A Preferred Position for Journalism?

Anthony Lewis
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"Congress shall make no law . . . abridging the freedom of speech, or of the news media." That was the clarified version of the first amendment proposed by Justice Stewart in his memorable 1974 address at the Yale Law School, Or of the Press. Most parts of the Bill of Rights, he said, protect liberties whoever exercises them; but the press clause of the first amendment is "a structural provision" protecting a particular institution: "the organized press," which Justice Stewart defined as "the daily newspapers and other established news media." Journalism, in short, has a special constitutional status, with rights not available to others.

The Yale speech broke important new ground. The Supreme Court had never really addressed the question posed by Justice Stewart—whether the press clause has an independent purpose and meaning—much less given his bold answer. The press clause, he said, did not merely join with the speech clause to guarantee freedom of expression to all; that would make it "a constitutional redundancy." Rather, the "primary purpose" of those who framed it was "to create a fourth institution outside the Government as an additional check on the three official branches." That purpose, Justice Stewart said, informed recent Supreme Court decisions on the rights of the press.

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1. The first amendment provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.
2. Address by Justice Stewart, Yale Law School (Nov. 2, 1974), reprinted, except for opening courtesies, in [Stewart, Or of the Press, 26 Hastings L.J. 631 (1975).]
3. Id. at 633 (emphasis in original).
4. Id. at 631, 632. Justice Stewart also speaks of "the established press." Id. at 632.
5. Id. at 631.
7. Stewart, supra note 2, at 633.
8. Id. at 634.
9. Id. at 635.
The media welcomed the message. In recent years, news organizations, both print and broadcast, have become increasingly sensitive to perceived legal threats and increasingly determined to define their rights in the courts. The more aggressive mood no doubt stems in part from the experience of Vietnam and Watergate, which weakened the old premise of shared beliefs and mutual respect between press and government. A growing sense of professionalism, fed by journalism schools and journalism reviews and press councils, also adds to journalism's pride of place. The news business in this country is now quick to use the law as both sword and shield. The last two terms of the Supreme Court alone have seen battles about access to news, searches of news premises, protection of confidential sources, and the confidentiality of the editorial process. I think Justice Stewart's speech contributed to the determination of news organizations to fight those cases, and to the legal doctrines advanced by their lawyers.

The speech is also finding its way into judicial opinions. It was cited in the Second Circuit's short-lived decision in Herbert v. Lando, which gave aspects of the editorial process protection from discovery in a libel case; the dissenter, Judge Meskill, wryly responded that he would not take such a step "on the basis of a single speech, even one given by Mr. Justice Stewart." Chief Justice Burger, in a case dealing with the free speech rights of corporations, wrote a concurring opinion to express a skeptical attitude toward "those who view the Press Clause as somehow

10. "Media" is a word ordinarily to be avoided in civilized discourse. Alas, there is no way to escape its use in discussing whether "the press" whose freedom is guaranteed by the first amendment favors journalism over other forms of publication.


16. Id. at 977 n.11 (citing Stewart, supra note 2, at 633).

17. Id. at 997 (Meskill, J., dissenting).
conferring special and extraordinary privileges or status on the ‘in-
stitutional press.’ ”18 If provoking judicial colleagues is one sign of
effect, and it is, Justice Stewart can rest content with the impact of
his Yale speech.

But in the end the Stewart thesis of press exceptionalism—of a
preferred status for journalists—will succeed or fail in the
marketplace of constitutional ideas. It should be tested there by
three standards: its roots in history, its basis in the decided cases,
and its wisdom in principle. By those tests I find it unconvincing.

HISTORY

“For centuries before our Revolution,” Justice Stewart said in
his Yale speech, “the press in England had been licensed, cen-
sored, and bedeviled by prosecutions for seditious libel. The . . .
free press meant organized, expert scrutiny of government. The
press was a conspiracy of the intellect, with the courage of num-
bers. This formidable check on official power was what the British
Crown had feared—and what the American Founders decided to
risk.”19

Those words are an admirable tribute to the romance of jour-
nalism and to its high duty. But as history designed to prove that
the first amendment gave special status to the news media, the
passage is less convincing. For “the press” that was licensed and
bedeviled in England was not newspapers alone. Those who called
for “freedom of the press” in the seventeenth and eighteenth cen-
turies had in mind books and pamphlets and all kinds of occasional
literature as much as newspapers. Indeed, some were not thinking
of newspapers at all.

The most famous statement on behalf of press freedom in that
period was John Milton’s Areopagitica.20 Published in 1644, it was
an attack on the requirement that any printed work be read and li-
censed by official censors before publication—a requirement first
established by the Crown in 153821 and reimposed by Parliament

ring). The Chief Justice did not actually cite Justice Stewart’s speech, but it was
plainly his target. He has cited it in support of the argument that the press has no
constitutional right of access to government information. Houchins v. KQED, Inc.,
19. Stewart, supra note 2, at 634.
20. J. MILTON, AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED
PRINTING TO THE PARLIAMENT OF ENGLAND (J. Dent ed. 1946).
21. F. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND, 1476-1776, at 48-49
(1952).
in a statute of June 14, 1643, after the Puritan Revolution. Milton argued that "regulating the Press" could be accomplished by means less onerous than the licensing system. By "the Press" he meant any product of a printing press; at one point, for example, he ironically sympathized with the conscientious censor who must be "the perpetual reader of unchosen books and pamphlets, oftentimes huge volumes."

To say that books and pamphlets were at issue in the long English debate about freedom of the press is to argue the obvious. The royal licensing system was first imposed by Henry VIII after the invention of printing had, as one leading commentator puts it, magnified the danger of "opinions deemed pernicious." That was in 1538, before the development of newspapers. The classic history of the long struggle, Frederick Seaton Siebert's *Freedom of the Press in England, 1476-1776*, cites the Levellers' petition to Parliament of January 18, 1649, as an outstanding statement of the argument for press freedom; the petition made its case in terms of books and pamphlets. Siebert also shows that well into the eighteenth century pamphlets as well as newspapers were the subject of prosecutions for seditious libel: A bookseller was tried in 1752 for publishing a pamphlet critical of the House of Commons.

A scholarly brief filed in the 1978 Term of the Supreme Court by Floyd Abrams and others relied on the Siebert book to demonstrate that many newspapers were published in England before 1776 and that they were a frequent object of repression. The brief also showed that American newspapers played a significant role in arousing anti-British feelings before 1776. Hence, it concluded, "the framers of the Constitution knew what the press was, knew how crucial a role it could play." True enough. But no one

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22. *Id* at 173.
23. J. MILTON, supra note 20, at 40.
24. *Id*. at 20.
26. F. SIEBERT, supra note 21, at 200-01.
30. *Id*. at 50-51.
31. *Id*. at 51. But the very material cited in the brief, from A. SCHLESINGER, PRELUDE TO INDEPENDENCE (1958), shows compellingly that the American press in that period was far from the provider of "organized, expert scrutiny of government"
argues that the eighteenth-century concept of "freedom of the press" did not include newspapers. Justice Stewart's suggestion, rather, is that the concept was applied exclusively to newspapers. No historian of whom I am aware has produced any evidence to support that proposition.

The precise motives of those who drafted the speech and press clauses of the first amendment are unlikely to be discovered now, if indeed they were ever ascertainable. Madison sponsored in the House what became the first amendment, and another amendment that would have prohibited state abridgment of press and other freedoms; the latter was killed in the Senate. Committee changes, unexplained in the materials left to us, reduced the language to its final compelling simplicity: "Congress shall make no law . . . abridging the freedom of speech, or of the press." The most natural explanation seems the most probable: The framers wanted to protect expression whether in unprinted or printed form. Freedom of the press was more often mentioned in colonial and state bills of rights than freedom of speech; at the time of the first amendment ten state constitutions protected the former while only two the latter. Very likely, as Chief Justice Burger has said, press freedom "merited special mention simply because it had been more often the object of official restraints." But the two phrases were used interchangeably, then as now, to mean freedom of expression. And there is evidence suggesting that eighteenth-century Americans, when they thought about the rights of speech and press, regarded them as aspects of the same fundamental personal freedom. George Mason began drafting the Virginia Declara-

portrayed by Justice Stewart, Stewart, supra note 2, at 634. Professor Schlesinger said the press "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." Brief for Respondents at 50, Herbert v. Lando, 99 S. Ct. 1635 (1979) (quoting A. SCHLESINGER, supra, at 46). In short, the press in those days was highly partisan. And that character continued after independence and after the formation of the United States. While Jefferson was Secretary of State in the Washington administration, for example, he employed a journalist to attack Washington's Federalist Party. Lange, The Speech and Press Clauses, 23 U.C.L.A. L. REV. 77, 90 (1975).

