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REFLECTIONS ON JUSTICE STEWART AND
THE AUTONOMOUS PRESS

Floyd Abrams*

Question: “And I suppose your argument, based as it is upon the First Amendment, could not logically be confined to newsmen, however defined. I suppose everyone of us has the—is protected in his right to free speech and the right to speak also includes the right to keep silent. And I suppose, logically carried to its conclusion, your argument would be that anybody would be protected if he just said, ‘I don’t want to talk.’”

Answer: “Well, I wouldn’t know—”

Question: “Why is it confined to newsmen? We all have the right of free speech, do we not?”

Answer: “As a general matter, your Honor, it seems to me that this case could be decided as a freedom-of-expression case without necessarily relying on the press clause itself.”

* * *

Question: “Is there any reason to think that if it is so as to the press, it’s different as to freedom of expression?”

Answer: “Well, do you suggest the privilege of a reporter is different from the privilege of some other witness?”

Answer: “Well, it seems to me, your Honor, that—this will take a moment or two . . . .”

But it takes more than a moment or two. The question occurs and recurs; it is rarely responded to directly by counsel and has yet to be ruled upon directly by the Court. My own answer is that

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the press is "different" from "everyone"; that it is, in a variety of circumstances, entitled to constitutional treatment distinct from that generally afforded those who exercise their freedom of expression; and that the nature of the treatment should largely be as urged in the provocative articulations of Justice Potter Stewart.

JUSTICE STEWART AND THE PRESS

At the core of these views, expressed on and off the bench, are two governing concepts. The first is that the press clause of the first amendment explicitly and purposively provides protection for the press that is independent from that provided others under the speech clause. The second is that the quintessential characteristic of the press requiring constitutional protection is its autonomy from government. Justice Stewart's views are set forth most notably in his brief but seminal lecture given at the Yale Law School in 1974. The press clause of the first amendment, Justice Stewart ar-


5. See note 8 infra and accompanying text.

6. The first amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

7. Autonomy is generally defined as "the quality or state of being independent, free and self-directing." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 146 (1976). Although Justice Stewart has not himself offered a definition of the word, the dictionary definition is a serviceable one—one which well describes the quality of the press Justice Stewart believes most requires first amendment protection.

JUSTICE STEWART'S vie of the autonomous press, is "in essence a structural provision [which] . . . extends protection to an institution," the "publishing business." The press clause, Justice Stewart urged, is not designed solely to ensure that newspapers serve as neutral forums for debate or neutral conduits of information between the people and their leaders. What the clause protects is the "institutional autonomy of the press." It does this by creating "a fourth institution outside the Government as an additional check on the three official branches." After analyzing a variety of first amendment cases decided by the Court, Justice Stewart concluded his Yale lecture by articulating a view which he would later reiterate in his judicial opinions: "So far as the Constitution goes, the autonomous press may publish what it knows, and may seek to learn what it can."

But Justice Stewart is acutely aware that the autonomy he finds built into the first amendment necessarily cuts both ways. While the press is "free to do battle against secrecy and deception in government," it cannot expect from the Constitution any guarantee that it will succeed. There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.

Justice Stewart's judicial opinions, both before and after the Yale address, have consistently echoed similar themes. Three cases are illustrative. When the Supreme Court in Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations upheld by a five-to-four vote the constitutionality of a Pittsburgh statute barring newspapers from publishing sex-designated employment columns, Justice Stewart (joined by Justice Douglas) dissented in the strongest

9. Stewart, supra note 8, at 633 (emphasis in original).
10. Id. at 634.
11. Id. at 636.
12. Id. (footnote omitted).
14. 413 U.S. at 400 (Stewart, J., dissenting). Justice Stewart's views in first amendment cases involving the press have been closer to those of Justice Douglas than to any member of the current Court; they were far less often joined in non-first amendment opinions. In fact, the two members of the Court with whom Justice Stewart joined least in his first eight years on the bench were Justices Douglas and Black; in each of the remaining five years these two Justices remained on the Court,
language. In its final application of the later-rejected rule that commercial speech is not entitled to any first amendment protection, the majority held that since discrimination in employment is "not only commercial activity . . . [but] illegal commercial activity," publication of advertisements for employment in sex-designated columns could constitutionally be barred. The Stewart dissent urged that the question is a far different one: "whether any government agency . . . can tell a newspaper in advance what it can print and what it cannot." The correct answer, Justice Stewart urged, is that the first amendment is "a clear command that government must never be allowed to lay its heavy editorial hand on any newspaper in this country."

Justice Stewart joined in opinions with one or the other of them less often than with any other member of the Court; subsequent to Justice Black's retirement at the end of the 1970 Term, and through 1975, Justice Stewart was found least in the judicial company of Justice Douglas; and in the 1976 Term (after Justice Douglas' retirement) he was found least in the company of Justices Brennan and Marshall. The members of the Court with whom he has most often found himself in agreement have varied through the years; in the last three years, it has been Justices Powell and Rehnquist. See The Supreme Court, 1976 Term, 91 HARV. L. REV. 70, 296 (1977); The Supreme Court, 1975 Term, 90 HARV. L. REV. 56, 277 (1976); The Supreme Court, 1974 Term, 89 HARV. L. REV. 47, 276 (1975); The Supreme Court, 1973 Term, 88 HARV. L. REV. 41, 275 (1974); The Supreme Court, 1972 Term, 87 HARV. L. REV. 55, 304 (1973); The Supreme Court, 1971 Term, 86 HARV. L. REV. 50, 301 (1972); The Supreme Court, 1970 Term, 85 HARV. L. REV. 38, 351 (1971); The Supreme Court, 1969 Term, 84 HARV. L. REV. 30, 252 (1970); The Supreme Court, 1968 Term, 83 HARV. L. REV. 60, 279 (1969); The Supreme Court, 1967 Term, 82 HARV. L. REV. 93, 307 (1968); The Supreme Court, 1966 Term, 81 HARV. L. REV. 110, 131 (1967); The Supreme Court, 1965 Term, 80 HARV. L. REV. 123, 145 (1966); The Supreme Court, 1964 Term, 79 HARV. L. REV. 103, 109 (1965); The Supreme Court, 1963 Term, 78 HARV. L. REV. 177, 183 (1964); The Supreme Court, 1962 Term, 77 HARV. L. REV. 79, 87 (1963); The Supreme Court, 1961 Term, 76 HARV. L. REV. 75, 85 (1962); The Supreme Court, 1960 Term, 75 HARV. L. REV. 80, 89 (1961); The Supreme Court, 1959 Term, 74 HARV. L. REV. 95, 105 (1960); The Supreme Court, 1958 Term, 73 HARV. L. REV. 126, 133 (1959).

All of this, I hasten to add, proves nothing other than that statistically based efforts to predict votes of members of the Court are—fortunately—fruitless. For a sampling of such efforts, see, e.g., G. SCHUBERT, THE JUDICIAL MIND (1965); G. SCHUBERT, THE JUDICIAL MIND REVISITED (1974).


