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**THE BURGER COURT AND THE MEDIA:
A TEN-YEAR PERSPECTIVE**

PHILIP R. HIGDON*

I. INTRODUCTION

In perhaps no area of the law have the first ten years of the Burger Court had a more profound impact than in the First Amendment's protection of the rights of journalists to gather and to publish the news. Some have interpreted the pattern of the Burger Court's decisions involving the media as a virtual declaration of war by the judiciary against the press.¹ Others have viewed the same decisions not as a restraint on press freedoms but as a thwarting of asserted press privileges.² However the trend may be characterized, the media have suffered repeated blows during the past decade to what they, at least, perceive to be their constitutional rights and privileges.

If war has not been declared, hostilities have at least broken out. They are not one-sided, and the media have at times reacted almost hysterically as various decisions have been announced. The enmity of the press toward the Court, however, is understandable in view of the numerous setbacks journalists' views of the First Amendment have undergone over the past ten years.

Most significantly, the Court has consistently refused to recognize any First Amendment right of the press to gather the news,

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1. Kwitny, *A Judicial War on the Press?*, Wall St. J., Aug. 23, 1978, at 12, col. 4.

2. *Commotion from the High Court?*, The Quill, July-Aug. 1978, at 23, col. 1 (quoting Professor Philip Kurland).

especially when the necessary information is in the hands of government officials, notwithstanding the press' constitutional responsibility to inform the public of government activities. The Court has refused to provide any meaningful protection for the confidentiality of news sources. It has exposed newsrooms to surprise searches by police. It has drastically cut back on the constitutional protections previously afforded the media in defamation cases. On the other side of the ledger, however, it has blocked government attempts to impose prior restraints on publication and to require the publication of certain matter.

This article examines the Burger Court's most significant decisions in five areas relating to the gathering and disseminating of news.³ The analysis is principally critical. Some criticism is directed toward the Court for creating confusion through several vague and imprecise decisions. Most dissatisfaction, however, derives from the Court's frequent failure to understand or to acknowledge the constitutional role of the press and the special privileges required by the press to fulfill that role.

The implications which follow from the Burger Court's first ten years of media law are disturbing, at least to those who believe that the framers of the Constitution intended the freedom of the press clause to create a special place for the media in the constitutional scheme. This article focuses on the future implications of the Burger Court's media decisions.

II. THE RIGHT OF THE PRESS TO PUBLISH WHAT IT KNOWS

Whatever alarm the attitudes and decisions of the Burger Court may have caused the media in other areas, the Court has at least shown considerable reluctance to abridge the right of the press to be free of prior governmental restraints on publication.

3. Three other important areas relating to the media, although treated by the Burger Court in significant decisions, will not be discussed. These are: (1) the relationship between the First Amendment and commercial speech (*see* *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973)); (2) government regulation of broadcasting (*see* *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979); *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973)); and (3) obscenity and pornography (*see* *Miller v. California*, 413 U.S. 15 (1973); *Paris Adult Theatre v. Slaton*, 413 U.S. 49 (1973); *Ward v. Illinois*, 431 U.S. 767 (1977); and *Pinkus v. United States*, 436 U.S. 293 (1978)).

This reluctance, of course, is but a part of a tradition predating even the First Amendment. In the eighteenth century, with debate raging over the extent to which freedom of the press should be recognized, even those who argued that "improper, mischievous, or illegal" publications could be punished after the fact, acknowledged the impropriety of prior restraint on such publications.⁴

The subsequent debate over the scope of press freedoms has principally concerned the government's power to censure matter when published, not its power to restrain prior to publication.⁵ While the Supreme Court has recognized that protection against even prior restraints is not absolute,⁶ it has narrowed the field of permissible restraints to exceptional cases⁷ and has insisted that courts subject governmental prior restraints on speech to the closest scrutiny.⁸ Thus, any system of prior restraint of expression comes before the Court with a heavy presumption against its constitutional validity.⁹ The restraint must be phrased in the narrowest terms and cannot be upheld if reasonable but less restrictive alternatives are available;¹⁰ and the activity restrained must pose a clear and present danger,¹¹ or a serious or imminent threat to a protected competing interest.¹²

4. 5 BLACKSTONE'S COMMENTARIES 151-52 (Tucker ed. 1803).

5. *Near v. Minnesota*, 283 U.S. 697, 714-15 (1931).

6. Government imposition of prior restraints is permissible when speech threatens to obstruct military recruiting, reveal sailing dates of transports, or the number and location of troops. "Decency" may require restraint of obscene publications. Incitement to violence, and the overthrow of the government may likewise be suppressed. *Id.* at 716 (footnote omitted). *See also* *Schenck v. United States*, 249 U.S. 47, 52 (1919) (some speech may lose constitutional protection during time of war if it hinders the war effort).

7. *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

8. *See* *CBS, Inc. v. Young*, 522 F.2d 234, 238 (6th Cir. 1975).

9. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (held state censorship scheme, although limited to informal sanctions, unconstitutional).

10. *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968) (held restraining order, banning rallies tending to disturb and endanger citizens during a period of racial turmoil unconstitutional).

11. To present a clear and present danger, the substantive evil of speech must be extremely serious and the degree of imminence extremely high. *Wood v. Georgia*, 370 U.S. 375, 384 (1962) (held contempt citation imposed for statement criticizing judicial actions unconstitutional) (quoting *Eridges v. California*, 314 U.S. 252, 263 (1941)).

12. The threat must be imminent, not merely likely, and the danger must create immediate peril, not be remote or even probable. *Craig v. Harney*, 331 U.S. 367, 376 (1947) (reversed journalist's conviction under contempt of court charge for publishing criticisms of judicial handling of pending action).

The first prior restraint case to reach the Burger Court was *Organization for a Better Austin v. Keefe*,¹³ in which Chief Justice Burger recognized that the party seeking to sustain a prior restraint must bear a heavy burden of justification.¹⁴ A real estate broker had obtained a temporary injunction prohibiting a community organization from distributing literature of any kind anywhere in the City of Westchester, Illinois. The broker argued that the organization's leaflets, critical of the broker's alleged "blockbusting" and "panic peddling"¹⁵ activities in a neighboring community, were not entitled to First Amendment protection because they invaded his right of privacy and were coercive and intimidating, rather than informative.¹⁶

The Court¹⁷ vacated the injunction because the heavy presumption against the constitutional validity of any prior restraint on publication had not been overcome.¹⁸ *Near v. Minnesota*¹⁹ held that prior restraints of publications concerning the malfeasance of public officers violate the First Amendment. Similarly, the *Keefe* Court could find no authority supporting the use of a court's injunctive power to protect an individual from public criticism of his business practices.²⁰ Against this backdrop, several more significant prior restraint cases were decided by the Burger Court.

A. "Gag" Orders in Criminal Proceedings

In *Sheppard v. Maxwell*,²¹ the Warren Court reversed a murder conviction on the ground that the defendant had not been given a fair trial. This conclusion had two bases. First, the trial judge had permitted the case to be tried in a "carnival atmosphere,"²² with newsmen hounding participants and disrupting the trial by their movement in and out of the courtroom.²³ Second, the record convinced the Court that the deluge of publicity emanating

13. 402 U.S. 415 (1971).

14. *Id.* at 419.

15. Respondent's activities allegedly were intended to arouse fear in local white residents that Blacks planned to move into the area, causing the white residents to sell their property and allowing the real estate broker to secure listings. *Id.* at 416.

16. *Id.* at 418.

17. Justice Harlan dissented on procedural grounds. *Id.* at 420-23.

18. *Id.* at 419.

19. 283 U.S. 697 (1931).

20. 402 U.S. at 419.

21. 384 U.S. 333 (1966).

22. *Id.* at 358.

23. *Id.* at 355.

from the proceedings had reached at least some members of the jury.²⁴ The Court was particularly concerned because these news accounts included charges about the defendant not raised in the trial, journalists' interpretations of the evidence and a "doctored" front-page photograph.²⁵

The Court severely criticized the trial judge's failure to maintain control of the publicity of the trial. It specifically suggested that the trial court should have insulated the witnesses from press accounts of other witnesses' testimony and other witnesses' out-of-court statements. Moreover, some effort should have been made "to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides."²⁶ Citing the right of the accused to a trial by an impartial jury free from outside influences, the Court suggested additional measures to curb the impact of publicity on the jury, including continuing the case until the threat of prejudice abated or transferring the case to another county not so inundated with publicity.²⁷ Missing from the Court's lengthy list of judicial powers to nullify prejudicial publicity was perhaps the most expeditious method, direct restraints on what might be published. The Court specifically stated that nothing proscribed the press from reporting events that transpired in the courtroom.²⁸

That possibility was raised six years later in *Branzburg v. Hayes*,²⁹ a case not involving prejudicial publicity, where the Burger Court suggested in dictum the validity of gag orders in criminal proceedings to protect the rights of the accused. Journalists, the Court said, could be prevented from "attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal."³⁰

The result was swift, undeniable and, perhaps, predictable:

24. *Id.* at 357.

25. *Id.*

26. *Id.* at 359.

27. *Id.* at 361-63. In addition, the judge should have raised sequestration of the jury sua sponte with counsel.

28. *Id.* at 362-63.

29. 408 U.S. 665 (1972).

30. *Id.* at 685 (emphasis added). The Burger Court's subsequent treatment of the power of the courts to bar the attendance of journalists at criminal proceedings will be discussed below in connection with *Gannett Co. v. DePasquale*, 99 S. Ct. 2898 (1979). As will further be discussed below, this was not the only troublesome dictum to come out of the *Branzburg* opinion. See notes 179-206 *infra* and accompanying text.

courts all over the country began issuing gag orders. From 1967 through 1973 twelve such orders were reported. There were thirteen in 1974 alone, fourteen in 1975 and eleven in the first six months of 1976.³¹ One such order, which had been imposed in a Nebraska murder case, was challenged in *Nebraska Press Association v. Stuart*.³² The Supreme Court agreed to review this decision which concerned the prosecution of Erwin Charles Simants for the murder of six members of a family in Sutherland, Nebraska, on the night of October 18, 1975. The crime had attracted widespread news coverage by local, regional, and national newspapers and by radio and television stations.³³ The day before Simants' preliminary hearing, and three days after the crime, the prosecutor and Simants' attorney joined in asking the county court to enter an order restricting what could be disclosed by the press to the public about the case. Following oral argument on the request, in which no representative of the press participated through counsel, the county court issued an order prohibiting everyone in attendance from releasing any testimony given at the preliminary hearing.³⁴ The preliminary hearing was opened to the public and the press, but subject to the order.

Several representatives of the media went to state district court, where Simants was to be tried, asking that the county court order be vacated. The district court instead issued a restrictive order of its own, applicable only until the jury was impaneled, specifically prohibiting the press from reporting on five specific subjects³⁵ and from reporting the exact nature of the order itself.

The Nebraska Supreme Court was asked to vacate the district court's order. In an attempt to accommodate Simants' right to a fair trial and the media's interest in reporting pretrial events, the Nebraska Supreme Court modified the county court's ruling and limited the scope of the gag to three matters.³⁶ It refused, how-

31. Friendly, *Murder in Nebraska*, Dateline 4, 9 (1977).

32. 194 Neb. 783, 236 N.W.2d 794 (1975), *rev'd*, 427 U.S. 539 (1976).

33. 427 U.S. at 542.

34. *Id.*

35. The five subjects were: (1) Simants' confession to law enforcement officers; (2) Simants' statements to other persons; (3) the contents of a note he had written the night of the crime; (4) medical testimony at the preliminary hearing; (5) the identity of the victims of Simants' sexual assault. *Id.* at 543-44.

36. The three matters subject to the gag order were: (1) any confessions or admissions made by the defendant to law enforcement officers; (2) any confessions or admissions made to any third parties, except members of the press; and (3) other facts "strongly implicative" of the accused. 427 U.S. at 545.

ever, to adopt an "absolutist position" that would bar a gag of any kind.³⁷

The United States Supreme Court granted certiorari³⁸ to consider the important issues raised by the district court order as modified by the Nebraska Supreme Court, but it refused to expedite review or to stay the orders entirely, pending Simants' trial. In the interim between the granting of certiorari and the Supreme Court's decision, Simants was convicted of murder and sentenced to death.³⁹

The decision of the Nebraska Supreme Court was reversed, the Justices unanimously holding that the prior restraints imposed by the Nebraska order had not been justified constitutionally. The point of departure for the Justices was whether prior restraints could ever be justified in this context.

Justice Brennan, in a concurring opinion in which Justices Stewart and Marshall joined, recognized that while the right to a fair trial by a jury of one's peers is one of the most precious and sacred safeguards within the Bill of Rights, prior restraints on freedom of the press are a constitutionally impermissible means of enforcing that right. Rather, alternative, less intrusive techniques exist to guarantee the accused a fair trial.⁴⁰ Because Justice Brennan believed the trial courts possess adequate tools other than injunctions against reporting to assure Sixth Amendment rights, he rejected the notion that there is an inherent conflict between free speech and the right to a fair trial, and that to uphold one right requires the exclusion of the other.⁴¹ Justice Brennan also cited practical reasons for not permitting prior restraints in this context. First, the potential for subjective judicial censorship would exist and would be exacerbated by the fact that judges might, in some cases, be required to rule on whether material regarding their own competence, integrity, or general performance on the bench should be published.⁴² In addition, there would be procedural dif-

37. 194 Neb. at 797, 236 N.W.2d at 804.

38. 423 U.S. 1027 (1975).

39. 427 U.S. at 546. The Court nevertheless concluded that the controversy was not moot because the dispute was "capable of repetition." *Id.*

40. *Id.* at 572-73 (Brennan, J., concurring).

41. *Id.* at 612. Among the tools listed by Justice Brennan were: (1) Sequestration of jurors and control over the courtroom and conduct of the trial; (2) the stemming of much of the flow of prejudicial publicity at its source, before it is obtained by the press; (3) *voir dire* probing fully into the effect of publicity on prospective jurors; (4) a brief continuance of the trial to attenuate the impact of publicity; and (5) the granting of a change of venue if necessary. *Id.* at 601.

42. *Id.* at 607.

ficulties associated with any attempt to impose prior restraints on publication of information relating to pending criminal proceedings,⁴³ and an inevitable overuse of the technique⁴⁴ that would lead to profuse litigation substantially burdening the media. The financial disincentives of such litigation, Justice Brennan argued, would deter the media from seeking relief and would create the distinct possibility that many erroneous impositions would go uncorrected.⁴⁵

In a separate concurring opinion,⁴⁶ Justice White expressed doubt that restraints on the press such as were entered in this case would ever be justifiable, but agreed that it may have been prudent not to announce such a rule in the first case in which the issue was squarely presented to the Court. According to Justice White, a general rule should issue only after the courts have received broader exposure to prior restraint cases and have reached similar recurring results.

Justice Stevens, in his concurring opinion, subscribed to Justice Brennan's approach and announced that he would probably reach the same conclusion as Justice Brennan when squarely faced with a prior restraint case.⁴⁷ That conclusion, he said, could not be reached without considering whether absolute protection would apply if the information sought to be published was obtained in a shabby or illegal manner or by intrusion on privacy, or was false, prejudicial, or published with a perverse motive.⁴⁸ Adoption of Justice Brennan's view by Justice Stevens, then, would require further argument on the issue of absolute protection.⁴⁹

In any event, a majority of the Justices either announced in *Stuart* a willingness to adopt an absolute prohibition of prior restraints on publication of information about criminal proceedings or left that possibility open for consideration in a subsequent case. The remaining Justices, however, believed that such prior restraints could be permissible, if only in certain limited circumstances.