32. E. HUDON, FREEDOM OF SPEECH AND PRESS IN AMERICA 5-6 (1963) (citing 1 ANNALS OF CONG. 432, 435, 778 (Gates & Seaton eds. 1789)).
34. U.S. CONST. amend. I.
35. See L. LEVY, supra note 25, at 183-85.
tion of Rights, which included a striking assertion of the need for freedom of the press, just two days after Dixon and Hunter's Virginia Gazette of May 18, 1776, carried the following on its front page:

[T]he liberty of the press is inviolably connected with the liberty of the subject . . . [.] The use of speech is a natural right, which must have been reserved when men gave up their natural rights for the benefit of society. Printing is a more extensive and improved kind of speech.

In sum, the Stewart thesis of a preferred position for the news media finds no support in history. Those who wrote the first amendment were familiar with newspapers. But there is no evidence that they meant to limit the freedom of "the press" to newspapers, excluding books and other publications, or that they intended to afford newspapers a higher standard of protection than other forms of expression.

THE DECIDED CASES

In his Yale speech, Justice Stewart said four groups of recent Supreme Court decisions reflected an understanding that the free press clause was "a structural provision of the Constitution," protecting "an institution." His list was headed by the series of libel cases starting with New York Times Co. v. Sullivan, in which the Court held libel actions by government officials subject to constitutional limitations. Officials are ordinarily immune from suit for what they say in the line of duty, Justice Stewart said, to encourage vigorous performance of their functions. He argued that the libel cases applied the same reasoning to the press. "By contrast," he said, "the Court has never suggested that the constitutional right of free speech gives an individual any immunity from liability for either libel or slander."

This explanation of Times v. Sullivan is, well, breathtaking. Justice Brennan's great opinion for the Court in that case began as follows: "We are required in this case to determine for the first

37. Mason's first draft of the Virginia Declaration, a committee draft, and the final version are set out in H. MILLER, GEORGE MASON: GENTLEMAN REVOLUTIONARY 337-40 apps. (1975).
39. Stewart, supra note 2, at 633 (emphasis in original).
41. Stewart, supra note 2, at 635 (emphasis in original).
time the extent to which the constitutional protections for *speech and press* limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct.\(^4\)

Not a word in the opinion intimated independent reliance on the press clause, or application of the new libel rule to media defendants only. Indeed, the decision reversed libel judgments against not only the *New York Times* but also four individual defendants, Alabama clergymen.\(^4\)

Justice Brennan drew an analogy to the official immunity doctrine quite different from that suggested by Justice Stewart. Officials, he said, were immunized against damage suits that might dampen their ardor "'in the unflinching discharge of their duties.'"\(^4\) He continued: "Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer."\(^4\) Not "the organized press" but "the citizen-critic"—which in philosophical terms is a pole apart. The vision that informs *Times v. Sullivan* is that of Alexander Meiklejohn, who saw free speech on public issues as the absolute right and duty of all citizens in a self-governing society.\(^4\) It is a vision of democracy, Steven Shiffrin has said, not "mediaocracy."\(^4\) Professor Shiffrin is surely right in saying that Justice Stewart's explanation "does violence to the language and underlying philosophy of *New York Times Co. v. Sullivan*."\(^4\)

\(^42\). 376 U.S. at 256 (emphasis added).
\(^43\). *Id.* at 256, 286. A year later the Court summarily reversed a libel judgment won by a Mississippi police chief from a civil rights leader who, on being arrested, issued a public statement saying that his arrest was "a diabolical plot." *See* Henry v. Collins, 380 U.S. 356, 356 (1965). The facts are given in more detail in Petitioner's Brief for Certiorari at 4, Henry v. Collins, 380 U.S. 356 (1965).
\(^44\). 376 U.S. at 282 (quoting Barr v. Matteo, 360 U.S. 564, 571 (1959)).
\(^45\). *Id.* (citation omitted).
\(^48\). *Id.* at 922. It should be added that there is some question now whether there is a constitutional difference between media and nonmedia publishers of defamatory statements about purely private persons. The Court dealt with libel of private persons in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The defendant in *Gertz* was a magazine publisher, and Justice Powell's opinion for the Court spoke of "the press and broadcast media," *id.* at 343. But the Court did not indicate whether the rule there established, that private libel plaintiffs must show at least negligent
Second, Justice Stewart found support for the idea of press exceptionalism in the Supreme Court’s close division in *Branzburg v. Hayes.* There, a five-to-four majority rejected claims for a journalist’s privilege not to disclose confidential sources, holding that reporters were required to appear before grand juries to testify at least about crimes they had witnessed. If only a free speech claim had been at issue, Justice Stewart suggested, the question “would have answered itself. None of us—as individuals—has a ‘free speech’ right to refuse to tell a grand jury the identity of someone who has given us information relevant to the grand jury’s legitimate inquiry. Only if a reporter is a representative of a protected institution does the question become a different one.”

But suppose a college lecturer refused on first amendment grounds to answer a congressional committee’s questions about his beliefs and associations. In that somewhat analogous situation the Supreme Court also divided five to four, rejecting the lecturer’s claim. Or suppose a professor visited Vietnam during the war, talked with American officials on the basis that he would not disclose their names, wrote a scholarly paper on the war—and was then called before a grand jury and asked the identity of his sources. Would a claim of confidentiality on his part be utterly without weight because he is not a member of “the organized press”? I think many journalists would be uncomfortable with a doctrine of testimonial privilege that included them and excluded publication of a damaging falsehood to recover, would apply to suits against nonmedia defendants. The American Law Institute has rejected any distinction, saying it would be “strange.” *See Restatement (Second) of Torts § 580B(e) (1977).* A number of state courts have similarly rejected any distinction between media and nonmedia defendants in libel actions by private plaintiffs. *See, e.g., Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976).*

50. Stewart, *supra* note 2, at 635 (emphasis in original).
51. *See Barenblatt v. United States, 360 U.S. 109 (1959).*
52. *See United States v. Doe, 460 *2d 328 (1st Cir. 1972), cert. denied, 411 U.S. 909 (1973).* Popkin, an associate professor of government at Harvard, was imprisoned for contempt when he refused to answer certain questions before a grand jury investigating the distribution of the Pentagon Papers. *See N.Y. Times, Nov. 22, 1972,* at 1, col. 1. The president of Harvard appeared as his counsel, and one week later the grand jury’s term was ended and Popkin was released. *See N.Y. Times, Nov. 29, 1972,* at 1, col. 1. For an instance of a judge protecting a scholar from forced disclosure in a civil case—on nonconstitutional grounds—*see Richards of Rockford, Inc. v. Pacific Gas & Elec. Co., 71 F.R.D. 388 (N.D. Cal. 1976) (declining to enforce, on discovery, demand by plaintiff in civil damage action that third-party academic researcher identify sources of material in scholarly paper on defendant company).*
others with similar reasons for silence. In any event I doubt that, for most judges, the question would "answer itself."

Third, Justice Stewart cited cases in which the Supreme Court had rejected claims of access to the press by outsiders. In *Miami Herald Publishing Co. v. Tornillo*, the Court unanimously held unconstitutional a Florida statute requiring newspapers to publish a reply submitted by any candidate for office whom they had criticized. Justice Stewart correctly described the decision as rejecting the idea that government may force a newspaper to be a "fair and open 'market place for ideas.' " But that holding does not imply a distinction between the speech and press clauses of the First Amendment. Government can no more require a speaker than a newspaper to be neutral. Justice Holmes' opinions on freedom of speech introduced the concept of the market in ideas, and it was Holmes' point that the most extreme or hateful beliefs must be allowed to compete in that market. His is now the accepted view.