17. Id. at 400 (Stewart, J., dissenting).

18. Id. at 403-04 (Stewart, J., dissenting).
Justice Stewart’s views on the need for editorial autonomy of the electronic media have been expressed with similar force. In \textit{CBS v. Democratic National Committee},\textsuperscript{19} Justice Stewart agreed with the Court’s rejection of the court of appeals’ holding that the first amendment requires broadcasters to carry editorial advertisements against their will. In a tartly phrased concurring opinion, he observed that the ad hoc balancing of first amendment “values” engaged in by the lower court would permit “such governmental controls upon the press as a majority of [the] Court at any particular moment might consider First Amendment ‘values’ to require.”\textsuperscript{20} This “frightening specter,”\textsuperscript{21} Justice Stewart argued, is a direct consequence of the apparent willingness of the court of appeals to “lose sight of the First Amendment itself, and march forth in blind pursuit of its ‘values.’”\textsuperscript{22} Justice Stewart concluded that even if the question were one of first amendment “values” alone, those values “should mean at least this: If we must choose whether editorial decisions are made in the free judgment of individual broadcasters, or imposed by bureaucratic fiat, the choice must be for freedom.”\textsuperscript{23}

Justice Stewart’s views are further explicated in his brief concurring opinion in \textit{Landmark Communications, Inc. v. Virginia}.\textsuperscript{24} In \textit{Landmark} the Court held that third persons, including, but not limited to, the press, cannot be criminally punished “for divulging or publishing truthful information regarding confidential proceedings of the [Virginia] Judicial Inquiry and Review Commission.”\textsuperscript{25} Justice Stewart concurred in the judgment but agreed with the Court’s holding only as to the press. As regards all others, Justice Stewart urged that punishment is constitutionally permissible. As to the press, Justice Stewart stated:

\begin{quote}
If the constitutional protection of a free press means anything, it means that government cannot take it upon itself to decide what a newspaper may and may not publish. Though government may deny access to information and punish its theft, government may not prohibit or punish the publication of that information once it falls into the hands of the press . . . .\textsuperscript{26}
\end{quote}

\textsuperscript{19} 412 U.S. 94 (1973).
\textsuperscript{20} \textit{Id.} at 133 (Stewart, J., concurring).
\textsuperscript{21} \textit{Id.} (Stewart, J., concurring).
\textsuperscript{22} \textit{Id.} at 145 (Stewart, J., concurring).
\textsuperscript{23} \textit{Id.} at 146 (Stewart, J., concurring).
\textsuperscript{24} 435 U.S. 829, 848 (1978) (Stewart, J., concurring). For further explication of the case, see text accompanying notes 147-149 infra.
\textsuperscript{25} 435 U.S. at 837 (footnote omitted).
\textsuperscript{26} \textit{Id.} at 849 (Stewart, J., concurring). \textit{See also} Stewart, \textit{supra} note 8, at 635-36.
As his Yale speech suggests and his Landmark concurrence urges, the price to be paid by the press for the autonomy Justice Stewart believes it is constitutionally guaranteed is high. Just as first amendment "values" are not to be balanced against the independence of the press, neither would Justice Stewart permit first amendment values to be balanced for the press in a manner that might compromise its independence. Thus, in two companion prison-access cases, Justice Stewart wrote strongly worded opinions for the Court rejecting the press' position. In *Pell v. Procunier*\(^{27}\) and *Saxbe v. Washington Post Co.*,\(^{28}\) members of the press and prison inmates challenged the constitutionality of rules prohibiting interviews between journalists and designated inmates. Emphasizing that one important function of a corrections system is to deter crime through such sanctions as isolation,\(^{29}\) and recognizing the existence of mail and visitation rights that permit indirect access to the press,\(^{30}\) the Court held that the first amendment rights of the inmates and the press are not violated by the rules. Justice Stewart's majority opinion in *Pell* noted that both the press and the public are "accorded full opportunities to observe prison conditions"\(^{31}\) and that the purpose of the rules is not to hinder the "press' investigation and reporting of those conditions."\(^{32}\) More broadly, both opinions emphasized that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public"\(^{33}\) and the Constitution does not impose upon "government the affirmative duty to make available to journalists sources of information not available to members of the public generally."\(^{34}\)

Still more striking is Justice Stewart's critical concurring opinion in *Houchins v. KQED, Inc.*\(^{35}\) The Ninth Circuit upheld a district court injunction that restrained the sheriff of Alameda County from restricting public and press access to a prison to a once-a-month guided tour of portions of the jail. Neither the public nor

\(^{27}\) 417 U.S. 817 (1974).


\(^{31}\) 417 U.S. at 830 (footnote omitted).

\(^{32}\) *Id.*


\(^{35}\) 438 U.S. 1 (1978).
press were permitted access to the “Greystone” portion of the jail where illness and suicide had reportedly occurred. The court of appeals found such restrictions to be an unconstitutional infringement of first and fourteenth amendment rights.\footnote{KQED, Inc. v. Houchins, 546 F.2d 284 (9th Cir. 1976), rev’d, 438 U.S. 1 (1978).}

The Supreme Court reversal by a three (Burger, White, Rehnquist) -to-one (Stewart) -to-three (Stevens, Brennan, Powell)\footnote{Since Justices Marshall and Blackmun did not participate in the Houchins ruling, it should be recalled that Justice Marshall has consistently voted with those members of the Court supporting some form of first amendment right of the press to gather news. See, e.g., Pell v. Procunier, 417 U.S. 817, 836 (1974) (Douglas, J., dissenting, joined by Brennan and Marshall, JJ.); Branzburg v. Hayes, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting, joined by Brennan and Marshall, JJ.). If, as may be predicted, Justice Marshall adheres to his previously expressed positions, Justice Stewart’s views in the area will remain of determinative import.} decision acknowledged the public interest in jail conditions and the media’s role in providing information.\footnote{438 U.S. at 8.} Chief Justice Burger’s opinion for the Court, however, held that there is no basis for reading into the Constitution a right to enter penal institutions, gather information, and take pictures for broadcast purposes in a manner not accorded the general public.\footnote{Id. at 8-11.} “We must not confuse the role of the media,” the Chief Justice wrote, “with that of government; each has special, crucial functions, each complementing—and sometimes conflicting with—the other.”\footnote{Id. at 8-9.} Chief Justice Burger further observed that “the government cannot restrain communication of whatever information the media acquires—and which they elect to reveal.”\footnote{Id. at 10.}

Justice Stewart’s brief and critical concurring opinion\footnote{Id. at 16 (Stewart, J., concurring in judgment).} reiterated his view that “[t]he First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally.”\footnote{Id. (Stewart, J., concurring in judgment).} However, since some access had been provided the public, Justice Stewart concluded that press access, as well, should be afforded and that such access, although more limited than that granted by the district court, must be made effective. “[T]erms of access,” Justice Stewart concluded, “that are reasonably imposed on individual members of the public may, if they impede effective report-
ing without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see."^{44}

**THE PRESS CLAUSE DEBATE: AN INTRODUCTION**

The articulation of Justice Stewart's views has led, in the main, to an academic^{45} and judicial^{46} debate as to whether the press is entitled to "more" first amendment protection than others—be they speakers, academics, or back-fence gossipers. In a sense, this issue is raised by Justice Stewart's views. But it is hardly the fairest way to phrase the question.^{47} The basic question to be addressed may be stated in a far simpler and more neutral manner: Is the press, however defined, entitled to *any* different treatment because it is the "press"?^{48}

Until recently, this question would not have seemed even a troublesome one, so self-evident has it seemed that whichever clause of the first amendment applies, the press is entitled to a significant degree of protection specially designed for it. If this were not so, if each "press" case must be a "speech" case as well, reexamination would be required of more than a few Supreme Court rulings. There has surely been no lack of Supreme Court language about the unique role played by the press in American life. It has, for example, been said that it is the press' special function to serve as a "mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees";^{49} to function as a "powerful antidote to any abuses of power by governmental officials";^{50} and to guard "against the mis-

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^{44} Id. at 17 (Stewart, J., concurring in judgment).


