannot be taken away.[295]

Concluding that inmates need no direct access to journalists because they can relay their concerns to others—family visitors, clergy, or counsel—presumes that those alternatives exist and will be effective. For people who are estranged from their families or have moved away from their family's home base, including immigrants whose families are overseas, this "alternative" is no alternative at all. This is doubly the case for people whose families are in the country without documentation and will understandably hesitate to contact government authorities to complain about jail conditions, for fear of attracting adverse attention. It is a dangerous oversimplification for courts to assume, categorically, that effective messengers other than journalists will always exist.

Additionally, one channel of communication that has been recognized as a viable alternative for people sentenced to prison—sending messages through legal counsel[296]—is unlikely to be accessible for those in county jail. As a

291. Schwartz, *supra* note 288.

292. *Id.*

293. *See generally* Smith v. Coughlin, 748 F.2d 783 (2d Cir. 1984); Cardoza v. Fair, No. 83-3977-T, 1988 U.S. Dist. LEXIS 2629 (D. Mass. Mar. 28, 1988); Hatch v. Lappin, 660 F. Supp. 2d 104 (D. Mass. 2009).

294. *See* Johnson, *supra* note 90, at 299–301 (noting that courts are split on whether inmates have a First Amendment right to make phone calls and that none has yet been willing to extend that entitlement to cover emails).

295. Additionally, inmates are aware that their phone calls can be recorded and monitored, so they understandably may hesitate to engage in criticism of prison employees on an unsecured phone line for fear of retaliation. *See* Bernstein, *supra* note 96, at 140 (discussing California prisons' practice of monitoring and enforcing ten-minute time limits on inmate phone calls).

296. *See* Pell v. Procunier, 417 U.S. 817, 825 (1974) (identifying visits from family members, clergy, and attorneys as methods for communicating a message to the outside world that obviates the need for interviews with the news media).

practical matter, a person serving a thirty-day sentence for driving without insurance or bouncing a check is unlikely to be visited by counsel; indeed, the lack of counsel may be why people who are accused of insignificant offenses end up in jail. Moreover, the Supreme Court has recognized no constitutional entitlement to court-appointed counsel for people facing misdemeanor charges that do not carry a jail sentence.[297] So a pretrial detainee who is charged with a minor misdemeanor, such as disorderly conduct or reckless driving, has no assurance of being able to meet with an attorney. This is doubly significant because courts have declined to recognize a constitutional right to visits from anyone other than counsel, leaving correctional authorities near-total discretion to decide whether, when, and how to allow visits.[298] If a detainee has no legal representation—or is represented by a public defender too busy to meet with accused misdemeanants to listen to their complaints—then there is no guarantee of being able to speak face-to-face with anyone.

There is no bright-line rule for how ineffective or impractical an alternative method of communication must be before it is no longer considered a substitute for the speaker's desired method. In the words of one federal appeals court, "an alternative must be more than merely theoretically available. It must be realistic as well."[299] Before a proffered alternative channel of communication can be considered legally inadequate, it must present some burden beyond mere inconvenience, making the speech unlikely to reach its intended recipients.[300] For instance, in a case outside the correctional setting, involving a book vendor's challenge to an ordinance prohibiting the sale of literature within one thousand feet of a sports stadium, the court invalidated the prohibition on First Amendment grounds because the self-published book would be of interest primarily to the hockey fans that the vendor was unable to reach, and reaching them through commercial bookstores would require "Herculean efforts."[301]

The Supreme Court has recognized that face-to-face interaction can be a uniquely valuable method of communication not easily replaced by letters or phone calls. In the case of a foreign national scholar who was denied a visa to

297. *See* Scott v. Illinois, 440 U.S. 367, 373–74 (1979) (holding that Sixth Amendment is not offended when misdemeanor defendant is denied appointed counsel, so long as defendant is not sentenced to incarceration).

298. *See* Overton v. Bazzetta, 539 U.S. 126, 130–32, 134 (2003) (finding no constitutional violation in prison rules that could result in loss of visitation privileges for as long as two years at a time, and declining to address whether any constitutionally significant right of freedom of association survives incarceration); Bellamy v. Bradley, 729 F.2d 416, 420 (6th Cir. 1984) ("Prison inmates have no absolute constitutional right to visitation.").

299. Gresham v. Peterson, 225 F.3d 899, 906 (7th Cir. 2000).

300. "An alternative is not ample if the speaker is not permitted to reach the intended audience." Bay Area Peace Navy v. United States, 914 F.2d 1224, 1229 (9th Cir. 1990) (internal quotes omitted).