In Professor Nimmer's view, *Tornillo* in another sense did demonstrate that free speech and press can be distinct, even conflicting interests. The Florida law enhanced the right of candidates to speak, he said, but infringed the freedom of the press by compelling publication; thus the two rights were directly in conflict in that case. But the vice of the law lay in the compulsion to publish; and I think the result would be no different if the case involved a compulsion to speak. If a state statute required any candidate who spoke falsely about another to make a corrective speech, would it survive challenge under the First Amendment?

The last example given by Justice Stewart of cases assertedly reflecting the special character of the press clause was *New York*
Times Co. v. United States,\(^{60}\) the Pentagon Papers Case, in which
the Supreme Court refused to restrain newspaper publication of se-
cret documents on the history of the Vietnam war. The per curiam
opinion said that the Government had not met the heavy burden of
justification for “[a]ny system of prior restraints of expression.”\(^{61}\)

The doctrine disfavoring prior restraints was established by the
opinion of Chief Justice Hughes in Near v. Minnesota,\(^{62}\) a newspa-
paper case. But cases rejecting restraints on publication are not lim-
ited to the news media; many have concerned books and pam-
phlets. The per curiam opinion in the Pentagon Papers Case itself
relied on a recent decision setting aside an injunction that kept a
community organization from distributing literature criticizing a
real estate broker for “blockbusting.”\(^{63}\) One of the seminal first
amendment decisions of the 1930’s, Lovell v. City of Griffin,\(^{64}\) set
aside a conviction for distributing pamphlets without a city permit.
Chief Justice Hughes, speaking for the Court, said the freedoms of
speech and press were “fundamental personal rights.”\(^{65}\) Citing the
history of the English struggle against press licensing, with a men-
tion of Milton,\(^{66}\) Hughes said: “The liberty of the press is not con-
fined to newspapers and periodicals. It necessarily embraces pam-
phlets . . . .”\(^{67}\) The city manager’s unlimited power to allow or
forbid the distribution of pamphlets, he said, “strikes at the very
foundation of the freedom of the press.”\(^{68}\) The Lovell case was
relied upon in Talley v. California,\(^{69}\) which held unconstitutional a
Los Angeles ordinance that forbade the distribution of handbills
unless they included the names of their authors and distributors.

\(^{60}\) 403 U.S. 713 (1971). See Stewart, supra note 2, at 635.
\(^{61}\) Id. at 714 (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).

The separate opinions of the six Justices in the majority actually gave two different
bases for the judgment in favor of the newspapers. Five Justices relied in whole or
part on the prior-restraint doctrine. Five relied in whole or part on the fact that Con-
gress had not authorized the injunctive relief sought by the Government, or had in-
deed rejected legislation to authorize it: a separation-of-powers basis, as in
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). For a view that the
Youngstown point really decided the case, see Junger, Down Memory Lane: The
Case of the Pentagon Papers, 23 CASE W. RES. L. REV. 3 (1971).

\(^{62}\) 283 U.S. 697 (1931).
\(^{63}\) 403 U.S. at 714 (citing Organization for a Better Austin v. Keefe, 402 U.S.
415, 419 (1971)).
\(^{64}\) 303 U.S. 444 (1938).
\(^{65}\) Id. at 450.
\(^{66}\) Id. at 451 (citing J. MILTON, APPEAL FOR THE LIBERTY OF UNLICENSED
PRINTING).
\(^{67}\) Id. at 452.
\(^{68}\) Id. at 451.
\(^{69}\) 362 U.S. 60 (1960).
Justice Black's opinion for the Court, in which Justice Stewart joined, emphasized the value of anonymous books and pamphlets in English and American history.\textsuperscript{70}

Nor is the prior-restraint doctrine limited to publications; it also protects freedom of speech and assembly. In \textit{Shuttlesworth v. City of Birmingham},\textsuperscript{71} the Supreme Court reversed a conviction for parading without a permit. Justice Stewart wrote the opinion of the Court. The city permit ordinance was so vague, he said, that it gave officials virtually unbridled discretion. Thus it fell "squarely within the ambit of the many decisions of this Court over the last 30 years" against laws "subjecting the exercise of First Amendment freedoms to the prior restraint of a license."\textsuperscript{72}

Case law, then, draws no line between "the organized press" and other publications—books, pamphlets, handbills—in their right to freedom of the press. Nor do the cases distinguish the quality of freedom assured to the press and to speech. Of course there are practical distinctions between speeches and publications, and between newspapers and books; and the law takes them into account. But as the decided cases show, they are distinctions without a difference in constitutional principle. No Supreme Court decision has held or intimated that journalism has a preferred constitutional position.

\textbf{Principle}

The practical consequences of the Stewart thesis, if it became accepted constitutional doctrine, would not be as beneficial to journalists as many of them believe. And the thesis is against the real interest of the press, and of society, for deeper reasons of principle.

The whole idea of treating the press as an "institution" arouses uneasy feelings. In the American system, institutions are usually subject to external check. The press has operated as a freebooter, outside the system. The more formally it is treated as a fourth branch of government, the more pressing will be demands that it be made formally accountable.\textsuperscript{73} Moreover, as Robert M. Kaus has

\begin{itemize}
\item \textsuperscript{70} \textit{Id.} at 64-65.
\item \textsuperscript{72} 394 U.S. at 150-51.
\item \textsuperscript{73} The following statement is illustrative: "The extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly—a duty widely acknowledged but not always observed by editors and publishers." Nebraska Press Ass'n v. Stuart,
suggested, the institutional view of the first amendment envisages a corporate organization of society, with groups assigned different roles and corresponding legal rights. The traditional American vision has been universal, positing a society of individuals with equal rights and responsibilities: Justice Brennan's citizen-critics.

Who Is the Press?

If a majority of the Supreme Court accepted the proposition that freedom of “the press” in the first amendment gives special status to the news media, the next question would be: Who is “the press”? Would the definition be limited to Justice Stewart's “established” newspapers, magazines, and broadcasters? Could it exclude underground papers? Journals of sexual exploitation? A sheet of viciously racist tone, like the new weekly at issue in Near v. Minnesota? In the age of the electronic copier, what about the citizen moved by outrage at some local development to circulate his or her views among neighbors? Or what of a specialty publication such as a Wall Street tip sheet: Could the Securities and Exchange Commission regulate it without violating the freedom of “the press”?

These questions are not fanciful. They would inevitably arise, and they would force the courts to go into the business of defining “the press,” of deciding who qualified for the higher constitutional status. Justice White foresaw the problem in his opinion for the Court in Branzburg. Selecting those entitled to a journalist's constitutional privilege, he said, “would present practical and conceptual difficulties of a high order.” In making the selection, courts would be drawn into “discriminating on the basis of content.”

427 U.S. 539, 560 (1976). The opinion, by Chief Justice Burger, made that appeal for self-restraint in the context of a holding that the courts could not, except in the most extreme circumstances, enjoin publication of a story that might affect the opinions of jurors in a pending criminal case.

74. Kaus, The Constitution, the Press and the Rest of Us, WASH. MONTHLY, Nov. 1974, at 50, 52. As an example of the universalist outlook, Kaus refers to the rule of one man, one vote, Id.

75. See text accompanying notes 44-47 supra.

76. 283 U.S. 697 (1931). Only nine issues of the Saturday Press, the newspaper in Near, were published. Id. at 703. The paper's antisemitic character is made clear in Justice Butler's dissent. Id. at 724 n.1 (Butler, J., dissenting).


78. 408 U.S. at 703-04.

79. Id. at 705 n.40.
Would the media really welcome this new form of judicial licensing?

Some supporters of the Stewart thesis, perhaps recognizing the risks in its exclusivist character, have tried to make it more appealing by broadening its definition of “the press.” In *Herbert v. Lando*, Judge Oakes, while relying explicitly on Justice Stewart’s speech, said he would not draw any “distinction between the institutional press and the individual pamphleteer.”80 Floyd Abrams, in his Supreme Court brief for the media respondents in *Herbert*, embraced that position; the press clause of the first amendment, he said, fully covered “the lonely pamphleteer.”81 But if the definition is thus broadened, then any publication becomes “the press” and Justice Stewart’s thesis loses its point. His argument was that the first amendment has special meaning for the news media.