^{47} One would, for example, hardly commence a discussion of academic or religious freedom by asking whether academics or clergymen are entitled to "more" rights than others; the question would be whether, and to what extent, they are entitled to any distinct constitutional treatment. The difference is more than one of rhetoric.


carriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."\textsuperscript{50}

Even in so significant a press defeat as \textit{Pittsburgh Press},\textsuperscript{51} the majority approvingly quoted from Justice Black's observation in the \textit{Pentagon Papers Case}\textsuperscript{52} that "'[i]n the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy.'"\textsuperscript{53} The majority in \textit{Pittsburgh Press} then acknowledged "the narrowness of the recognized exceptions to the principle that the press may not be regulated by the Government."\textsuperscript{54}

And, in what may be the two greatest press victories of the 1970's, \textit{Miami Herald Publishing Co. v. Tornillo}\textsuperscript{55} and \textit{CBS v. Democratic National Committee}\textsuperscript{56}---both, not incidentally, written by Chief Justice Burger\textsuperscript{57}---there is soaring language about the need for press independence and autonomy, as if all would agree that there is some identifiable entity called the press that serves significant societal functions and receives constitutional protection to enable it to perform these functions.

\textsuperscript{51.} See text accompanying notes 13-18 supra.
\textsuperscript{53.} Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. at 381-82 (quoting New York Times Co. v. United States, 403 U.S. at 717 (Black, J., concurring)).
\textsuperscript{54.} \textit{Id.} at 382.
\textsuperscript{55.} 418 U.S. 241 (1974).
\textsuperscript{57.} As I have suggested elsewhere, see Abrams, \textit{The Press, Privacy, and the Constitution}, N.Y. Times, Aug. 21, 1977, § 6 (Magazine), at 11, 65, Chief Justice Burger has been far more supportive of legal positions of the press than has been generally recognized. Chief Justice Burger's opinions in \textit{Tornillo}, 418 U.S. at 258, \textit{CBS}, 412 U.S. at 120, and even \textit{Houchins}, 438 U.S. at 13-14, contain language which, as much as any that has emanated from the Court, recognizes the most sweeping authority of the press to make its own editorial decisions. In \textit{CBS}, for example, the Chief Justice states:

For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but . . . [c]alculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression.

\textit{412 U.S.} at 124-25. Whatever the accuracy of the repeated reports about Chief Justice Burger's off-the-bench views of the press, and notwithstanding that the Chief Justice has hardly been a consistent supporter of press positions in the Supreme Court, he remains entitled to considerably more recognition from the press for opinions authored by him.
One may look back to *Grosjean v. American Press Co.*, through *Mills v. Alabama*, the *Pentagon Papers Case*, and *Nebraska Press Association v. Stuart*. It could not have been seriously argued in any of these cases that it was not relevant, not significant, and perhaps not central that the challenged governmental conduct would have silenced, stifled, or suppressed the press.

What then is the argument about? And why the intensity of it all? Why, for example, this Symposium on this particular facet of Justice Stewart's score of productive and often luminous years on the Supreme Court?

There are undoubtedly troublesome, if not debatable, points raised by Justice Stewart's views. Among them are his historical interpretation of the adoption of the first amendment, the painful difficulty of defining "press," and the nature of press autonomy which Justice Stewart believes is constitutionally protected.

These are difficult questions, ones I attempt to deal with elsewhere in this Article. But I doubt they even begin to explain why Justice Stewart's Yale speech and judicial opinions have provoked such widespread attention and opposition. The reason, I would suggest, is far different—and far simpler. It is that, to some, Justice Stewart's views are not simply unpersuasive but, in some fashion, threatening. That this should be the reaction of those who see the press as excessively powerful, uncomfortably "adversary," or who feel personally aggrieved by press treatment is hardly surprising. Those who routinely condemn the press as, for example, "the judge, jury and prosecutor, not merely the recorder of human

58. 297 U.S. 233 (1936).
62. See, e.g., Houchins v. KQED, Inc., 438 U.S. at 17 (Stewart, J., concurring in judgment); Stewart, *supra* note 8, at 633-35.
63. Perhaps the best definition of the "adversary" press is that of Tom Wicker: I assert the necessity to encourage the developing tendency of the press to shake off the encumbrance of a falsely objective journalism and to take an adversary position toward the most powerful institutions of American life.

By "adversary," I don’t mean a necessarily hostile position; I use the word in the lawyer's sense of cross-examining, testing, challenging, in the course of a trial on the merits of a case. Such an adversary is "opposed" only in the sense that he or she demands that a case be made—the law stated, the facts proven, the assumptions and conclusions justified, the procedure squared with common sense and good practice. An adversary press would hold truth—unattainable and frequently plural as it is—as its highest value, and knowledge as its first responsibility.

T. WICKER, ON PRESS 259-60 (1978) (emphasis in original).
events," are unlikely to cheer a view of press performance which itself celebrates much of the reporting of the last ten years.

What is less predictable—and far more interesting—is the intensely adverse response of some within the press itself, a response most consistently voiced in the columns of Anthony Lewis. Lewis, the Pulitzer Prize winning author of Gideon's Trumpet and former Supreme Court correspondent of the New York Times, has consistently opposed the notion that the press has any special constitutional status. The reaction of the press to the Supreme Court ruling in Zurcher v. Stanford Daily approving police searches of newsrooms, Lewis wrote, was "unjustifiably hysterical" and Justice Stewart's dissent "labored and unconvincing." Press pleas for legal protection of confidential sources are, according to Lewis, merely the "current American press mystique." More broadly, Lewis has sternly admonished the press that it is a "fundamental mistake" to argue for "different and better treatment under the Constitution." "The press," Lewis has written, "does itself no good when it claims special privilege under the Constitution."