Justice Powell, in his concurring opinion, declared his view that a prior restraint may issue only when it is necessary to prevent

43. *Id.*

44. *Id.*

45. *Id.* at 611.

46. *Id.* at 570-71 (White, J., concurring).

47. See text accompanying notes 40-45 *supra*.

48. *Id.* at 617 (Stevens, J., concurring).

49. *Id.*

the dissemination of prejudicial publicity that is likely to interfere with the impaneling of a jury meeting the Sixth Amendment requirement of impartiality.⁵⁰

The plurality opinion, written by Chief Justice Burger, also rejected Justice Brennan's absolutist approach. The Chief Justice reiterated the Court's position that First Amendment rights are not absolute and went on to say that a showing of substantial threat to fair trial rights could justify restraint.⁵¹ For the plurality, then, it was necessary to review the record that led to the Nebraska Supreme Court's gag order to determine whether the prior restraint was justifiably imposed. In so doing, the plurality remarked that "the barriers to prior restraint remain high,"⁵² describing such restraint as an extraordinary remedy in our jurisprudence.⁵³ The plurality based its conclusion that the Nebraska Supreme Court's order was constitutionally invalid on a number of considerations.

First, although the plurality was persuaded that the Simants case would receive intense and pervasive pretrial publicity which the trial court could reasonably conclude would impair the defendant's right to a fair trial, such a conclusion was at best speculative, being founded on factors unknown and unknowable.⁵⁴

Second, the plurality noted that there was no finding that alternative measures would have inadequately protected Simants' rights. The Nebraska Supreme Court did no more than imply that other less intrusive measures might have failed to protect Simants' rights.⁵⁵ For specific alternatives that could have been considered, the plurality cited *Sheppard*.⁵⁶

Third, the plurality believed that the orders of the Nebraska courts would be inefficacious in view of the attention the Simants case received nationally and the territorial limitations on the Nebraska courts' jurisdiction. There also existed the problem of trying to determine in advance what information would be prejudicial. Information that was not restricted because it did not appear to be potentially prejudicial to the defendant could emerge through

50. This requires a showing that "(i) there is a clear threat to the fairness of trial, (ii) such a threat is posed by the actual publicity to be restrained, and (iii) no less restrictive alternatives are available." *Id.* at 571-72 (Powell, J., concurring).

51. *Id.* at 569-70.

52. *Id.* at 570.

53. *Id.* at 562.

54. *Id.* at 563.

55. *Id.* at 565.

56. 384 U.S. 333, 361-62 (1966). See notes 26 & 27 *supra* and accompanying text.

publication and be damaging.⁵⁷ Illustratively, each of the three Nebraska courts had developed a different list of subject matter that would be prejudicial to Simants' rights. The plurality also cited the anomaly of permitting a small community's rumor mills to function unabated while shutting down reasonably accurate news accounts.⁵⁸

In addition, to the extent that the gag orders prohibited the reporting of evidence adduced at the open preliminary hearing, they violated the settled principle that nothing can prevent the press from reporting on events that transpire in the courtroom.⁵⁹ Once a public hearing has been held, the events that took place there cannot be subjected to prior restraint.⁶⁰ Finally, the Nebraska Supreme Court's order, to the extent it prohibited publication of "implicative" information, was found by the plurality to be too vague and too broad to survive the close scrutiny the Court gives restraints on First Amendment rights.⁶¹

Despite the unanimity of the Court's decision in *Stuart*, generalizations about the case are hard to make, and guidelines for the future are not easy to develop since five Justices filed separate opinions and no more than three Justices subscribed to any one of them. For example, while only four Justices rejected the "absolutist" approach for all time, they did so vehemently. Furthermore, it is quite possible to imagine a case involving "shabby" and "illegal" means of obtaining information, serious intrusions of privacy and so forth, that might cause Justice Stevens to abandon his announced inclination toward an "absolutist" approach.⁶²

Even the lack of dissent from the view that the press may not be restrained from publishing what comes out in *public* criminal proceedings⁶³ opened up another can of worms. The plurality in

57. 427 U.S. at 567.

58. *Id.*

59. *Id.* at 568 (quoting *Sheppard v. Maxwell*, 384 U.S. at 362-63).

60. 427 U.S. at 568.

61. *Id.*

62. See note 49 *supra* and accompanying text.

63. In a similar case, the Supreme Court first stayed and then summarily reversed in an order by a state court judge in a juvenile proceeding that the press not publish the name of an eleven year old boy accused of homicide. *Oklahoma Publishing Co. v. District Court*, 429 U.S. 967 (1976), *rev'd*, 430 U.S. 308 (1977). The boy's identity had been disclosed earlier during an open hearing and the Court held that the First Amendment "will not permit a state court to prohibit the publication of widely disseminated information obtained at court proceedings which were in fact open to the public." 430 U.S. at 310. That the trial court judge had not expressly ordered the hearing to be public made no difference because the presiding judge, the

Stuart referred without comment to the statement by the Nebraska Supreme Court that, under Nebraska law, the preliminary hearing could have been closed to the public, including the press. A majority of the Justices have since held that nothing in the First Amendment prevents such closure,⁶⁴ a decision that has been interpreted in some state courts as applicable not only to preliminary hearings but also to criminal trials.⁶⁵ The vexing problem of media access to information not produced in the courtroom also remains, and it, too, will be discussed below.

In any event, *Stuart* indicates that the Burger Court means what it says about the barriers to prior restraint remaining high. Nothing in the various opinions indicates that they soon will be lowered by this Court. For that, at least, the press may be grateful.

B. *Statutes Requiring Confidentiality of Proceedings*

In each of the last two terms, the Burger Court has reviewed state statutes making it a crime for members of the press to divulge to the public information about certain proceedings. On each occasion, the Court has found the statute constitutionally improper.

*Landmark Communications, Inc. v. Virginia*⁶⁶ involved a Virginia statute creating the Virginia Judicial Inquiry and Review Commission⁶⁷ to investigate charges of judicial improprieties. Pursuant to a state constitutional provision which required the creation of such a commission and which required the confidentiality of proceedings before the commission,⁶⁸ the statute provided that all "papers filed with and proceedings before the Commission . . . including the identification of the subject judge as well as all testimony and other evidence" given to the Commission was not to be divulged "by any person to anyone except the Commission" until the filing of a formal, complaint with the Virginia Supreme Court.⁶⁹ Moreover, it was a misdemeanor for any person to divulge information in violation of the statute.⁷⁰

prosecutor, and the defense counsel all knew that members of the press were in fact present and no objection was raised. *Id.* at 311.

64. *Gannett Co. v. DePasquale*, 99 S. Ct. 2898 (1979). For a discussion of *Gannett* see notes 179-206 *infra* and accompanying text.

65. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 5 MED. L. RPTR. 1545 (Va.), *cert. granted*, 100 S. Ct. 204 (1979).

66. 435 U.S. 829 (1978).

67. Hereinafter referred to as the Commission.

68. VA. CONST. art. 6, § 10.

69. VA. CODE §§ 2.1-37.13 (1973).

70. *Id.*

Notwithstanding these prohibitions, the *Virginia Pilot*, a newspaper owned by Landmark Communications, published an article accurately reporting on a pending inquiry by the Commission and identifying the judge being investigated. The newspaper was prosecuted under the confidentiality statute, found guilty, and fined five hundred dollars. The Virginia Supreme Court affirmed the conviction and fine, holding that premature disclosure of the Commission's sensitive proceedings posed a clear and present danger to the state's legitimate interests in the effective discharge of the Commission's purpose and to the orderly administration of justice.⁷¹

The Burger Court, reversing, noted that forty-seven states, the District of Columbia and Puerto Rico had all established some type of judicial inquiry and disciplinary procedures, and that only Puerto Rico did not provide for the confidentiality of judicial disciplinary proceedings in some way. The Court willingly accepted "the collective judgment that confidentiality promotes the effectiveness of this mode of scrutinizing judicial conduct and integrity," but considered this "only the beginning of the inquiry."⁷² The issue, as the Court saw it, was not the validity of a confidentiality requirement, but rather, whether the divulging or publishing of information concerning the work of the Commission by third parties, including the media, could be criminally punishable.⁷³

The Court unanimously held⁷⁴ that the media could not be criminally punished for divulging information about the Commission's work. While willing to assume that confidentiality of the Commission's proceedings served legitimate state interests, it

71. *Landmark Communications, Inc. v. Virginia*, 217 Va. 699, 233 S.E.2d 120 (1977). The Virginia court identified three functions served by the requirement of confidentiality in the commission's proceedings: (1) Protection of the judge's reputation from the adverse publicity that might flow from frivolous complaints; (2) maintenance of confidence in the judicial system by preventing the premature disclosure of a complaint before the commission had determined that the charge was well-founded; and (3) protection of complainants and witnesses from possible recrimination by prohibiting disclosure until the validity of the complaint had been ascertained. *Id.* at 712, 233 S.E.2d at 128-29.

72. 435 U.S. at 836.

73. Indeed, while the "collective judgment" favored confidentiality provisions, only Hawaii, in addition to Virginia, provided criminal sanctions for disclosure. *Id.* at 836-37.

74. Neither Justice Brennan nor Justice Powell participated in the decision. Justice Stewart's concurring opinion was that, while Virginia could not extend its law to punish the media, it was not constitutionally prohibited from punishing other third parties who violated the confidentiality provisions. *Id.* at 849. The implications of driving this wedge between free press and free speech were not discussed.

found nothing in the record beyond assertion and conjecture to support the contention that without criminal sanctions these interests would be undermined. The majority questioned the relevance of the clear and present danger standard to the case and rejected what it termed a mechanical application of the standard by the Virginia Supreme Court amounting to nothing more than deference to legislation.⁷⁵

The thrust of the majority's opinion was that the *Virginia Pilot* newspaper article, in providing accurate factual information about the Judicial Inquiry and Review Commission's investigation, had served the First Amendment's aim of promoting discussion of governmental affairs⁷⁶ while the State of Virginia had failed to justify its attempted encroachment on that constitutionally protected activity.

While *Landmark Communications* has been hailed by the media as one of its few victories in the Burger Court in recent days,⁷⁷ the decision is not without disturbing features for the press. For example, *Landmark Communications* urged that "truthful reporting about public officials in connection with their public duties is always insulated from the imposition of criminal sanctions by the First Amendment."⁷⁸ One might have thought that this was almost a black letter law proposition, especially since *Landmark Communications* was able to cite, in its support, cases according constitutional protection to untruthful speech about public officials⁷⁹ and to the dissemination of truthful commercial information.⁸⁰ But the Court treated the proposal as if it represented some startling new jump that should not be taken precipitously: "We find it unnecessary to adopt this categorical approach to resolve the issue before us."⁸¹ It can only be hoped that we never find out in what circumstances criminal sanctions can be imposed for truthful reporting about public officials in connection with their public duties.

The majority also concurred with the Virginia Supreme Court that the statute before it did "not constitute a prior restraint or attempt by the State to censor the news media."⁸² No one ques-

75. *Id.* at 842-43.

76. *Id.* at 839.

77. *See, e.g., Press hoping for improved court record*, *Publisher's Auxiliary*, Nov. 13, 1978, at 1, col. 1.

78. 435 U.S. at 838.

79. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

80. *See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

81. 435 U.S. at 838.

82. *Id.*

tioned in *Stuart* that an order by a judge not to publish certain information, enforced with the threat of jail for contempt of court, is a prior restraint and attempt to censor. Somehow, however, legislative directives with similar provisions and enforcement mechanisms are not viewed as prior restraints or attempts at censorship, though they produce, at least as a practical matter, the same result.⁸³ But if different standards are to be used to determine the validity of prior restraints and subsequent punishments, a point not addressed in *Landmark Communications*, the distinction is not without a difference. Unfortunately, when the Court had the opportunity a year later to recognize that court injunctions and prohibition statutes operate with the same prior restraint effect and should, therefore, be treated alike, it declined to do so.

That opportunity came when the Supreme Court reviewed another statute intended to prevent the publication of information relating to judicial proceedings. *Smith v. Daily Mail Publishing Co.*⁸⁴ involved a West Virginia statute making it a misdemeanor for the name of a juvenile connected with juvenile proceedings to "be published in any newspaper without a written order of the court"⁸⁵ Two newspapers were indicted under the statute after publishing the name of a juvenile allegedly responsible for killing a fellow junior high school student on the school grounds. The newspapers had obtained the alleged assailant's name from various witnesses, the police and an assistant prosecuting attorney who were at the school.⁸⁶ The *Charleston Daily Mail* elected to omit the name in its first story on the incident because of the statutory prohibition; but the *Charleston Daily Gazette*, having made a different editorial decision, identified the juvenile the following morning. By that afternoon, at least three radio stations had carried the juvenile's name on various broadcasts; and the *Daily Mail*, believing that the information had by then become public knowledge, published the name in its follow-up story on the killing.

Following their indictments for violating the statute, the two newspapers sought and obtained from the state supreme court an order prohibiting county officials from taking any action on the indictments. The West Virginia Supreme Court held that the statute operated as a prior restraint on speech and that the state's interest in protecting the identity of the juvenile offender did not overcome

83. See note 129 *infra*.

84. 99 S. Ct. 2667 (1979).

85. W. VA. CODE § 49-7-3 (1976).

86. 99 S. Ct. at 2669.

the heavy presumption against the constitutionality of such prior restraints.⁸⁷

When the case reached the Burger Court on certiorari, the newspapers first asked for a ruling that the West Virginia statute, while not a typical prior restraint, that is, a prior injunction against publication, nonetheless acted in "operation and effect" as another form of prior restraint.⁸⁸ The Burger Court, however, declined the invitation, preferring instead to retain the distinction between prior restraints and statutes attempting to punish publication after the event.⁸⁹ Thus, the "operation and effect" argument was not given its deserved recognition, and the Court continued to give the impression that prohibition statutes are to be judged less harshly than judicial injunctions although the practical effect, as witnessed by the *Charleston Daily Mail's* initial editorial decision not to publish the juvenile's name, is the same.

The Supreme Court found it unnecessary to declare the West Virginia statute a prior restraint because, even under the apparently lesser standards by which prohibition statutes are now judged,⁹⁰ it could be stricken as deficient. West Virginia's interest in protecting the anonymity of a juvenile offender to further his rehabilitation was found in sufficient to warrant punishment of newspapers for publishing truthful information about a matter of public significance.⁹¹ Moreover, even assuming the statute served a note-

87. *State ex rel. Daily Mail Publishing Co. v. Smith*, 248 S.E.2d 269 (W. Va. 1978), *aff'd sub nom. Smith v. Daily Mail Publishing Co.*, 99 S. Ct. 2667 (1979).

88. 99 S. Ct. at 2670. The newspapers, perhaps recognizing the politics of the situation, argued that the statute constituted a prior restraint only because of the need to apply to the judge for permission to publish the name. They were obviously stretching matters in an effort to make the prohibition more judicial than legislative, and thus more like a "classic" prior restraint. A more direct approach would have been a frontal assault on the judicial-legislative distinction.

89. *Id.* Prior restraints are accorded the most exacting scrutiny while punishment after publication must be merely necessary to further a state interest.

90. In fairness, Chief Justice Burger's majority opinion does state that a criminal prohibition statute "requires the highest form of state interest to sustain its validity." *Id.* This does not, however, dispel the clear impression that such statutes are judged by a different, and lesser, standard than prior restraints by judicial injunction.