301. Weinberg v. City of Chicago, 310 F.3d 1029, 1042 (7th Cir. 2002).

enter the United States, preventing a willing audience from hearing his remarks, the Court stated that the possibility that audience members could instead read his lectures or listen to audiotapes does not extinguish "altogether any constitutional interest . . . in this particular form of access."[302]

In the correctional setting, inmates' challenges to the adequacy of the communication options they are offered have not always found a sympathetic audience. In addressing the limited time—approximately ten minutes—an inmate was permitted to spend in a family visit during which he wished to communicate his grievances to family members while also carrying on a normal family conversation, the Southern District of New York found that regulations did not "seriously, if at all, actually curtail" the inmate's freedom to associate and communicate.[303]

Because there is no absolute constitutional entitlement to telephone or e-mail access, an inmate in a jail that disallows interview requests could be left with the communication option of a postcard—or nothing. Although there may be a high bar to demonstrate that constraints on media interviews in county jails categorically leave inmates with inadequate communication channels, the courts should be open to entertaining such claims under the right set of facts, such as in states where telephone charges make phone calls an impracticable alternative and where jails provide limited or nonexistent internet access.

VI. UNSHACKLING FIRST AMENDMENT RIGHTS

A. Current Patchwork Legal Standards Leave Inmates Inadequately Protected

The state of free-speech protections for inmates is, at best, murky as a result of a half-century's worth of inconclusive court interpretations. What can be said for sure is that, within a state prison, neither inmates nor journalists can insist on a right to speak face-to-face so long as courts find that viable communication alternatives exist, such as phone calls, letters, and meetings with counsel, clergy, or families.[304] But when those alternatives are disaggregated, there is no constitutional right to insist on any one of them, except for the opportunity to speak with counsel—and that is the one option that, as a practical matter, is likely to be of little usefulness to people in county jail. That Supreme Court precedent is both fragmented and intensely fact-specific leaves considerable uncertainty that accrues to the detriment of the

302. Kleindienst v. Mandel, 408 U.S. 753, 765 (1972).

303. Amaker v. Annucci, No. 14-CV-9692 (KMK), 2016 U.S. Dist. LEXIS 135788, at *12 (S.D.N.Y. Sept. 29, 2016).

304. *See* Pell v. Procunier, 417 U.S. 817, 825 (1974) (citing visits with family, friends, clergy, and attorneys as alternative means of conveying information to the outside world).

would-be speaker because the institution is in control of all of the methods of communication and can obstruct access to any of them.

An oft-cited reason for denying in-person interview requests concerns safety. It is possible, however, to accommodate legitimate safety concerns while still recognizing a baseline First Amendment right of access that is not zero. Both prisons and jails have been able to craft effective middle-ground policies that do not require total authority to ban interviews entirely. For example, interviews can be limited to normal business hours when staffing levels are highest or capped at a reasonable duration so that any officers who are pulled off ordinary duties to accompany the journalist are able to resume their posts.[305] The existence of these effective alternatives would be enough, outside the prison setting, to demonstrate that excluding news organizations is an overbroad remedy inadequately tailored to meet the government's valid safety objectives.

To illustrate how a court might analyze overbroad restrictions on inmate communications, consider the First Circuit's approach in a 1971 case, *Nolan v. Fitzpatrick*, involving a Massachusetts prison's total ban on inmate correspondence with the news media.[306] The state argued that the prohibition was justified by safety concerns, such as keeping prisoners from airing rivalries and grievances that might result in inmates taking revenge.[307] But the court found that a total ban unduly restricted not just inmates' right to speak but also the public's right to hear, noting "the fact that the condition of our prisons is an important matter of public policy as to which prisoners are, with their wardens, peculiarly interested and peculiarly knowledgeable."[308] A balance was then struck between the tangible concerns of the facility and inmates' rights. Officials at the facility were told they could instead enforce a narrower, more tailored prohibition by refraining from distributing editions of newspapers containing inflammatory articles about the prison that could incite violence.[309]

In raising order as a concern, correctional institutions fail to acknowledge that prisoners communicate amongst themselves, expressing the same sentiments that officials are so concerned about re-entering the facility. Information does not need to leave the facility at all to become provocative. Limiting media access to prevent the spread of inflammatory information makes little sense as long as inmates are able to talk to each other. Unlike

305. Ayan Ajeen, A 50 State Prison Policy Analysis on Media Access (2019) (unpublished B.A. thesis, University of North Carolina) (on file with authors).

306. Nolan v. Fitzpatrick, 451 F.2d 545, 549 (1st Cir. 1971).

307. *Id.* at 548.

308. *Id.* at 546.

309. *Id.*

cafeteria gossip, newspapers will fact-check inmates' claims before publishing them, so there is little concern that unfounded claims will be published as fact.

As the *Nolan* court noted, the rights of the listening public cannot be overlooked or minimized where jails are concerned because so many matters of public concern are implicated: whether facilities are secure and safe, whether basic civil rights and civil liberties are being protected, and whether public money is being spent providently.[310] As the court stated in *Nolan*, "the prisoners' right to speak is enhanced by the right of the public to hear."[311] Journalists are the conduit giving effect to "the right of the public to hear" because few ordinary citizens will visit and inspect jails themselves.