Lewis' disagreement with Justice Stewart's opinions should, of course, be evaluated on their legal, historical, and policy merits. To some extent, my views and those of Lewis concerning such matters are set forth in this Symposium and the reader may decide between them. But there is a disturbing tone worthy of special comment in more than one of Lewis' columns: the tone epitomized by Lewis' contention that it does the press "no good" to seek distinct legal protection under the first amendment. To the extent

64. The phrase is that of John Connally, quoted in J. HOHENBERG, A CRISIS FOR THE AMERICAN PRESS 19 (1978). Connally, who has fared well by the jury system, should surely know better where the ultimate power of judgment lies.
65. After noting that many have criticized the press as "arrogant and irresponsible," and that others are "deeply disturbed by what they consider to be the illegitimate power of the organized press in the political structure of our society," Justice Stewart responded that "on the contrary, the established American press in the past ten years . . . has performed precisely the function it was intended to perform." Stewart, supra note 8, at 631.
72. Lewis, supra note 70, at A27, col. 1.
73. Lewis, supra note 69, at A19, col. 5.
74. Lewis, supra note 69, at A19, col. 5 (emphasis added).
Lewis' statement is simply a prediction of immediately forthcoming judicial behavior—that the press lacks sufficient support on the Supreme Court to be afforded distinct protection—he may well be correct. To the extent, however, that it is an argument that the press should not seek "special" rights for fear the public will think ill of a press that views itself as special, Lewis' position is far more troubling. Not necessarily so in its assessment of the current public mood, but dangerously so in its unwillingness to combat this mood. For whatever else is true, the press will surely make no long-term friends by being unwilling to defend its own constitutional role in reporting the news to the public; and it will deceive no one except itself by acting as if it believes that the public interest in news reporting is no different from—or no more significant than—the public interest in many other aspects of American life. By posing as just another institution, all the press will assure is that it will be treated like one.

**THE PRESS CLAUSE: AN HISTORICAL OVERVIEW**

"[A] morsel of genuine history," Jefferson wrote to Adams, is "a thing so rare as to be always valuable." The historical events which enveloped Jefferson, Adams, and their compatriots are at least as contradictory and confusing as those in any period—no less so with respect to the adoption of the first amendment. It is, as Professor Emerson has observed, "by no means clear exactly what the colonists had in mind, or just what they expected from the guarantee of freedom of speech, press, assembly and petition." And, the truth, as Zechariah Chafee astutely observed, may well be "that the framers had no very clear idea as to what they meant."

But there are at least a few morsels of history from which some conclusions may be drawn. There can be, for example, no quarrel with Justice Stewart's observation that:

For centuries before our Revolution, the press in England had been licensed, censored, and bedeviled by prosecutions for seditious libel. The British Crown knew that a free press was not

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just a neutral vehicle for the balanced discussion of diverse ideas. Instead, the free press meant organized, expert scrutiny of government. . . . This formidable check on official power was what the British Crown had feared—and what the American Founders decided to risk.78

One may go further: Repressive measures familiar to pre-Revolutionary England and America went beyond direct censorship and licensing of presses. From the introduction of the printing press in England in the fifteenth century, the English government had an astute understanding that the press functioned as an industrial and economic institution—as a business—and fashioned its regulation accordingly.79 Across the Atlantic, the American colonials learned that the press' ability to function could be grievously impaired by regulation that does not, on its face, implicate the editorial process, for example, the infamous Stamp Act. These measures supplemented the familiar inquiries into the prepublication process.80

78. Stewart, supra note 8, at 634.
79. The legal history of the press in 16th- and 17th-century England is acutely surveyed in W. Holdsworth, A History of English Law (1924). Holdsworth demonstrates that from the inception of printing in England, the Crown recognized the government’s need to maintain strict control “over the printing, publication and importation of books,” to ensure the state’s “peace and security.” 5 id. at 208 (footnote omitted). Jurisdiction over state control of printing was vested in the Star Chamber. Id. Control also was effected initially through the Stationers’ company, which was granted inherent power by the Tudors to supervise and charge fees to individual printers in exchange for helping the government suppress objectionable works. 6 id. at 363-64. The Stationers were originally the book-purveyors who bought the printers’ wares, “the capitalists upon whom the printers depended.” Id. at 362-63 (footnote omitted). Patent monopolies were issued for the exclusive right of individual printers to publish on particular subjects. Id. at 363. Thus while it was used to control and limit press autonomy, the earliest regulation of the press was economic.
80. Within the broad mandate of the press-regulating Stationers’ company in England were extraordinary powers of search and seizure in quest of unlicensed presses, and the responsibility for “discovering the authors or printers of any noxious works that appeared.” 6 W. Holdsworth, supra note 79, at 364. The earliest English news publications resulted in hostile official inquiry into the prepublication process; but printers like Nicholas Bourne, Michael Sparke, and James Bowler resisted by refusing to reveal the authors or purchasers of works they printed. F. Siebert, Freedom of the Press in England, 1476-1776, at 155 (1952). The same tactic of forcing publishers to answer questions about the prepublication process was used in colonial America. See, for example, the story of the New York trial in 1770 of Alexander McDougall, who was identified as the author of an allegedly seditious handbill by the handbill’s printer, after the printer was threatened with imprisonment. The printer’s name was in turn betrayed after the Governor of New York offered a £150 reward for the information. Levy, Introduction to Freedom of the Press from Zenger to Jefferson at xli-xliii (L. Levy ed. 1966).
Newspaper production in America was not as advanced as in England; yet it was sufficiently developed by the time of the Revolution to refute any suggestion that the pre-Revolutionary journalistic press was inconsequential. The exhaustively researched study by Arthur M. Schlesinger, Sr., documents the vitality of the pre-Revolutionary press and its crucial role in the war.\(^8\) Schlesinger surveys the array of forms of communication in pre-Revolutionary America—songs, poems, pamphlets, religious sermons. He concludes:

Of these many ways of kneading men's minds none, however, equaled the newspapers. Published from New Hampshire to Georgia, increasing in number with the rise of American opposition, issued with clocklike regularity and reaching every segment of society, they influenced events both by reporting and abetting local patriot transactions and by broadcasting kindred proceedings in other places. The press, that is to say, instigated, catalyzed and synthesized the many other forms of propaganda and action. It trumpeted the doings of Whig committees, publicized rallies and mobbings, promoted partisan fast days and anniversaries, blazoned patriotic speeches and toasts, popularized anti-British slogans, gave wide currency to ballads and broadsides, furthered the persecution of Tories, reprinted London news of the government's intentions concerning America and, in general, created an atmosphere of distrust and enmity that made reconciliation increasingly difficult. Besides, the newspapers dispensed a greater volume of political and constitutional argument than all the other media combined.\(^2\)

Schlesinger's conclusions, as well as other data,\(^3\) refute the contention that the eighteenth century was unfamiliar with the concept of an institutional, journalistically functioning, press—or its central impact on American political and social life.\(^4\)

Emphasis on the distinct role of the press is evident in the adoption of the first amendment itself. As initially introduced by James Madison in June 1789, what became the first amendment stated: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom

\(^{81}\) A. Schlesinger, Prelude to Independence (1958).
\(^{82}\) Id. at 45-46 (emphasis added).
\(^{83}\) See F. Siebert, supra note 80. For further accounts of the vitality of pre-Revolutionary journalism in the American colonies, see C. Duniway, The Development of Freedom of the Press in Massachusetts (1906).
\(^{84}\) Contra, Lange, supra note 45, at 90 n.80. The colonial press "was neither well-circulated nor widely-read." Id.
of the press, as one of the great bulwarks of liberty, shall be inviolable." Madison simultaneously proposed an amendment that "[n]o state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." The House of Representatives altered this second proposed amendment by adding freedom of speech. The amendment as adopted by the House was: "[N]o State shall infringe the equal rights of conscience, nor the freedom of speech or of the press, nor of the right of trial by jury in criminal cases." Madison was said to consider this "the most valuable amendment in the whole list." The Senate would not, however, accept these restrictions on state powers. The ensuing compromise produced the language presently embodied in the first amendment.