*The Danger of Exclusivity*

The danger of exclusivity was demonstrated when Justice Stewart applied his thesis in literal terms to a case before the Court. The case was *Zurcher v. Stanford Daily*.82 A majority held that authorities could search a newspaper office under warrant—that is, without notice or a prior adversary hearing—for documentary evidence of a crime committed by other parties. Justice Stevens dissented on the ground that notice should ordinarily be required before such a search of any third party: one not suspected of crime.83 Justice Stewart, in an opinion joined by Justice Marshall, dissented on the ground that the search violated the freedom of the press. He wrote:

> Perhaps as a matter of abstract policy a newspaper office should receive no more protection from unannounced police searches than, say, the office of a doctor or the office of a bank. But we are here to uphold a Constitution. And our Constitution

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80. 568 F.2d at 994 n.34 (Oakes, J., concurring).
83. Id. at 581 (Stevens, J., dissenting). Some immediate scholarly comment agreed with Justice Stevens’ view of the case. See Harv. L. Rec., Sept. 29, 1978, at 5, col. 1 (comments of Professors Freund and Katz). The Stevens argument is the more compelling because the opinion of the Court failed to discuss a central fact noted by the dissent: that when the Court first allowed searches for “mere evidence,” in *Warden v. Hayden*, 387 U.S. 294, 300 (1967), it was dealing with the evidence of a criminal suspect’s clothes; it left open the more sensitive question of documentary evidence.
does not explicitly protect the practice of medicine or the business of banking from all abridgment by government. It does explicitly protect the freedom of the press.\textsuperscript{84}

In Justice Stewart's view, then, the Constitution forbids the unannounced search of a newspaper office for photographs of a felony; but it allows the police, without notice, to search a psychiatrist's files,\textsuperscript{85} or Ralph Nader's.\textsuperscript{86} I think such a concept of the Constitution would be quite unacceptable to most Americans. The Constitution protects values, not particular classes of people. And the values are not limited to those listed by name in the Constitution; if the significance of that eighteenth-century document were limited by such literalism, it would long since have become a museum piece.\textsuperscript{87}

If attention is focused on the rights of the organized press, damage to other vital first amendment interests may occur without adequate awareness or resistance. Relatively little outcry was heard when the Fourth Circuit developed the doctrine that in my judgment presents the most serious threat in American constitutional history to public knowledge of government: the secrecy-by-contract doctrine of \textit{United States v. Marchetti}.\textsuperscript{88} Because he had signed a secrecy agreement upon joining the agency, a former official of the Central Intelligence Agency was enjoined from publishing a book on CIA activities without the agency's prior censorship.\textsuperscript{89} When

\begin{thebibliography}{99}
\bibitem{84} 436 U.S. at 576 (Stewart, J., dissenting).
\bibitem{86} Nader would apparently be covered by legislation suggested by the Carter administration six months after the decision in \textit{Zurcher}. The proposal was to prohibit searches by either state or federal officers for the work product of anyone preparing a publication or speech for dissemination in, or affecting, interstate commerce. The work product would include notes, drafts, outtakes, photographs, tapes, and files. The Justice Department said its intention was to cover not only the news media but scholars, freelance writers, and pamphleteers. \textit{See Lewis, A Blow for Liberty}, N.Y. Times, Dec. 14, 1978, at A31, col. 1.
\bibitem{87} The word "reputation" is not found in the Constitution, but Justice Stewart once said that reputation has weight in the constitutional scale because it reflects "our basic concept of the essential dignity and worth of every human being." \textit{Rosenblatt v. Baer}, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).
\bibitem{88} 466 F.2d 1309 (4th Cir.), \textit{cert. denied}, 409 U.S. 1063 (1972).
\bibitem{89} The court found the secrecy agreement to be a legally enforceable contract, which it said took the case out from under the prior-restraint rule that had just been reaffirmed by the Supreme Court in \textit{New York Times Co. v. United States}, 403 U.S. 713 (1971). 466 F.2d at 1316-17. It did not discuss the need, suggested by Supreme Court cases, \textit{see, e.g.}, \textit{Greene v. McElroy}, 360 U.S. 474, 506-08 (1959), to find explicit authorization by Congress for executive action that raises serious constitutional doubts.
\end{thebibliography}
the agency made massive deletions and the author sought judicial review, the court gave the CIA virtually unreviewable discretion to delete any passage that it said contained information classified during the author's employment.90 He was also enjoined for the rest of his life from disclosing such information “in any manner.”91 In a subsequent case92 the United States sued another former CIA employee who had already published a book; the Government did not allege that he had disclosed any classified matter; but it claimed, and was awarded, damages because he had failed to submit the manuscript to the agency for clearance.

Those decisions have had much less attention in the news media than cases involving journalists, although they present direct and profound threats to the core purpose of the first amendment: keeping the public aware of what its government does. And the journalist-centered view of the first amendment may well reduce the legal prospects of a Victor Marchetti. The insistence that a particular class has special immunities under the first amendment is likely to suggest to judges that persons outside that class are of a lower order of constitutional concern.

The idea that the news media are constitutionally unique may also encourage hubris, the excessive pride that goes before a fall. Powerful newspapers and networks are not universally beloved as it is; there is talk about the arrogance of the media. Ordinary citizens may find it hard to understand why the press should have rights denied to them. And in the long run, rights depend on public understanding and support.93 Professor Bork has put it succinctly: “To the degree that the press is alone in the enjoyment of freedom, to that degree is its freedom imperilled.”94


93. Vermont Royster of the Wall Street Journal has said:
That first amendment we cherish is not some immutable right handed down to Moses on Mt. Sinai. It's a political right granted by the people in a political document, and what the people grant they can, if they choose, take away.
There is no liberty that cannot be abused and none that cannot be lost.

94. R. Bork, Freedom, the Courts and the Media 13 (Dec. 8, 1978) (address to
The Right to Gather News

One legal issue has become the focus of the debate about a special constitutional position for journalists: the claim that the first amendment affords a right to gather news, and stemming from that a testimonial privilege to protect the confidentiality of news sources. It is this claim that journalists have lately been pressing with the greatest fervor, and that for some critics raises the sharpest questions about press exceptionalism.95

The issue was dramatized, for press and public, in In re Farber.96 M.A. Farber, a reporter for the New York Times, was assigned in 1975 to follow up a tip about thirteen suspicious deaths in a New Jersey hospital a decade earlier.97 On the basis of interviews with confidential sources, he wrote articles suggesting that "Dr. X" had poisoned the patients with curare. The local prosecutor reopened the case, and Dr. Mario Jascalevich was charged with five murders.

At his trial in 1978, Dr. Jascalevich’s lawyer subpoenaed all the notes Farber had made in reporting the story in 1975 and 1976. He and the Times both declined to produce the notes, claiming a privilege under the first amendment and under a New Jersey shield law for journalists.98 At a minimum, they argued, they should not have to respond to such an indiscriminate subpoena; the defendant should have to show that particular items were likely to be relevant, material, and unobtainable by other means.99 The trial judge ordered the notes delivered to him for examination in camera, a process he said was necessary to pass on the legal arguments.100 When the Times and Farber declined to

95. Royster has warned that [w]e should be especially wary of claiming for ourselves alone exemptions from the obligations of all citizens, including the obligation to bear witness once due process has been observed. There is nothing in the Bill of Rights, including the first amendment, that makes the press a privileged class apart. The risk is that the people may think us arrogant. Royster, supra note 93, at A19, col. 1.