Historically, correctional institutions were open for public inspection, often at a nominal fee, and open to the press for interviews.[312] As prisons and jails closed to the public, journalistic access became all the more important, often the only line of communication between inmates and the public. Refusing to allow journalists to enter the facility for interviews creates the perception that correctional officials have something to hide.[313] That perception undermines public confidence in the entire criminal justice system, its efficiency, and the way it treats those who have been entrusted to its care. Inhibiting effective news coverage of the correctional system, much like preventing coverage of criminal trials, could easily "breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law."[314] The Court in *Press-Enterprise I* recognized that the value of openness lies in the fact that those who cannot be present can still have confidence that the standards of fairness and justice are being observed, that the normal procedures are being followed, and that any abuses can become known.[315] Openness enhances both the fairness of the system and the public perception of fairness, both of which lend themselves to increased confidence in the criminal justice system.[316]

B. Striking the Balance of Autonomy Versus Control

If a lawsuit challenged the constitutionality of jail policies in Dougherty County, Georgia, or Orange County, Florida, it is not at all certain what

310. *Id.* at 548.

311. *Id.*; *see also* Cooper, *supra* note 111, at 272 ("Communication between prisoners and the public is an important source for keeping the public informed about one of its public institutions, as well as providing prisoners a forum of expression. The public has a vested interest in discussing and criticizing the prison system and its administration.").

312. Bernstein, *supra* note 96, at 160.

313. *Id.*

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

315. Press-Enterprise I, 464 U.S. 501, 508 (1984).

316. *Id.*

standard a federal court would apply in evaluating the constitutionality of those policies. It should be. There should be a uniform national standard by which courts evaluate challenges to policies that unduly restrict jail inmates and journalists from communicating.

For the reasons previously enumerated, the *Pell* and *Saxbe* analysis, however debatably meritorious in the state prison setting, is even more poorly suited to the very different setting of a county jail: people are often confined there for petty crimes (or no crimes at all), the administrator may be an elected official with no expertise in corrections, few of the inmates are assured of having legal counsel, and external oversight and supervision is minimal. Nor is a traditional "public forum analysis" a perfect fit because unlike demonstrators or others who choose to use public property for their speech, inmates have no other choice. A jail's communication policy is not so much a restraint on property as a restraint on people, and for that reason, forum doctrine may be unduly deferential.

Recognizing a First Amendment right of access to jails for purposes of interviewing inmates requires navigating a narrow passage between two established bodies of case law. On one hand, there is a clearly established entitlement for the public to receive information that already exists and for the media to watch critical stages of the criminal justice process and the activities of police in public places.[317] On the other hand, there is neither a First Amendment right to compel an unwilling speaker to make inaccessible information available nor an absolute right to enter a confined space where news happens, even a space owned by the government.[318] These pillars are unshakable. The question is whether enough daylight exists between them to recognize a First Amendment right of access to a willing speaker that the government has, through its affirmative act of confinement, made unavailable. What makes the question so tricky is that the issue of inmate access can be viewed from two very different vantage points that may lead to decisively different analyses: a policy prohibiting, or greatly restricting, interviews could be seen as an act of government interference regulating the speech of a willing speaker (in which case it would be viewed under rigorous scrutiny and

317. Michael Roffe, *Journalist Access*, FREEDOM F. INST. (May 25, 2004), https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-the-press/journalist-access/#:~:text=The%20First%20Amendment%20bars%20Congress,not%20the%20collection%20of%20it.&text=Access%20becomes%20an%20issue%20when,enter%20private%20or%20restricted%20areas [https://perma.cc/7F8B-F4VR].

318. *Id.*

presumed to be unconstitutional)[319] or, alternatively, could be viewed as a refusal to affirmatively make an inaccessible piece of public property open for expression, which would be viewed more deferentially.[320]

The courts have dealt with this distinction in the somewhat analogous public-school setting. Students have minimal First Amendment protection in using a government-provided medium to convey their speech, such as a newspaper produced as a graded exercise in a journalism class.[321] A school has discretion to censor "curricular" student speech as long as there is some educationally reasonable basis for the decision.[322] But students have considerably greater First Amendment protection when using their own voices, which a school may not censor without concrete proof that the speech will provoke a material and substantial disruption of school functions.[323]

Notably, the Supreme Court has drawn on prisoner-rights case law in its student-speech jurisprudence. In its 1987 *Turner* decision, the Court held that prisons may regulate inmate speech so long as the regulation is "reasonably related to legitimate penological interests."[324] Just a year later, almost exactly the same alignment of Justices parroted the *Turner* standard in the *Hazelwood* school-speech case, holding that "school-sponsored expressive activities" may be censored so long as the justification is "reasonably related to legitimate pedagogical concerns."[325]

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319. In the context of judicial gag orders on trial participants, reviewing courts have applied demanding scrutiny, with some even finding that the gag orders are unconstitutional "prior restraints" on journalists because they interfere with journalists' ability to speak with otherwise-willing sources. *See* CBS Inc. v. Young, 522 F.2d 234, 237–38 (6th Cir. 1975) (viewing trial judge's gag order as a prior restraint on journalists because it interfered with journalists' ability to gather news from willing speakers); *see also* J. Publ'g Co. v. Mechem, 801 F.2d 1233, 1235 (10th Cir. 1986) (finding that news reporters had standing to contest a gag order on participants in a high-profile civil-rights lawsuit "because the court's order impeded its ability to gather news, and that impediment is within the zone of interests sought to be protected by the first amendment").