In stating his opposition to the Alien and Sedition Laws, Madison later emphasized the central role the inclusion of the press clause of the first amendment had played in leading to ratification of the Constitution:

When the Constitution was under the discussions which preceded its ratification, it is well known that great apprehensions were expressed by many, lest the omission of some positive exception, from the powers delegated, of certain rights, and of the freedom of the press particularly, might expose them to the danger of being drawn, by construction, within some of the powers vested in Congress, more especially of the power to make all laws necessary and proper for carrying their other powers into execution. In reply to this objection, it was invariably urged to be a fundamental and characteristic principle of the Constitution, that all powers not given by it were reserved; that no powers were given beyond those enumerated in the Constitution, and such as were fairly incident to them: that the power over the rights in question, and particularly over the press, was neither among the enumerated powers, nor incident to any of them; and consequently that an exercise of any such power would be a manifest usurpation. It is painful to remark, how much the arguments now employed in behalf of the Sedition Act

85. 1 ANNALS OF CONG. 451 (Gales & Seaton eds. 1789).
86. Id. at 452.
87. Id. at 783.
88. Id. at 784.
89. U.S. CONST. amend. I. This history, and further details and background to the passage of the first amendment, are recounted in E. HUDON, FREEDOM OF SPEECH AND PRESS IN AMERICA (1963). See especially id. at 1-7.
are at variance with the reasoning which then justified the Constitution, and invited its ratification.

From this posture of the subject resulted the interesting question, in so many of the Conventions, whether the doubts and dangers ascribed to the Constitution should be removed by any amendments previous to the ratification, or be postponed in confidence that, as far as they might be proper, they would be introduced in the form provided by the Constitution. The latter course was adopted; and in most of the States, ratifications were followed by propositions and instructions for rendering the Constitution more explicit, and more safe to the rights not meant to be delegated by it. Among those rights, the freedom of the press, in most instances, is particularly and emphatically mentioned.\textsuperscript{91}

Allowing for the hyperbole sometimes present in heated discussions of current affairs, there is simply no basis for quarreling with Madison's recollections. Virginia, for example, had ratified the Constitution with the express caveat that

no right of any denomination can be cancelled abridged restrained or modified by the Congress by the Senate or House of Representatives acting in any Capacity by the President or any Department or Officer of the United States except in those instances in which power is given by the Constitution for those purposes: & that among other essential rights the liberty of Conscience and of the Press cannot be cancelled abridged restrained or modified by any authority of the United States.\textsuperscript{92}

In fact, of the original colonies, eleven had written constitutions; of these, nine had clauses in their constitutions protecting against deprivations of the liberty of the press; only two—New York and New Jersey—had constitutions which did not refer explicitly to freedom of the press.\textsuperscript{93} Of the eleven colonies with written constitutions, however, only one—Pennsylvania—made any refer-

\textsuperscript{92} Virginia's Resolution of Ratification, reprinted in VIRGINIA COMM'N ON CONSTITUTIONAL GOVERNMENT, WE THE STATES 70, 71 (1964).
\textsuperscript{93} L. LEVY, LEGACY OF SUPPRESSION 184-85 (1960). Massachusetts' constitutional provision is illustrative: "The Liberty of the press is essential to the security of freedom in a state; it ought not, therefore, to be restricted in this commonwealth." Id. at 184 n.22. (quoting MASS. CONST. of 1780, art. XVI). The history of the ratification of the Massachusetts Constitution is set forth in C. DUNIWAY, supra note 83, at 133-36.
ence to freedom of speech.\textsuperscript{94} There were, as well, extended discussions during the ratification process about the functions performed by the press and the particularized need for press freedom so that those functions could be effectively performed.\textsuperscript{95}

Whatever other conclusions may be drawn—and disputes engaged in—from the history of the adoption of the press clause of the first amendment, one thing is clear: The press clause of the first amendment was no afterthought, no mere appendage to the speech clause. The press clause was \textit{not}, the views of Chief Justice Burger to the contrary, merely “complementary to and a natural extension of Speech Clause liberty.”\textsuperscript{96} Whatever ambiguities there may be about its meaning, the press clause was, at the very least, a deeply felt response to the deprivations of \textit{press} liberty that the colonists had witnessed and to which they had been subjected. That does not, to be sure, answer questions regarding the scope of the press clause, let alone the definition of "press." But it does demonstrate that as to one critical historical issue Justice Stewart was correct: “That the First Amendment speaks separately of freedom of speech and freedom of the press is no constitutional accident, but an acknowledgement of the critical role played by the press in American society.”\textsuperscript{97}

To say this is not to denigrate the speech clause and all that it

\textsuperscript{94} L. \textsc{Levy}, \textit{supra} note 93, at 184. Pennsylvania's first constitution provided: “That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained.” 5 \textsc{The Federal and State Constitutions, Colonial Charters, and Other Organic Laws} 3083 (F. Thorpe ed. 1909). If one had to choose, based upon the language of the Pennsylvania Constitution alone, between the relative importance afforded freedom of speech and press, one would be hard put to choose the former.

\textsuperscript{95} See, e.g., R. \textsc{Lee}, \textit{Letter XVI}, in \textsc{An Additional Number of Letters from the Federal Farmer to the Republican} 142 (Quadrangle pub. 1962) (New York 1788).

A free press is the channel of communication as to mercantile and public affairs; by means of it the people in large countries ascertain each others sentiments; are enabled to unite, and become formidable to those rulers who adopt improper measures. Newspapers may sometimes be the vehicles of abuse, and of many things not true; but these are but small inconveniences, in my mind, among many advantages. A celebrated writer, I have several times quoted, speaking in high terms of the English liberties, says, “lastly the key stone was put to the arch, by the final establishment of the freedom of the press.”

\textit{Id.} at 152-53.

\textsuperscript{96} First \textsc{Nat'l Bank} v. \textsc{Bellotti}, 435 U.S. at 800 (Burger, C.J., concurring).

\textsuperscript{97} \textsc{Houchins} v. \textsc{KQED, Inc.}, 438 U.S. at 17 (Stewart, J., concurring in judgment).
protects; nor is it to elevate the press clause to supremacy above all other constitutional provisions. It simply means that claims of the press to constitutional protection must be considered within the context of the particularized protection that the words "or of the press" are deemed to convey.

**ON DEFINING "PRESS"**

But who and what is the "press"? And is there not, as Chief Justice Burger has urged, a danger that in the very act of articulating who is, and is not, deserving of press clause protection, we will act in a manner "reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country."98 These are serious questions, but the first response that may be offered is that their import is easily overstated.

In the great preponderance of cases, a court has little difficulty knowing a journalist when it sees one. Indeed, in virtually every first amendment press case in recent years, there has been no definitional difficulty at all. The *New York Times*,99 the Nebraska Press Association,100 Paul Branzburg,101 the *Miami Herald*,102 CBS,103 and others104 have surely been easily recognizable as "press." This is not to say that yet another "lonely pamphleteer"105 will not find his or her way to the Supreme Court, thus requiring a definitive definition of "press"; it is suggestive that the genuine difficulty in providing a totally satisfying definition should hardly deter us from affording protection to those who are plainly entitled to it.

