A Barometer of Freedom of the Press: The Opinions of Mr. Justice White

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A Barometer of Freedom of the Press: The Opinions of Mr. Justice White

Since the Zurcher v. Stanford Daily decision which was authored by Justice Byron F. White, the news media has become increasingly concerned with its first amendment protections from governmental searches. Since Justice White has been the voice of the United States Supreme Court on this very issue, the author submits that an examination of Justice White's media related opinions can serve as a “barometer” for the constitutional protections of the news media. The author examines the use of Justice White to the Supreme Court, his staunch adherence to stare decisis, and the historical foundation of the first amendment as they relate to the news media. The author then analyzes Justice White's media related opinions so as to indicate that the “barometer” does not point to a liberalized, almost privileged status of the press. Rather, the “barometer” points back to the Founding Fathers and notes that Justice White believes the press deserves neither more nor less constitutional protection than contemplated and afforded by the creators of the first amendment.

I. INTRODUCTION

The topic of the freedom of members of the press to gather information without governmental interference has seen a resurgence in recent years before the United States Supreme Court. Among the most frequently involved in authoring majority opinions on this matter has been Associate Justice Byron R. White. It is the thesis of this comment that through the examination of Mr. Justice White's personal background and his legal opinions, one may conclude that his views are a fair indicator of what to expect in future first amendment decisions of the type discussed here. This comment will also explore why Justice White holds these opinions. For the purposes of this comment, the discussion of press freedoms will be limited to the print media and the area known as “newsman's privilege” or “newsgathering function.”

1. See Stewart, Or of the Press, 26 HASTINGS L.J. 631 (1975):
I turn this morning to an inquiry into an aspect of constitutional law that has only recently begun to engage the attention of the Supreme Court. Specifically I shall discuss the role of the organized press—of the daily newspapers and other established media—in the system of government created by our Constitution.

Id. Mr. Justice Stewart goes on to remark that it was not until the Vietnam War that the nation became aware of investigative reporting and an adversary press, and not until the resignation of President Nixon that the nation realized the "enormous power" exerted by an investigative and adversary press. Id.

2. "Newsman's privilege" is a term used in this comment to represent the
A secondary point to be made is that, while appointed by a Democratic President, John F. Kennedy, White did not turn out to be the "liberal" voice on the Court that some authorities initially expected. In fact, the ensuing examination of his background and opinions shows that his viewpoint is conservative regarding press freedoms and so rooted in stare decisis as to clearly indicate why the press holds its current legal status.

Mr. Justice White's opinions include the following propositions: (1) reporters are not privileged in matters of offering testimony about criminal activity; (2) newsroom files are not privileged in criminal subpoena situations; and (3) there exists no privilege concept that reporters are privileged from certain legal processes due to the guarantees of the first amendment. See, e.g., Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 Hastings L.J. 709 (1975). The "newsgathering function" is the mode practiced by a reporter in gathering information for his story and is inclusive of unnamed sources and information desired by the reporter to be kept private.

3. Mr. Justice Byron White was appointed to the United States Supreme Court on March 30, 1962, at the age of 44. IV L. FRIEDMAN AND F. ISRAEL, THE JUDGES OF THE UNITED STATES SUPREME COURT 1789-1969, at 2951 (1969) [hereinafter cited as FRIEDMAN AND ISRAEL].

4. Branzburg v. Hayes, 408 U.S. 665 (1972). The Court combined three cases involving reporters who refused to testify before grand juries regarding the divulgence of confidential information. *Id.* at 667. The Court held that it would not create another "privilege against compelled self-incrimination... by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy." *Id.* at 690.

Branzburg was a staff reporter for the *Louisville Courier-Journal*, for which he wrote an article detailing his observations of two residents of Jefferson County, Kentucky, synthesizing hashish from marijuana. The article stated that Branzburg promised not to reveal the two hashish producers' identities. The Kentucky Court of Appeals held that while the state law allows a claim of nondivulgence of informants, it does not apply when testifying as to observations of criminal acts. *Id.* at 669. Branzburg was called again to testify in another instance when he wrote about drug usage; he presented the same argument and the court made the same conclusion. *Id.* at 670.

One of the companion cases of *Branzburg*, *In re Pappas*, involved a reporter who had been allowed inside a building taken over by the Black Panther Party during a confrontation with police. Pappas agreed not to disclose anything he saw inside the hide-out, except anticipation of a police raid. He limited his answers to the court to cover only events occurring outside the building and was held in contempt for refusing to testify on his observations. *Id.* at 675-677.

The other companion case of *Branzburg*, United States v. Caldwell, dealt with the attempts by a federal grand jury to subpoena a *New York Times* reporter to testify and produce notes concerning the aims, purposes and activities of the Black Panther Party as divulged to the reporter by party officials. Reporter Caldwell brought a motion to quash, contending that his working relationships with the Black Panthers would be destroyed and that his first amendment rights would be suppressed. *Id.* at 676. The subpoena was modified to require his appearance only with a qualified privilege to keep his sources confidential; upon Caldwell's refusal to testify he was found in contempt. The court of appeals reversed the contempt order and found a qualified testimonial privilege for news reporters existed under the first amendment. *Id.* at 675-679.

regarding the editorial process of responsible parties when the published material is alleged to be false and damaging.\(^6\)

The response to many of Justice White's opinions has been one of indignation from both the press and politicians.\(^7\) The factors would be required before a search, and that in the case of newspapers, the first amendment requires a clear showing of destruction or removal of the materials sought and the futility of a restraining order. \textit{Id.} at 552-553.

The search of the Stanford Daily office was precipitated by the paper's publication of photographs of the student-police clash at a demonstration at Stanford University Hospital. Nine police officers were injured and hospital administrator's offices were damaged. The Stanford Daily indicated in its special edition on the demonstration that its photographer had been in an area where the assault on the police officers could have been photographed. \textit{Id.} at 550-551.

A search warrant for a search of the paper's offices was issued on a finding of "just, probable and reasonable cause for believing that: Negatives, and photographs and films, evidence material relevant to the identity of the perpetrators of felonies to wit, Battery on a Police Officer, and Assault and Deadly Weapon, will be located [on the premises of the Daily]." The paper's photographic laboratories, filing cabinets, desks and wastepaper baskets were searched but locked drawers and rooms were not opened. \textit{Id.} at 551.

\(^6\) White alludes to the meaning of the term "editorial process" in his majority opinion in Herbert v. Lando, 99 S. Ct. 1635 (1979), where it is described as "thoughts, opinions, and conclusions with respect to the material gathered by [respondent-editor Lando] and about his conversation with his editorial colleagues." \textit{Id.} at 1639 n.2, 1640.

\(^7\) \textit{Id.} at 1645. Petitioner Herbert had accused his superiors in the military of covering up reports of atrocities and war crimes during the Vietnam War. Respondent Lando produced a program on petitioner's allegations, which was broadcast by the Columbia Broadcasting System, which was later published into a related article for \textit{Atlantic Monthly} magazine. Petitioner sued for the false and malicious portrayal and damages for injury to his reputation and to the literary value of his newly published book on his experiences. \textit{Id.} at 1638-1639.

\(^8\) The reaction to Zurcher v. Stanford Daily indicates the concern being evoked by the seemingly restrictive holdings of the White opinions. The \textit{Los Angeles Times} reported Zurcher as "a major setback for news organizations." L.A. Times, June 1, 1978, \S\ 1, at 1, col. 3. \textit{Washington Post} managing editor Benjamin Bradlee contended that the Zurcher holding would have enabled the federal government to forestall publication of the Pentagon Papers and harass the \textit{Washington Post}'s Watergate investigation by seizing materials and putting newsrooms in a state of siege. \textit{Comment}, 1978 COLUM. JOURNALISM REV. 22.

Nationally syndicated \textit{New York Times} columnist James Reston wrote an open letter to White, stating:

The troubling thing to us in the press is what may now happen as a result of this . . . decision . . . . It is not really that you have said that the press is the same as everybody else, but that you have said also that our efforts to get at the truth, in private conversations, are subject to government inquiry on demand by government officials.

\textit{Cznerniejewski, Your Newsroom May be Searched}, Quill, July-August 1978, 24, col. 2 [hereinafter cited as \textit{Cznerniejewski}].

On the political front, several bills were proposed in the United States Congress. Rep. Robert Drinan (D-Mass.) asked the Congress to require that news organizations be given a chance to contest a planned search unless there was probable
that have caused the White opinions to be contrary to those of some politicians and much of the press are the subject matter of this comment.