320. Johnson, *supra* note 90, at 290, 302, discusses this issue in the context of the evolving body of law regarding inmate access to e-mail, observing that the First Amendment is traditionally perceived as imposing negative ("Congress shall make no law") obligations as opposed to affirmative obligations to supply a means of communication that speakers do not already have: "The failure of state prison systems to provide inmates with email access is not the same as a regulation barring access to email services that are already in place."

321. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272–73 (1988) (holding that public-school students' First Amendment rights diminish when they are using a publication bearing the school's name that the school distributes).

322. *Id.* at 273.

323. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 503 (1969); *see also* Lowry v. Watson Chapel Sch. Dist., 540 F.3d 752 (8th Cir. 2008) (applying *Tinker* and finding that students had a First Amendment right to wear armbands protesting a school's mandatory uniform code in defiance of an administrative directive prohibiting armbands).

324. Turner v. Safley, 482 U.S. 78, 89 (1987).

325. *Hazelwood*, 484 U.S. at 273.

In the *Houchins* plurality opinion, Chief Justice Burger referred to jail inmates as "government-controlled sources of information."[326] This view conveniently inverts the facts: jail inmates are people whom the government has cut off from any ability to communicate except that furnished by the government.[327] For that reason, a pure "public forum" analysis is inapposite in the custodial setting; an inmate has not *chosen* to use government-owned property for speech but rather is limited by the government to doing so.[328]

Just as the Court has created two tiers of First Amendment protection in schools—a higher tier for individual expression and a lower tier for speech that depends on a government-provided "forum" to convey speech—it is possible to craft a standard for jails that balances the interests of speaker and institution in place of the current regime that is (in practice, if not clearly so in law) essentially zero First Amendment recourse. As in schools, it might make sense to afford inmates diminished free-speech protection in a government-supplied medium that the government is under no obligation to furnish, such as e-mail access. When an inmate uses a jail computer to send e-mail, the jail's interests in regulating that communication are heightened; a crime victim who receives harassing or threatening e-mails might justifiably ask why a jail turned an inmate loose with internet access to do harm. But the same calculus does not apply to a face-to-face interview—a person who wants no contact with her tormentor will not schedule an appointment to visit him—especially where the interviewer is a professional journalist who accepts the risk of experiencing unpleasant speech. In the case of e-mail access, the jail is refusing to offer a communication method (a "positive" obligation), whereas in the case of interviews, the jail is using its governmental authority to get between two people who, but for the jail's intervention, would meet and exchange information (a "negative" obligation). Even if the First Amendment does not entitle people to have government-created channels made available to them, it

326. Houchins v. KQED, Inc., 438 U.S. 1, 8 (1978).

327. *See* Leverson, *supra* note 233, at 445 ("A prisoner is not just a source of information within government control. She is a human being in the custody of the state who retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from [her] by law." (internal quotation marks omitted) (quoting Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945))).

328. *See* Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45–48 (1983) (describing three categories of "public forum" property—traditional, designated, and nonforum—where a speaker's right to use the property for expression varies with the character and use of the property); *see also* Bloedorn v. Grube, 631 F.3d 1218, 1232 (11th Cir. 2011) ("[T]he scope of the relevant forum is defined by the access sought by the speaker, meaning that if a speaker seeks access only to a limited area of government property, we must tailor our approach to the perimeters of a forum within the confines of the government property." (internal quotes omitted) (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 801 (1985))).

certainly entitles them to be free from undue interference in conversations with willing listeners.

A "school-like" two-tier First Amendment approach would start with the proposition that jailed people may (subject to reasonable time, place, and manner restrictions) speak with the outside visitors of their mutual choice, while allowing the government to reject a meeting upon surmounting a burden, in an individual case, of showing that the interview is realistically likely to result in a substantial disruption. Such an analysis would honor the distinction between the ability to push speech onto a potentially unwilling audience (such as by using social media or e-mail) versus the ability to entertain a visit by a willing listener whose First Amendment rights are unimpaired by confinement.