97. For the history of Farber’s involvement, see An Almost Routine Assignment Led to Historic Case, N.Y. Times, Nov. 28, 1978, at B8, col. 1.


obey that order, they were held in contempt. The *Times* was fined $100,000, plus $5,000 for each day it remained in contempt. Farber was fined $1,000, ordered to jail until he changed his mind, and, in addition, given a six-month sentence for criminal contempt to begin when he complied with the order or when the case was resolved.101

The New Jersey Supreme Court affirmed,102 holding that the first amendment argument had been rejected in *Branzburg*103 and that the state shield law, while in terms protecting Farber, had to yield to the New Jersey constitutional provision assuring defendants the right to compel evidence on their behalf.104 In deference to the legislature's intent in enacting the shield law, the court agreed that a particularized showing of need was required to force production of a journalist's notes, even for purposes of in camera inspection;105 but it said the facts were so obvious in this case that the judge did not have to bother with the requirement.106 Farber had been in jail forty days, and the *Times* fined $285,000, by the time the trial ended in Jascalevich's acquittal. The further six-month prison sentence was then dropped.107

There is much to criticize in the performance of the courts in the Farber case. A rule requiring a particularized showing should apply in all cases, not every case except the one in which the rule is laid down. If a newly enacted statute squarely supports a claim of testimonial privilege, those who rely on it in good faith surely should not be imprisoned and subjected to huge fines unless and until an authoritative decision holds the statute void. Farber himself asserted no absolutes and sought no clash with the law; when he went to prison, on grounds of principle, he said: "I deeply appreciate how much our civilization, and civility, depend on order and the rule of law."108 Yet he was treated in the state courts with a rigor seldom shown to thieves, and a federal judge verbally

103. Id. at 266-68, 394 A.2d at 333-34 (discussing *Branzburg* v. Hayes, 408 U.S. 665 (1972)).
104. Id. at 269-74, 394 A.2d at 335-37 (citing N.J. CONST. art. 1, ¶ 10).
105. Id. at 275-77, 394 A.2d at 338.
106. Id. at 277-81, 394 A.2d at 339-41.
abused him without basis in fact or any effort to discover the facts. But that is not the same as saying that his was the only side to the case.

During the proceedings the Executive Editor of the Times, A.M. Rosenthal, issued a statement saying:

Mr. Farber and The Times have been fighting this case because they feel it goes to the heart of the constitutional guarantee of the first amendment. It has always been believed that the first amendment guarantees the right not only to print the news freely but to gather it freely. It is quite plain that without the right to gather information, the right to print it means little. We believe the right to gather information will eventually be destroyed if any branch of government, including the judiciary, has the right to seize and make public a reporter’s notes, confidential information and raw material.

Many in the news business share those views, but they are not the law—or the fact. Two professors of journalism, under a grant from a journalism-based foundation, recently made historical studies of the claim that the first amendment guarantees the right to

109. United States District Judge Frederick B. Lacey, after a brief hearing on a petition for habeas corpus, made findings that, among other things, "Farber has a stake in the conviction of Dr. Jascalevich . . . . This is a sorry spectacle of a reporter who purported to stand on his reporter's privilege when in fact he was standing on an alter [sic] of greed. . . . What he did here is . . . evil . . . ." Application to Vacate Stay of Single Justice at 17, New York Times Co. v. New Jersey, 439 U.S. 886 (quoting United States District Court Judge Lacey), cert. denied, 439 U.S. 997 (1978). Judge Lacey’s statements were based upon conclusions he erroneously drew from Farber's intention to write a book. The judge seemed to believe that the book contract, which was before him, made Farber's remuneration dependent upon the conviction of defendant Jascalevich; it did not. See Response of The New York Times Company and Myron Farber to Application to Vacate Stay at 1-7 app., New York Times Co. v. New Jersey, 439 U.S. 886, cert. denied, 439 U.S. 997 (1978), which demonstrates that the “findings” were made in the absence of any evidence or in contradiction of the record. In my opinion, the transcript presents a sorry spectacle of judicial abuse.

110. Professor Ronald Dworkin, in an article arguing that Farber, in seeking a privilege, asserted interests of public policy that had to yield to the rights of the defendant, nevertheless praised Farber and the Times for raising the issues. He added that the New Jersey courts were unreasonable in jailing Farber and making the Times "pay punitive daily fines while their legal arguments were pending before appellate courts.” Dworkin, The Rights of Myron Farber, N.Y. REV. BOOKS, Oct. 26, 1978, at 34, 36. Dworkin challenged the relevance of Farber’s book contract, criticized by Judge Lacey. Id. at 36 n.*. For a further decimation of the book-contract red herring, see Kwitny, A Judicial War on the Press?, Wall St. J., Aug. 23, 1978, at 12, col. 4.

gather news. One wrote that he was "sad to say there is no evidence" to support the claim. The other concluded: "I can't think of a more dubious proposition for a journalist to try to support."

No Supreme Court decision has ever enforced a constitutional right to gather news. Without such a right, the American press has performed more boldly and with greater freedom than any other press in the world. Judicial inspection of subpoenaed material in camera cannot accurately be described as seizing material and making it public; judges routinely examine trade secrets, national security records, and other sensitive matter to decide on its use, and they keep confidences. Nor is it accurate in this country to speak of courts as an arm of the state. They often stand against the state; they have stood up even to its highest officer. In United States v. Nixon, the President asserted a privilege to withhold tapes of intimate White House conversations subpoenaed by the Special Prosecutor. The Supreme Court agreed that there was a qualified privilege based on the Constitution but held that it was overridden.

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112. The studies, sponsored by the Gannett Foundation, were made by Professors Don R. Pember of the University of Washington and Harold L. Nelson of the University of Wisconsin. Articles by them were published, together with a comment by Professor Donald M. Gillmor of the School of Journalism, University of Minnesota, in BULL. Am. Soc'y Newspaper Editors, Dec./Jan. 1979, at 6-9. A leading newspaper writer on questions of journalism commented:

The verdict of the professors will not end the claims of news people that the gathering of news must have special protection if the press is to serve effectively as the public's watchdog and informer. But it should put to rest any illusion that the position of the current Supreme Court is just an aberration—Nixon's Revenge, some journalists call it—and that all that is needed is a return to the thinking of the Founders.


113. Pember, Founders (meeting in secret) protected our right to publish, but not to gather the news, BULL. Am. Soc'y Newspaper Editors, Dec./Jan. 1979, at 6. Professor Pember wrote that a "right to gather news" was not discussed at the time of the first amendment's adoption, or for years after, for a simple reason:

Consider the "newspapers" of that era. News-gathering was hardly a prime function. These were papers of opinion and ideas. . . . News-gathering, reporting, access to government information as we speak of it today was not really an important part of the American press of that era. It is not surprising then that that concept was not considered a part of the definition of freedom of the press. (Reporting, per se, really didn't begin to be important until the 1830's.)

Id.


116. Id. at 705-06 (discussing U.S. Const. art. II).
by the particularized needs of law enforcement. Not even the argument that an adverse decision would cripple the Presidency persuaded the Court to reject the claims of law. Most editors applauded the Nixon decision. They should be slow to argue that the press will be crippled unless its claims of privilege always prevail.

Law and common sense both reject the notion that journalists alone in the society have an overriding constitutional claim to secrecy. Their interest is a serious one. But in the real world it must inevitably be balanced against other interests. That is plain if one considers how the courts would feel—how the public would feel, indeed—if various parties sought the same information that Farber had. The balance of interests would vary.

Suppose, for example, that a congressional committee subpoenaed Farber's notes and that he declined to produce them, relying on the first amendment. If the committee had only a general interest to justify its inquiry, Farber would surely have a good chance of persuading a court not to sustain a contempt citation. In Sweezy v. New Hampshire, Justice Frankfurter, who did not treat state interests lightly, concluded that the state's asserted desire to investigate subversion had to yield to the claims of academic freedom—to the political privacy of a university lecturer. In such a balance, I believe Farber's interest would be just as weighty.

Next, suppose a grand jury sought Farber's notes. Branzburg indicates that he would have to produce them unless he could show, in the words of Justice Powell's concurring opinion, that his information was "remote" from the subject of the investigation or that he would be forced to disclose confidential sources "without a legitimate need of law enforcement."