II. PERSONAL CREDENTIALS

Byron White was appointed to the United States Supreme Court in 1962, after serving for almost two years as Deputy United States Attorney General under Robert F. Kennedy. White's life has been punctuated with various noteworthy achievements throughout his academic, athletic and legal ventures. Accordingly, the New York Times hailed his appointment by calling him "one of those increasingly rare specimens who prove that the Greek and Renaissance ideal of the well-rounded man has validity in the twentieth century."

It is useful to examine the achievements, which have contributed to this Renaissance image, as they are a manifestation of White's great determination to be the best in every traditional sense of the word. As one will see later in this comment, White is similarly determined to adhere to a traditional stance in his views regarding the press. White was in fact well-rounded; he received the following honors while an undergraduate student at the University of Colorado: class valedictorian, Phi Beta Kappa and All-American football player. He went on to become a Rhodes Scholar at Oxford University, England. White cut short his Rhodes Scholarship to play professional football for the National Football League, where in his first year he drew the highest rookie salary and led the league in rushing. Following these accomplishments, he was admitted to the Yale Law School. At Yale, White had the highest freshman grade point average and was selected to serve on the law journal. White turned down the law journal and left Yale to play another season of profes-

10. FRIEDMAN AND ISRAEL, supra note 3, at 2951, 2953. White was paid $15,000 for his first season, during which he led the league with 567 yards in rushing while playing for the Pittsburgh Steelers. "No other rookie had ever before led the league in any department, and White did it with the last place team." Id.
11. Id.
sional football, followed by a tour of duty as a naval intelligence officer in the South Pacific during World War II.

White became acquainted with John F. Kennedy whom he had met while at Oxford; Kennedy's father was then the American Ambassador to Great Britain. Later during World War II, it was White who wrote the intelligence report on Naval Lt. (j.g.) Kennedy's salvage of crewmembers on PT-109. Upon returning to Yale after his military service, White was graduated magna cum laude and awarded a judicial clerkship with United States Supreme Court Chief Justice Fred M. Vinson. It was in Washington where White crossed paths with John F. Kennedy a third time, as then-Congressman Kennedy had offices across the street from the Supreme Court. After clerking for the Chief Justice, White declined offers from Washington, D.C.'s most prestigious firms because they could not guarantee him a law firm partnership in three years, and instead moved back to Colorado where he spent fourteen years in private practice.

Byron R. White and John F. Kennedy were again brought together by events, after Kennedy declared himself a candidate for President of the United States. Concluding that Kennedy was "cool and courageous under fire [and was] ... a pretty solid sort of person," White organized Colorado attorneys and Colorado's national convention delegates for Kennedy and headed up the Citizens for Kennedy national volunteer group.

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12. Id. White played the 1940-41 season with the Detroit Lions and made up his missed Yale classes at the University of Colorado summer session. He was convinced his legal education would be inevitably interrupted by the draft.

13. FRIEDMAN AND ISRAEL, supra note 3, at 2953. White reminisced:

   It's hard to say that you had a good time in the war but, on the other hand, you couldn't say it was dull or purposeless. It's an experience I'd just as soon not have had but, having had it, I have to admit it was a very great experience.


15. N.Y. Times, note 14 supra.

16. FRIEDMAN AND ISRAEL, supra note 3, at 2954.

17. Id. at 2954.

18. Id. at 2954, 2955. "One day in the summer of 1959 while I was driving back from an A.A.U. track meet in Boulder [Colorado]," recalled White, "I got to thinking about the coming presidential campaign... I began to feel that Jack Kennedy would be my preference." Acting upon that preference, White proceeded to enlist a group of lawyers into a Colorado Committee for Kennedy. Id. at 2954. Later, as an organizer of Colorado delegates attending the national convention, White was able to deliver to Kennedy thirteen and one-half out of twenty-one Col-
III. THE WHITE STYLE

After Kennedy was elected President, he appointed White to the position of Deputy Attorney General. Upon his appointment, White commented that he "didn't get into the campaign with the idea of getting a job." Indeed, through his actions White would soon illustrate that his being a Kennedy supporter did not mean he shared the approach or same style as the Kennedys. A glimpse of his actions while at the Justice Department serves as an examination of White's working style and as support for the idea that his style and attitude differed. White, instead, is seen as having a very classic legal approach as contrasted with an informal, results-oriented approach on the part of the Kennedys; the same schism will be shown in this comment to have formed between White and his dissenters regarding freedom of the press. For example, White's insistence on procedure contrasted with the style of Attorney General Robert F. Kennedy:

Edwin Siberling of the Organized Crime Section recalls sitting in on a conference between Deputy Byron White and [Attorney General Robert] Kennedy. After White had started to outline the technical grounds of an issue that could go either way, Kennedy waved his hand after a couple of minutes and said, 'Give me a yes or no.'

White was characterized by another Justice Department associate accordingly: "I remember Whizzer White used to sit on the window seat with his feet up and not say very much except to bring the discussion back to point."

Another example of White's differing attitude from the Kennedys delegate votes at the 1960 Democratic Party Convention. Id. Campaign manager Robert Kennedy asked White to head Citizens for Kennedy after the national convention. This was a network of volunteer groups whose efforts were coordinated wherever possible with the local political clubs. Id. at 2955. Robert Kennedy was so impressed with White's work that he wanted White to be appointed chairman of the Democratic National Committee, which Presidential Assistant Kenneth O'Donnell termed a display of "naivete... that was downright astonishing." A.M. SCHLESINGER, JR., ROBERT KENNEDY AND HIS TIMES 212 (1978) [hereinafter cited as SCHLESINGER].

19. It was Robert Kennedy who asked his brother, the President-elect, to name White as Deputy Attorney General. White was nominated to the post on December 16, 1960. FRIEDMAN AND ISRAEL, supra note 3, at 2955.

20. FRIEDMAN AND ISRAEL, supra note 3, at 2955.

21. V. NAVASKY, KENNEDY JUSTICE 281 (1971) [hereinafter cited as NAVASKY]. White's replacement as Deputy Attorney General, Nicholas Katzenbach who was later appointed as Attorney General after Robert Kennedy's resignation in 1964, recalled that Robert Kennedy "never went through what the law was. You'd come to him and say here's a real close one and he'd decide — but not on legal grounds." Id.

22. N.Y. Times, note 14 supra.

23. NAVASKY, supra note 21, at 47.
nedys was in the area of perceiving opportunities for achievement. In discussing possible appointees to replace retiring Justice Whittaker, Robert Kennedy remarked, “Do you really think Byron wants to go on the Court?” It “was not quite believable to Kennedy that White would prefer a job on the U.S. Supreme Court to the number-two job in the Justice Department where, according to the Attorney General's way of thinking, the real action was.”

Byron White was directly involved with most of this real action while at the Justice Department; perhaps he was involved to a greater degree than most deputy attorneys general because the Attorney General was frequently busy advising his brother the President on various affairs of state. For example, Robert Kennedy's Justice Department associates were told to report to White during the Cuban missile crisis. Victor S. Navasky, author of a critique on Kennedy's tenure at the Justice Department, characterizes White as both a “tough-minded proceduralist” and an administrator “who had a remarkable ability for reconciling the competing claims of the various Justice Department principalities.” The White style of mixing tough proceduralism while reconciling competing claims resurfaces in his opinions on the freedom of the press, wherein he tries to reassure the press of its preeminent freedoms while driving home his points regarding the lack of press privilege.

White's particular skills were applied to a number of difficult issues, among them directing the force of 500 federal marshals sent to Alabama to protect Martin Luther King during sit-in demonstrations. Another assigned task was supervising all federal

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24. Id. at 255. Katzenbach told Kennedy “I can understand why you don't want to let Byron go,” explaining later that “I knew this would offend Bobby [Kennedy] but I think it was fairly instrumental in helping to persuade him.” Id. Kennedy's response to Katzenbach was “I'm not going to stand in Byron's way. I can handle the Justice Department without Byron.” SCHLESINGER, supra note 18, at 378.