The Court already fashioned a workable standard in the *Martinez* case, which allows for censoring outgoing prison mail only if the regulation satisfies rigorous scrutiny: the regulation must advance a "substantial" government interest and be narrowly tailored to advance that interest, avoiding overbreadth.[329] Notably, the *Martinez* Court cited school-speech jurisprudence in fashioning its standard, which—as with schools—is somewhat more deferential to government authorities than "real-world" standards but still an elevated level of scrutiny beyond mere rational-basis review.[330] As with school speech, a *Martinez*-type standard for judicial review of policies that purport to restrict face-to-face communications between journalists and jail inmates would be sufficiently adaptable so that administrators could reserve judgment to make individualized safety-based decisions but would be put to their proof before nakedly asserting "safety" as a catch-all rationale for secrecy.[331]

One of the many "missing pieces" that makes the Supreme Court's inmate-speech jurisprudence unhelpfully circular is that the cornerstone *Pell* case began with the premise that the California prison system's prohibitions on interviewing were not an attempt to cover up abusive conditions.[332] By starting with that assumption, the Justices left no roadmap for deciding a case in which stronger evidence of invidious motive exists. If any such claim is even cognizable at all after the *Pell* and *Houchins* cases, the Court has given no guidance for deciding who would carry the burden of proof, what level of scrutiny would apply, or what would constitute a decisive taint removing the

329. Procunier v. Martinez, 416 U.S. 396, 413–14 (1974).

330. *See id.* at 409–10 (first citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969); then citing Healy v. James, 408 U.S. 169 (1972) (the college-speech case)).

331. *See* Leverson, *supra* note 233, at 450–51 (recommending *Martinez* as the proper standard when balancing all flow of communication between prison and jail inmates and the outside world).

332. Pell v. Procunier, 417 U.S. 817, 830 (1974) ("We note at the outset that this regulation is not part of an attempt by the State to conceal the conditions in its prisons or to frustrate the press' investigation and reporting of those conditions.").

case from the ambit of *Pell*. Given the well-documented history of abusive and inhumane conditions within jails and the government's self-evident interest in making sure those conditions are not publicly scrutinized, it should not be necessary for a journalist, or the journalist's would-be interviewee, to come forward with individualized proof of a wrongful conspiracy to suppress information. Justice Stewart's credulity in *Pell* notwithstanding, it is a state of nature that government agencies will, to borrow his words, "conceal the conditions" in custodial facilities or "frustrate the press' investigation and reporting of those conditions."[333]

Even if it is permissible under prevailing constitutional standards to impose burdens on media visitors above and beyond what is imposed on family or clergy visitors, there are real public-policy questions about the wisdom of doing so. A journalist visitor does not pose any greater safety risk than a non-journalist (and arguably less because a friend or family member will be more likely to be enlisted in smuggling dangerous items). If there is no safety rationale for making journalists secure more demanding approvals than non-journalists, the remaining rationales—that, as in the case of Dougherty County, Georgia, or Gaston County, North Carolina, jail authorities are concerned about how they will be portrayed in the media—are certainly not compelling ones and may not even be reasonable ones.

There are worthy arguments for the Supreme Court to revisit its prison-speech jurisprudence (in *Turner*, *Thornburgh*, and *Jones*) in light of what has happened since those mid-1970s decisions: (1) the Court has recognized a First Amendment right to observe every critical phase of the criminal trial process,[334] (2) an evolving body of case law recognizes the right to record government employees doing official business on public property, which specifically includes police but appears to extend more broadly,[335] and (3) the Court has created the "public forum" standard by which restrictions on speech on government property are evaluated.[336] In light of all of these changed circumstances, the method of analysis set forth in the *Pell*-*Saxbe* line of cases seems dated both as a matter of law and as a matter of fact. Additionally, there

333. *Id.*

334. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980).

335. Matt Ford, *A Major Victor for the Right to Record Police*, ATLANTIC (July 7, 2017), https://www.theatlantic.com/politics/archive/2017/07/a-major-victory-for-the-right-to-record-police/533031/ [https://perma.cc/B9QW-BCGJ].

336. *See* Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45–46 (1983) (explaining how a public forum comes to exist and the level of First Amendment scrutiny that applies depending on the nature of the government property to which the speaker seeks access); *see also* R. George Wright, *Public Fora and the Problem of Too Much Speech*, 106 KY. L.J. 409, 414–17 (2018) (explaining the recognized categories of forum property and how the level of judicial scrutiny that applies to First Amendment claims varies with the property's character).

are worthy arguments for recognizing a heightened degree of constitutionally guaranteed access for journalists, whose presence in correctional facilities serves important checking and representational functions and whose effectiveness in discharging those functions is limited if they must adhere to the same prohibitions on recording devices that apply to the general public.[337]

But neither of those steps, which would involve reevaluating precedent to some degree, is necessary for the courts to take the more modest steps of recognizing meaningful First Amendment protection for people in county jail (as opposed to prison) and for the people who seek to exchange information with them. *Houchins* did not conclusively decide anything, and the meager body of post-*Houchins* cases from lower courts in the jail context provide no greater clarity. All that seems certain is that jailed people and journalists will have no constitutionally guaranteed right to speak with each other as long as some mix of other effective communication options is available, which suggests that there is some yet-to-be-located floor of "ineffectiveness" beneath which prohibiting contact with the press might become constitutionally suspect.