91. In reaching this conclusion, the majority relied upon *Davis v. Alaska*, 415 U.S. 308 (1974), in which similar interests were advanced by the state to justify prohibiting criminal defendants from impeaching prosecution witnesses on the basis of their juvenile records. *Id.* at 2671. It was declared that the state's policy must be subordinated to the defendant's Sixth Amendment right of confrontation. Finding the First Amendment right of publication to be of equal weight to the Sixth Amendment confrontation right, Chief Justice Burger concluded that the state's interest in juvenile offender anonymity must give way here as well. *Id.* (citing *Davis v. Alaska*, 415 U.S. at 319).

worthy state interest, it did not accomplish its stated purpose because it prohibited only newspaper dissemination. Broadcasters could, and did, publish the information with impunity.⁹² Finally, the majority noted that, while all fifty states provide in some way for confidentiality in judicial proceedings, only five imposed criminal penalties on nonparties for identifying juveniles, indicating that most states have found alternative means of accomplishing the objective of protecting juveniles identities.⁹³

In addition to refusing to recognize the West Virginia statute as a prior restraint, the majority opinion gave the media occasion for pause by going out of its way to explain how narrow its holding was:

There is no issue before us of unlawful press access to confidential judicial proceedings . . . ; there is no issue here of privacy or prejudicial pretrial publicity. At issue is simply the power of a state to punish the truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper. The asserted state interest cannot justify the statute's imposition of criminal sanctions on this type of publication.⁹⁴

C. *Injunctions in the Name of "National Security"*

While the Supreme Court has consistently maintained that the barriers to prior restraints are high,⁹⁵ it has with equal consistency recognized at least certain categories of publications where the barriers may be overcome upon a proper showing of justification. For example, the requirement of "decency" may be enforced⁹⁶ by pre-

92. 99 S. Ct. at 2672. Justice Rehnquist concurred in the result because he agreed that the West Virginia statute, by permitting the names of juvenile offenders to be broadcast, did not accomplish its purpose. He disagreed, however, with the majority's conclusion that protecting juveniles in this type of case was not an interest of the "highest order." He argued that such an interest "far outweighs any minimal interference with freedom of the press . . ." *Id.* at 2673 (Rehnquist, J., concurring).

93. *Id.* at 2672 (citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978)). Justice Rehnquist was not impressed:

Even if the juvenile court's proceedings and records are closed to the public, the press still will be able to obtain the child's name in the same manner as it was acquired in this case. Thus, the Court's reference to effective alternatives for accomplishing the State's goals is a mere chimera. The fact that other States do not punish publication of the names of juvenile offenders, while relevant, certainly is not determinative of the requirements of the Constitution.

Id. at 2674 (Rehnquist, J., concurring) (citation to record omitted).

94. *Id.* at 2672.

95. See notes 6-12 *supra* and accompanying text.

96. *Near v. Minnesota*, 283 U.S. at 716.

venting, as well as by punishing, the publication of "the lewd and obscene, [and] the profane . . . ,"⁹⁷ and community security may be protected by restraining incitements to acts of violence and the overthrow by force of orderly government.⁹⁸ The rationale for the special treatment of these narrowly limited classes of speech in prior restraint analysis traditionally has been that lewd, obscene, profane and inciteful types of speech are of only slight social value, are not essential to the exposition of ideas, and are clearly outweighed by society's interest in order and morality.⁹⁹

For very different reasons, the Court has also left the door open to the possibility of prior restraints in times of war. Certain speech tolerated during times of peace may be of such hindrance to a war effort that it loses its constitutional protection during times of war.¹⁰⁰ Thus, the government may prevent obstruction of its recruiting service and the publication of the sailing dates of transports or the number and location of troops.¹⁰¹ The Court's unstated purpose in recognizing this special class of speech was promotion of national security. The questions of how much restraint "national security" could justify, and of how directly speech must relate to a war effort for it to trigger a governmental right to prevent its publication were largely of academic interest until 1971.

Legal scholars may differ as to whether the United States was "at war" in 1971 because no formal declaration of war against North Vietnam had been made by Congress; and politicians may disagree as to whether the Vietnam conflict really involved matters of national security, but American troops were certainly fighting and dying in Southeast Asia. The Nixon Administration was convinced that publication by *The New York Times*, the *Washington Post* and others of Daniel Ellsberg's "Pentagon Papers" would endanger its "war" effort and would be otherwise detrimental to "national security." For that reason, the United States Government, apparently for the first time, sought to enjoin newspapers from publishing information in their possession.¹⁰²

97. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

98. 283 U.S. at 716.

99. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). The class of "libelous" speech was also included among those less protected in the *Chaplinsky* formulation under the same rationale. *Id.* It has since been held that even some libelous statements are entitled to full, if not absolute, constitutional protection. See notes 356-82 *infra* and accompanying text.

100. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

101. 283 U.S. at 716.

102. *New York Times Co. v. United States*, 403 U.S. 713, 725 (1971) (Brennan, J., concurring).

The case, *New York Times Co. v. United States*,¹⁰³ did not fit neatly into previous Court dicta. Publication of the "Pentagon Papers" did not involve direct obstruction of recruitment or revelation of numbers or locations of troops. The majority viewed publication as courageous reporting which served the First Amendment purpose of revealing the workings of government.¹⁰⁴ The counterbalancing fear, expressed by Justice Blackmun in dissent, was that publication of the "Pentagon Papers" might also result in "the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate' [and the] prolongation of the war and of further delay in the freeing of United States prisoners. . . ."¹⁰⁵

Whether such results might, in another case, be sufficient to warrant a prior restraint was not decided. Six Justices voted to dismiss the government's complaint, but they could only agree to a brief per curiam opinion that the government had not met its heavy burden of showing justification for prior restraint in this case. All nine Justices filed separate opinions; combining them to form generalizations or to find guidance in future cases yields few meaningful results.

Justices Black and Douglas maintained their absolutist positions, arguing that the First Amendment permits no prior restraints in any circumstances.¹⁰⁶ Justice Brennan would not go that far, but believed that the *Near* and *Schenck v. United States*¹⁰⁷ dicta covered the field of what may be properly enjoined: "[O]nly governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order."¹⁰⁸ Because the

103. *Id.* at 713.

104. *Id.* at 717.

105. *Id.* at 763 (Blackmun, J., dissenting).

106. "[I]t is unfortunate that some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment." *Id.* at 715 (Black, J., concurring). Justice Black would not recognize an exception even for "national security." *Id.* at 719.

Justice Douglas expressed the similar view that the First Amendment "leaves . . . no room for governmental restraint on the press." *Id.* at 720 (Douglas, J., concurring). He viewed *Near* as a direct repudiation of the "expansive" view that the government has the inherent power to go into court and obtain an injunction to protect the national interest. *Id.* at 723. He considered the dominant purpose of the First Amendment to be the prohibition of the government's widespread practice of suppression of embarrassing information. *Id.* at 723-24.

107. 249 U.S. 47 (1919).

108. *Id.* at 726-27 (Brennan, J., concurring).

government had failed at every step to make out such a case, Justice Brennan believed that each restraint that had been issued violated the First Amendment, even if its purpose had been to afford the courts an opportunity to examine the claim more thoroughly.¹⁰⁹

Justice Stewart expressed the view that the President alone should determine which internal security measures are necessary to maintain effectiveness in executing the Executive's power to conduct foreign affairs and to maintain a national defense. Though Justice Stewart announced that he was convinced that the Executive was correct with respect to some of the documents involved, he nevertheless joined with the majority because he could not say that disclosure of any of the documents would surely result in direct, immediate, and irreparable damage to the nation or its people.¹¹⁰

Justice White was confident that revelation of the documents would do substantial damage to public interests, but voted against the injunctions sought by the government because it had not satisfied the very heavy burden that it must meet to warrant an injunction against publication. He would not, however, proscribe injunctions against publishing information about government plans or operations in all circumstances.¹¹¹ Justice White then noted provisions of the Criminal Code that he believed were relevant to this case. The sections he discussed make it a crime to publish certain photographs or drawings of military installations,¹¹² proscribe publication of certain classified information,¹¹³ and prohibit the willful communication of documents relating to the national defense to one not entitled to receive them.¹¹⁴ Should the "Pentagon Papers" be published and any materials within the book violate these statutory prohibitions, Justice White suggested that he would sustain the publisher's conviction under the Criminal Code even though a prior restraint could not justifiably be imposed on the writings.¹¹⁵

The final Justice to vote with the majority, Justice Marshall, came to his decision from yet another direction. Feeling compelled

109. *Id.* at 727.

110. *Id.* at 729-30 (Stewart, J., concurring).

111. *Id.* at 731 (White, J., concurring) (footnote omitted).

112. 18 U.S.C. § 797 (1976).

113. *Id.* § 798(a).

114. *Id.* § 793(e).

115. 403 U.S. at 735, 736-37 (White, J., concurring). Justice Douglas' concurring opinion analyzed the same statutory provisions and found no relevance therein to these publications. *Id.* at 720-22.

to uphold the concept of separation of powers, he refused to prevent behavior which Congress had specifically declined to prohibit.¹¹⁶ Justice Marshall also believed that the government had failed to establish that the criminal statutes referred to by Justice White did not provide an adequate remedy at law so as to require equitable relief.¹¹⁷

The dissenters' reasons for their votes were also varied. Chief Justice Burger simply announced that the "unseemly haste" with which the cases were conducted left him unprepared to reach the merits.¹¹⁸ The Chief Justice said he generally agreed with the views of the other dissenters, but the only solid clue to his ultimate position was his rejection of the view of the "First Amendment as an absolute in all circumstances."¹¹⁹ While Justice Black had argued that "every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment,"¹²⁰ Chief Justice Burger argued that the newspapers could not complain of any additional delay of publication that full adjudication might necessitate since the newspapers themselves had delayed publication for months after receiving the documents.¹²¹

The Chief Justice also chided the newspapers for failing to perform their basic duty as citizens with respect to the discovery or possession of stolen property or secret government documents, namely, "to give the government an opportunity to review the entire collection" and to determine whether agreement could be reached on publication.¹²² The Chief Justice announced that he would have ordered a stay of publication until the trial courts had had the opportunity to make a full determination of the merits.¹²³

Justice Harlan also complained of the haste in the proceedings, but felt nevertheless forced to reach the merits of the case. His dissent was based upon a belief in a limited scope of judicial review in cases of this sort and a general deference to the Execu-

116. *Id.* at 742 (Marshall, J., concurring).

117. *Id.* at 743-44.

118. *Id.* at 748, 752 (Burger, C.J., dissenting). "The prompt settling of these cases reflects our universal abhorrence of prior restraint. But prompt judicial action does not mean unjudicial haste." *Id.* at 749.

119. *Id.* at 748, 752.

120. *Id.* at 715 (Black, J., concurring).

121. *Id.* at 750 (Burger, C.J., dissenting).

122. *Id.* at 750, 751.

123. *Id.* at 752. He added his "general agreement" to Justice White's views on the potential applicability of the penal statutes. *Id.*

tive in determining matters of national security. The courts, he said, may not properly go beyond two specific inquiries: First, whether the subject matter of the dispute lay within the President's foreign relations power; and second, whether the head of the Executive Department concerned personally determined that disclosure of the subject matter would irreparably impair the national security.¹²⁴ Justice Harlan would have continued the restraints on publication pending "further hearings in each case conducted under the appropriate ground rules."¹²⁵

Finally, Justice Blackmun joined in Justice Harlan's analysis and embraced much of what Justice White had said concerning possible criminal liability after the fact of publication.¹²⁶ He added his concern for the possible results of publication¹²⁷ and stated that, if such results should come about, "then the Nation's people will know where the responsibility for these sad consequences rests."¹²⁸

The ultimate result was that the *Times*, the *Post* and others eventually published the "Pentagon Papers," but the Court's wide diversity of opinions left little guidance for the future. Only two Justices, Black and Douglas, expressed the view that the First Amendment absolutely prohibits prior restraints in this area, and they no longer sit on the Court. Except for Justice Harlan's scope of review approach, none of the remaining Justices provided much in the way of guidelines for determining the validity of attempted prior restraints in national security cases.

Five Justices discussed the criminal sanctions against communicating certain information but could not agree on the implications of those statutes for this case. Justice Douglas believed that the criminal statutes indicated no intention by Congress that publication of documents relating to national security be either enjoined or punished. Justices White and Marshall believed that the statutes could lead to punishment after the fact of publication. Justice Marshall, however, felt that Congress' decision that certain communications could be punished without providing for pre-publication injunctions ended any question of prior restraint. Chief Justice Burger and Justice Blackmun, however, saw no barriers to prior restraint imposed by the statutes and viewed the punish-

124. *Id.* at 757 (Harlan, J., dissenting).

125. *Id.* at 758-59.

126. *Id.* at 759 (Blackmun, J., dissenting).

127. *See* text accompanying note 105 *supra*.

128. 403 U.S. at 763 (Blackmun, J., dissenting).

ments provided therein simply as additional inducements not to publish. None of the Justices discussing the penal statutes appeared to have any problem with their First Amendment implications.¹²⁹

An opportunity for further refinement of the law of prior restraints based upon national security claims has been aborted. On March 26, 1979, district court Judge Robert W. Warren issued, at the request of the government, an injunction prohibiting the magazine *The Progressive* from publishing an article, *The H-Bomb Secret: How We Got It, Why We're Telling It*.¹³⁰ The Judge concluded that the article, while probably not providing a "do-it-yourself" guide for making a hydrogen bomb, could assist a medium-sized nation in developing such a weapon more quickly.¹³¹ While *The Progressive* argued that all the data contained in the article was in the public domain and readily available to any diligent seeker, Judge Warren was convinced that the article set forth concepts vital to the operation of the hydrogen bomb which were not available to the general public.¹³²

The district court distinguished the "Pentagon Papers" cases on three grounds: First, the Pentagon cases dealt with purely historical data; second, the government in the "Pentagon Papers" cases had advanced no cogent reasons as to what effect the article had on the national security interest, except that publication might cause the United States some embarrassment; and third, the most vital difference, the hydrogen bomb case involved a specific statute¹³³ prohibiting publication of the material in question.¹³⁴

Judge Warren viewed his task as one of weighing the merits and consequences of the two divergent views before him, injunction or publication: "A mistake in ruling against *The Progressive* will seriously infringe on cherished First Amendment rights. . . . A mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all. In that event, our right to life is extinguished and the right to publish becomes moot."¹³⁵ The district court imposed an injunction based on the

129. It has been argued, for example, that "*Times*-style injunctions may induce less self-censorship than criminal sanctions." Kalven, *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 209 (1971).

130. *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979).

131. *Id.* at 993.

132. *Id.*

133. 42 U.S.C. § 2274(b) (1976).

134. 467 F. Supp. 990, 994 (W.D. Wis. 1979).

135. *Id.* at 996.

following findings: The hydrogen bomb article was sufficiently analogous to the publication of troop movements in 1931 to warrant a prior restraint under the *Near* dicta; the government had met its heavy burden of justification for such a restraint; and restraining publication of the objectionable technical portions of the article would not impede the development of public knowledge or the national debate on national policy questions.¹³⁶

The Supreme Court refused to expedite *The Progressive's* appeal¹³⁷ and never had the opportunity to review the district court's injunction or to refine the law of prior restraints in the national security area through this case. In September 1979, before the court of appeals ruled on *The Progressive's* appeal, the Justice Department dropped the case after material from *The Progressive* article was published elsewhere, despite the government's efforts to block publication.¹³⁸

III. THE PRESS' RIGHT OF ACCESS TO INFORMATION

If the Burger Court has been reasonably solicitous of the right of the media to publish what it knows, it has been downright niggardly in recognizing any right of the press to find out anything. It suggested in dicta that news gathering qualified for First Amendment protection and that some protection for seeking out the news was crucial to upholding freedom of the press.¹³⁹ But the position of the Burger Court, as applied in practice, has been closer to that first independently expressed by Justice Stewart. Justice Stewart maintained that the constitutional guarantee of a free press created a fourth institution outside the government which provided an additional check on the three official branches.¹⁴⁰ He explained that, although the autonomous press may publish what it knows and may

136. Judge Warren acknowledged that his decision constituted "the first instance of prior restraint against a publication in this fashion in the history of this country, to this Court's knowledge." *Id.*

137. *Morland v. Sprecher*, 99 S. Ct. 3086 (1979). The denial was principally based on *The Progressive's* own delay before asking for expedition. *Id.* at 3087.