25. NAVASKY, supra note 21, at 255; see also SCHLESINGER, supra note 18, at 378.

26. SCHLESINGER, supra note 18, at 446.

27. Id.

28. NAVASKY, supra note 21, at 54.

29. Id. at 58.

30. See notes 158-162 infra, and accompanying text.

31. SCHLESINGER, supra note 18, at 297. For details as to the Birmingham, Alabama, operation, see id. at 295-303. White recalls:

There was an issue at this time in my own mind which I took up with the
judge selection, which involved directing over 1,000 investigative reports. Supreme Court biographers Leon Friedman and Fred L. Israel wrote that White's role as judge selector was perhaps his most notable achievement while deputy attorney general; the New York Times remarked that White had "been criticized for approving some Southerners whose devotion to equal rights [had] turned out to be distinctly limited."

White voiced his thoughts on the judicial selection process and also on the frustrations of working at the Justice Department which, while off the main point of this comment, serve to illuminate a more complete picture of Byron White's personality. Regarding judicial selection, White told the American Bar Association House of Delegates that "[t]here is nothing odious about the preference for Democrats. Picking judges is a political process in the best sense of those words." Regarding the frustrations of working at the Justice Department, White once told a colleague as he viewed the Department building, "You know, we have about as much chance of changing that place as you and I do of walking up to it, putting our shoulders against the building and moving it." Yet White could also remark, "It's nothing to come to an important job in government and be smart. The key is what you spend your time on."

Attorney General and that was this: The Department is, among other things, a law enforcement agency and speaking for law and order is to speak for a very strong position but when you mix law enforcement with other things not necessarily related to it, you get law enforcement mixed up with other things. I had thought that the Administration ought to locate the primary leadership in the civil rights fight outside the Department of Justice. I thought it should be located either in the White House or a separate agency so that initiative, aggressive action, education, persuasion should emanate from a different source than the Department of Justice. . . .

NAVASKY, supra note 21, at 161. This attitude of keeping a pure approach in speaking for law and order is echoed in his law clerk's comments on Whites division of personal morals and judicial reasoning. See notes 187-192 infra.

32. NAVASKY, supra note 21, at 254. Navasky characterizes the federal judicial selection process under White as an "improvisatory style [which] was in marked contrast to the more routinized approach of their Republican predecessors, who had themselves delegated more of the judicial selection process to the ABA." Id.

33. FRIEDMAN AND ISRAEL, supra note 3, at 2955.
34. N.Y. Times, Oct. 8, 1972, (Magazine), at 95.
35. NAVASKY, supra note 21, at 256.
36. Id. at 48. White had addressed the remark to Ramsey Clark, who would be appointed Attorney General under President Lyndon B. Johnson and whose father was Supreme Court Associate Justice Tom Clark. At that time, Ramsey Clark was the Assistant Attorney General in charge of the Lands and Natural Resources Division. Id. The frustrations of working at the Justice Department hit White in a physical sense when early in his tenure he suffered from a duodenal ulcer. Id. at 254.
37. Id. at 439.
When Byron White was nominated to the Supreme Court, an assessment was made on what White had spent his time in order to predict what kind of a justice he would be. One area of speculation was on White's position on governmental interference with individual activities. In 1962, the New York Times predicted that White was to be on one side, yet a Times columnist sixteen years later would picture White on the opposite side. The initial Times position, in addition to its portrayal of White as having a Renaissance image, was that while White refused to give himself a conservative or liberal label, "a swift survey of those who knew him well brought a consensus that he would probably wind-up more freely against Government restraints on the individual." Yet in 1978, Times syndicated columnist James Reston charged in an open letter to Mr. Justice White regarding White's majority opinion in Zurcher v. Stanford Daily that White had said that the press's "efforts to get at the truth, in private conversations, are subject to government inquiry on demand by government officials."

Any thoughts of White reflecting the Kennedy and therefore
liberal ideology were dealt a severe blow by his first opinion, a dissent delivered in *Robinson v. California*, which reportedly "attracted wide attention because its conservative tinge approached the judicial thinking of retired Justice Whittaker." White disagreed from the majority holding that stated narcotics addiction is an illness that should not be given criminal offense designation because such a classification constituted cruel and unusual punishment. Instead, White stated:

I deem this application of 'cruel and unusual punishment' so novel that I suspect the Court was hard put to find a way to ascribe to the Framers of the Constitution the result reached today rather than to its own notions of ordered liberty.

Thus, the theme of "the Framers of the Constitution" was used by White in writing his first Supreme Court opinion and would play a recurring role in the coming decade when he wrote his opinions regarding press freedoms.

Another early White dissent struck upon a theme used in his opinions on the press — that of protecting the criminal investigation process. In *Escobedo v. Illinois*, the majority's extension of right to counsel to preliminary police investigations was rejected by White because "law enforcement will be crippled and its task made a great deal more difficult."

Consequently, the first opinions of Associate Justice Byron White established a preference for conservative themes in his opinions regarding freedom of the press. The origin of his views on press freedom is anchored in portions of early case law regarding the press, supporting a characterization of White as a traditionalist in this area. Accordingly, a discussion of this historical foundation of freedom of the press is in order.

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43. 370 U.S. 660, 685 (1962).
44. FRIEDMAN AND ISRAEL, supra note 3, at 2956. For a biography of Justice Whittaker, who was appointed by Eisenhower, see id. at 2893-2918.
45. 370 U.S. at 685, 686.
46. Id. at 689.
47. See notes 61-69 infra.
48. See generally notes 93-102, 121-25, 131, 133 infra, and accompanying text.
50. Id. at 492.
51. Id. at 499. White continues:
When the accused has not been informed of his rights at all the Court characteristically and properly looks very closely at the surrounding circumstances. . . . I would continue to do so. But in this case Danny Escobedo knew full well that he did not have to answer and knew full well that his lawyer had advised him not to answer.

*Id.* (citations omitted).
IV. HISTORICAL FOUNDATION OF THE FIRST AMENDMENT

A. Colonial Law

In dealing with the issue of freedom of the press, Mr. Justice White set forth his view as to its origins. He has stated that freedom of the press, as envisioned by the Founding Fathers, was a remedy for stifling and punishment of colonists’ criticisms of the Crown and its agents.52

Pre-revolutionary American history is dotted with such instances of suppression of the press. In 1690, America’s first newspaper was suppressed by the Massachusetts government, which declared not only that publication would be suppressed but that no future publications could be set forth by anyone without first obtaining a license or governmental appointment.53 Speech and press were traditionally subject to controls in England, where “[a]s early as 1275, English law prevented the telling of ‘any false news or tales whereby discord or occasion of discord or slander may grow between the king and his people or the great men of the realm.’”54 In 1692, a conviction in Philadelphia for “Publishing, Uttering, & Spreading a Malitious [sic] and Seditious paper... Tending to the Disturbance of the Peace and Subversion of the present Government” was the first time that the use of a jury in libel cases was advocated on the grounds that it was required by the Magna Charta.55

In Massachusetts in the early 1720s, James Franklin published the first paper to survive in America without official sanction.56 The paper led the first newspaper crusade in American history, and for his efforts James Franklin was twice thrown into prison

52. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 259. “[A] major purpose of that Amendment was to protect the free discussion of governmental affairs... Thus the press serves and was designed to serve as a powerful antidote to any abuse of power by governmental officials...” Id. at 260 (citing Mills v. Alabama, 384 U.S. 214, 218-219 (1966)).


54. Id. at 203.

55. Id.

56. Id. at 203-204.

57. This paper was entitled The New England Courant, in which James Franklin’s brother Benjamin published his “Silence Dogood” essays. The elder Franklin was jailed for failing to divulge the name of the author of a comment on the government’s efforts to fight piracy and escaped an arrest warrant for a second contempt charge. Id. at 204.
for refusal to identify sources. Perhaps the most well-known of the colonial press was that of Peter Zenger, who as publisher of America's first opposition party newspaper, surprised many because he was acquitted after prominent attorney Andrew Hamilton argued that a libel was not actionable if true.

After the revolution, the principles brought out in the libel case of Peter Zenger were slowly adopted state by state, but the first amendment neither repealed seditious libel charges nor applied to the states until 1925.

Justice White's dissent in *Gertz v. Robert Welch, Inc.* points out that ten of the fourteen states ratifying the Constitution by 1792 provided constitutional guarantees for free expression, but that thirteen of the fourteen also provided for the prosecution of libels. White also remarked that the fact that there was sharp curtailment of freedom of the press in colonial America is "contrary to some popular notions." Convinced that *Gertz* is illustrative of a weakening of the colonial laws on libel, White asserts that "[s]cant, if any, evidence exists that the First Amendment was intended to abolish the common law of libel. . . ." Variations on the theme of viewing the Founding Fathers as promoters of restricted press freedoms exist in several cases. In *Zurcher*, Justice White states that contrary to assertions of privilege by press interests, the Framers did not forbid warrants or require subpoenas where the press was concerned; neither did they insist on special treatment of the owner of searched premises if he was a member of the press. White's majority opinion in *Herbert v. Lando* reiterates that the framers had no intention of abolishing defamation liability.