Finally, suppose a journalist's notes were sought by a defendant, as Farber's were—a defendant, moreover, who found himself

117. Id. at 706-07.
118. Counsel for President Nixon argued that an adverse decision would "impair markedly the ability of every President of the United States from this time forward to perform the constitutional duties vested in him," and would "alter the nature of the American Presidency profoundly and irreparably." Brief for Respondent at 135, 137, United States v. Nixon, 418 U.S. 683 (1974).
120. 354 U.S. 234 (1957).
121. Id. at 265-67 (Frankfurter, J., concurring in result).
122. 408 U.S. at 710 (Powell, J., concurring). Justice Powell's concurrence was crucial because he provided the fifth vote.
123. Id. (Powell, J., concurring).
in the dock largely because of articles by Farber. A defendant has an unusually explicit constitutional right to compel evidence on his behalf: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." And a reporter's notes could be useful. Witnesses sometimes change their stories, and a reporter's record of what a prosecution witness said years before about the defendant could be vital for impeachment purposes on cross-examination. That was the principle of Jencks v. United States, holding that in federal prosecutions the defense must be allowed to see prior statements made by witnesses to the government. When a defendant seeks information from a journalist with genuine knowledge of the case, there are strong interests—constitutional interests—on the defendant's side. Those who assert a press privilege would win more respect for their position if they admitted as much.

The outcome of the Farber case evoked some cries of doom in the press. Theodore H. White, in an article headed "Why the

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124. U.S. CONST. amend. VI.
126. It is sometimes said that denial of a journalist's privilege is inconsistent with the granting of a privilege to lawyers and others. Kwitny wrote that journalists "are now being denied privileges commonly accorded to private lawyers, doctors, priests and so on." Kwitny, supra note 110, at 12, col. 4. In Farber the New Jersey Supreme Court did not explain, and should have, why it honors those privileges when created by statute, but held the shield law unconstitutional to the extent that it would deny a defendant relevant evidence; any privilege, after all, keeps out evidence. But I think there is an explanation. The older privileges are for the benefit not of the doctor or lawyer or priest, but of the patient or client or penitent, who alone can waive the privilege. Each of these persons is a defendant or prospective defendant, and the privilege in these situations is akin to the fifth amendment privilege against compelled self-incrimination: It protects a defendant from having a private confession used by the state, as if he had been tricked into incriminating himself. The journalist's privilege is designed not to protect an individual but to advance the general public interest in the flow of information.
But the differences between the claimed journalist's privilege and others do not justify judicial disrespect for a legislature's decision to extend a privilege to newsmen. A disturbing feature of the Farber decision was the abrupt way in which the New Jersey Supreme Court brushed aside a considered judgment of its legislature. The court might, for example, have accommodated the defendant's interest and the public interest found by the legislature by holding that the prosecution of Dr. Jascalevich must be dismissed unless Farber produced his notes for in camera inspection. At a minimum, the court might have discussed that and other possible accommodations of the statute and the Constitution. After all, in Branzburg the Supreme Court pointedly invited state legislatures and Congress to enact journalists' shield laws if they found that conditions so required. See 408 U.S. at 706.
127. But see Royster, Minority View on Newsman's Rights, Wall St. J., Aug. 16, 1978, at 22, col. 4. Royster wrote: "What we in this craft must guard against is a knee-action reflex that anything we find inconvenient or annoying is somehow a vio-
Jailing of Farber 'Terrifies Me,' ”128 said the files that he had accumulated in forty years as a journalist would now be at the mercy of "any politician styled 'judge.'"129 If the Supreme Court let the Farber decision stand, he said, "I should at once go back to my files and start burning up my old notes."130 As an example of the danger, White wrote: "Had the jurisprudence that threw Farber into prison prevailed in 1974, the attorneys of Messrs. Mitchell, Haldeman and Ehrlichman could have demanded that [Bob] Woodward and [Carl] Bernstein give up their notes and so reveal the identity/identities of 'Deep Throat' or go to jail."131 But the "jurisprudence" did exist in 1974. Branzburg had been decided in 1972,132 and counsel for the Watergate coverup defendants were intelligent and determined enough to make use of it if it had promised to be helpful. Counsel did not subpoena the Washington Post reporters' notes because they obviously included no information significant to that trial, and a subpoena would not have been enforced.

Confidential sources are unquestionably crucial, these days, to a high function of the press: exposing abuse in our institutions. There is no real chance of discovering wrongdoing in the CIA133 unless an insider decides to talk, and usually he does so only on condition that his name not be used. But it does not follow that the press will find no confidential sources unless it has an assured testimonial privilege not to name them in court. In Britain the press has no such privilege and operates in general under stringent legal inhibitions;134 yet the serious newspaper with the largest circulation, the Sunday Times, produces outstanding investigative re-

129. Id. at 84.
130. Id. The Court did. Has he burned his notes?
131. Id. at 76.
132. To be precise, Branzburg was decided on June 29, 1972. That was 12 days after the break-in at Democratic party headquarters in the Watergate. It has always seemed to me extraordinary prescience that Justice White included this observation in his opinion: "In United States v. Burr, 25 F. Cas. 30, 34 (No. 14,692d) (C.C. Va 1807), Chief Justice Marshall, sitting on Circuit, opined that in proper circumstances a subpoena could be issued to the President of the United States." 408 U.S. at 688 n.26.
133. See, e.g., Huge CIA Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years, N.Y. Times, Dec. 22, 1974, § 1, at 1, col. 8 (by Seymour M. Hersh).
ports. The idea of a testimonial privilege under the first amendment was not even raised in this country until 1958; reporters managed to function without it. My guess is that most confidential sources talk to the press for their own compelling reasons of conscience or ideology or personal animus—and will continue to do so even if an occasional case demonstrates that reporters may come under legal pressure to name their sources.

A publicized case like Farber's will of course inspire some defense lawyers to try the gambit of press subpoenas. But judges are capable of dealing with lawyers who abuse the process. In this country, as in Britain, the number of reporters who have actually gone to jail to protect their sources for genuine pieces of investigative reporting is very small. And one can hardly argue that the number of press reports based on confidential sources is decreasing. Theodore White said there "would have been no exposure of the My Lai massacre had it not been for the ability of a brave reporter to persuade a handful of men in the United States Army to tell the truth." But that premier investigative reporter, Seymour M. Hersh of the New York Times, does not believe that the denial of a legal privilege to the press has made it harder to get confidential information. It would be different, very different, if

136. See Branzburg v. Hayes, 408 U.S. 665, 698 (1972). The 1958 case in which the claim was first raised is Garland v. Torre, 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958). Justice Stewart, then a Sixth Circuit judge, but sitting by designation with the Second, wrote the opinion.
138. One judge has noted: "Lawyers are beginning to abuse the privilege of requiring newspaper reporters to come in with their notes and to testify. This is not the function of a newspaper reporter, not the function of the court." 3 Newspaper Reporters to Comply with Subpoenas to Testify on L.I., N.Y. Times, Mar. 5, 1979, at B2, col. 5 (quoting Judge Joseph Jaspin of New York Supreme Court).
139. According to the Reporters Committee for Freedom of the Press, since 1972 at least 12 reporters have gone to jail for refusing to disclose confidential sources and information. See Reporters Committee for Freedom of the Press, Reporters Taken into Custody (Apr. 18, 1979) (internal compilation on file in committee's Washington, D.C., office). But this compilation includes a number of reporters who were imprisoned for violating a court order against disclosure of grand jury minutes and refusing to tell the court where they had obtained the minutes—action that hardly rises to the level of genuine investigative reporting.
140. White, supra note 128, at 76.
141. I do not see any sign that reporters are finding it any more difficult to get secret information and documents now than before the Farber case. In fact, for the past ten years—when the issue of sources and concern about judicial decisions was developing—we have seen a steadily escalating volume of leaks.

Statement by Seymour M. Hersh to the Author (Dec. 1, 1978).
a government set out to expose the sources of embarrassing newspaper stories for political reasons, as has happened in South Africa. But any such attempt in the United States would be fought in the courts and beaten. Nothing in Branzburg or Farber allows exposure for exposure's sake.