138. *U.S. Drops Its Effort To Stop Publication Of H-Bomb Article*, Wall St. J., Sept. 18, 1979, at 10, col. 3.

139. *Branzburg v. Hayes*, 408 U.S. at 681.

140. Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975). Professor Vincent Blasi has described this function of the First Amendment as the "checking value" and has concluded that "one of the most important values attributed to a free press by eighteenth century political thinkers was that of checking the inherent tendency of government officials to abuse the power entrusted to them." Blasi, *The Checking Value in First Amendment Theory*, 3 AM. B. FOUNDATION RESEARCH J. 521, 538 (1977).

seek to learn what it can, the press does not have a constitutional right of access to all government information. "The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act."¹⁴¹

To what extent, then, does news gathering qualify for First Amendment protection? The Supreme Court strove to answer that question in a series of cases in the mid-1970's. The principal conclusion to be drawn from those decisions is that the *Branzburg* dicta carried little, if any, weight in deciding specific cases and probably is by now only a curiosity.

A. *Access to Government Institutions and Persons Within Them*

In *Pell v. Procunier*¹⁴² and *Saxbe v. Washington Post Co.*,¹⁴³ the Burger Court clearly stated that the media have no greater right of access to government facilities than does the general public. Both cases involved regulations by penal institutions banning press interviews with inmates.¹⁴⁴

Justice Stewart, writing for the majority in *Pell*, said that the California regulations were intended to conceal prison conditions or to frustrate the press' investigation and reporting of those conditions. On the contrary, the majority found that the existing corrections policy provided the press and the general public opportunities to observe prison conditions.¹⁴⁵ The challenged regulation had reversed a previous policy permitting press interviews and was imposed only after a violent episode that corrections officials believed was at least partially attributable to the former policy.¹⁴⁶

After finding that the prison officials had shown good cause for the regulation, the majority disposed of the media's constitutional right of access argument by concluding that newsmen have no con-

141. Stewart, *supra* note 140, at 636 (footnote omitted).

142. 417 U.S. 817 (1974).

143. 417 U.S. 843 (1974).

144. Inmates of the California prison system and representatives of the press instituted *Pell* to challenge the constitutionality of a section of the California Department of Corrections Manual, which provided that "[p]ress and other media interviews with specific individual inmates will not be permitted." 417 U.S. at 819. *Saxbe* involved a challenge by the *Washington Post* of a policy statement of the Federal Bureau of Prisons which prohibited interviews of individual inmates by press representatives, even when such interviews were requested by the inmate. The federal policy, however, permitted conversation "with inmates whose identity is not to be made public, if it is limited to the discussion of institutional facilities, programs and activities." *Id.* at 844 n.1.

145. *Id.* at 830.

146. *Id.* at 831 (footnote omitted).

stitutional right of access to prisons or their inmates or to information beyond that afforded to the general public.¹⁴⁷ The majority also rejected the prisoners' contention that their free speech rights had been denied by the regulation.¹⁴⁸

In *Saxbe*, the majority opinion, again written by Justice Stewart, found that the federal regulation was similarly merely a reiteration of the general rule that inmates may be visited only by a lawyer, clergyman, relative or friend. Thus the press was being treated the same as the public generally.¹⁴⁹ Viewing *Saxbe* as "constitutionally indistinguishable from *Pell*," the Court upheld the regulation.¹⁵⁰

The majority in both *Pell* and *Saxbe* rejected the notion that the press' watchdog function warranted special access rights for the media. That view was expressed in the dissents of Justice Douglas in *Pell*¹⁵¹ and of Justice Powell in *Saxbe*.¹⁵²

Somewhat prophetically, Justice Douglas asked in dissent: "Could the government deny the press access to all public institutions and prohibit interviews with all governmental employees? Could it find constitutional footing by expanding the ban to deny such access to everyone?"¹⁵³ The answers were provided at least in part by *Houchins v. KQED, Inc.*¹⁵⁴

On March 31, 1975, radio and television stations KQED of San Francisco reported the suicide of a prisoner in the Santa Rita Jail in Alameda County, California. The reports included a statement by a psychiatrist that the conditions at the facility created the illnesses of his patient-prisoners there, and included a denial by Thomas Houchins, the Alameda County sheriff. The sheriff refused

147. *Id.* at 834.

148. *Id.* at 821-28.

149. *Saxbe v. Washington Post Co.*, 417 U.S. at 849.

150. *Id.* at 850.

151. 417 U.S. at 841 (Douglas, J., dissenting) (footnote omitted). Justice Douglas' *Pell* dissent applied as well to *Saxbe*. *Id.* at 836. Joining in Justice Douglas' dissent were Justices Brennan and Marshall.

152. *Saxbe v. Washington Post Co.*, 417 U.S. at 864 (Powell, J., dissenting). Justice Powell then examined the Prison Bureau's rationale for the ban and found it insufficient for a total prohibition of prisoner-press interviews. *Id.* at 864-75. He favored remanding the *Saxbe* case "with instructions to allow the Bureau to devise a new policy." *Id.* at 874. In his *Saxbe* dissent, Justice Powell was joined by Justices Brennan and Marshall. Justice Powell adopted the same reasoning for his dissent on the press issue in *Pell*, in which he concurred with the majority on the prisoners' claims. *Pell v. Procunier*, 417 U.S. at 835-36 (Powell, J., concurring in part and dissenting in part).

153. 417 U.S. at 841 (Douglas, J., dissenting).

154. 438 U.S. 1 (1978).

KQED's request to inspect and take pictures within the facility.¹⁵⁵ As a result, KQED filed suit under the Federal Civil Rights Act,¹⁵⁶ claiming that its First Amendment rights had been violated by the sheriff's failure to provide any effective means by which the public could be informed of conditions at the jail or could learn of the prisoners' grievances.¹⁵⁷ They further contended that television coverage was the most effective means of informing the public of jail conditions.¹⁵⁸

The district court rejected the sheriff's contention that his policies were necessary to protect inmate privacy and to minimize security and administrative problems. The court granted a preliminary injunction prohibiting the sheriff from denying KQED representatives and other "responsible representatives" of the news media access to the jail facilities "at reasonable times and hours" and from "preventing . . . [them] from utilizing photographic and sound equipment or from utilizing inmate interviews in providing full and accurate coverage of the . . . facilities."¹⁵⁹ The Ninth Circuit affirmed on interlocutory appeal, rejecting the sheriff's argument that *Pell* was controlling, and concluded that both the public and the media had a First Amendment right of access to prisons and jails.¹⁶⁰

In his majority opinion¹⁶¹ reversing the court of appeals, Chief Justice Burger agreed with many of KQED's generalized assertions: Conditions in jails and prisons are matters of great public im-

155. At that time, there was apparently no formal policy regarding public access to the jail. *Id.* at 4.

156. 42 U.S.C. § 1983 (1976).

157. The Alameda and Oakland branches of the NAACP joined in the suit, claiming that public access to the information sought by KQED was essential for its members to participate in the public debate on jail conditions in Alameda County. 438 U.S. at 4.

158. Shortly after the complaint was filed, the sheriff announced a new policy and invited all interested persons to make arrangements for attending regular monthly tours of the jail facility. *Id.* The tours, however, were limited to twenty-five persons each on a first come, first served basis and did not include some of the most controversial areas of the jail. Photographs of selected parts of the jail were made available, but no cameras or tape recorders were allowed on the tours. Those on the tours were not permitted to interview inmates, who were generally removed from view. Not satisfied, KQED and the NAACP went forward with their suit. *Id.* at 4-5.

159. *Id.* at 6.

160. *KQED, Inc. v. Houchins*, 546 F.2d 284 (9th Cir. 1976), *rev'd*, 438 U.S. 1 (1978).

161. Chief Justice Burger's opinion was adopted by Justices White and Rehnquist and Justice Stewart's concurring opinion was not materially different. Three Justices dissented and two, Blackmun and Marshall, did not participate. 438 U.S. at 1.

portance; the public can form its opinions about prison conditions more intelligently the greater its information; and the media, as the "eyes and ears" of the public, are a potentially constructive factor in remedying abuses in the conduct of public business.¹⁶² But the Chief Justice could find no constitutional basis entitling the public or the media to enter these institutions with camera equipment, and to take pictures of inmates for broadcast. More broadly, he rejected any intimation in previous decisions of "a First Amendment guarantee of a right of access to all sources of information within government control."¹⁶³

The *Houchins* decision took two significant constitutional steps. First, it rejected any relationship between the press' First Amendment right to gather news and the responsibility of the government to provide information. As the Burger Court interpreted the earlier cases, the First Amendment concerns only the freedom of the media to communicate information once obtained and does not compel the government to provide the media with information or access to it on demand. According to the majority, the *Branzburg* dicta, stating that "news gathering is not without its First Amendment protections,"¹⁶⁴ provided no basis to compel the government to supply information but stood only for the proposition that there is a right to gather news from any lawful source.¹⁶⁵

Second, while the Court asserted that the issue in *Houchins* was only "a claimed special privilege of access" by the media, and that *Pell* and *Saxbe* were, therefore, controlling,¹⁶⁶ Chief Justice Burger's decision went far beyond a repetitious denial of a special access right to the press. Underlying the media's access claims was an asserted right of the public to know what its government is doing and a responsibility of the press, as the public's "eyes and ears," to provide that information. But if the press' special role afforded it no special rights, the public's "right to know" fared no

162. *Id.* at 8.

163. *Id.* at 9.

164. *Branzburg v. Hayes*, 408 U.S. at 707.

165. 438 U.S. at 11. The majority pleaded that the *Branzburg* dicta "must be read in context." *Id.* at 10. Yet, it neither quoted nor discussed the stated rationale for the asserted First Amendment protection for newsgathering, that is, that without such protection "freedom of the press could be eviscerated." 408 U.S. at 681. The majority in *Houchins* apparently had no problem with eviscerating freedom of the press by permitting the government to shut down legal access to information while intimating to the press that its only constitutional right is to gather news "by means within the law." 438 U.S. at 11 (quoting *Branzburg v. Hayes*, 408 U.S. at 681).

166. 438 U.S. at 12.

better. Previous Court references "to a public entitlement to information" were dismissed as meaning "no more than that the government cannot restrain communication of whatever information the media acquire."¹⁶⁷ Specifically rejecting any notion that either the public or the media had a constitutional right to information about government activities, the majority embraced Justice Stewart's previously stated view that neither the press nor the public has a constitutional right of access to particular government information.¹⁶⁸

The two-pronged effect of *Houchins* is clear: The press has no special right of access to government information to inform the public because the public itself has no constitutional right to the information. The focus of First Amendment cases in this area, therefore, shifts from the right of the press and public to government information to the right of the government to keep its activities secret.

The majority attempted to excuse its position in several ways. The question of access to penal facilities, it asserted, presents legislative and executive concerns best left to experts. No one questions the right and the responsibility of prison officials to impose regulations designed to maximize order and minimize invasions of privacy. The very injunction appealed from limited the right of access, for example, to "reasonable times and hours," an order clearly recognizing that right. But the Supreme Court's implicit view that requiring access and maintaining order and privacy are mutually exclusive is unsupported and unsupportable.¹⁶⁹

The majority further asserted that media access to prisons is unnecessary to inform the public of jail conditions. It contended, for example, that visiting citizens committees had provided impetus to the early English penal reform movements, and continue to play an important role in keeping citizens informed.¹⁷⁰ Grand juries and the legislature traditionally evaluate conditions in public, tax-supported institutions such as prisons.¹⁷¹ Also, the media have

167. *Id.* at 10.

168. *Id.* at 14-15 (quoting Stewart, *supra* note 140, at 636). See note 3 *supra* and accompanying text.

169. Sheriff Houchins contended, for example, that "unregulated access by the media would infringe inmate privacy, [and tend to create] 'jail celebrities,' who in turn [would] tend to generate internal problems and undermine jail security," and would otherwise "disrupt jail operations." 438 U.S. at 5 (footnote omitted). Neither KQED's arguments nor the district court's preliminary injunction, however, can be fairly read to require "unregulated access," but only access more meaningful than the sheriff had been willing to provide. 438 U.S. at 36 (Stevens, J., dissenting).

170. *Id.* at 12-13.

171. *Id.* at 13.

a First Amendment right to receive letters from inmates criticizing jail officials and reporting on conditions, and they are free to interview prisoners' counsel, and to pursue former inmates, visitors to the prison, public officials, and institutional personnel,¹⁷² such as the complaining psychiatrist here. In California, the Board of Corrections has the statutory authority to inspect prisons and the duty to provide a public report at regular intervals.¹⁷³

Without pretense of expertise in penology, common sense dictates that such indirect means of access constitute insufficient mechanisms for informing the public of prison conditions. Inmates' correspondence, for example, is often censored. Indeed, prior to commencement of KQED's suit, prison rules in Alameda County provided that all outgoing mail, except letters to judges and lawyers, would be inspected and prohibited any mention in outgoing correspondence of the names or actions of any correctional officers.¹⁷⁴ While former prisoners and institutional personnel may inform the media about prison conditions, they may have an equally strong interest in concealing information or a fear about revealing it. Pointedly, the prison psychiatrist, whose interview with KQED had sparked the station's initial interest in visiting the Alameda County facilities, was quickly discharged.¹⁷⁵ As to periodic inspections and reports, the Court's assumption that such activities will provide meaningful and disinterested information may not be valid.¹⁷⁶

As a final justification for his conclusion, Chief Justice Burger took a gratuitous swipe at the media, claiming that the media assumed that they were the best qualified persons for discovering malfeasance in public institutions. The Chief Justice not only announced that he could find no constitutional or judicial basis for such an assumption, but further suggested that media representa-

172. *Id.* at 15.

173. *Id.*

174. *Id.* at 20 (Stevens, J., dissenting). The policy was eased somewhat after the suit was filed, deleting the latter prohibition. *Id.* at 22. The point here is not the inmate correspondence should not be censored (that is an argument for another context), but only that inmate mail may not be a very useful means of obtaining information. On the prisoners' rights issue, however, it is notable that a substantial number of Santa Rita inmates were not convicted criminals but detainees awaiting trial. *Id.* at 37.

175. McCormick, *Press Access to Jails and Prisons*, Freedom of Information Center Report No. 405, at 4 (1979).

176. One commentator suggested that the potential for inefficacy of such inspections has been a historical problem, and quoted from Dumas' *The Count of Monte Christo*. *Id.*

tives are not confronted with being coerced by public opinion to disclose what they might prefer to conceal as public officers sometimes are.¹⁷⁷

One can easily dismiss this straw man attack unless he believes that the foibles of journalists are any less human than anyone else's. KQED's argument was not that media representatives possess superior abilities to report jail conditions in an evenhanded manner. Instead, the media have urged a recognition of the practical as well as constitutional mandates of the situation. As a practical matter, not everyone can view jail conditions for themselves; likewise, not everyone, not even those with a vital concern for this issue, wants to. Given the media's responsibility in the constitutional scheme of things to act for the public in watching its government's functions and reporting on its shortcomings, any argument that the press may make mistakes begs the question. As even the Chief Justice has recognized in other contexts, what appears in newspapers and how public issues and public officials are treated are matters for editorial judgment and control.¹⁷⁸

Not so easily dismissed, however, is the attitude reflected by the Chief Justice's argument. Judging from his remarks, Chief Justice Burger has the impression that the media are pampered, spoiled children who carp constantly, though enjoying special privileges and immunities they do not deserve. This kind of argument may, then, serve to tell us a good deal more about the reasons behind some of the Burger Court's media law decisions than the considered reasoning in the main portions of the opinions. While the issues in *Pell*, *Saxbe* and *Houchins* were limited to media and public access to penal institutions, their broad conclusions have found application in other contexts.