58. *Id.*
59. The *New-York Weekly Journal* was the paper printed by Zenger, and it was only two months old when the colonial governor had Zenger arrested after failing twice to get grand jury indictments. The paper was published while Zenger spent eight months in jail, and he "never revealed the names of his editors, writers, or sources." *Id.* at 205.
60. See *Gitlow v. New York*, 268 U.S. 652 (1925). This case used the fourteenth amendment through "selective incorporation" to apply the first amendment to the states as well as the federal government.
63. 418 U.S. at 381.
64. 436 U.S. at 565. "Aware of the long struggle between the Crown and the press and desiring to curb unjustified official intrusions, the Framers took the enormously important step of subjecting searches to the test of reasonableness and to the general rule requiring search warrants issued by neutral magistrates." *Id.*
65. See notes 6 and 7 *supra*.
66. 99 S. Ct. at 1640.
In *Gertz*, Justice White promotes the Blackstone formula preserving free speech: protection is limited to prevention of prior restraint, with publisher liability allowed for injurious publication. He cites specific Founding Fathers' preferences: Benjamin Franklin and John Adams favored limiting freedom of the press to truthful statements; James Wilson suggested a restatement of the Blackstone standard; Thomas Jefferson wanted to allow anything but falsity injuriously affecting the life, liberty or reputation of others. Thus, White is contending that modern differences from common law stand not to preserve freedom of the press as its function grows more complex, but rather that they weaken our entire system of justice through creating a privileged class where none was meant to exist.

**B. Modern Development of Newsman's Privilege**

The present-day area of discussion involving freedom of the press differs from the areas covered by common-law, namely, newsman's privilege. In the *Branzburg v. Hayes* majority opinion, White relies again on the common law to show that there is no history of newsman's privilege. Accordingly, there is Justice White on one side arguing that any area not covered by the common law cases does not follow under the purview of freedom of the press; on the other side there is the argument that since the Framers and early cases did not deal with new areas, it is therefore necessary to have these new areas covered by the first amendment as a logical extension of its protections. Examples of this legal struggle are contained in the documentation of newsman's privilege cases in the lower courts preceding the relevant opinions of Mr. Justice White.

The first amendment's protection against compelling testimony from the press was not even an issue in reported cases until the

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67. 418 U.S. at 381 n. 14. “Prior restraint” refers to preventing publication or restraining the publisher prior to publication. White's usage of common law in *Gertz* implies “injurious publication” to be such things as defamation or obscenity. *Id.* at 381-383.
68. *Id.* at 383-384.
69. “The First Amendment was intended to guarantee free expression, not to create a privileged industry.” *Id.* at 389 (citing Commission on Freedom of the Press, *A Free and Responsible Press*. 130, 181 (1947)).
70. Note 4 supra.
71. *Id.* at 685-686.
72. Descriptions of the role of the press are found in Lovell v. Griffin, 303 U.S. 444, 450 (1938), where the Court states “[t]he press in its historic connotation com-
Court of Appeals for the Second Circuit decided *Garland v. Torre* in 1958. In *Garland*, a newspaper columnist was cited for contempt in a libel suit for refusing to name her source for unattributed, published statements. In subsequent state court opinions, the concept of newsman's privilege was repeatedly rejected by the courts; in several of these cases the United States Supreme Court also denied certiorari. From the Hawaii Supreme Court, *In re Goodfader's Appeal* held that a newsman's refusal to reveal a source was outweighed by the need to obtain relevant evidence. From the Pennsylvania Supreme Court, *In re Taylor* held that the first amendment contains no privilege of non-disclosure to prevent complying with a grand jury subpoena duces tecum. The Oregon high court, in *State v. Buchanan*, held that a campus newspaper reporter was in contempt for refusing to reveal the identities of students interviewed regarding marijuana usage. In *State v. Knops*, the Wisconsin high court held that an underground newspaper reporter's claim of privilege regarding sources knowledgeable about campus crimes was outweighed by the public's overriding need to know the identity of criminals at large.

prehends every sort of publication which affords a vehicle of information and opinion," *id.* at 452, and *Branzburg v. Hayes*, 408 U.S. 665 (1972), where the Court states "[t]he informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists." *Id.* at 705.

73. 259 F.2d 545 (2d Cir. 1958), cert. denied, 358 U.S. 910 (1958). The suit was brought by entertainer Judy Garland for the publication of unkind remarks attributed to an unnamed network executive by columnist Marie Torre in the *New York Herald Tribune*.

74. 259 F.2d at 547, 551.

75. Certiorari was denied in both *Garland*, see note 73 supra, and in *State v. Buchanan*, see note 80 infra.


77. *Id.* at 344, 367 P.2d at 487. The public employee was suing three civil service commissioners for reinstatement to her position as the commission's personnel director. Her allegation was supported by testimony of Goodfader, a reporter. The dismissal was deemed improper and based on improper motives.


79. *Id.* at 39, 193 A.2d at 184, 186. The *Philadelphia Bulletin* had printed the name of the source of a story purporting to reveal the substance of a grand jury investigation. The grand jury ordered the *Bulletin* to produce the documents subject to a subpoena duces tecum, and the *Bulletin* responded with a first amendment privilege argument. While the Pennsylvania Supreme Court did not agree with the first amendment interpretation, it held that a state statute creating a privilege of non-disclosure applied.

80. 250 Or. 244, 436 P.2d 729 (1968), cert. denied, 392 U.S. 905 (1968).

81. *Id.* at 251, 436 P.2d at 732. "Freedom of the press is a right which belongs to the public, it is not the private reserve of those who possess the implements of publishing." *Id.* at 248, 436 P.2d at 731.

82. 49 Wis.2d 647, 183 N.W.2d 93 (1971).

83. *Id.* at 659, 183 N.W.2d at 99. The article was entitled *The Bombers Tell Why and What Next—Exclusive to Kaleidoscope*, and printed on the front page.
The issue of newsman's privilege finally reached the United States Supreme Court in 1972, when Mr. Justice White's *Branzburg* opinion ruled on whether the first amendment protects newsmen from testifying about their confidential sources and information.\(^8\) Combining three cases involving reporters who refused to testify before grand juries regarding the divulgence of confidential information,\(^9\) White wrote for the majority that the Court would not create another "privilege against compelled self-incrimination . . . by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy."\(^10\)

Thus, in the first amendment cases from *Garland* through *Branzburg*, the idea of an absolute privilege vested in members of the press had been rejected.\(^11\)

V. THE WHITE OPINIONS: A SURVEY

In *New York Times v. United States*,\(^12\) White wrote a concurring opinion to the majority's *per curiam* ruling that the United States had not met the burden of proof for showing justification of enforcing a prior restraint of publishing classified material in the *New York Times* and the *Washington Post*.\(^13\) White agreed that the danger of allowing prior restraint was that a sweeping potential for limiting publication would be created, this potential being contradictory to the extraordinary protection against prior restraints granted by our constitutional system.\(^14\) However, White noted that the first amendment would not prevent prior restraint of publishing government plans or operations in all circumstances.\(^15\) He drew an analogy by noting that if "the Government

Knops testified that he had some information, but that he did not have to divulge it on the basis of the first amendment. *Id.* at 649, 183 N.W.2d at 94.