Given the inherent slowness of resolving constitutional litigation, jailed people will essentially never be able to litigate the adequacy of their communication options during a time when relief can reach them. For that reason, a "standard" that says "jails must offer some communication options, of undetermined quality and quantity" is no standard at all. Because jail inmates rarely can obtain meaningful relief by suing, courts must establish bright-line standards and not intensely fact-specific ones. Even if *Pell* and *Saxbe*, as reinforced by the Court in *Turner*, contemplate what is effectively unlimited discretion to ban interviews—for the Court has yet to identify any set of circumstances under which prisons would be *required* to admit journalists—that body of law need not be conclusive of the rights of people in jails, especially those who are being held in pretrial detention and not for purposes of post-conviction punishment.

VII. CONCLUSION

Following the killing of a forty-six-year-old Black man by Minneapolis police who were arresting him for a petty offense, communities across the

337. For an in-depth discussion of this point, see generally Tom A. Collins, *The Press Clause Construed in Context: The Journalists' Right of Access to Places*, 52 MO. L. REV. 751 (1987). In a wide-ranging analysis looking not just at correctional institutions but also at other government-maintained property such as military bases, Collins posits that for journalists to be treated "equally" with the general public may at times require what seems like preferential status because journalists may need superior access to do their jobs as effectively as members of the public can do theirs with less access. *See id.* at 779 ("The controlling factor in determining a different treatment of media and public should be the degree of access appropriate for the media to fulfill its function.").

United States erupted in sustained protests against police brutality, especially the overzealous use of deadly force against Black people who present no threat.[338] The outcry led to a wave of reform proposals, including immediate legislative action in several states liberalizing public access to formerly secretive misconduct complaints against law enforcement officers.[339] While the focus of the Black Lives Matter campaign has understandably been on policing—because police misconduct often takes place in public and, increasingly, on the type of shareable video that ignites outrage—it is the very nature of jails' invisibility to the public that enables abuse and neglect to fester. In a typical year, more people die in county jail than are shot to death by police officers,[340] yet those fatalities only occasionally attract public scrutiny.[341]

It is impossible to ignore the fact that limitations on speech behind bars, along with every other limitation that comes with the loss of rights during imprisonment and detention, disproportionately affects nonwhite people.[342] The incarceration rate for Black males in 2018 was 5.8 times that of white males, while the rate for Black women was 1.8 times the rate of white women.[343] The optic of largely white law enforcement agencies muzzling largely nonwhite speakers is one that should rightly raise eyebrows. In a June 2020 study, the nonprofit advocacy organization Reflective Democracy Campaign, using data gathered from sheriff's departments across the country, reported that ninety percent of sheriffs' positions are held by white males,

338. *See* Maureen Groppe & Kristine Phillips, *From Coastal Cities to Rural Towns, Breadth of George Floyd Protests—Most Peaceful—Captured by Data*, USA TODAY (June 10, 2020, 10:45 AM), https://www.usatoday.com/story/news/politics/2020/06/10/george-floyd-black-lives-matter-police-protests-widespread-peaceful/5325737002/ [https://perma.cc/GAC3-38C6] (describing nationwide reaction to May 25th police killing as "the most widespread mass demonstrations in recent memory").

339. *See* Ginia Bellafante, *Why Secrecy Laws Protecting Bad Officers are Falling*, N.Y. TIMES (June 5, 2020), https://www.nytimes.com/2020/06/05/nyregion/police-records-50a.html [https://perma.cc/8XEJ-QC8P] (highlighting recent pro-transparency reforms in California and New York).

340. According to a database maintained by *The Washington Post* that uses records from law enforcement agencies across the country, 999 people were shot dead by police in 2019. *See Fatal Force*, WASH. POST, https://www.washingtonpost.com/graphics/2019/national/police-shootings-2019/ [https://perma.cc/TL8S-K2CZ] (last updated Aug. 10, 2020).

341. A rare exception was the case of Sandra Bland, a twenty-eight-year-old Black motorist who was found hanged in a jail cell in Waller County, Texas, in July 2015, a case that attracted deep suspicion because Bland was facing an insignificant traffic charge and had exhibited no discernible indicia of suicidal disposition to family and friends. *See* Bill Chappell, *Sandra Bland's Phone Video of Her Own Arrest Surfaces, Reviving Calls For New Inquiry*, NPR (May 7, 2019, 3:23 PM), https://www.npr.org/2019/05/07/721086944/sandra-blands-phone-video-of-her-own-arrest-surfaces-reviving-calls-for-new-inqu [https://perma.cc/4VCD-PBB6] (describing cellphone video that shows Texas highway patrol officer threatening Bland with a stun gun while citing her for failing to signal for a lane change).