The privilege cases have brought from some corners of the press strident attacks on the motives and character of judges. After the decision in Zurcher v. Stanford Daily, a columnist wrote that "one of the worst Supreme Courts in our history" had "delivered an atrociously un-American ruling." During the Farber case a Wall Street Journal reporter commented: "The judiciary—certainly not all of it, but enough of it to lay down the law—has for all practical purposes declared war against the press." Is such hysteria supposed to increase respect for the press' judgment? Only someone unfamiliar with the overwhelmingly conservative history of the Supreme Court could describe the current Court as "worst" in first amendment terms. Only someone unwilling to look at the recent record of major press victories in the law would be silly enough to talk of a judicial war on the press.

It seems especially ill advised to picture the courts as the enemy when judges have so often protected the press and the rest of society from the branch of government that most often tends to abuse its power, the executive. Yet journalists, perhaps currently intoxicated by the notion of press exceptionalism, do often see judges as enemies. At one conference of journalists, judges, and

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142. See N.Y. Times, Dec. 12, 1978, at A3, col. 3. The story quotes Prime Minister P.W. Botha as promising legislation to curb "gossip mongering" by forcing "people or parties," including newspapers, to disclose their sources of information.

143. The Court said in Branzburg that it was not dealing with "a governmental institution that has abused its proper function, as a legislative committee does when it 'expose[s] for the sake of exposure.'" 408 U.S. at 699-700 (quoting Watkins v. United States, 354 U.S. 178, 200 (1957)).

144. Rowan, This Supreme Court Doesn't Understand, Wash. Star, June 7, 1978, at A19, col. 6.

145. Kwitny, supra note 110, at 12, col. 4.

146. "[N]ever in its entire history can the Supreme Court be said to have for a single hour been representative of anything except the relatively conservative forces of its day." R. Jackson, The Struggle for Judicial Supremacy 187 (1949).

lawyers—occasions that seem to bring out the machismo in journalists—a judge usually sympathetic to the press listened to the steady stream of abuse until he could remain silent no longer. He said:

Where, ladies and gentlemen, do you think these great constitutional rights that you are so vehemently asserting, and in which you were so conspicuously wallowing yesterday, where do you think they came from? The stork didn’t bring them. These came from the judges of this country, from these villains here sitting at the table.148

Justice Stewart is hardly to be held responsible if the press is sometimes strident in its own cause, sounding as if its own rights were central to freedom and all others peripheral. But on the question of confidential sources, which is more troubling to reporters and editors than any other legal issue, his opinions have embraced the press’ cause. His dissent in Zurcher has been noted.149 Dissenting in Branzburg, he sounded a major press theme when he said, “A corollary of the right to publish must be the right to gather news . . . . News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist.”150

But Justice Stewart’s argument that a testimonial privilege arises from a first amendment “right to gather news” presents a paradox. For, two years after Branzburg, Justice Stewart wrote the opinion of the Court in Pell v. Procunier,151 holding that the press has no greater right than the public at large to gather news in a prison. He relied on the majority’s statement in Branzburg that “‘the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.’”152 Toward the end of his Yale speech he made the point again, in words not so welcome to the press: “There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. . . . The

149. See text accompanying note 84 supra.
150. 408 U.S. at 727-28 (Stewart, J., dissenting) (citations omitted).
152 Id. at 833 (quoting Branzburg v. Hayes, 408 U.S. 665, 684 (1972)).
Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.” Then, in *Houchins v. KQED, Inc.*, Justice Stewart indicated that government could completely exclude both press and public from jails and other public facilities: “The 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.”

How can a judge say in one case that the first amendment affords a “right to gather news,” and in another that the amendment does not give anyone “a right of access to information generated or controlled by government”? How can he tell journalists in one breath that the Constitution treats them differently from everyone else, and in the next that they have no more rights than the public? The mystery has a solution, I think, but it requires some exploration.

Based on the precedents, Justice Stewart is plainly right that the Constitution does not give the press or anyone else a general right of access to information. Chief Justice Warren, writing for the Court when it rejected a claim that restrictions on travel to Cuba violated a right to acquire information, said: “The right to speak and publish does not carry with it the unrestrained right to gather information.” The most frequently cited judicial affirmation that such a right exists is Justice White’s statement for the majority in *Branzburg* that “news gathering is not without its First Amendment protections,” and only a Pangloss could take much comfort from that reluctant double negative. But it does leave open the possibility of judicial intervention to prevent the total denial of public access to public matters, if that extreme should occur—as, indeed, does the adjective “unrestrained” in Chief Justice Warren’s statement. Imagine, for example, that large numbers of prisoners in a local prison died under unexplained circumstances and that the warden persistently refused to allow visits by any outside person: journalist, lawyer, relative, whomever. If an outsider sued for access, would Justice Stewart say that the Constitution has no application to those facts?

155. *Id.* at 16 (Stewart, J., concurring in judgment).
157. 408 U.S. at 707.
The example of the sealed prison suggests that what is at stake in the prison-access cases is not really a right of journalists. It is, rather, the principle of our system of government that public institutions must in some way be publicly accountable. Justice Stevens made the point in his dissent in *Houchins*: "Without some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance."\(^{158}\)

Access to an institution is not the only way to assure its accountability. In *Branzburg* the Court noted, by way of showing the accepted limits on press access, that Supreme Court conferences have always been closed to press and public;\(^{159}\) and it is true that the Justices could not exchange views candidly and effectively in a public forum. The exclusion is philosophically acceptable because the Court is held accountable in another way: in the persuasiveness of its opinions. But this alternative mode of accountability is not present in the example of the prison totally closed to public inspection, since conditions, decisions, and actions remain undisclosed. Nor is there good reason to keep the public ignorant of prison conditions, as there is to maintain the secrecy of court conferences. To the contrary, as Justice Stevens noted, imprisonment is part of the criminal-law process, and must be visible to the community if it is to attract the necessary public confidence. So long as public access is not allowed to interfere with prison management, Justice Stevens said, "there is no legitimate penological justification for concealing from citizens the conditions in which their fellow citizens are being confined."\(^{160}\)

But if public accountability requires some access to a prison, why should a court grant access to a newspaper or television station rather than, say, a member of the prison reform league? Chief Justice Burger asked that question at the oral argument in *Houchins*. Justice Stevens answered in his dissenting opinion: because in this case the press is the only party seeking access.\(^{161}\) And the press represents the public, as Justice Powell said in dissent in

\(^{158}\) 438 U.S. at 32 (Stevens, J., dissenting) (footnote omitted).
\(^{159}\) 408 U.S. at 684. See also Rehnquist, *Sunshine in the Third Branch*, 16 Washburn L.J. 559 (1977).
\(^{161}\) 438 U.S. at 39 (Stevens, J., dissenting).
Individual citizens today, he said, cannot become personally familiar with the affairs of government, nor is unrestrained public access often feasible. In seeking out the news the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government.

. . . The underlying right is the right of the public generally. The press is the necessary representative of the public's interest in this context and the instrumentality which effects the public's right.

Justice Stewart in fact appears to have moved toward that position. In *Houchins*, three of the seven Justices who sat would have vacated in its entirety a district court injunction giving KQED access on special terms to the prison. Three others would have affirmed the district court order. Justice Stewart agreed with the first three that the station had no right of access to areas or sources of information in the prison from which the public was excluded. But where the public was admitted, he said, the press' right of "equal access" had to reflect "the practical distinctions between the press and the general public:" the press had to have "effective access to the same areas." Thus he agreed with the district court—and this became the law of the case—that KQED had to be able to use cameras and sound equipment to show the viewers, effectively, what individual visitors could see with their own eyes. "When on assignment," he said, "a journalist does not tour a jail simply for his own edification. He is there to gather information to be passed on to others, and his mission is protected by the Constitution for very specific reasons. . . . Our society depends heavily

163. *Id.* at 853 (Powell, J., dissenting).
164. *Id.* at 864 (Powell, J., dissenting).
165. *Id.* at 863-64 (Powell, J., dissenting).
166. 438 U.S. at 16 (Stewart, J., concurring in judgment).
167. *Id.* (Stewart, J., concurring in judgment).
168. *Id.* (Stewart, J., concurring in judgment) (emphasis in original).
169. On remand, defendant sheriff entered into a stipulation that representatives of the news media would be allowed frequent access to most areas of the prison with their cameras and recording equipment. Stipulation and Order Regarding Dismissal of Action, KQED, Inc. v. Houchins, No. C-75-1257 (N.D. Cal. Nov. 15, 1978).
on the press for . . . enlightenment.” In other words, as Justice Powell said in Saxbe, the press acts as the representative of the public.