84. 408 U.S. 665 (1972).
85. *Id.* at 667.
86. *Id.* at 690.
87. *But see id.* at 714 (dissenting opinion; Douglas, J.). Mr. Justice Douglas favored the absolute privilege of the press, "regardless of how suspect or strange [individual opinions and beliefs] may appear to others." *Id.*
88. 403 U.S. 713 (1971). This case is better known as the Pentagon Papers case, in which the United States had brought suit to enjoin publication of what it considered to be classified material in the *New York Times* and *Washington Post*.
89. *Id.* at 714.
90. *Id.* at 730-732.
91. *Id.* at 731, n. 1 (National Labor Relations Board powers, 29 U.S.C. § 160(c), and Federal Trade Commission powers, 15 U.S.C. § 45(b), allow the imposition of "cease and desist" orders having the effect of prior restraint).
mistakenly chose to proceed by injunction," it would not necessarily prevent obtaining a criminal conviction.92

White's most lengthy, detailed and revealing majority opinion addressing freedom of the press is in *Branzburg v. Hayes*.93 He wrote that requiring newsmen to appear and testify before grand juries does not abridge the first amendment guarantee of freedom of speech and press.94 White asserted that the obligation to answer grand jury subpoenas was of such paramount importance so as to make restriction of the press a non-issue.95 He observed that the lack of newsmen's privilege from appearing before grand juries did not create an intrusion upon press freedoms, or constitute a command as to what to publish.96 Thus, White rejected the claim that the need to keep the function of newsgathering unburdened should out-weigh the interest of a grand jury in obtaining information not disclosed by reporters.97 The press, White declared, is like any other citizen who had an obligation to answer such subpoenas.98 He found the traditional investigatory role of the grand jury to require press compliance with subpoena orders,99 and he found the claims of the press without merit,100 and unsupported by precedent.101 White again used his method of

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92. Id. at 736-737.
94. Id. at 708.
95. Id. at 682.
96. Id. at 681, 682. "The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request." Id.
97. Id.
98. Id. at 690-691. See also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 702 (1974).
99. 408 U.S. at 696-697. "[T]he ancient role of the grand jury . . . has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions." Id.
100. Id. at 702-704. "If newsmen's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory approach to the problem." Id. at 702. Justice White continues that the destination of such a journey is uncertain, and the administration of newsmen's privilege would present "practical and conceptual difficulties of a high order." Id. at 703, 704. White also stated that the frequency of informant deterrence due to grand jury testimony by newsmen is "unclear," and evidence fails to demonstrate . . . significant constriction of the flow of news . . . . Evidence of the inhibiting effect of such subpoenas . . . are speculative . . . . [W]e cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future.

Id. at 693-695.
101. Id. at 685-687.

It is thus not surprising that the great weight of authority is that newsmen
traditionalism to justify opposition to the claims of those supportive of newsman's privilege.

In 1974, White wrote a concurring opinion in *Miami Herald Publishing Co. v. Tornillo*¹⁰² and a dissenting opinion in *Gertz v. Robert Welch, Inc.*¹⁰³ Although *Miami Herald* was decided before *Gertz*, *Gertz* shall be discussed first as its outcome has a direct correlation to White's *Miami Herald* opinion.

The *Gertz* majority opinion instigated White's lengthiest and most forcefully argued dissent regarding rights of the media. The *Gertz* majority held the states could set higher standards of proof for defamation of private persons, and neither compensation could be allowed unless actual injury was shown nor could punitive damages be allowed unless knowledge of falsity of reckless disregard of the truth was shown.¹⁰⁴ For thirty-five pages, White decries the creation of standards beyond mere causation of hatred, contempt and ridicule in order to allow for compensation of private individuals in defamation cases.¹⁰⁵ For support, White cited precedent dating back to the "very founding of our nation,"¹⁰⁶ Blackstone and the Founding Fathers,¹⁰⁷ *New York Times*

are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation. At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury. See, e.g., *Ex parte Lawrence*, 116 Cal. 298, 48 P. 124 (1897); *Plunkett v. Hamilton*, 136 Ga. 72, 70 S.E. 781 (1911); *Clein v. State*, 52 So.2d 117 (Fla. 1950); *In re Grunow*, 84 N.J.L. 235, 85 A. 1011 (1913); *People ex rel. Mooney v. Sheriff*, 269 N.Y. 291, 199 N.E. 415 (1936); *Joslyn v. People*, 67 Colo. 297, 184 P. 375 (1919); *Adams v. Associated Press*, 46 F.R.D. 416 (Mass. 1957).

*Id.* The first time an argument regarding newsman's privilege to refuse a subpoena for confidential information was presented (and was rejected) was in *Garland v. Torre*, 259 F.2d 545 (1958), *cert. denied*, 358 U.S. 910 (1958). See note 73 *supra.*

¹⁰². 418 U.S. 241 (1974). Appellee Tornillo sought to have his replies to editorials critical of his candidacy printed, based on an argument asserting a right to equal time pursuant to Florida law.

¹⁰³. 418 U.S. 323, 369 (1974). See notes 61-63, 68, 69 *supra.* Petitioner sued respondent for defamation for carrying articles in a John Birch Society magazine which stated that petitioner's representation of the family of the decedent who was killed by a police officer was a Communist inspired frame-up of the officer. *Id.* at 325-326.

¹⁰⁴. *Id.* at 348-350.

¹⁰⁵. *See id.* at 369-370.

¹⁰⁶. *Id.* at 369.

¹⁰⁷. *Id.* at 381-383. White states that while Founding Fathers Benjamin Franklin, John Adams, William Cushing, James Wilson and Thomas Jefferson did not hold identical views on freedom of the press; none favored an absolute and privileged status. *Id.*
opinions of the famed first amendment absolutist Mr. Justice William O. Douglas, the vigor and robustness of the press, and his own belief that the majority "points to absolutely no empirical evidence to substantiate its premise."

Miami Herald held a Florida "right of reply" statute which granted political candidates equal and free space to answer editorial criticisms unconstitutional. White uses his concurring opinion to point out where he draws the line in protection of media interests. While he finds the Miami Herald majority to be correct in its holding that newspapers cannot be forced to print answers to his criticisms of politicians, he would not go so far as to approve the Gertz majority's raising of the standards of proof for defamation of private persons. In this context, White remarked:

The press is the servant, not the master, of the citizenry, and its freedom does not carry with it an unrestricted hunting license to prey on the ordinary citizen. . . . To me it is a near absurdity . . . to leave the people at the complete mercy of the press . . . when the press . . . is steadily becoming more powerful and much less likely to be deterred by threats of libel suits.

White had the opportunity to reiterate his opposition to Gertz in his dissent in Time, Inc. v. Firestone. Firestone was another defamation case, which held that respondent was not a public figure and thus should fall under the Gertz rather than New York Times v. Sullivan standard. White argued that the lower court award of compensation for defamation should be upheld because

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108. Id. at 387.
109. Id. at 387. Justice White quotes Justice Douglas as stating, "Simply put, the First Amendment did not confer a license to defame the citizen," id., and that our "system cannot flourish if regimentation takes hold." Id. at 387, 402 (citing Public Util. Comm'n v. Pollack, 343 U.S. 451, 469 (1952) (dissenting opinion; Douglas, J.).
110. Id. at 390-391. I doubt that jurisprudential resistance to liability without fault is sufficient ground for employing the first amendment to revolutionize the law of libel, and in my view, that body of legal rules poses no realistic threat to the press and its service to the public. The press today is vigorous and robust. To me, it is quite incredible to suggest that threats of libel suits from private citizens are causing the press to refrain from publishing the truth. Id. at 390.
111. Id. at 397.
112. Miami Herald Publishing Co. v. Tornillo, 418 U.S. at 258. The Court held "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials . . . constitute the exercise of editorial control and judgment." Id. at 262.
113. Id. at 263.
114. 424 U.S. 447 (1976). Respondent Mrs. Firestone brought suit for defamation against petitioner Time, Inc., because Time alleged Mrs. Firestone was being divorced on grounds of extreme cruelty and adultery. Id. at 449-452.
115. Id. at 461-464.
it predated the Gertz requirement of proof of injury.\textsuperscript{117} Further, White stated that the Gertz rationale of excusing innocent falsehood so as to protect "speech that matters" was not applicable here.\textsuperscript{118} The application of the Gertz standards, White stated, will not further first amendment values in any way.\textsuperscript{119} Thus, we see a common thread of reasoning in Gertz, Miami Herald and Firestone: White believed that the real first amendment issues, as based on the common law viewpoint on defamation, were being injured by the creation of new defamation standards which seek to give further protection to the press. The emerging picture of White's concept of the first amendment was a preservation of colonial remedies not to be tampered with, rather than a protective standard which could be more specifically delineated whenever times dictate new or more complex dangers facing the function of newsgathering.

Speaking again for the majority in Zurcher v. Stanford Daily,\textsuperscript{120} White declared that where a newspaper office is believed to house photographs of persons suspected of committing criminal acts, the non-suspect status of a newspaper office does not prevent it from being searched for the photographs as seizable evidence via a warrant issued upon probable cause.\textsuperscript{121} In Zurcher, White dismissed the notion of it being a first amendment case, instead stating the issue to be "how the Fourth Amendment is to be construed and applied to the third party search."\textsuperscript{122} He stated that the element of probable cause, rather than the fact that the affected party was a newspaper, was the critical factor in the search of the Stanford Daily offices.\textsuperscript{123} White only considers the

\textsuperscript{117} Id. at 482-483. "Therefore, to require proof of fault in this case—or in any other case predating Gertz and Rosenbloom in which a private figure is defamed—is to interfere with the State's otherwise legitimate policy of compensating defamation victims without furthering First Amendment goals \textit{in any way at all} (emphasis in original)." Id. at 483.