342. BUREAU OF JUST. STATS., OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST., PRISONERS IN 2018, at 1 (2020), https://www.bjs.gov/content/pub/pdf/p18_sum.pdf [https://perma.cc/69J9-MNEL].

343. *Id.*

though they represent just thirty percent of the country's population, while people of color, who represent thirty-nine percent of the U.S. population, hold only eight percent of sheriff positions, and fewer than three percent of the positions are held by women of any race.[344] While other state elected offices are also disproportionately held by white men, including district attorney's offices and legislative seats, the report concluded: "[W]e have found no other elected office so overwhelmingly controlled by white men."[345]

The occupancy of jails is not just disproportionately people of color—it is also disproportionately poor people.[346] The inability to pay for bail is one of the primary reasons that people remain in county jail custody. By one estimate, ninety percent of the pretrial detainees held in county jail are there because they cannot afford bail, putting them in danger of assault, suicide, or infectious disease for no reason other than poverty.[347] Research has documented that spending a substantial amount of time in pretrial detention is linked with a greater likelihood of a conviction, which may be attributable to the pressure to plead guilty experienced as people become impatient to resolve their cases.[348] People who lack legal representation and are feeling coercion to plead guilty are exactly the people who might most benefit from having their cases scrutinized by journalists. Indeed, because of backlogged courts and lack of adequate legal representation, it is not uncommon for people to stay in jail longer on pretrial holds—on occasion, even *years* longer—than the potential sentence associated with the charged crime; one study found people in Louisiana sitting in pretrial detention for as long as four years.[349] It seems inconceivable that the Constitution could tolerate cutting off those people from

344. REFLECTIVE DEMOCRACY CAMPAIGN, CONFRONTING THE DEMOGRAPHICS OF POWER: AMERICA'S SHERIFFS (2020), https://wholeads.us/wp-content/uploads/2020/06/reflectivedemocracy-americassheriffs-06.04.2020.pdf [https://perma.cc/372A-35V9].

345. *Id.* at 4.

346. Cherise Fanno Burdeen, *The Dangerous Domino Effect of Not Making Bail*, ATLANTIC (Apr. 12, 2016), https://www.theatlantic.com/politics/archive/2016/04/the-dangerous-domino-effect-of-not-making-bail/477906/ [https://perma.cc/SHR9-6RED].

347. *Id.*; LAURA M. MARUSCHAK, MARCUS BERZOFSKY & JENNIFER UNANGST, U.S. DEP'T OF JUST., MEDICAL PROBLEMS OF STATE AND FEDERAL PRISONERS AND JAIL INMATES, 2011–12 (2015), https://www.bjs.gov/content/pub/pdf/mpsfpji1112.pdf [https://perma.cc/J5DR-VQVX]; NANCY G. LA VIGNE, SARA DEBUS-SHERRILL, DIANA BRAZZELL & P. MITCHELL DOWNEY, JUST. POL'Y CTR, PREVENTING VIOLENCE AND SEXUAL ASSAULT IN JAIL: A SITUATIONAL CRIME PREVENTION APPROACH (2011), https://www.urban.org/sites/default/files/publication/26746/412458-Preventing-Violence-and-Sexual-Assault-in-Jail-A-situational-Crime-Prevention-Approach.PDF [https://perma.cc/Y8DM-VUT8].

348. Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L., ECON. & ORG. 511, 512–13 (2018).

349. Emily Hamer & Sheila Cohen, *Poor Stay in Jail While Rich Go Free: Rethinking Cash Bail In Wisconsin*, WIS. PUB. RADIO (Jan. 21, 2019, 6:00 AM), https://www.wpr.org/poor-stay-jail-while-rich-go-free-rethinking-cash-bail-wisconsin [https://perma.cc/EWC5-7STX].

any method of reaching out to the public for rescue except mailing a postcard to a news organization.

During 2020, jails across America filled up with detainees swept up by police in, at times, overzealous responses to protests against the unjustified use of deadly force by law enforcement against people of color.[350] An *Associated Press* tally at the beginning of June 2020 found protest-related arrests to add up to ten thousand and counting.[351] Most of these arrests have been nonviolent, the majority of them involving charges of failure to disperse and curfew violations.[352] A minority occur on charges of burglary and looting, with some people being charged only for being in the wrong place at the wrong time, such as a man charged with looting when he happened to walk by and photograph what was going on.[353]

Jails are in no way immune to the brutalization of people—disproportionately, Black people—by the law enforcement officers entrusted to keep the public safe. In North Carolina, five former jail officers and a nurse were charged with involuntary manslaughter in the death of John Neville, a fifty-six-year-old Black man who was forcibly restrained on the jail floor during an apparent seizure as he cried out "I can't breathe!"[354] In Tennessee, a thirty-seven-year-old Black man suffering from mental distress died after jailers pinned him to the ground for six minutes until he went limp.[355] Even when employees are not directly responsible for inflicting the fatal blows, their

350. *See* Michael Sainato, *'They Set Us Up': US Police Arrested Over 10,000 Protesters, Many Non-Violent*, GUARDIAN (June 8, 2020, 6:00 AM), https://www.theguardian.com/us-news/2020/jun/08/george-floyd-killing-police-arrest-non-violent-protesters [https://perma.cc/EY6U-2NXD] (collecting complaints by demonstrators who say police overreacted to peaceful protests with arrests, rubber bullets, and tear gas, including several incidents that resulted in criminal charges against the officers).