A useful analogy is to that other central spoke of the first amendment: freedom of religion. Consider the paradox. It is plain that "we will not tolerate either governmentally established religion or governmental interference with religion."106 Yet, despite

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100. *See* *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).
the evident risks of governmental decisionmaking in this excruciatingly sensitive area, we permit judicial definition of what is and is not a *religion*[^107] and which allegedly religious activities are and are not constitutionally protected.[^108]

Is this truly the "licensing" of religion? If so, we are led to the bizarre conclusion that in the interest of protecting first amendment rights, we are precluded from enforcing any such rights. If not, why should we be so much more squeamish about the press clause? The fact remains that whatever the definitional difficulties as to religion, it has never even been urged that they bar affording constitutional protection to those who plainly fall within whatever definition is chosen. In this context, it is difficult to comprehend why the difficulties in defining "press" should lead to the conclusion that no uniquely "press" protections may be afforded.

Nor are the definitional difficulties insurmountable. Three approaches to defining "press" may be considered. One would be to afford equivalent "press" protection to all who write, thus treating the occasional pamphleteer precisely the same as the regularly employed journalist. Dictum in *Branzburg v. Hayes*[^109] is supportive of this approach.[^110]

A second, narrower, approach is a functional one similar to that taken by the Carter administration in proposed legislation to reverse the Supreme Court's ruling in *Zurcher v. Stanford Daily*.[^111] Protection could be afforded not only to journalists on established newspapers but "to free-lance writers, radio and televis-

[^107]: The constitutional issue has arisen, for example, in connection with the prosecution of Mormons for bigamy, see *Davis v. Beason*, 13 U.S. 333, 342 (1890); *Reynolds v. United States*, 98 U.S. 145, 161-64 (1878), and prosecutions of Jehovah's Witnesses for proselytizing without a license, see, e.g., *Borchert v. City of Ranger*, 42 F. Supp. 577, 580 (N.D. Tex. 1941). The issue has arisen in a statutory context in connection with conscientious-objector status. See *Berman v. United States*, 156 F.2d 377, 380-81 (9th Cir.), *cert. denied*, 329 U.S. 795 (1946); *United States v. Kauten*, 133 F.2d 703, 707-08 (2d Cir. 1943). See also *United States v. Macintosh*, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting) (defining religion).


[^111]: See *id.* at 704-05. Justice White, in his plurality opinion, approvingly quoted the assertion in *Lovell v. Griffin* that "'[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.'" *Id.* at 704 (quoting *Lovell v. Griffin*, 303 U.S. 444, 452 (1938)).
sion stations, magazines, academicians and any other person possessing materials in connection with the dissemination to the public of a newspaper, book, broadcast or other form of communication."

The third, narrowest, definition might limit the entities protected by the press clause to what Justice Stewart refers to as the "institutional press." Analogous support for—and examples of—this definition may be found in the laws of most states that protect, by statute, journalists from being required to disclose their confidential sources and information. These statutes tend to focus on such factors as the regularity of employment of the journalist and the regularity of publication of the newspaper involved. These definitions have worked tolerably well. While shield laws have been judicially gutted with regularity, it rarely has been for lack

112. Office of Media Liaison, White House Press Office, Carter Administration Stanford Daily Announcement 3-4 (Dec. 13, 1978). On April 2, 1979, President Carter formally announced the proposed legislation in the House and the Senate. 125 CONG. REC. H1866, S3771 (daily ed. Apr. 2, 1979). "It [the legislation] will restrict police searches for documentary materials held by the press and by others involved in the dissemination of information to the public. With limited exceptions, the bill will prohibit a search for or seizure of 'work product'—such as notes, interview files and film." Id. at H1867-68, S3772.


115. The regularity with which shield laws have been overcome should gratify the most demanding adherents of "neutral principles." The neutral principle, alas, appears to be this: The press always loses. See, e.g., CBS v. Superior Court, 85 Cal. App. 3d 241, 250, 149 Cal. Rptr. 421, 426 (1978) (California shield law, CAL. EVID.

http://scholarlycommons.law.hofstra.edu/hlr/vol7/iss3/2
of knowledge about who or what was intended to be protected.116

All three of these approaches are acceptable ones, although none is without difficulty. The broader the class included within the definition of press, the more attenuated the distinction between press and speech; the narrower the class, the greater the risk of appearing to license some newspapers, but not all. For this reason, the second approach seems a workable, if not flawless, compromise. What is most important, however, is not the definition that is chosen; it is the recognition that the conceded definitional difficulty is hardly a basis for affording no press clause protection at all. In a legal world in which lawyers make tolerably acceptable livings disputing what is and is not "unreasonable" restraint of trade or "unfair" competition, it is simply unacceptable to say that because a word in the Constitution is difficult to define, it should be afforded no meaning at all.

"PRESS" RIGHTS VIS-A-VIS OTHERS

A discrete argument against Justice Stewart's view that the press is entitled to constitutional protection distinct from that afforded by the speech clause is that by the very act of granting "special" rights to the press, others deserving similar rights would be deprived of them. Anthony Lewis, among others, has thus

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urged that granting the press the legal right not to respond to questions seeking confidential sources might or would damage the chances of academics to receive similar protection. Yet, it is largely because the press has achieved some degree of legal success in seeking first amendment protection for its sources that a developing, analogous right of academics to protect their sources has begun to be recognized. Similarly, the recognition of some degree of testimonial protection for journalists may yet be of some help—and is, in any event, of no harm—to clergymen seeking similar protection beyond that afforded by the priest-penitent privilege.

Here, as elsewhere in the law, judicial movement is interstitial in nature. What is recognized as needed by the press in one case may later be—and, in the case of scholars cited above, has already been—recognized as needed by others. More broadly, there is no reason to doubt that in most cases press and speech protections are likely to be identical: When the government cannot stifle the press, more often than not it will, for identical reasons, be barred from stifling speech.

But not always. Some protections which are particularly needed by the press are neither needed nor deserved by others. Those who gossip over their back fences about public figures do not require or deserve protection for their confidential sources;
nor do they require protection against intrusion into their non-existent "editorial process." But this is hardly a basis for denying such protections to the press.

Similarly, there is strong reason to question whether Zurcher, which permits the use of search warrants (as opposed to subpoenas) to obtain evidence from journalists and other innocent third parties, is at all as threatening to others as it is to the press. For all but the press, Zurcher, probably unnecessarily, risks invasion of significant privacy interests; for the press itself, Zurcher threatens not only privacy interests, but the very ability—unique to the press—to serve as an independent check on government power. A sheriff, armed with the routinely issued search warrant, can, by seizing confidential and other documents in the possession of a newspaper, virtually destroy the paper's investigation of him, his associates, or his political party; there is simply no apt and continuing analogy with respect to the documents of others.

Another area that may lend itself to distinct treatment for the press is libel cases commenced by private-figure plaintiffs. In Gertz v. Robert Welch, Inc., the Court permitted states to impose liability upon "a newspaper or broadcaster that publishes defamatory falsehoods" about private figures, so long as they do not impose "liability without fault." As part of this newly struck balance, the Court also held that presumed or punitive damages may not be

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In Zurcher, as well, the Court was presented with a range of uncontradicted affidavits from journalists and editors concerning the effects on the journalistic process of the searches at issue. Zurcher v. Stanford Daily, 436 U.S. at 573-74 & n.8 (Stewart, J., dissenting). Whatever the correctness of either the Branzburg or Zurcher rulings, there is simply no analogous argument that can be made to protect sources of back-fence gossipers—or of many others.