\textsuperscript{118} Id. at 482. "Speech that matters" is a term taken from the Gertz majority which stated "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." 418 U.S. at 341.

\textsuperscript{119} Id. at 481, 483.

\textsuperscript{120} 436 U.S. 547 (1978).

\textsuperscript{121} Id. at 563, 567. "[W]e decline to reinterpret the Amendment to impose a general constitutional barrier against warrants to search newspaper premises, to require resort to subpoenas as a general rule, or to demand prior notice and hearing in connection with the issuance of search warrants." Id. at 567.

\textsuperscript{122} Id. at 553.

\textsuperscript{123} Id. at 554-555.

[I]n criminal investigations, a warrant to search for recoverable items is
first amendment in the context of clearly seeing the warrant for newsroom materials to be nonthreatening to first amendment freedoms, thus allowing him to view it as a pure search and seizure case. This position parallels another part of his Zurcher opinion, which in essence declares that compelling a reporter's compliance with a grand jury subpoena also poses no threat. "Prior cases," White states, "do no more than insist that the courts apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by the search." White is thus unwilling to go beyond this acknowledgment to label the media a privileged class.

Finally, Justice White's most recent media-oriented majority opinion was in Herbert v. Lando. In Herbert, White's opinion stated that a plaintiff could inquire into the editorial processes of those responsible for a publication allegedly circulating damaging falsehoods, when the inquiry would produce evidence material to the proof of a critical element of one's cause of action. White stated that previous defamation cases were conditioned upon "specified showing of culpable conduct by those who publish damaging falsehood," and that "[g]iven the required proof [.,] . . . damages liability for defamation abridges neither freedom of speech nor freedom of the press." In fact, White stated, the very requirement of showing malice requires an examination of the editorial process and this examination is justified by common law before New York Times v. Sullivan as well as beyond. However, White once again reached into common law to justify his position. But unlike previous opinions when invoking common law was used as a basis for resisting any further expansion of press freedoms and protections, White's claim in Herbert was that the common law allowed him to define the "examination of the editorial process" standard. White once again rejected the claim that his holding would threaten the suppression of information by stating that truthful information would not be threatened.
when the examination was for the purposes of proving the necessary awareness of probable falsehood.\textsuperscript{129} The common thread in \textit{Zurcher} and \textit{Herbert} was White's desire to promote proper procedure. This was evidenced by White's justifying the \textit{Zurcher} holding on fourth amendment grounds and the \textit{Herbert} holding with his common law perception of defamation standards.

\section*{VI. Recurring Themes}

\subsection*{A. The Balancing with Classic Legal Concepts}

A noteworthy consistency in White's opinions is that when he has defined the role of the press in terms of obligation to the public interest, he then discusses a balancing between press and a variety of classic legal concepts. Most frequently, his historically based analysis lends itself to the conclusion that the classic legal concepts prevail over his perception of the claims of the press. This observation is evidenced by the sustaining of the "ancient role of the grand jury" in \textit{Branzburg},\textsuperscript{130} the sustaining of "the average citizen's chance for vindication" in \textit{Miami Herald},\textsuperscript{131} the defending of the "classic view" of defamation in \textit{Gertz},\textsuperscript{132} the sustaining of the search warrant as an essential tool of criminal investigation in \textit{Zurcher},\textsuperscript{133} and the preserving of the individual's

\textsuperscript{129} \textit{Id.} at 1648.

This is not to say that the editorial discussions or exchanges have no constitutional protection from casual inquiry. There is no law that subjects the editorial process to private or official examination merely to satisfy curiosity or to serve some general end such as the public interest; and if there were, it would not survive constitutional scrutiny as the First Amendment is presently construed.

\textit{Id.}

\textsuperscript{130} 408 U.S. 665, 687 n.23, 688 (1972).


\textsuperscript{132} \textit{Id.} at 384.

This Court in bygone years has repeatedly dealt with libel and slander actions from the District of Columbia and from the Territories. Although in these cases First Amendment considerations were not expressly discussed, the opinions of the Court unmistakably revealed that the classic law of libel was firmly in place where federal law controlled.


\textsuperscript{133} 436 U.S. 547, 559-560 (1978). White states that those free of criminal involvement should be allowed to be searched to "recover evidence of a crime not committed by them but committed by others," since a search could be conducted under civil statutes. \textit{Id.} at 559. "As we understand the structure and language of the Fourth Amendment and our cases expounding it, valid warrants to search..."
interest in protecting one’s reputation in *Herbert*. In each case, White aligns, defines and restricts the issues into a setting where the particular first amendment issue is replaced by the concept of a reporter as an individual outside the amendment’s scope, who should not expect to prevail against firmly entrenched legal principles.

**B. The Obligations of All Persons**

In furthering his notion of the balanced press privilege, White reveals his bottomline reasoning: the press is collectively under the same obligations required of all Americans, seemingly making the role of the ordinary person paramount. Thus, as other citizens must answer grand jury subpoenas, so must the press. The general public is denied special access to passport information, grand juries, executive sessions and private organizations, so is the press. The public cannot be not exempt from being subjected to warrants, cannot require special subpoenas and cannot insist upon showing a property owner’s implication in a crime before allowing a search; neither can the press.

**C. The Power of the Press**

Coinciding with White’s view of members of the press as ordinary citizens is his view that the press has enough power without giving it privileged status. What White views as the real threat is not that of press inhibition, but rather its distortion. The press, White says, is vigorous and robust and will continue to flourish. He sees the communications industry as powerful and not easily intimidated. White sees danger in the creation of an imbalance in the communications process. In *Branzburg*, White writes that the advocacy of liberalized press freedoms has the potential of being misguided; the goal is not to create a

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property may be issued when it is satisfactorily demonstrated to the magistrate that fruits, instrumentalities, or evidence of crime is located on the premises.”

*Id.*

134. 99 S. Ct. at 1646.
136. *Id.* at 684-685.
140. 418 U.S. at 390-391.
141. *Id.* at 391. See also 436 U.S. at 566.
142. 418 U.S. at 400.
143. 408 U.S. at 692-693. White characterizes the view of the press as being “it is better to write about crime than to do something about it,” thus dismissing the claim of privilege as insubstantial and one “we cannot seriously entertain.” *Id.*

As to the argument of diminishing the flow of news by requiring reporters to tes-
"privileged industry." In *Herbert*, White voices the fear that once internal communications within the editorial process are immunized, there is only the possibility of further immunization outside the editorial process. Taking such a misguided direction, he contends, would result in the conditions decried in his *Gertz* dissent: "yielding to the apparently irresistible impulse to announce a new and different interpretation of the First Amendment."

Accordingly, White states that "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability." White is once again distinguishing between the concept of the first amendment as a protective device and the concept of the first amendment as creator of a privileged class. White does not see the powers of the press as privileged; they are not raised to the same level of importance as those of the public interest. "[L]aws serving substantial public interests," White states, "may be enforced against the press as against others, despite the possible burden that may be imposed." Thus, the goals of the press and the public interest are not, in White’s mind, always synonymous.

D. Skepticism Toward Press Fears

Justice White repeatedly meets claims of privilege with skepticism, in addition to his reliance on precedent. In *Branzburg*, he states: the evidence fails to demonstrate that there would be a significant con-

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144. 418 U.S. at 399 (citing Commission on Freedom of the Press, *A Free and Responsible Press* 130, 181 (1947)).
145. 99 S. Ct. at 1646:
It is worth noting here that the privilege as asserted by respondents would also immunize from inquiry the internal communications occurring during the editorial process and thus place beyond reach what the defendant participants learned or knew as the result of such collegiate conversations or exchanges. If damaging admissions to colleagues are to be barred from evidence, would a reporter's admissions made to third parties not participating in the editorial process also be immune from inquiry?