Protection of the Editorial Process

The decided cases treat two phases of the press’ work very differently. In acquiring information, it has little if any constitutional protection. In publishing, it has great protection: Once the press gets information, not even strong interests of national security or privacy or fair trial justify interference with publishing. But there is something in between: the editorial process. It is a legal battleground relevant to the search for Justice Stewart’s position.

The Supreme Court has said in general terms that the editorial process is entitled to constitutional protection. In Tornillo, Chief Justice Burger wrote for the Court that “the exercise of editorial control and judgment” was “a crucial process” from which the first amendment had so far excluded government regulation. In CBS v. Democratic National Committee, rejecting the claim of would-be television advertisers that they had a constitutional right to buy advertising time, the Chief Justice said: “For better or worse, editing is what editors are for . . . .”

But the specific reasons for protecting the editorial process were made clearer in an episode that arose not in the courts but in Congress. In 1971 CBS produced a television documentary, “The Selling of the Pentagon,” on the Defense Department’s public relations techniques. A subcommittee of the House Commerce Committee, responding to criticism that the producers had unfairly

170. 438 U.S. at 17 (Stewart, J., concurring in judgment) (citation omitted).
175. 418 U.S. at 258. Justice White, concurring, said: We have learned, 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. Regardless of how beneficent-sounding the purposes of controlling the press might be, we . . . remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation’s press.
177. Id. at 124.
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edited their film footage, subpoenaed the outtakes (the film not used in the final version); Dr. Frank Stanton, president of CBS, declined on first amendment grounds to comply with the subpoena.178 The Commerce Committee cited him for contempt.179 But the full House, by a vote of 226 to 181, killed the citation.180 What that episode showed is that governmental intrusion into the editorial process may have a chilling effect. Editors are rightly concerned about any official effort to second-guess the editorial process. Inspection of the process by private litigants—the issue in Herbert v. Lando—seems to me less threatening; and it did not draw constitutional objection from Justice Stewart.181

Such considerations may explain the apparent inconsistency in Justice Stewart's words in Branzburg, on the one hand, and in Pell and his Yale speech on the other. When he spoke in Branzburg of "a right to gather news,"182 he may not have meant a right to get government information against the government's wishes—a right he denied in later statements.183 He may have meant, rather, a right to seek the news without official interference in the process.184 If one analyzes Branzburg that way, then the grand jury

179. See N.Y. Times, July 2, 1971, at 1, col. 5.
181. The Second Circuit in Herbert held that the first amendment protects media libel defendants from having to answer certain questions on discovery about their knowledge at the time of publishing the disputed material; that is, it limited inspection of the editorial process in a civil action. Herbert v. Lando, 568 F.2d 974 (2d Cir. 1977), rev'd, 99 S. Ct. 1635 (1979). The Supreme Court, reversing, observed that facts about libel defendants' state of knowledge are essential to recovery under the rule of New York Times Co. v. Sullivan, which requires proof that a defamatory falsehood was published with knowledge of its falsity or reckless disregard of the truth. Herbert v. Lando, 99 S. Ct. 1635, 1641 (1979) (discussing New York Times Co. v. Sullivan, 376 U.S. 254 (1964), rev'd 568 F.2d 974 (2d Cir. 1977). Justice Stewart dissented on the ground that plaintiff had abused discovery in this case by asking questions irrelevant to the criteria of Times v. Sullivan; he would have remanded to the trial court with instructions to limit discovery. 99 S. Ct. at 1661-63 (Stewart, J., dissenting).
182. See text accompanying note 150 supra.
183. See text accompanying notes 152-155 supra.
subpoena forcing disclosure of confidential sources is like the congressional subpoena for outtakes of "The Selling of the Pentagon." It is a chilling intrusion—one that, if sustained, could make editors trim their judgment in the future.

This explanation of Justice Stewart's "right to gather news" fits a suggestion, toward the end of his Yale speech, that relations between the press and the government should be seen as a contest. This image was used by the late Alexander M. Bickel, who after representing the New York Times in the Pentagon Papers Case wrote that the first amendment "ordains an unruly contest between the press, whose office is freedom of information . . . , and government, whose need is often the privacy of decision-making." Justice Stewart spoke of the press' "autonomy." But autonomy, he said, "cuts both ways. The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed. . . . The Constitution, in other words, establishes the contest, not its resolution."186

Justice Stewart's concept of press "autonomy" is a useful one—if not limited to journalism but embracing the pamphleteer and the publisher of Victor Marchetti's book. But there is danger in the other side of the contest theory as Justice Stewart frames it: the government's right to deny access by press or public to information or institutions that it controls. How far Justice Stewart would carry that right was indicated when he wrote for the Court in Gannett Co. v. De Pasquale that "members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials."188

CONCLUSION

Blackstone, recording the successful outcome of the long English struggle against press censorship, wrote: "Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press

186. Stewart, supra note 2, at 636.
187. The CIA learned of Marchetti's book, according to a CIA official's affidavit, from "a confidential source"—evidently someone in one of the six New York publishing houses to which Marchetti had submitted an outline. See Marks, On Being Censored, FOREIGN POL'Y, Summer 1974, at 93, 96.
Every freeman, that is, not just those organized or institutionalized as "the press." Freedom of the press arose historically as an individual liberty. Eighteenth-century Americans saw it in those terms, and the same view is reflected in Supreme Court decisions; freedom of speech and of the press, Chief Justice Hughes said, are "fundamental personal rights." To depart from that principle—to adopt a corporate view of the freedom of the press, applying the press clause of the first amendment on special terms to the "institution" of the news media—would be a drastic and unwelcome change in American constitutional premises. It would read the Constitution as protecting a particular class rather than a common set of values. And we have come to understand, after much struggle, that the Constitution "neither knows nor tolerates classes among citizens."

The press is not a separate estate in the American system. Its great function is to act for the public in keeping government accountable to the public. And it would be a poor bargain, for the press and the country, if a special status for journalism were accompanied by greater latitude for government to avoid accountability by closing its proceedings.

Justice Stewart's idea of a preferred constitutional position for the organized press was inevitably appealing to journalists, but it would hurt their real interests if it became accepted doctrine. It would separate the professional press from the public it represents, and increase the risk of arrogance. In our complex democracy, newspapers and magazines and broadcasters usually vindicate the

189. 4 W. BLACKSTONE, COMMENTARIES *152.
190. See text accompanying note 65 supra.
192. That is the practical result of Gannett Co. v. De Pasquale, 99 S. Ct. 2898 (1979). The Court upheld against constitutional objection by a newspaper company the action of a New York judge in excluding press and public, at the joint request of prosecution and defense, from a pretrial hearing on a motion to suppress evidence. Justice Stewart, writing for a five-man majority, said the sixth amendment guarantee of the right to public trial was for the benefit of defendants and could be invoked only by them. As to the first amendment, Justice Stewart cited the prison-access cases, see notes 151, 154 & 162 supra, and said "[s]ome Members of the Court" believe that the press and public could not be completely excluded from prisons "in the absence of a significant governmental interest." Id. at 2911. (Interestingly, he put himself in that category by citing his concurrence in Houchins v. KQED, Inc., 438 U.S. 1, 16 (Stewart, J., concurring in judgment); see text accompanying notes 166-170 supra.) But even assuming arguendo such a qualified first amendment presumption of access to criminal trials, he found that in this case there were sufficient countervailing interests to overcome it. 99 S. Ct. at 2911-12. The effect of the Gannett deci-
“‘social interest in the attainment of truth.’”193 They are at the cutting edge. But others play their part: scholars and conscience-stricken officials and citizen-critics. The first amendment was written for them, too, and freedom is indivisible. The safety of the American press does not lie in exclusivity.