B. *Access to Judicial Proceedings*

*Gannett Co. v. DePasquale*¹⁷⁹ involved the right of the media and the public to attend pretrial criminal proceedings. The Supreme Court, in *Craig v. Harney*,¹⁸⁰ had said that events in the courtroom are public property. The press' right to report events that transpire in the courtroom was also recognized in *Shep-*

177. 438 U.S. at 13-14.

178. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974). See also *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 124 (1973).

179. 99 S. Ct. 2898 (1979).

180. 331 U.S. 367, 374 (1947).

pard.¹⁸¹ Troublesome dicta in *Branzburg*,¹⁸² however, cast doubt on this right. Newsmen, the Court said in *Branzburg*, "may be prohibited from attending or publishing information about trials if . . . necessary to assure a defendant a fair trial before an impartial tribunal."¹⁸³ *Gannett* afforded the Burger Court the opportunity to decide whether it really meant that. It apparently did.

In *Gannett*, a trial court judge in New York granted a motion by two murder defendants to exclude the public and the press from a pretrial hearing on the defendants' motion to suppress allegedly illegally obtained evidence. The case had received considerable local publicity, and the trial court, while recognizing a constitutional right of press and public access to the proceedings, ruled that such a right had to be balanced against the defendants' constitutional right to a fair trial. He found that in this case the latter outweighed the former because publicity concerning an open suppression hearing would pose a reasonable probability of prejudice to the defendants.¹⁸⁴ After the appellate division reversed and vacated the trial judge's exclusion order,¹⁸⁵ the New York Court of Appeals upheld the exclusion of the press and media from the proceedings notwithstanding New York law's presumption of open criminal "trials"; that presumption was overcome, the court held, because of the danger posed to the defendants' ability to receive a fair trial.¹⁸⁶

181. 384 U.S. at 362-63.

182. 408 U.S. at 665.

183. *Id.* As support for this proposition, *Branzburg* cited only *Sheppard's* endorsement of "stricter rules governing the use of the courtroom by newsmen," insulating witnesses from the press, and controlling extra-judicial statements to the press by persons involved in the trial. 384 U.S. at 358-59. But nowhere does *Sheppard* suggest, in its list of trial court powers to ensure a fair trial, that the press may be barred outright from courtroom proceedings, or prevented from publishing what they learn.

184. In the pre-trial hearing, the defendants specifically sought suppression of allegedly illegally obtained confessions and physical evidence obtained as fruits of those confessions, including a buried revolver belonging to the murder victim, to which one of the defendants had led the police following his confession. 99 S. Ct. at 2903. The defendants argued that their right to a fair trial would be denied if the evidence were suppressed but reported to prospective jurors in the newspapers anyway. *Id.*

185. *Gannett Co. v. DePasquale*, 55 App. Div. 2d 107, 389 N.Y.S.2d 719 (1976), *rev'd*, 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977), *aff'd*, 99 S. Ct. 2898 (1979).

186. 43 N.Y.2d 370, 377, 372 N.E.2d 544, 547, 401 N.Y.S.2d 756, 759 (1977), *aff'd*, 99 S. Ct. 2898 (1979).

On certiorari, five Justices¹⁸⁷ agreed that the Sixth Amendment's guarantee of a "public trial" is a right personal to the accused and does not create "any right of access to a criminal trial on the part of the public."¹⁸⁸ Although the majority recognized an independent public interest in the enforcement of Sixth Amendment guarantees, it said that did not create a constitutional right on the part of the public. The public's interest, it said, was protected by the adversary system of criminal justice.¹⁸⁹ Even assuming a public right to open trials, however, the five Justices found no persuasive evidence in common law supporting the public's right to attend pretrial proceedings, which have never been as open to the public as actual trials.¹⁹⁰ In short, the majority could find no constitutional requirement for opening a pretrial criminal proceeding, such as a suppression hearing, to the public even though the participants agreed that it should be closed to protect the defendants' right to a fair trial.¹⁹¹

The majority disintegrated, however, on the issue of whether a separate First Amendment right on the part of the press and the public to open criminal proceedings exists. Three of the five members of the majority¹⁹² evaded the question with the excuse that the trial court had assumed First Amendment rights to exist and had made its exclusionary order after assessing the competing soci-

187. Justice Stewart wrote the majority's opinion. He was joined by the Chief Justice and Justices Powell, Rehnquist and Stevens.

188. 99 S. Ct. at 2905.

189. *Id.* at 2907. The majority noted, for example, that the public's interest in jury trials is protected by the rule that a defendant cannot waive a jury trial without the consent of the prosecutor and judge. "But if the defendant waives his right to a jury trial, and the prosecutor and the judge consent, it could hardly be seriously argued that a member of the public could demand a jury trial because of the societal interest in that mode of fact-finding." *Id.*

190. *Id.* at 2909, 2910.

191. *Id.* at 2908. In dissent, Justice Blackmun, joined by Justices Brennan, White and Marshall, argued that the Sixth Amendment does create an independent constitutional interest on the part of the public in open criminal trials and that the public may not be constitutionally barred from such trials "without affording full and fair consideration to the public's interests in maintaining an open proceeding." *Id.* at 2933 (Blackmun, J., dissenting). The dissenters also would have held that the public's constitutional interest in open criminal proceedings extends to pretrial suppression hearings as well as to trials themselves, because such hearings resemble and relate "to the full trial in almost every particular" and are often critical and "may be decisive, in the prosecution of a criminal case." *Id.* Finally, the dissenters felt that the facts of this case did not present sufficient reason for concern about the defendants' fair trial rights to justify abridgement of the public's right to open proceedings. *Id.*

192. Chief Justice Burger, Justices Stewart and Stevens.

etal interests involved rather than determining that First Amendment freedoms were not implicated.¹⁹³ Thus, the actions of the trial judge were found to be "consistent with *any* right of access" the complaining newspaper "*may* have had" under the First Amendment,¹⁹⁴ rendering it unnecessary to decide the First Amendment issue.

Justice Powell, in a separate opinion, joined in the majority's opinion but announced that he would hold explicitly that the petitioner's reporter had an interest protected by the First and Fourteenth Amendments in being present at the pretrial suppression hearing. Justice Powell did not recognize any absolute right of access to courtroom proceedings, however, because he believed it was limited by the constitutional right of defendants to a fair trial and by the government's need to obtain just convictions and to preserve the confidentiality of sensitive information and the identity of informants.¹⁹⁵ On balance, Justice Powell believed that the trial court correctly concluded that the defendants' Sixth Amendment fair trial rights would have been sufficiently endangered to warrant an abridgement of the First Amendment rights of the public and press.

Justice Rehnquist also wrote separately on the First Amendment issue, but found no First Amendment right of access in the public or the press to judicial or other governmental proceedings. The First Amendment, he said, is not a constitutional sunshine law requiring notice, an opportunity to be heard and substantial reasons before the public and press may be excluded from a governmental proceeding.¹⁹⁶

Although four Justices dissented from the majority's position that the Sixth Amendment creates no independent public right to open trials, Justice Powell was not joined by any of the dissenters on the First Amendment question. Writing for all four dissenters, Justice Blackmun stated that the Sixth Amendment fixed the press' and the public's right of access; he rejected the complaining newspaper's argument that the First Amendment requires that the free flow of information about judicial proceedings not be cut off without justifying a prior restraint. But Justice Blackmun found no need to address the broader issue of First Amendment access,

193. *Gannett Co. v. DePasquale*, 99 S. Ct. at 2912 (quoting *Saxbe v. Washington Post Co.*, 417 U.S. 843, 860 (1974) (Powell, J., dissenting)).

194. 99 S. Ct. at 2912 (emphasis added).

195. *Id.* at 2914, 2915 (Powell, J., concurring).

196. *Id.* at 2918 (Rehnquist, J., concurring).

believing that the Sixth Amendment protected the right of access.¹⁹⁷

The Chief Justice, while joining in the majority's opinion, wrote separately to "emphasize" his view of pretrial motions to suppress evidence in criminal cases and took great pains to distinguish hearings on such motions from criminal trials. But what he was trying to tell us is obscure. If *Gannett* had involved a closed criminal trial rather than a pretrial hearing, would he have voted differently? He did say that, by definition, "a hearing on a motion before trial to suppress evidence is not a *trial*; it is a *pre trial* [*sic*] hearing,"¹⁹⁸ and his italicization might suggest a different conclusion in a case involving the closure of a trial. He also italicized the word "accused" in his quotation of the Sixth Amendment,¹⁹⁹ indicating an adoption of the view of the four other majority Justices that the Sixth Amendment right to a public trial belongs to the accused, not to the public. He also stated that the public's "interest" in public trials "alone does not create a constitutional right."²⁰⁰ Moreover, he joined in the majority opinion, with its explicit statement that the Sixth Amendment may not be properly viewed as embodying a constitutional right of the public to attend criminal trials. It would be dangerous, then, to assume that the Chief Justice intended to say that he would have taken a different view of a case involving a closed criminal trial.

Depending on one's point of view,²⁰¹ lower court judges, after *Gannett*, either exercised restraint in the use of their new power to close criminal pretrial proceedings or stampeded to the courthouse doors to close them to the press and public. *Newsweek* reported

197. *Id.* at 2940 (Blackmun, J., dissenting).

198. *Id.* at 2913 (Burger, C.J., concurring) (emphasis in original).

199. "The Sixth Amendment states that 'in all criminal prosecutions, the *accused* shall enjoy the right to a . . . public trial.'" *Id.* (citing U.S. CONST. amend. VI) (emphasis added).

200. *Id.*

201. The press reacted to *Gannett* swiftly and predictably. Allen H. Neuharth, chairman of Gannett Co., Inc., and chairman and president of the American Newspaper Publishers Association, described the decision as "saying that the judiciary is a private Supreme Club, which can shut the door and conduct public business in private." *Press Sees Public Rights Jeopardized*, Publisher's Auxiliary, July 9, 1979, at 3, col. 1. The National Newspaper Association charged that "the twin concepts of a free press and the public's right to know have been dealt another serious blow in the interest of going to an extreme to ensure a fair trial." *Id.* Jack Landau, director of the Reporters Committee for Freedom of the Press, asserted that the decision would "deprive the public of timely and critical information about the criminal justice process." *Id.*

that, in the month following *Gannett*, at least thirteen judges shut their courtrooms while sixteen judges rejected motions to do so. Inexplicably, three judges "barred the press, but not the public."²⁰²

Public debate over the wisdom of the *Gannett* decision, however, was quickly overshadowed by a new debate among the Justices themselves over the scope of the decision. Did *Gannett* authorize trial court judges to close full criminal trials as well as pretrial proceedings? The Chief Justice has said publicly that the *Gannett* decision was limited to pretrial hearings;²⁰³ but Justice Blackmun, who led the dissent in *Gannett*, has just as publicly disagreed, stating that the decision allowed the closure of full trials.²⁰⁴ Justice Powell, however, has somewhat cryptically suggested that trial judges might be "a bit premature" to read meanings into *Gannett* beyond its narrow holding.²⁰⁵

Whatever the subliminal message of Chief Justice Burger's concurring opinion in *Gannett*, he clearly intended to confine his vote to pretrial proceedings. Since his vote was crucial to the majority, it would appear that trial judges were being "a bit premature" in reading *Gannett* to mean that full trials may be closed. In fact, the Supreme Court has held recently that the First and Fourteenth Amendments do guarantee to the public and the press a right to attend criminal trials absent an overriding interest. Justice Powell took no part in the decision and only Justice Rehnquist dissented.²⁰⁶

C. Access to Public Records

1. Judicial Records

The Burger Court has considered both constitutional and statutory claims of a right on the part of the press and the public to inspect public documents and records. The results have not deviated markedly from those in other access cases.

In *Nixon v. Warner Communications, Inc.*,²⁰⁷ seven Justices agreed that neither the press nor the public had a constitutional or

202. *Press, Open and Shut Cases*, NEWSWEEK, Aug. 27, 1979, at 69.

203. *Confusion in the Courts*, TIME, Sept. 17, 1979, at 82.

204. *Greenhouse, Appeal Could Clarify Justices' Stand on Closed Courts*, N.Y. Times, Sept. 4, 1979, at 15, col. 1.

205. *Id.*

206. *Richmond Newspapers, Inc. v. Virginia*, 48 U.S.L.W. 5008 (July 2, 1980).

207. 435 U.S. 589 (1978).

common law right to inspect or copy tape recordings of White House conversations admitted into evidence during the criminal trial of Watergate figures John Mitchell, H.R. Haldeman, John Ehrlichman, Kenneth Parkinson and Robert Mardian. The jury and the public had heard some twenty-two hours of taped conversations during the course of the trial; and transcripts of the conversations, although not admitted into evidence, were furnished by the district court to the jurors, reporters and members of the public in attendance at the trial and were widely reprinted in the press.

Six weeks after trial had begun, several broadcasting organizations sought permission of the district court to copy, broadcast and sell to the public the portions of the tapes played at trial. Former President Nixon, who asserted both property interests in the tapes and executive privilege, opposed these requests. Judge Gesell reasoned that the common law privilege of public access to judicial records permitted the broadcasters to obtain copies of exhibits in the custody of the clerk, including the tapes. Because of potential administrative and mechanical difficulties, however, he prohibited copying until termination of the trial.²⁰⁸ The matter was thereafter retransferred to Judge Sirica, the trial judge in the Watergate conspiracy trial. Judge Sirica denied without prejudice the broadcasters' petitions for immediate access to the tapes, noting that all four men convicted at trial had filed notices of appeal, and declaring that their rights could be prejudiced by immediate access followed by public dissemination of the recordings.²⁰⁹

The court of appeals reversed, finding that the district court had abused its discretion in allowing the mere possibility of prejudice to the defendants' rights in the event of a retrial to outweigh the public's right of access to judicial records. Although the court of appeals' decision was based upon a common law interest in access, its opinion noted that the First Amendment sharply limited the court's power to control the uses to which the tapes are put once they are released.²¹⁰

208. *United States v. Mitchell*, 386 F. Supp. 639 (D.D.C. 1974).

209. *United States v. Mitchell*, 397 F. Supp. 186 (D.D.C. 1975), *rev'd*, 551 F.2d 1252 (D.C. Cir. 1976), *rev'd sub nom.* *Nixon v. Warner Communications, Inc.*, 435 U.S. at 589.

210. *United States v. Mitchell*, 551 F.2d 1252, 1263 n.52 (D.C. Cir. 1976), *rev'd sub nom.* *Nixon v. Warner Communications, Inc.*, 435 U.S. at 589 (emphasis by the Court). District court Judge Gesell, by contrast, had cautioned against "overcommercialization" of the evidence and had requested the parties to submit proposals for access and copying procedures that would minimize such overcommercialization. *United States v. Mitchell*, 386 F. Supp. 639, 643 (D.D.C. 1974).