Id. See notes 6 and 7 supra.
146. 418 U.S. at 380.
148. Id. at 682-683.
striction of the flow of news to the public if this Court reaffirms the prior
common-law and constitutional rule regarding the testimonial obligations
of newsmen. Estimates of the inhibiting effect of such subpoenas on the
willingness of informants to make disclosures to newsmen are widely di-
vergent and to a real extent speculative.\textsuperscript{149}

In \textit{Gertz}, he remarks that Court decisions forcing self-censor-
ship do not inhibit the editorial process, but rather that self-cen-
sorship is a welcomed by-product when dealing with potentially
defamatory material.\textsuperscript{150} Similarly, he states in \textit{Herbert} that any
precautionary measures before publication would be both posi-
tive and desired.\textsuperscript{151} The skepticism theme is carried more
strongly in \textit{Zurcher}, as White is not convinced that the lack of re-
porter’s privilege will cause news sources to disappear,\textsuperscript{152} or that
his decision will bring more than “incremental effects” which
make no constitutional difference.\textsuperscript{153} In \textit{Herbert}, White sees no
threat from his decision in the form of suppression of truthful in-
formation.\textsuperscript{154} Nonetheless, White concedes in \textit{Time, Inc. v. Fire-
stone} that unless innocent falsehood is allowed, some true speech
will also be deterred.\textsuperscript{155} This, however, is not a concession to the
fears of the press, for as a promoter of traditional common law, he
has stated that the original defamation standard was more than a
showing of mere falsity, but is also a requirement for one to show
causation of hatred, contempt and ridicule.\textsuperscript{156}

\textbf{E. Reassuring the Press}

It has been shown here that the basis for all of Mr. Justice
White’s recurring themes is a belief in prior policy rather than ac-

\textsuperscript{149} Id. at 693.
\textsuperscript{150} 418 U.S. at 396. “It is difficult to understand what is constitutionally wrong
with assessing punitive damages to deter a publisher from departing from those
standards of care ordinarily followed in the publishing industry, particularly if
common-law malice is also shown.” \textit{id}.
\textsuperscript{151} 99 S. Ct. at 1647-1648. White states that the fear of dampening “frank dis-
cussion among reporters and editors” if such discussion is subject to inquiry is un-
founded, because “the press has an obvious interest in avoiding the infliction of
harm by the publication of false information.” White continues:

\begin{quote}
[I]t is not unreasonable to expect the media to invoke whatever pro-
cedures that may be practicable and useful to that end. Moreover, given ex-
posure to liability when there is knowing or reckless error, there is even
more reason to resort to prepublication precautions, such as a frank in-
terchange of fact and opinion.
\end{quote}
\textit{Id.} at 1648. \textit{See notes 6 and 7 supra.}
\textsuperscript{152} Zurcher v. Stanford Daily, 456 U.S. at 566.
\textsuperscript{153} Id.
\textsuperscript{154} 99 S. Ct. at 1647.
\textsuperscript{155} 424 U.S. at 482. This remark portrays White’s reasoning as to why previous
cases have required some degree of fault to exist before defamation can be shown
and is the foundation for the “speech that matters” term used in \textit{Gertz}, 418 U.S. at
341.
\textsuperscript{156} 418 U.S. at 369, 370.
tivist posture in viewing the first amendment. As shown by his skeptical attitude towards press fears and his viewpoint toward press powers, White believes that the press has nothing to fear from his traditionalist method of applying the first amendment. Accordingly, White's opinions eventually enter into a section devoted to reassuring the press. In effect, he tells the press that his opinions do not really endanger basic first amendment freedoms as he sees them. He sees the press as having vast protection which can be summarized as follows: New York Times\textsuperscript{157} gave a grant of extraordinary protection; Miami Herald\textsuperscript{158} struck down the "right of reply" statute and expressed court skepticisms of measures allowing the government to inject itself into the editorial rooms;\textsuperscript{159} Gertz\textsuperscript{160} refused to reject the essentiality of a free press; and Zurcher\textsuperscript{161} gave a standard of "scrupulous exactitude" when materials protected by the first amendment are subject to search and seizure.

VII. THE DIRECTION OF THE COURT AND THE PRESS

The opinions of Mr. Justice White, as discussed, clearly evidence a traditionalist slant. But there are those who take issue with White's approach and first among them are White's brethren on the Court. The late former Associate Justice William O. Douglas was known as a strong advocate of press freedoms to the degree of viewing the first amendment as an absolute protection that would award the privileges so far refused by the Court.\textsuperscript{162} White argues that the first amendment was based not on privilege but on the right to speak;\textsuperscript{163} Justice Douglas contended that the first amendment's effect was to create a protection of the media. For example, Douglas wrote a strongly worded dissent to White's majority opinion in Branzburg which gives one a clear understanding of his position:

\begin{itemize}
\item \textsuperscript{157} 403 U.S. at 730.
\item \textsuperscript{158} 418 U.S. at 259.
\item \textsuperscript{159} \textit{Id}.
\item \textsuperscript{160} 418 U.S. at 398.
\item \textsuperscript{161} 436 U.S. at 566.
\item \textsuperscript{162} See, e.g., Branzburg v. Hayes, 408 U.S. at 713 (dissenting opinion; Douglas, J.): "[T]he . . . position that First Amendment rights are to be balanced against other needs or conveniences of government [is amazing] . . . . My belief is that all of the "balancing" was done by those who wrote the Bill of Rights (footnotes omitted)."
\item \textsuperscript{163} Miami Herald Publishing Co. v. Tornillo, 418 U.S. at 259-262. See note 52 \textit{supra}.
\end{itemize}
Two principles which follow from this understanding of the First Amendment are at stake here. One is that the people, the ultimate governors, must have absolute freedom of, and therefore privacy of, their individual opinions and beliefs regardless of how suspect or strange they may appear to others. Ancillary to that principle is the conclusion that an individual must also have absolute privacy over whatever information he may generate in the course of testing his opinions and beliefs.

Douglas countered another White opinion, *Red Lion Broadcasting Co., v. Federal Communications Commission* in an address in late 1974. *Red Lion*, Douglas said, has placed radio and television “into harness” in an effort to “heat the media . . . as public utilities . . . [with the idea being] to make them available to all so that every facet of current problems and events may be presented.” The rule of fair comment and prior restraints, Douglas stated, is only a forerunner of censorship. Rather than using the approach of calling for governmental regulation to promote fairness in voicing opposing views, Douglas claimed that the right of various media owners, “be they conservative, reactionary or ignorant,” promises independence for any opposed school of thought. He concludes that “if Big Brother in Washington, D.C., got his hands on the controls,” the wide spectrum of ideas to be expected from media independence would not be presented.

Associate Justice Potter Stewart, educated at Yale at the same time as White, also wrote a strongly worded dissent to White's majority opinion in *Branzburg*.

The court's crabbed view of the First Amendment reflects a disturbing insensitivity to the critical role of an independent press in our society. The question whether a reporter has a constitutional right to a confidential relationship with his source is of first impression here, but the principles that should guide our decision are as basic as any to be found in the Constitution . . . [T]he Court in these cases holds that a newsman has no First Amendment right to protect his sources when called before a grand

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164. 408 U.S. at 714 (dissenting opinion; Douglas, J.).
165. 395 U.S. 367 (1969). White wrote the majority opinion which held that the Federal Communications Commission “fairness doctrine” of requiring the fair presentation of each side of public issues was not violative of the first amendment freedoms of press and speech, being an implementation of congressional intent and enforcement of public interest above media selectivity. *Id.* at 369, 378-379, 385. The case centered on a 15 minute broadcast on WGCB, a Pennsylvania radio station owned by Red Lion Broadcasting Company, during which the Reverend Billy James Hargis claimed the author of a book critical of United States Senator Barry Goldwater (R-Ariz.) had been fired from his job for making false charges and had worked for a Communist affiliated publication. *Id.* at 371. The author heard of the broadcast and demanded free “reply time” on the grounds that he had been “personally attacked” on the broadcast. *Id.* at 371-372.
167. *Id.*
168. *Id.* at 821.
169. *Id.*
170. *Id.*
jury. The Court thus invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government. Not only will this decision impair performance of the press' constitutionally protected functions, but it will, I am convinced, in the long run harm, rather than help administration of justice.\(^{172}\)

Stewart further commented on newsman’s privilege in an address at Yale Law School.\(^{173}\) He took issue with the idea, promoted by White in *Branzburg*, that the question of a reporter’s right to conceal sources was simply a freedom of speech issue which did not stand in the face of the obligation to testify before a grand jury.\(^{174}\) “None of us — as individuals — has a ‘free speech’ right,” he said, “to refuse to tell a grand jury” the identity of an informant who divulged relevant information.\(^{175}\) “Only if a reporter is a representative of a protected *institution*\(^{176}\) does the question become a different one.”\(^{177}\)

White’s approach has been to declare the press to be a protected institution even as he writes an opinion that may not settle well with much of the media.\(^{178}\) A similar approach was taken and explained in revealing fashion in an address to the American Society of Newspaper Editors\(^{179}\) by Chief Justice Warren Burger, who has sided with White in all but two of the opinions discussed in this comment, *Time, Inc. v. Firestone*\(^{180}\) and *Herbert v. Lando*.\(^{181}\) The Chief Justice stated:

I am sure you would agree that a strong and independent judiciary is imperative to a free society, but there is a tendency to take it for granted.