122. In Zurcher, the Court refused to "forbid the states from issuing warrants to search for evidence simply because the owner or possessor of the place to be searched [was] not then reasonably suspected of criminal involvement." Zurcher v. Stanford Daily, 436 U.S. at 560.

123. See id. at 577 (Stevens, J., dissenting).

124. See generally Blasi, supra note 45.

125. For a fictional account of a similar occurrence, see A. MACLEAN, GOODBYE CALIFORNIA 83 (Fawcett pub. 1977).


127. Id. at 332.

128. Id. at 347.
awarded, "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."^{129}

Since *Gertz*, lower courts have divided on whether the protection afforded "publishers or broadcasters"—the phrase repeatedly used in one form or another throughout the opinion^{130}—applies as well to nonmedia defendants. Should such defendants be able to avoid liability for articulating defamatory falsehoods about a private person if the defamation was made "without fault"?^{131} Should the restriction on presumed damages against the press apply, as well, to nonmedia defendants?^{132} These are difficult questions, ones I would be inclined to answer by affording similar treatment to media and nonmedia defendants. But the argument for distinct treatment for the press in this area is strong: It may be that only the press requires the *Gertz* protections since its institutional viability is at stake, and that for others the balance should be struck in favor of the victims of defamatory falsehoods.

As is evident, I do not offer the above examples to demonstrate that the press must always receive broader protection than is afforded others. What they do demonstrate is that the considerations that must be taken into account in determining whether and when the press requires protection differ from those applied to

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129. *Id.* at 349.

130. *Id.* at 348 ("publisher or broadcaster"); *id.* ("the press and broadcast media"); *id.* at 346 ("publisher or broadcaster"); *id.* at 343 ("needs of the press"); *id.* at 342 ("vigorous and uninhibited press"); *id.* at 341 ("the communications media"); *id.* ("publishers and broadcasters"); *id.* ("the news media"); *id.* at 332 ("newspaper or broadcasters"); *id.* at 330 ("any publication or broadcast").


others. In most cases, the first amendment compels the identical result for press and nonpress. For example, Justice Stewart himself joined (correctly, I believe) the majority opinion in *First National Bank v. Bellotti*, holding unconstitutional, on first amendment grounds, limits imposed by Massachusetts on corporate speech. Massachusetts urged that only the institutional press was entitled to first amendment protection against such governmental limitations. Justice Powell's majority opinion (joined by Justice Stewart) responded by observing that: "The press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate. . . . But the press does not have a monopoly on either the First Amendment or the ability to enlighten." As *Bellotti* itself demonstrates, the conclusion that the press has a "special and constitutionally recognized role" is hardly inconsistent with the broadest grant of first amendment rights to others—when those others are constitutionally deserving of them.

**THE AUTONOMOUS PRESS**

To say that the press clause provides distinct constitutional protection for the press does not, of course, even begin to answer the question of what the scope of this protection should be. In cases involving the press, as I have suggested elsewhere, the Supreme Court has afforded virtually absolute protection to decisions regarding what should or should not be printed; press protection has been considerable, although by no means absolute, against punishment subsequent to publication; least—although some—protection has been afforded newsgathering.

Although basically consistent with this tri-parte breakdown, Justice Stewart's opinions have increasingly emphasized its polar extremities: Virtually total first amendment protection for the press in the first two areas, and what Justice Stewart views as the all-but-total absence of distinct press rights in the third. It is a

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134. Id. at 781-82 (citations omitted) (footnotes omitted).
140. Compare Houchins v. KQED, Inc., 438 U.S. at 19 (Stewart, J., concurring in
fascinating equation which raises the fundamental issue of whether there need be any equation at all. Why should the press not be able to gather all that it is permitted to print? Why should it be permitted to print what it is not constitutionally entitled to gather? One eloquent answer was provided by Alexander Bickel:

[G]overnment may guard mightily against serious but more ordinary leaks, and yet must suffer them if they occur. Members of Congress as well as the press may publish materials that the government wishes to, and is entitled to, keep private. It is a disorderly situation surely. But if we ordered it we would have to sacrifice one of two contending values—privacy or public discourse—which are ultimately irreconcilable. If we should let the government censor as well as withhold, that would be too much dangerous power, and too much privacy. If we should allow the government neither to censor nor to withhold, that would provide for too little privacy of decision-making and too much power in the press and in Congress.141

The acceptance of constitutional “disorder” also seems a practical necessity if the press is to continue to be granted all but total power to determine what to print. The Pentagon Papers Case is a fitting example: Justices White and Stewart stated in a concurring opinion that they were “confident” that publication of all the materials obtained by the press in that case would likely do “substantial damage to public interests”;142 another member of the Court was even harsher in his comments;143 and others as well seemed unpersuaded that the documents would have no harmful effect on American foreign policy.144 Yet the approach of all the members of the Court was that the prior restraint challenged in the case was presumptively unconstitutional,145 and the six-to-three majority held in favor of the newspapers against whom proceedings had

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143. Id. at 762-63 (Blackmun, J., dissenting).
144. Id. at 758 (Harlan, J., dissenting, joined by Burger, C.J., and Blackmun, J.).
been commenced.\textsuperscript{146} If the situation were more "ordered," it hardly seems conceivable that the classified information could have been published.

The \textit{Landmark} case\textsuperscript{147} is another useful example. Confidential proceedings of the Virginia Judicial Inquiry and Review Commission relating to the fitness of a juvenile-court judge were made known to a Virginia newspaper which identified the judge in a news article. The newspaper was convicted under a Virginia statute making it a crime to disseminate the name of the judge. The Commonwealth defended the statute on the ground, \textit{inter alia}, that:

\begin{quote}
It benefits no one to say that the State can determine that certain matters of public interest should be kept confidential, but that the press is free to use whatever means it chooses to discover that information and to print what it learns. That kind of trial by battle and cleaverness [sic] between the State and the press hardly seems the way best to further the various aims of a democratic society.\textsuperscript{148}
\end{quote}

The Supreme Court, in an opinion by Chief Justice Burger, not only reversed the conviction, but held that "the publication Virginia seeks to punish . . . lies near the core of the first amendment."\textsuperscript{149} Again, it seems most unlikely that any member of the Court would have held that the press has any "right" to the information; the only right is to publish it once it is learned.

There is no doubt that any such system is an intellectually untidy one.\textsuperscript{150} The result may be viewed as anomalous, but nonetheless necessary: much information that the press does not learn and from which the public would profit will not be disclosed; some information that the press does learn and from which the public

\begin{footnotes}
\item[146] New York Times Co. v. United States, 403 U.S. at 714.
\item[147] See text accompanying notes 24-26 \textit{supra}.
\item[150] In oral argument in \textit{Landmark}, the following colloquy occurred between Assistant Attorney General Kulp, representing the Commonwealth, and Justice Rehnquist:

\begin{quote}
MR. KULP: I say, as I point out in my brief, I think it's a very untidy way for us to be trying to run a democratic society [for the press and government] to be competing one with another on information of that nature. . .