In an opinion delivered by Justice Powell, five Justices held that, considering all circumstances, the common law right of access to judicial records did not authorize release of the tapes from the district court's custody. The majority noted that the common law right of access to judicial records was infrequently litigated; and, therefore, its contours had not been delineated precisely. No previous case addressed the applicability of the common law right to exhibits subpoenaed from third parties.²¹¹

Justice Powell's opinion purportedly followed established precedent recognizing "a general right to inspect and copy public records and documents, including judicial records and documents."²¹² That right is not conditioned on a proprietary interest in the document or upon its evidentiary value in a lawsuit.²¹³ Beyond this, and declarations that there is no absolute right to inspect and copy judicial records²¹⁴ and that the trial court should decide the issue of access,²¹⁵ the majority made no further effort to delineate precisely the contours of the common law right.²¹⁶ The majority did not feel required to weigh the interests advanced by the parties in this case²¹⁷ because it believed that the Presidential Record-

211. 435 U.S. at 597. Some of the tapes had been received by the Watergate Special Prosecutor following the issuance of a 1973 subpoena duces tecum directing then President Nixon to produce certain tapes, the existence of which had been revealed in testimony before the Senate Select Committee on Presidential Campaign Activities. *Id.* at 591. The subpoena was upheld in *In re Subpoena to Nixon*, 360 F. Supp. 1 (D.D.C.), *aff'd sub nom.* *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973). More tapes were made available following a second subpoena duces tecum issued in 1974 in preparation for the *Mitchell* trial. That subpoena was upheld in *United States v. Mitchell*, 377 F. Supp. 1326 (D.D.C.), *aff'd sub nom.* *United States v. Nixon*, 418 U.S. 683 (1974).

212. 435 U.S. at 597 (footnotes omitted).

213. *Id.* at 597.

214. "Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes," such as gratification of private spite or promotion of public scandal through the publication of details of divorce cases or the use of judicial records as sources of business information that might harm a litigant's competitive standing. *Id.* at 598.

215. *Id.* at 599.

216. *Id.*

217. On the broadcasters' side of the scales were the incremental gain in public understanding of the Watergate scandal and the presumption, however gauged, in favor of public access to judicial records. On former President Nixon's side were his asserted proprietary and privacy interests, the limited use of the subpoena tapes as authorized by *United States v. Nixon*, 418 U.S. 683 (1974), and the asserted impropriety of facilitation by the courts of the commercialization of the tapes. 435 U.S. at 600-02.

ings and Materials Preservation Act (Act)²¹⁸ provided an alternative means of public access that justified denying release.²¹⁹

That Act created an administrative procedure for processing and releasing to the public, on terms meeting with congressional approval, all of former President Nixon's materials of historical interest, including recordings of the conversations at issue. This meant to the majority that the district court was, thus, not the only potential source of information regarding these materials, and that the existence of the Act was crucial to exercising discretion regarding release of the tapes.²²⁰

Following this line of reasoning to its logical conclusion meant that the district court did not abuse its discretion in denying immediate public access to the tapes, and that the court of appeals erred in its review by failing to add the weight of the Act to former President Nixon's side of the scales.²²¹ Application of such reasoning seemingly would have established that the public's right of access to judicial records did not require release of the tapes, but the majority actually held that the common law right of access did not authorize release of the tapes from the district court's custody.²²² Perhaps it was merely a slip of Justice Powell's pen, but his choice of words appears to imply that something more than a weighing of interests is involved in cases of this nature. An argument could be constructed from this language prohibiting public access to judicial records absent proof of authorization by those seeking access. This would appear to gauge any presumption in favor of public access to judicial records quite narrowly indeed.

218. 44 U.S.C. §§ 2017, 3315-3324 (1976).

219. 435 U.S. at 606.

220. *Id.* at 607.

221. The majority did not hold that the Act prohibited the district court from releasing the tapes. Indeed, the Act appeared not to cover the handling of the specific tapes at issue because they were copies of the original tapes and were not made until after the time period relevant to the Act. *Id.* at 603-04 & n.15. In partial dissent, Justices White and Brennan argued that the Act required delivery of all copies made from the original Nixon White House tapes to the Administrator of General Services, who alone (subject to congressional approval) had the power to regulate public access to the tapes. Justices White and Brennan, like the majority, would have reversed the court of appeals' decision, but would have further ordered the delivery of the district court's copies of the tapes to the Administrator. *Id.* at 611-12 (White, J., dissenting in part). The majority, however, did not feel compelled to rule on the applicability of the Act to the specific tapes at issue. *Id.* at 604 n.15. For them, the Act's only relevance to the case before the Court was that the Act provided an additional outlet to the public for the contents of the tapes.

222. *Id.* at 608.

The majority referred to *Nixon* as a concededly singular case²²³ and to the Presidential Recordings and Materials Preservation Act as a unique element.²²⁴ As to the issues of the scope and application of the public's common law right of access to judicial records, *Nixon* may not be broadly applied in future cases. The majority's determination of the broadcasters' constitutional arguments, however, will have significant influence. In support of their position, the broadcasters relied on both the First and Sixth Amendments for the proposition that the Constitution required public access to the tapes played in open court. The majority rejected the arguments based on both amendments.

As to the First Amendment, the broadcasters relied on *Cox Broadcasting Corp. v. Cohn*,²²⁵ which held that the First Amendment prohibited a state from outlawing the press from publishing information in the public domain on official court records.²²⁶ They argued that *Cox* guaranteed the press' access to exhibits and materials displayed in open court, but the majority limited *Cox* to merely affirming the right of the press to publish accurately information contained in court records open to the public.²²⁷ *Cox* did not apply, the majority ruled, because what was involved here was an asserted right to physical access to copies of the White House tapes when the public had never received any such access.²²⁸ Since the First Amendment generally does not grant the press a right to information about a trial superior to that of the general public, it did not compel press access to the tapes at issue.²²⁹

The majority also rejected the broadcasters' argument that the

223. *Id.*

224. *Id.* at 603.

225. 420 U.S. 469 (1975); see text accompanying notes 473-88 *infra*.

226. 420 U.S. at 495.

227. 435 U.S. at 609.

228. Jurors, reporters and members of the public were provided with earphones during the *Mitchell* trial through which the portions of the tapes presented in evidence were played. *Id.* at 594. As aids in listening to the exhibits, transcripts of the tapes were provided to the jurors, counsel and news media representatives in attendance and these transcripts were widely reprinted in the press. *Id.* at 593 n.3, 594. The tapes themselves (that is, the district court's copies of the original tapes) remained in the custody of the district court, but were not made available by the court for inspection or copying. *Id.* at 594 nn.3 & 4.

229. *Id.* at 609-10. The majority did not indicate the extent to which its determination of the First Amendment issue was influenced by the crucial fact that the broadcasters required a court's cooperation in furthering their commercial plans. The commercial plans involved were desired by some of those seeking permission to copy the tapes to sell to the public the portions of the tapes played at trial. *Id.* at 594, 602-03.

Sixth Amendment's guarantee of a public trial required release of the tapes to facilitate public understanding of the Mitchell trial and to permit the public to form its own judgments as to the meaning of the recorded conversations. First, the majority found, the argument proved too much because the same could be said of live testimony, yet no constitutional right exists to have such testimony recorded and broadcasted.²³⁰ Second, the purpose of the public trial guarantee is not to confer any special benefit on the press, but to assure that the courts do not become instruments of persecution. The Court said that the Sixth Amendment is satisfied if the public and the press have an opportunity to attend the trial and to report what they have observed, as was the case here.²³¹

Two Justices dissented in the result. Justice Marshall did not consider the Presidential Recordings and Materials Preservation Act decisive since by its terms it did not apply to the district court's copies of the original White House tapes. He argued that the Act strongly indicated that the tapes should be released to the public.²³² Justice Stevens similarly found the majority's reliance upon the Act ironic.²³³ Neither dissenting Justice directly confronted the constitutional issues. But Justice Stevens' references to *United States v. Mitchell*²³⁴ and to the Mitchell trial's "special characteristics" and to the "great historical interest" in "the conduct disclosed by the evidence," the full understanding of which "may affect the future operation of our institutions,"²³⁵ could serve as the basis for a response to the majority's rather pedantic disposition of the broadcasters' First Amendment argument. The reason no First Amendment right exists to broadcast the testimony of live witnesses at an ordinary criminal trial is the perception that the First Amendment must yield to a criminal defendant's Sixth Amendment right to a fair trial free of the distractions caused by cameras, flood lights and tape recorders.²³⁶ No such considerations were involved here. Justice Stevens' language, however, suggests the more compelling insufficiency of the majority's constitutional

230. *Id.* at 610 (citing *Estes v. Texas*, 381 U.S. 532, 539-42 (1965)).

231. 435 U.S. at 610. *Cf.* *Gannett Co. v. DePasquale*, 99 S. Ct. 2898, 2909 (1979) (the press may not have access under the circumstances of *Gannett*). *See* text accompanying notes 179-206 *supra*.

232. 435 U.S. at 613 (Marshall, J., dissenting).

233. *Id.* at 616-17 (Stevens, J., dissenting).

234. 377 F. Supp. 1326 (D.D.C.), *aff'd sub nom.* *United States v. Nixon*, 418 U.S. 683 (1974).

235. *Id.* at 616.

236. *See* *Estes v. Texas*, 381 U.S. 532 (1965).

analysis: this was no ordinary criminal trial. Whatever the usual standard to be applied in ordinary cases involving an asserted First Amendment right of access to judicial records, the Watergate trial undoubtedly warranted a special standard. As Justice Stevens noted, this was not a case in which the media argued a right to broadcast testimony to enable the public to make its own informed verdict of the guilt or innocence of the accused. It was the conduct disclosed by the evidence, not the persuasiveness of the evidence in the context of the criminal trial, that the public had an interest in. The need for a full public understanding of that conduct, based upon its own interpretations of the conversants' statements, tones of voice and inflections, made this a special case. The majority's failure to perceive that makes the result in *Nixon* difficult to accept.

2. Freedom of Information Act—Agency Records

The Supreme Court made two significant rulings in 1979 concerning the Freedom of Information Act (FOIA)²³⁷ that, while not involving media parties directly, will influence the ability of the press to obtain, through FOIA, public records in the hands of federal agencies.

In *Chrysler Corp. v. Brown*²³⁸ a unanimous Court construed FOIA exclusively as a disclosure statute which affords no private right of action to enjoin agency disclosure to parties to government contracts compelled by government regulations to supply sensitive information to various agencies. The Act's provisions exempting certain categories of records from FOIA's disclosure requirements were viewed only as being concerned with the agencies' need or preference for confidentiality and not as mandating nondisclosure even if the agency had no objection to disclosure. By itself, the Court said, FOIA protects the interests of private parties submitting information only to the extent that the agency receiving the information endorses those interests.

237. 5 U.S.C. § 552 (1976). FOIA essentially requires, *inter alia*, that federal agencies make available for inspection and copying, on demand, records in their possession and under their control, unless such records fall within specified categories of exemptions. Earlier Burger Court FOIA decisions include *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978); *Department of the Air Force v. Rose*, 425 U.S. 352 (1976); *FAA Adm'r v. Robertson*, 422 U.S. 255 (1975); *Renegotiation Bd. v. Grumman Aircraft Eng'r Corp.*, 421 U.S. 168 (1975); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1 (1974); *EPA v. Mink*, 410 U.S. 73 (1973).

238. 99 S. Ct. 1705 (1979).

Chrysler Corporation had sought to enjoin disclosure by the Department of Defense's Defense Logistics Agency of certain submissions by Chrysler reporting on its affirmative action employment programs. The reports had been submitted pursuant to regulations requiring such information of all government contractors. Notwithstanding exemption from mandatory disclosure by FOIA, the regulations provided for availability of such information to the public upon a determination that disclosure would further the public interest and would not impede agency functions, except where such disclosure was prohibited by law. Chrysler argued that disclosure of its submissions was barred by FOIA exemptions and would be inconsistent with the Trade Secrets Act²³⁹ which imposes criminal sanctions on government employees who disclose to any extent not authorized by law certain classes of information submitted to a government agency, including confidential statistical data.

Besides rejecting Chrysler's arguments that FOIA mandated nondisclosure of the exempted categories of information and that it created a private right of action to enjoin disclosure of exempted material, the Court also held that the Trade Secrets Act did not afford a private right of action to enjoin disclosure in violation of that statute. Even though the Court deemed disclosure of the material not authorized by law within the meaning of the Trade Secrets Act, it could find nothing in that Act to afford a private right of action under this criminal statute, especially since the agency's decision was reviewable under the Administrative Procedure Act.²⁴⁰ Unless overruled by congressional action, *Chrysler's* effect should put an end to most reverse-FOIA suits by private entities seeking to avoid government disclosure of exempted information produced by them to government agencies.²⁴¹

The Supreme Court's second significant FOIA decision in 1979 was *Federal Open Market Commission of the Federal Reserve System v. Merrill*,²⁴² where seven Justices²⁴³ rejected an argument that federal agencies have a right under FOIA to delay release of policy reports merely because they deem such delay to be necessary to protect their own efficiency. At the same time they recog-

239. 18 U.S.C. § 1905 (1976).

240. 5 U.S.C. § 706 (1976).

241. For a discussion of some of these suits by private parties, see Schorr, *Telling Tales: How Law Is Being Used to Pry Business Secrets From Uncle Sam's Files*, Wall St. J., May 9, 1977, at 1, col. 6.

242. 99 S. Ct. 2800 (1979).

243. Justice Stevens, joined by Justice Stewart, dissented.

nized a "qualified privilege" in the Act for confidential commercial information generated by the government itself in the process leading up to awarding a contract. This "qualified privilege" permitted the Federal Reserve System to delay public disclosure of certain monthly monetary directives that were in effect, provided the directives contained sensitive information not otherwise available and immediate release of the directives would significantly harm the government's monetary functions or commercial interests.²⁴⁴

In dissent, Justice Stevens argued that the directives were either required by FOIA to be released currently or were exempted from the Act, in which case its provisions did not apply.²⁴⁵ He could find no middle ground for another alternative for exempt material to which the Act nonetheless applies, even though on a delayed basis.²⁴⁶ Since he could find no exemption in FOIA concerning the directives, Justice Stevens would have held that the statute mandated current availability to the public. He said that the majority's newly created category, would impose substantial litigation costs and burdens on any party seeking to overcome an agency's objection to immediate disclosure.²⁴⁷

IV. THE SANCTITY OF THE NEWSROOM

A. *Public Access to the Media*

In an influential 1967 article, Professor Jerome A. Barron argued that the prevailing First Amendment theory of a self-operating "marketplace of ideas" had become outmoded. The modern mass media, he asserted, had closed the marketplace to unorthodox points of view by denying them access to media outlets while hiding behind the First Amendment to claim immunity for their actions. Professor Barron maintained that the constitutional imperative of free expression had devolved into a rationale for repressing competing ideas and that First Amendment theory must be reexamined in order that the constitutional guarantee of free speech best serve its original purposes.²⁴⁸

244. 99 S. Ct. at 2812, 2814.

245. *Id.* at 2815-16 (citing 5 U.S.C. § 552(a)(1), (b) (1976) (Stevens, J., dissenting)).

246. *Id.* at 2816.

247. *Id.* "For henceforth, that party must prove that compliance with the statute's disclosure mandate would not 'significantly harm the Government's monetary functions or commercial interests.'" *Id.*

248. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1642 (1967).

To promote dissemination and confrontation of diverse viewpoints, Professor Barron urged that the right to be heard should be recognized as a constitutional principle, and he proposed that the courts establish a remedy for a right of access. In the alternative, he suggested that a forum for the expression of diverging opinions was secured in the constitutional law which authorized a carefully framed right of access statute which would forbid an arbitrary denial of space.²⁴⁹

Professor Barron's comments immediately received considerable attention,²⁵⁰ with an ensuing debate over the validity of his premise and the wisdom of his proposals. Within seven years, however, the Burger Court laid to rest any right of access to the print media. In *Miami Herald Publishing Co. v. Tornillo*,²⁵¹ the Supreme Court overturned a Florida decision upholding the constitutionality of a right of access statute.²⁵² The Florida Supreme Court had embraced the view that since ownership of the mass media was being concentrated in a limited number of hands, a form of private censorship existed which jeopardized the public's right to know all sides of a controversy. It upheld the statute on the theory that it prohibited nothing and required additional information for full and fair discussion.²⁵³

249. *Id.* at 1678. Professor Barron further developed his access theory in a series of subsequent articles. See Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487 (1969); Barron, *Access—The Only Choice for the Media?*, 48 TEX. L. REV. 766 (1970).