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172. 408 U.S. at 725 (dissenting opinion; Stewart, J.).
174. Stewart, J., supra note 1, at 635.
175. In the cases involving the newspaper reporters’ claims that they have a constitutional privilege not to disclose their confidential news sources to a grand jury, the Court rejected the claims by a vote of five to four, or, considering Mr. Justice Powell’s concurring opinion, perhaps by a vote of four and a half to four and a half. But if freedom of the press means simply freedom of speech for reporters, this question of a reporter’s asserted right to withhold information would have answered itself.
176. Id. (emphasis added). Assumedly Stewart is referring here to “the press” as individuals, since the topic of his speech is the press as a protected institution.
177. Id.
178. See generally notes 158-162 supra, and accompanying text.
It is easy to take things for granted when we have had them for a long time. Yet, based on what I hear and read, I doubt that journalists take the First Amendment of the Constitution and press freedom for granted. That is only natural, because the press freedoms, for journalists, are the shoes you wear every day — and when they pinch you feel it quickly. I hope you will not consider me an unmannerly guest, if I say that some journalists occasionally react to criticism of the media as though the First Amendment rights of the critics had in some way become second class. But it is good that journalists react quickly on press freedom. If you and your predecessors had not been alert, we probably would not have all the great freedoms we cherish.

However, the Chief Justice goes on to state that he is well aware that there is a strong view among at least some journalists that when conflicts arise between claims of the press and interests of others — for example, in areas of privacy or enforcement of criminal law — the decision should always go in favor of the press. But courts must balance conflicting claims and few rights are absolute. . . . Those few who think that the press must have unrestrained, unreviewable power sometimes tend to view the Court as 'enemies.' Nothing could be further from a realistic appraisal of how press freedom has evolved in our country.

It is this evolutionary process which is of great concern to White. This process has been shown to preoccupy his writing, which frequently includes a reference to the Founding Fathers or common law principles. Lance Liebman, a former law clerk of White's, writes that Justice White is not only concerned with reaching desirable results, but that the process of reaching the result itself will be desirable. This same concern was shown by White while deputy attorney general.

Liebman further states that White differs with others when he has a concern about the effectiveness of the Court over time, recalling the argument expressed several times that if more privi-

183. See discussion in opposition to White's views, note 8 supra, and the views of the late Justice Douglas, notes 162, 164, 168-170 supra, and accompanying text.
184. 63 Geo. L.J. 1195, 1196. See, e.g., Gertz v. Robert Welch, Inc., 418 U.S. at 381-383, regarding the absence of any favor by the founding fathers for an absolute and privileged status for the press or Branzburg v. Hayes, 408 U.S. at 681-682, which lists traditional first amendment protections as being against intrusion upon speech or assembly, prior restraint, commanding publication, and exaction of a tax for the privilege of publishing, among others.
186. Id. at 95, col. 3. "He is also a democrat, preferring legislative-political—settlement for its own sake; not just because it may reach a desirable result but because the process of reaching the result will be itself desirable." Id.
187. See notes 21 and 23 supra, and accompanying text for a discussion of White's preference for a procedural approach to legal analysis.
188. N.Y. Times, Oct. 8, 1972, (Magazine), at 98.

But it certainly seems clear that Justice White's differences with the Warren majority were not over whether the Court should play this role[,] but over their political judgements—he differed over timing, public acceptance and the effectiveness of the Court over time, and differed as well over the basic question of whether a reform was desirable.
lege is given to the press now, there would be an uncontrollable situation in the future.

In the area of free speech, Liebman states "[f]or White, the starting point is personal, professional and institutional responsibility." 189 While White as an individual might choose a more active and less orderly "role in the process of social change," 190 White as a Supreme Court Justice is "part of the present scheme for resolving public controversies, and he will not be an instrument by which that scheme is employed to justify attempts to overthrow it." 191 Thus, White would not let refusal to divulge sources or refusal to submit material from newsroom files, no matter how moral, go unchecked because he believes he is charged with a greater responsibility to insure the orderly working of traditional modes of prosecution.

VIII. Conclusion

White's philosophy of legal thinking has required him to adhere to principles grounded in the common law. In the context of freedom of the press and the first amendment, White has chosen to view common law principles as restricting the first amendment to a protection of political criticism and from prior restraint. 192 Additionally, his adherence to a non-activist stance causes him to view the traditional modes of prosecution, such as subpoenas of persons and materials and the obligation to testify, as always being the proper modes of providing justice. Accordingly, this does not allow for the creation of a privileged class or industry as some might wish to classify newsmen or the press. 193 To allow such a creation would require White to concede that the subpoena, the grand jury and other prosecutorial weapons are not always the best means of assuring that justice is done. 194 White then has placed his faith in the legal system through a traditional, nonac-

189. Id.
190. Id.
191. Id. at 99.
192. See note 184 supra. See generally notes 52-69 supra, and accompanying text for a discussion of colonial law.
193. See notes 70-87 supra, and accompanying text for a discussion of newsmen's privilege.
194. See, e.g., Branzburg v. Hayes, 408 U.S. 665 (1972), where White classifies the operation of the grand jury as a "fundamental function of government," while characterizing a corresponding burden on the press to be "consequential, but uncertain." Id. at 690.
tivist manner. In acting as an attorney and as a judge, it appears that he has adopted legalism as a way of life. Witness the insistence on proper procedure as observed by colleagues at the Justice Department and the Supreme Court and his admitted desire to distinguish between a personal moral call and the obligations of a Supreme Court Justice. The result is that White apparently chooses not to merge personal ideas with his professional faith of legalism.

The effect of White’s stance regarding the press is still uncertain; Chief Justice Burger’s claim that the press has given an unrealistic appraisal of the Court’s first amendment interpretations remains unanswered until future situations test the scope of decisions such as those authored by White. Both those who praise and fear White’s opinions believe they are voicing the concerns of the so-called “public interest.” White remarks in his Gertz dissent that when the public interest is not being furthered, the search for truth may be frustrated. The question then is whether the public interest is frustrated when the traditional prosecutorial methods are not being furthered, or when the privileges sought by the press are not being furthered.

Because the above two interests have been shown to clash,

195. See notes 21, 23 and 189 supra, and accompanying text.

196. An exception to this choice is when White’s sense of morals and sense of justice are the same, as evidenced from this statement: “the crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not,” Branzburg v. Hayes, 408 U.S. at 692, and this statement:

[W]e cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future.

Id. at 695.

197. See note 184 supra.

198. White concedes there is an interest in the burden placed upon the press, but states that the extent of an impact is unclear and insignificant. 408 U.S. at 690, 693. See also note 101 supra.

199. 418 U.S. at 392.

It is difficult for me to understand why the ordinary citizen should himself carry the risk of damage and suffer the injury in order to vindicate First Amendment values by protecting the press and others from liability for circulating false information. This is particularly true because such statements serve no purpose whatsoever in furthering the public interest or the search for truth but, on the contrary, may frustrate that search and at the same time inflict great injury on the defenseless individual. The owners of the press and the stockholders of the communications enterprises can much better bear the burden. And if they cannot, the public at large should somehow pay for what is essentially a public benefit derived at private expense.

Id. (emphasis added).

200. Justice White, in striking the balance, makes his choice for the public in-
White is correct in his belief that the public interest and the interests of the press are not always synonymous. Historically, the interest in promoting a free press has been designated the most paramount of all American rights. Nevertheless, by insisting upon divorcing personal views from judicial decision making, White has chosen to restrict the meaning of the freedom of the press to only those areas in which specific protection was delegated by the common law. Based upon the fact that he often speaks for the majority of today's Court when the first amendment is at issue,201 White's opinions can be viewed as a barometer for the immediate future of the freedom of the press.

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