351. Anita Snow, *AP Tally: Arrests at Widespread U.S. Protests Hit 10,000*, ASSOCIATED PRESS (June 4, 2020), https://apnews.com/bb2404f9b13c8b53b94c73f818f6a0b7 [https://perma.cc/Q6L4-HNZM].

352. *Id.*

353. *Id.*; *see also* Aaron Miguel Cantú, *Federal Prosecutors Engaged in Unprecedented Push to Jail Protestors Before Trial*, INTERCEPT (Oct. 30, 2020, 6:00 AM), https://theintercept.com/2020/10/30/federal-prosecutors-protests-pretrial-detention/ [https://perma.cc/H7C9-ZUKD] (discussing how detainee held on federal charges of inciting a riot via a method of interstate commerce for livestreaming the event on Facebook is finally allowed to tell his story detailing rough treatment disproportionate to his nonviolent charge).

354. *Videos Show North Carolina Man Restrained by Jail Officers Before His Death: "I Can't Breathe"*, CBS NEWS (Aug. 6, 2020, 10:39 AM), https://www.cbsnews.com/news/john-neville-death-body-cam-videos-guards-arrest-north-carolina/ [https://perma.cc/4AV3-PERW].

355. *See* Bob Ortega, Nelli Black & Drew Griffin, *Videos Raise Question About In-Custody Death Deemed an 'Accident' by Tennessee Officials*, CNN (June 12, 2020, 9:09 PM), https://www.cnn.com/2020/06/12/us/videos-jail-custody-death-sterling-higgins-invs/index.html [https://perma.cc/YT25-EVJK] (reporting on wrongful death lawsuit by survivors of Sterling Higgins, whose death was investigated by a grand jury but produced no criminal charges).

indifference has been blamed for scores of deadly inmate-on-inmate attacks.[356] Manifestly, the deferential "hands-off" approach of the federal judiciary, embodied in the *Pell-Houchins* line of cases, is not working.

Just as assumptions about the confidentiality of police personnel records are being revisited in light of public alarm over officers' violent misbehavior,[357] it is equally timely to revisit seemingly settled judicial assumptions devaluing the role of public oversight in keeping detention facilities sanitary and safe. Public trust in the criminal justice system has been strained to the breaking point and beyond. If jails are largely operated in an honest and safe manner, then inviting journalists through the gates will reassure the public and restore confidence—and if not, then independent media scrutiny is the best hope for catalyzing reform.

356. *See, e.g.*, Elvia Malagón, *Family of Chicago Man Beaten to Death in Cook County Jail Cell Files Lawsuit: 'Nothing is Going to Take Away This Pain'*, CHI. TRIB. (Feb. 12, 2020, 10:39 AM), https://www.chicagotribune.com/news/breaking/ct-cook-county-jail-beating-death-lawsuit-pedro-ruiz-20200212-udhqvnpf75dolmis6q44ukbicq-story.html [https://perma.cc/QU83-7E4Q] (reporting that nineteen-year-old Chicago man was beaten to death within a half-hour of arriving at Chicago jail by a cellmate affiliated with a rival gang); Ross Jones, *19 Inmates Have Died in Macomb Co. Jail Since 2012; Sheriff Says 'We Do Our Best'*, WYYZ (Sept. 26, 2018, 10:45 PM), https://www.wxyz.com/news/local-news/investigations/19-inmates-have-died-in-macomb-co-jail-since-2012-sheriff-says-we-do-our-best-#:~:text=19%20inmates%20have%20died%20inside,of%20the%20ACLU%20of%20Michigan (describing 2014 beating death of inmate the day after his arrival at a Detroit-area jail at the hands of a known assaultive and mentally unstable cellmate).

357. *See* Weihua Li & Humera Lodhi, *Which States Are Taking on Police Reform After George Floyd?*, MARSHALL PROJECT (June 18, 2020, 3:00 PM), https://www.themarshallproject.org/2020/06/18/which-states-are-taking-on-police-reform-after-george-floyd [https://perma.cc/24NZ-645D] (reporting that lawmakers in sixteen states filed bills to open up police agencies to greater accountability in the aftermath of outrage over the police killing of George Floyd).