QUESTION [Justice Rehnquist]: The press doesn't believe in tidiness, does it?

MR. KULP: No sir. I would have to concede that I don't believe they do.

\end{quote}
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would not profit will be disclosed. But the alternative is a grim one: "We have learned," Justice White has warned, "and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers."\(^{151}\)

There remains the argument that the first amendment should be held to require that acts of government must be open. In certain cases, such as those involving access to the courts, the argument is a powerful one,\(^{152}\) although no particular "press" rights need be vindicated to assure a public right of access to the judicial system. In other cases, such as those involving access to prisons, the argument is strong that the first amendment should at least require some public access in the absence of strong countervailing public interests,\(^{153}\) but, again, there appears to be no need for special press rights, apart from that resulting from there being insufficient room to accommodate all who wish to inspect a prison. In this area, it appears that Justice Stewart is of the view that so long as neither the public nor the press has any right of access, the first amendment rights of neither are violated.\(^{154}\) As the opinions of Justices Powell and Stevens in the prison-access cases suggest, this seems, at the very least, a constricted view of the nonpress clause first amendment rights of the public.\(^{155}\)

But insofar as any unique rights of the press are concerned, the

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151. Miami Herald Publishing Co. v. Tornillo, 418 U.S. at 259 (White, J., concurring). The scope of the appalling limitations on press freedom throughout the world requires no elaboration. Even in England, the press was unable, consistent with English contempt law—and over fifteen years after the event—to publish truthful information in its possession about the sale of thalidomide that resulted in the births of eight thousand deformed babies. Under English law, since the actions brought by parents of these children remained sub judice, the Sunday Times of London was barred from publishing information as to the culpability of drug manufacturers. See P. KNIGHTLEY, H. EVANS, E. POTTER & M. WALLACE, SUFFER THE CHILDREN (1979).


155. See id. (Stewart, J., concurring in judgment); Saxbe v. Washington Post Co., 417 U.S. at 850 (Powell, J., dissenting); Pell v. Procunier, 417 U.S. at 835 (Powell, J., concurring in part and dissenting in part). Justice Stewart's Landmark concurrence, as well, affords extremely—and unpersuasively—narrow protection to free expression rights of others than the press. See 435 U.S. at 848 (Stewart, J., concurring in judgment).
balance struck by Justice Stewart seems the correct one. A press that continually applies to the courts for vindication of its right to gather information cannot credibly be the same press that tells the same courts that what the press prints and why it prints it are not matters that courts may even consider. When Professor Bickel, representing the New York Times in the Pentagon Papers Case, was asked by District Court Judge Gurfein "what good" it would do the public to read in the New York Times in 1971 what the American Ambassador in the Soviet Union had thought in 1968, he could—and did—respond by saying, "I think, your Honor, the First Amendment forecloses [you] from asking that question." It was a rare moment, a response both bold and brave. Yet, had the Times, a week earlier, attempted to demonstrate the "good" served by judicial enforcement of access to other news, Bickers answer could hardly have been a credible one. A press that vindicates the public’s "right to know," not by its own independent newsgathering, but by appeals for judicial or legislative consent, is hardly likely to be able through the years to defend the proposition that the first amendment "is a clear command that government must never be allowed to lay its heavy editorial hand on any newspaper in this country."157

THE ROLE OF THE PRESS

In the end, any decision as to whether the press should be afforded distinct constitutional protection is less dependent upon any particular interpretation of the press clause of the first amendment than on one’s perception of the role of the press in American life. Metaphors are useful in defining that role. The press is often likened to a watchdog guarding against abuse of governmental power.158 De Tocqueville, in turn, likened the press to an "eye constantlly open to detect the secret springs of political designs and to summon the leaders of all parties in turn to the bar of public opinion."159

If, as I would urge, these metaphors are apt, it is hardly because the press invariably serves as a vigilant protector of the public from its government; few newspaper readers would recognize such a magical transformation of the too often bland products thrust upon their doorsteps. On the contrary, it is because the press is the only institution that can serve on a continuing basis as an open eye of the public—and because, now and again, the press plays precisely this role.

To a considerable degree, the first amendment is bottomed on a "worst case" scenario—more particularly, a worst government case scenario. The scenario includes visages of government officials acting weakly and foolishly—sometimes corruptly and wickedly; it assumes a press ready to "bare the secrets of government and inform the people." As such, it is fortunately exaggerated as a statement of common behavior, since the government is hardly so consistently venal or the press so consistently able. But the scenario has all happened, all too recently. And there is no reason to assume it will not happen again.

It is thus crucial that the roles of the players in the scenario be clear ones. "Your job," Secretary of State Dean Acheson wrote to James Reston, "requires you to pry, and mine requires me to keep secret." Acheson was right. At the core of Justice Stewart's view of the first amendment is the telling concept that both Acheson and Reston served society best when they performed their separate and ultimately autonomous functions.


161. J. HOHENBERG, supra note 64, at 47 (quoting letter from Dean Acheson to James Reston (Jan. 1953), recounted in letter from Dean Acheson to John Hohenberg (Apr. 6, 1965)). See also id. at 149 for similar comments by Secretary of State Dean Rusk.

162. Subsequent to the completion of this Article, Justice Stewart wrote the opinion for the Supreme Court in Gannett Co. v. De Pasquale, 99 S. Ct. 2898 (1979), holding that the sixth amendment does not afford the public the right to attend pretrial hearings when both the defendant and prosecutor have agreed to their closing. Although Justice Stewart's opinion for the closely divided court was bottomed on the sixth amendment—and, as such, heartily and generally successfully assaulted in Justice Blackmun's spirited dissent, id. at 2919 (Blackmun, J., concurring in part and dissenting in part)—its first amendment emanations are troubling. Assuming, arguendo, some first and fourteenth amendment right to attend trials, Justice Stewart's opinion held that they were given adequate recognition since the trial court, after a hearing, had balanced first amendment interests against the defendant's right to fair trial, and since a transcript of the suppression hearing was later made available. Yet on the facts of the Gannett case, the balance struck by the trial judge is difficult to defend: prior publication by the newspapers had been, in Justice
Blackmun's words, "placid, routine and innocuous," as well as "comparatively infrequent." Id. (Blackmun, J., concurring in part and dissenting in part). Moreover, any such totally ad hoc balancing test offers trial courts no guidelines as to how to assess and weigh competing first and sixth amendment claims: Under such circumstances, the already evident tendency of trial courts to "balance" in favor of their own turf by routinely closing courtrooms was all too predictable. See N.Y. Times, Aug. 4, 1979, at A1, col. 5. Less defensible still is the proposition that distribution of after-the-fact transcripts comes close to being an adequate substitute for contemporaneous scrutiny of judicial behavior. As any trial lawyer would confirm, such a proposition is something only an appellate judge could believe.

Given all that, Justice Stewart's Gannett opinion remains basically consistent with his earlier opinions rejecting claims of access by both the press and the public and should, as this Article indicates, come as no surprise. Nonetheless, one may, perhaps, be forgiven the wistful hope that some day some of Justice Stewart's majority opinions with respect to the press will be transformed into dissents; and—more important—that more of his dissents and concurrences will become opinions of the Court. Then, at least, counsel will know how to respond to the questions posed at the commencement of this Article—and the answers will be glowing ones.