250. See, e.g., the literature compiled in Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N.C.L. REV. 1 (1973).

251. 418 U.S. 241 (1974).

252. See *Tornillo v. Miami Herald Publishing Co.*, 287 So. 2d 78 (Fla. 1973), *rev'd*, 418 U.S. 241 (1974). The statute in question, FLA. STAT. § 104.38 (1973), read as follows:

104.38 *Newspaper assailing candidate in an election; space for reply*—If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083.

418 U.S. at 244-45 n.2 (citing FLA. STAT. § 104.38 (1973)).

253. *Tornillo v. Miami Herald Publishing Co.*, 287 So. 2d 78, 82-83 (Fla. 1973), *rev'd*, 418 U.S. 241 (1974). This case arose when the *Miami Herald* refused a legislative candidate's demand under the statute for reply space following an editorial at-

The United States Supreme Court's virtually unanimous opinion, delivered by Chief Justice Burger, said that the clear implication of the Court's previous decisions was that it was unconstitutional for the media to publish that which "reason" tells should not be published.²⁵⁴ While recognizing the undoubtedly desirable goal of a responsible press, the Court declared that the press' sense of responsibility is not mandated by the Constitution.²⁵⁵ Moreover, the opinion found that the statute exacted an impermissible penalty on the basis of the content of a newspaper, consisting of the cost in printing and composing time and materials and of taking up space that could be devoted to other material that the newspaper may have preferred to print.²⁵⁶ Chief Justice Burger also found the statute repugnant because of its intrusion into the function of editors. Government regulation of the editorial process, the Court found, could not coexist with the First Amendment.²⁵⁷

While a clear victory for the media, the Court's opinion in *Tornillo* is lamentable in several respects. First, it painstakingly set out the arguments in favor of Professor Barron's access theory, including the statistics pointing to a rapidly increasing concentration of newspaper ownership but dispensed with a studied refuta-

tacking him and his candidacy. The candidate sued for declaratory and injunctive relief and for damages. The *Miami Herald* responded by seeking a declaration that the statute was unconstitutional. The Florida Supreme Court's decision upholding the statute was a reversal of the trial court's ruling that the legislation was an unconstitutional infringement on the freedom of the press. 38 Fla. Supp. 80 (1972).

254. 418 U.S. at 256.

255. *Id.*

256. *Id.*

257. *Id.* at 258. Justices Brennan and Rehnquist filed a concurring opinion for the sole purpose of pointing out that the Court's decision in *Tornillo* was limited to "right of reply" statutes and implied no view upon the constitutionality of "retraction" statutes affording plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction. *Id.* at 258 (Brennan, J., concurring).

Justice White, concurring, agreed with the Chief Justice that the Florida statute violated the First Amendment proposition that government may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor. *Id.* at 261 (White, J., concurring). Justice White viewed *Tornillo* as a proper balance between First Amendment interests and the government's legitimate concern for protecting individual reputational interests. But he took the occasion to express his view that the result in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), announced on the same day and discussed below, represented an improper balance of these same two interests because, in his view, *Gertz* went far toward eviscerating the effectiveness of the ordinary libel action, thereby deprecating individual dignity and leaving people at the complete mercy of the press. *Id.* at 262, 262-63.

tion. Instead, it relied heavily on other decisions which assumed that access requirements were unconstitutional, without justifying that assumption substantively.²⁵⁸ Commentators have even asserted, not without some justification, that the *Tornillo* opinion lacked reasoned support.²⁵⁹ Rather, the *Tornillo* decision simply decided that editorial content should be left to the discretion of the editors and that principle was not outweighed by whether more information would reach more people.²⁶⁰ Regrettably, the lack of substantial refutation to Professor Barron's arguments in Chief Justice Burger's approach may permit a resurrection of the access theory and a successful effort in the future to permit governmental intervention in the editorial process. There are even those among us who fear that Chief Justice Burger, faced with eight other Justices not persuaded by the access theory, elected to write the *Tornillo* opinion in such a way as to leave open the possibility that another court less interested in editors' First Amendment role might adopt the access theory. The paranoia that has sprung from the Chief Justice's announced views of the press in general, and editors in particular, has no doubt fueled this fear.

Perhaps more remarkable, the *Tornillo* opinion conflicts absolutely with the Supreme Court's previous decision concerning the public's right of access to the broadcast media. That decision concerned the Fairness Doctrine of the Federal Communications Commission (FCC), formally announced in 1949, requiring broadcasters to devote a reasonable percentage of time to the coverage of public issues and offer "fair" coverage by providing an opportunity for the presentation of contrasting viewpoints.²⁶¹

The Fairness Doctrine, as developed by the FCC,²⁶² focuses

258. Abrams, *In Defense of Tornillo*, 86 YALE L.J. 361, 364 (1976). The opinions referred to were *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 391 (1973); *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 117 (1973); *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972); *Associated Press v. United States*, 326 U.S. 1, 20 n.18 (1945).

Professor Abrams defends the Chief Justice's use of these opinions by noting that his decision "claimed no more of the earlier opinions than that they had long since placed a 'judicial gloss' on the First Amendment strongly pointing to the unconstitutionality of compulsory access. And they had." Abrams, *supra* at 373 (footnote omitted).

259. Abrams, *supra* note 258, at 363 (footnote omitted).

260. *Id.* at 367 (footnote omitted).

261. FCC, *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949).

262. The Doctrine was refined in FCC, *Fairness Doctrine and Public Interest Standards, Fairness Report Regarding Handling of Public Issues*, 39 Fed. Reg. 26, 372 (1974).

more particularly on broadcast personal attacks and political editorials. The Commission's regulations require that, in the event of a personal attack on an identified person during the course of a presentation of views on a controversial issue, the broadcaster notify the attacked individual and offer him a reasonable opportunity to respond. In the event of a political endorsement by a broadcast station, the licensee must afford an opportunity to respond by the endorsed candidate's opponents or their spokesmen.²⁶³

The Warren Court declared these regulations constitutionally permissible in *Red Lion Broadcasting Co. v. FCC*.²⁶⁴ *Red Lion*, together with its companion case, *United States v. Radio Television News Directors Association (RTNDA)*,²⁶⁵ and *Tornillo* appear factually indistinguishable. Like *Tornillo*, *RTNDA* involved political editorials.²⁶⁶ Like *Tornillo*, *Red Lion* involved an attack on an identified individual published by the media.²⁶⁷ Like *Tornillo*, *Red Lion* and *RTNDA* involved a governmentally imposed requirement that the subject of a personal attack be given an opportunity to respond in the same medium in which the attack occurred. Yet the Warren Court decided unanimously in favor of the regulation in *Red Lion*, and the Burger Court decided unanimously in favor of the press in *Tornillo*. The only difference between the cases is the medium involved; *Red Lion* concerned broadcasting, *Tornillo* a newspaper. Why the result in *Tornillo* differed from *Red Lion* remains a complete mystery since *Red Lion* was not even cited in *Tornillo*.

Adding to the mystery, the Warren Court found persuasive virtually the identical arguments the Burger Court rejected:

1. *Scarcity*. The Warren Court found government regulation

263. See 47 C.F.R. § 73.123 (1979).

264. 395 U.S. 367 (1969).

265. 400 F.2d 1002 (7th Cir. 1968), *rev'd*, 395 U.S. 367 (1969).

266. Rather than involving a particular broadcast, *RTNDA* arose as an action to review the FCC's 1967 promulgation of the personal attack and political editorial regulations, 47 C.F.R. § 73.123 (1979). The rules were held unconstitutional by the Court of Appeals for the Seventh Circuit as abridging the freedoms of speech and press. *Radio Television News Directors Ass'n v. United States*, 400 F.2d 1002 (7th Cir. 1968), *rev'd*, 395 U.S. 367 (1969).

267. *Red Lion* actually arose before the final promulgation of the FCC's personal attack regulations and was litigated under the Commission's broader Fairness Doctrine as interpreted in the personal attack context in *Times-Mirror Broadcasting Co.*, 24 RAD. REG. (P & F) 404 (1962). *Red Lion Broadcasting* appealed an order of the FCC that it provide reply time to an individual attacked in a broadcast carried by its station. The Court of Appeals for the District of Columbia upheld the Commission's order. *Red Lion Broadcasting Co. v. FCC*, 381 F.2d 908 (D.C. Cir. 1967), *aff'd*, 395 U.S. 367 (1969).

of broadcast media content necessary in *Red Lion* because of the scarcity of broadcast channels and the inability of all citizens to broadcast their views on the limited number of available frequencies.²⁶⁸ Even recognizing rapid technological advances, such as microwave transmission, that have created more efficient use of spectrum space, the Court declared that there is still concern about scarcity of available frequencies.²⁶⁹ This scarcity was found in *Red Lion* to be a justification for the FCC's regulations. In *Tornillo*, the Burger Court found a greater scarcity to exist in newspapers, together with a trend toward chain-owned newspapers. The Court was concerned that chain-owned newspapers made the industry less competitive and increased the potential for a fewer number of industry leaders to manipulate popular opinion and to influence the course of events.²⁷⁰ Yet this scarcity of newspaper outlets did not, in the Burger Court's view, outweigh the newspapers' First Amendment immunity from government intrusion in the editorial process.

2. *Monopolization*. In *Red Lion*, the Warren Court, referring to "frequency monopolies" conferred by the government on a relatively small number of licensees, declared that the First Amendment provided "no sanctuary" for "unlimited private censorship operating in a medium not open to all."²⁷¹ In *Tornillo*, the Burger Court pointed out that one-newspaper towns predominate and only four percent of the large cities have competing newspapers.²⁷² The Court also found that this monopoly of the means of communication lessened the public's ability to respond or to contribute meaningfully to the debate on issues.²⁷³ Further, the same economic factors that have led to the demise of competing newspapers and the creation of monopoly markets have also prevented new market entrants.²⁷⁴ Yet the Burger Court considered this monopoly power, greater in the newspaper field than in either television or radio, to be insufficient to require public access to the print media.

3. *Enhancement of Free Speech*. In both *Red Lion* and *Tornillo*, the proponents of media access argued that the government's

268. 395 U.S. at 376-77.

269. *Id.* at 396-97.

270. 418 U.S. at 249.

271. 395 U.S. at 390, 392.

272. 418 U.S. at 249 n.13 (quoting A. Balk, *Background Paper*, reprinted in TWENTIETH CENTURY FUND TASK FORCE REPORT FOR A NATIONAL NEWS COUNCIL, A FREE AND RESPONSIVE PRESS 18 (1973)).

273. *Id.* at 250.

274. *Id.* at 251.

access requirements enhanced, rather than abridged, free speech because of the requirements' guarantees that all viewpoints would be published. The Warren Court, apparently persuaded by this argument in the broadcasting context, explained that a goal of the First Amendment was to produce "an informed public capable of conducting its own affairs"²⁷⁵ and found nothing inconsistent with that goal in requiring the opportunity to respond to personal attacks or political endorsements. In *Tornillo*, the Florida Supreme Court had found that the statute at issue did not impinge First Amendment rights because it did not exclude any newspaper content.²⁷⁶ The Burger Court disagreed, finding that the statute had the same effect as a statute or regulation forbidding publication of specified matter. Governmental restraints on publication, it said, could be subject to constitutional limitations on governmental powers.²⁷⁷

4. *Reduction of Discussion of Controversial Issues.* In *Tornillo*, the Burger Court expressed the fear that publishers faced with the penalties that would accrue upon the publication of news or commentary within the reach of the right of access statute²⁷⁸ might well choose to avoid controversy. If that were the case, such statutes would only serve to blunt or reduce political and electoral coverage.²⁷⁹ In *Red Lion*, however, the Court abruptly dismissed such fears as speculative.²⁸⁰

5. *Rights of the Public.* The Warren Court, in *Red Lion*, announced that nothing in the First Amendment prevented the government from requiring a broadcast licensee to act as a proxy or fiduciary for the public, with an obligation to present views unrepresentative of the community that would otherwise not be aired.²⁸¹ On the contrary, the public has a First Amendment interest in having such views available and the right of the viewers and listeners, not the right of the broadcasters, is paramount.²⁸² In

275. 395 U.S. at 392.

276. 287 So. 2d 78, 82 (Fla. 1973), *rev'd*, 418 U.S. 241 (1974).

277. 418 U.S. at 256.

278. See note 256 *supra* and accompanying text.

279. 418 U.S. at 257.

280. 395 U.S. at 393. The Court noted that if this became a problem, however, "the Commission is not powerless to insist that [broadcasters] give adequate and fair attention to public issues." *Id.* Assuming that is true, it is admittedly one additional distinguishing feature between *Red Lion* and *Tornillo*, since there is no governmental power that can require newspapers to do the same.

281. *Id.* at 389.

282. *Id.* at 390. This view parallels that expressed by the FCC in its initial announcement of the Fairness Doctrine:

Tornillo, it was similarly argued that the claim of newspapers had a role to play as surrogates for the public, but that newspapers had a fiduciary obligation to account for that stewardship. Further, in view of the monopolies controlled by the owners of most newspapers, it was argued that affirmative government action was required as the "only effective way to insure fairness and accuracy and to provide for some accountability."²⁸³ The Burger Court rejected this argument, opining that press responsibility, while desirable, was neither mandated by the Constitution nor capable of being legislated.²⁸⁴ Moreover, the Court contended that the affirmative governmental action urged by proponents of access would require an invasion of the exercise of editorial control and judgment, which exercise, the Court found, could not be conducted consistently with the First Amendment.²⁸⁵

Despite various attempts to reconcile *Red Lion* and *Tornillo*,²⁸⁶ they fundamentally conflict. *Red Lion* adopts a series of policy arguments that appear sound as a matter of practicality, while *Tornillo* rejects these same arguments, perhaps in the face of even more persuasive factual evidence, in favor of equally sound and perhaps more compelling constitutional principles. If these principles override the practical aspects of the newspaper industry, they should do so with respect to the broadcast industry as well; if they do not, it is because of the "uniqueness" of the broadcast media, a concept often alluded to but never sufficiently explained.²⁸⁷ In any event, if the Burger Court intended that its constitutional reasoning in *Tornillo* should not apply to broadcasting, it could have, and should have, said so and explained the relationship be-

It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.

FCC, *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1249 (1949).

283. 418 U.S. at 251.

284. *Id.* at 256.

285. *Id.* at 258.

286. See, e.g., Note, *Reconciling Red Lion and Tornillo: A Consistent Theory of Media Regulation*, 28 STAN. L. REV. 563 (1976).

287. *Red Lion* describes broadcasting as a "unique medium," on the basis that "there are substantially more individuals who want to broadcast than there are frequencies to allocate." *Id.* at 388 & 390. But the fact is that in virtually every market of any size there are today far more broadcasting facilities than daily newspapers. And, as the Burger Court pointed out in *Tornillo*, economic considerations make it as difficult today to successfully publish a new daily newspaper as economic and technical considerations make it difficult to open a new broadcast facility.

tween *Tornillo* and *Red Lion* that it intended. As it stands, *Tornillo* invites the broadcasting industry to request a review of the *Red Lion* opinion. This invitation, it is hoped, will be quickly accepted.

B. *Searches of Newspaper Property*

On April 8, 1971, demonstrators occupied the administrative offices of the Stanford University Hospital. The next day police were called in to remove them. Demonstrators armed with sticks and clubs attacked a group of nine policemen, breaking one policeman's shoulder and injuring the other eight. The *Stanford Daily*, the student-run campus newspaper, published a special edition on the incident, including photographs. The district attorney's office obtained a warrant to search the *Daily's* offices for any prints or negatives that might help identify those who assaulted the police. Officers searched through filing cabinets, desks and wastebaskets but found no pictures except those already published in the *Daily*.

The *Daily* challenged the constitutionality of the search by suing the policemen, the district attorney and others for violating its federal civil rights under the First and Fourth Amendments. Although the newspaper won in both the trial court²⁸⁸ and the court of appeals,²⁸⁹ the Supreme Court reversed in *Zurcher v. Stanford Daily*,²⁹⁰ holding against the newspaper on both its constitutional arguments.

The Fourth Amendment declares inviolate "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and says that search warrants shall issue only "upon probable cause."²⁹¹ The *Stanford Daily* argued thereunder that an unannounced search for criminal evidence at the premises of a party not itself suspected of a crime was legal *only if* the person may otherwise destroy the evidence. Absent probable cause to believe that the *Daily* or its staff were implicated in the assault on the police, the officials who wanted the

288. *Stanford Daily v. Zurcher*, 353 F. Supp. 124 (N.D. Cal. 1972), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd*, 436 U.S. 547 (1978). The district court denied the newspaper's request for an injunction, but, upon the *Daily's* motion for summary judgment, granted declaratory relief.

289. *Stanford Daily v. Zurcher*, 550 F.2d 464 (9th Cir. 1977), *rev'd*, 436 U.S. 547 (1978).

290. 436 U.S. 547 (1978). The five Justice majority opinion was written by Justice White. Justice Powell joined in the majority opinion but filed a separate concurring opinion. Justices Stewart, Marshall and Stevens dissented, while Justice Brennan took no part in the decision.

291. U.S. CONST. amend. IV.

photographs should have, in the newspaper's view, proceeded by a subpoena, which, unlike a search warrant, would have given the *Daily* prior notice and an opportunity to be heard. The Supreme Court characterized that argument as a remarkable, sweeping revision of the Fourth Amendment because the amendment made no distinction between criminal suspects and others as possessors of material sought for purposes of law enforcement.²⁹²

On the First Amendment issue, the newspaper argued that the official intrusion into a newsroom without notice or a chance to object presented an extremely grave violation of press freedoms. It posited a "chilling" of the whole editorial process from the fear of scrutiny by the state and contended that searches might disclose confidential sources as well. The majority of the Supreme Court found these claims unconvincing. Justice White's opinion said that because the framers of the Constitution did not make any special provision for the press when drafting the Fourth Amendment, they must have thought that the general rules of reasonableness and probable cause sufficiently protected the press.²⁹³ Nor was the majority persuaded that press sources would dry up.²⁹⁴ Finally, it found no reason to believe that magistrates, who issue the majority of warrants, could not guard against unduly intrusive searches of newspapers.²⁹⁵

Not every Justice was unpersuaded by the newspaper's First Amendment arguments, however. Justice Stewart, joined by Justice Marshall, filed a strong dissenting opinion.²⁹⁶ He stated: "police searches of newspaper offices burden the freedom of the press. . . . [and] will inevitably interrupt its normal operations, and thus impair or even temporarily prevent the processes of newsgathering, writing, editing, and publishing."²⁹⁷ He also argued that an unannounced police search of a newspaper office could have a chilling effect on information received from confidential sources. Those

292. 436 U.S. 547, 554 (1978). This decision followed the expansive view of the Fourth Amendment taken by the Warren Court in *Warden v. Hayden*, 387 U.S. 294 (1967), which abandoned an earlier doctrine prohibiting search warrants for "mere evidence," as opposed to instrumentalities, contraband or fruits of crime.

293. 436 U.S. 547, 565 (1978).

294. *Id.* at 566. The majority found in any event that "[w]hatever incremental effect there may be in this regard if search warrants, as well as subpoenas, are permissible in proper circumstances, it does not make a constitutional difference in our judgment." *Id.*

295. *Id.*

296. 436 U.S. 547, 571-73 (1978) (Stewart, J., dissenting).

297. *Id.* at 571.

sources need protection to ensure that the press can fulfill its constitutionally designated function of informing the public. Important information can often be obtained only by an assurance that the source will not be revealed.

He said that a search warrant allows police officers to read each and every document in a newspaper's files until they have found the one named in the warrant. Therefore, it would be possible to have needless exposure of confidential information completely unrelated to the purpose of the investigation. Consequently, confidential news sources will dry up. The end result would be a diminishing flow of potentially important information to the public.²⁹⁸

The media swiftly reacted to the *Stanford Daily* decision with predictable outrage. Benjamin Bradlee expressly opposed it.²⁹⁹ Allen Neuharth, president of the American Newspaper Publishers Association and of Gannett Newspapers, said that the decision put "a sledgehammer in the hands of those who would batter the American people's First Amendment rights. . . . It literally and legally picks the lock that protects the exercise of a free press. . . ." ³⁰⁰ Walter Cronkite predicted the potential results of the decision: "[A] warrant is signed by a judge, who [frequently] owes his election to the [local] political machine. . . . [S]ources dry up, scandal dies, and the political machine is free. . . ." ³⁰¹ Perhaps the most impassioned reaction came from Howard K. Smith who analogized this to an experience he had as a new young reporter at the United Press in Nazi Berlin when fifteen Gestapo men knocked at his door, barged past him, began opening every desk and for six hours studied every piece of paper they could find.³⁰²

Others, like Anthony Lewis, a Lecturer on Law at Harvard Law School and a columnist for *The New York Times*, expressed as much alarm to the press' reaction as to the decision. Unpersuaded by the *Stanford Daily's* argument that the First Amendment accorded the press special protection against search warrants, Mr. Lewis chastised the media for narrow-mindedness in their reactions to the Supreme Court's decision. The real danger in the *Stanford Daily* case, he said, lay in the magnitude of the search and its in-

298. *Id.* at 571-72.

299. *Leading Media Figures Attack Police Raid Ruling*, 2 THE NEWS MEDIA & THE LAW 4 (1978).

300. *Id.*

301. *Id.*

302. *Id.*

trusive quality. Persons who are not themselves suspected of any crime but are thought to have evidence could be harmed. Doctors, lawyers and others, Mr. Lewis pointed out, may fear unreasonably intrusive police searches through their files.³⁰³

The lower courts did not hesitate to apply the *Stanford Daily* decision in other contexts. On August 11, 1978, the United States Court of Appeals for the District of Columbia held that the federal government could subpoena telephone company records of a journalist's long distance telephone calls and could review those records without providing any prior notice. The court reasoned that government access to third-party evidence in the course of a good faith felony investigation in no sense abridged news gathering and placed no burden on journalists except "mere inconvenience."³⁰⁴

A number of state and federal legislators have introduced legislation to nullify the *Stanford Daily* decision. Some of the proposed legislation would protect the press only from third-party search warrants in which the subject of the search warrant is not itself suspected of a crime and there is no probable cause to believe that evidence would be destroyed if a search warrant did not issue. Other proposed legislation adopts the concerns expressed by Mr. Lewis and would prohibit the issuance of a search warrant against anyone not suspected of having committed a crime.

Interestingly, the first state to enact protective legislation after the *Stanford Daily* decision was California. On September 23, 1978, Governor Edmund G. Brown, Jr., signed a bill that included an amendment extending the state's shield law to prohibit newsroom searches. That enactment applies strictly to media and media personnel.³⁰⁵

The Carter Administration, in December 1978, proposed a new law to protect reporters, scholars and their sources from

303. Czerniejewski, *Your Newsroom May Be Searched*, *The Quill*, July-Aug. 1978, 21, 24-25; see also Lewis, Comment, 30 *Harv. L. Sch. Bull.* No. 1, 5, 7-8 (1978).

304. *Reporters Comm. for Freedom of the Press v. AT&T*, 593 F.2d 1030 (D.C. Cir. 1978).

305. CAL. PENAL CODE § 1524(c) (West Cum. Supp. 1979) (amending *id.* § 1524 (West 1972)) prohibits the issuance of a warrant for any item described in CAL. EVID. CODE § 1070 (West Cum. Supp. 1979) (amending *id.* § 1070 (West 1965)), the California reporters' "shield" law. Eight states have passed legislation geared toward overturning the results reached in *Stanford*. They are: California, Connecticut, Illinois, Nebraska, New Jersey, Oregon, Texas, and Wisconsin. See CAL. EVID. CODE § 1070 (West 1979); 1979 Conn. Pub. Acts 79-14 § 1; ILL. REV. STAT. ch. 38 § 108-3 (1975); NEB. REV. STAT. § 29-813 (1979); N.J. STAT. ANN. § 2A:84A-21.9 (West 1979); 1979 Or. Laws ch. 820; CRIM. PROC. ANN. TEX. CODE art. 18.01(e) (Vernon 1980); 1979 Wis. Laws ch. 81.

searches by federal, state and local law enforcement officers. The Administration's proposal would prohibit law enforcement officers from searching the notes, photographs and other "work product" of reporters, scholars and others who disseminate information to the public. The only exceptions would arise where a search was deemed necessary to prevent serious injury to an individual, or where the person possessing protected material was believed to have committed a crime for which the material would be evidence. The proposal would extend protection to those who have gathered information with the intention of making it available for publication or broadcast.³⁰⁶ None of this legislation has, as yet, been enacted.

C. *Protection of Confidential Sources*

In *Stanford Daily*,³⁰⁷ the majority referred to its decision in *Branzburg* and dismissed the newspaper's argument that confidential sources might "dry up" if they had reason to fear warranted searches of newspaper offices by the police. The *Branzburg* decision³⁰⁸ involved a group of cases in which reporters had been subpoenaed by grand juries to testify about criminal activities they had witnessed or learned of from confidential news sources during the course of investigations for news stories. Each reporter claimed a qualified privilege not to appear or to testify before a grand jury until and unless sufficient grounds were shown for believing that: (1) The journalist possesses information relevant to a crime under investigation by the grand jury; (2) the information the journalist has is unavailable from other sources; and (3) "the need for the information is sufficiently compelling to override the . . . invasion of First Amendment interests occasioned by the disclosure."³⁰⁹ The privilege was necessary, the reporters asserted, because informants would become reluctant to provide newsworthy information if journalists were forced to respond to subpoenas and to identify their sources or to disclose other confidences. This, they argued, would place an unconstitutional burden on news gathering.

A clear majority of the Court found that the reporters lacked any privilege not to appear before the grand juries.³¹⁰ The plurality

306. *Carter Proposes Law to Shield Reporters, Others From Search*, Wall St. J., Dec. 14, 1978, at 45, col. 4.

307. 436 U.S. 547, 566 (1978).

308. 408 U.S. 665 (1972).

309. *Id.* at 680.

310. Justice White wrote a plurality opinion joined by three other Justices, including the Chief Justice, which concluded that reporters shared the obligation of

opinion of four failed to identify any constitutional basis for a reporter's privilege of any sort not to testify. In sum, the plurality found:

On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid jury investigation or criminal trial.³¹¹

The plurality further rejected the asserted qualified reporter's privilege on the grounds of a lack of efficacy³¹² and problems that would arise in judicial administration.³¹³

In dissent, Justice Douglas argued that journalists ought to enjoy not a qualified but an absolute privilege not to appear or testify before a grand jury concerning their sources or professional observations.³¹⁴ Justice Stewart, joined by Justices Brennan and Marshall, also in dissent, urged adoption of a qualified privilege not to testify, abridgeable only upon a showing of relevance, exhaustion of alternate sources and a "compelling and overriding interest in the information."³¹⁵ These dissenters believed that no such showing had been made in these cases.

Thus, it was left to Justice Powell to break a four-to-four tie. He did so by voting that the reporters in these cases must appear and testify, while apparently refusing to join the plurality's rejection of any qualified privilege. Justice Powell argued that the plurality's opinion required only that a "proper balance" be struck between First Amendment rights and a citizen's obligation to give relevant testimony in criminal matters. Specifically, he said that the plurality's decision left open the possibility of a motion to

all citizens to appear and testify before grand juries when subpoenaed. 408 U.S. 665 (1972). Justice Powell, concurring, added the fifth vote on the appearance issue when he said that the "newsman witness, like all other witnesses, will have to appear. . . ." 408 U.S. at 710.

311. *Id.* at 690-91.

312. "If newsmen's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem. For them, it would appear that only an absolute privilege would suffice." 408 U.S. at 702 (footnote omitted).

313. *Id.* at 703-05.

314. "[T]here is no 'compelling need' that can be shown which qualifies the reporter's immunity from appearing or testifying before a grand jury, unless the reporter himself is implicated in a crime." *Id.* at 712 (Douglas, J., dissenting).

315. *Id.* at 743 (Stewart, J., dissenting).

quash and the entry of "an appropriate protective order" if first, the grand jury's investigation is not being conducted in good faith or the purpose of the subpoena is merely harassment of the press, second, the information sought from the reporter bears "only a remote and tenuous relationship to the subject of the investigation," or third, the journalist's testimony would implicate "confidential source relationships without a legitimate need of law enforcement. . . ." ³¹⁶

Thus, Justice Powell's substantive formulation of a qualified reporter's privilege not to testify in grand jury proceedings did not differ markedly from that urged by Justices Stewart, Brennan and Marshall; Justice Powell did part company with the other three on the burden of proof. He viewed the dissenters' requirement that no reporter be compelled to testify before a grand jury and to reveal confidential sources until the government has proven clear relevance, no alternative sources and a compelling and overriding interest as an unnecessarily heavy burden for the government to bear. Instead, he preferred to leave the courts free to balance the competing interests on an ad hoc basis. ³¹⁷

Journalists, and their lawyers, have tended to read *Branzburg* as establishing a qualified privilege not to testify in criminal matters, at least where they could convince the court that, on balance, the government's need for the information did not outweigh their First Amendment rights. Some courts have read *Branzburg* the same way. In *Brown v. Commonwealth*, ³¹⁸ for example, the Virginia Supreme Court held that a journalist need not reveal his identified source's confidential statements where it has not been shown that the information was essential or relevant to the case. The decision was premised on the Virginia court's determination that a journalist's privilege of confidentiality yields only in cases in which his information is relevant, essential to a fair trial and not otherwise available. A similar result was reached in *State v. St. Peter* ³¹⁹ by the Vermont Supreme Court. ³²⁰

316. *Id.* at 709-10 (Powell, J., concurring).

317. *Id.* at 710.

318. 214 Va. 755, 757, 204 S.E.2d 429, 431, *cert. denied*, 419 U.S. 966 (1974).

319. 132 Vt. 266, 315 A.2d 254 (1974).

320. For similar adaptations of a qualified reporter's privilege along the lines of Justice Stewart's dissent in *Branzburg* see also *United States v. Orsini*, 424 F. Supp. 229 (E.D.N.Y. 1976), *aff'd*, 559 F.2d 1206 (2d Cir.), *cert. denied*, 434 U.S. 997 (1977); *Laughlin v. State*, 323 So. 2d 691 (Fla. Dist. Ct. App. 1975); *State v. Sandstrom*, 224 Kan. 573, 581 P.2d 812 (1978), *cert. denied*, 440 U.S. 929 (1979); *People v. Monroe*, 82 Misc. 2d 850, 370 N.Y.S.2d 1007 (N.Y. Sup. Ct. 1975).

Other courts, however, have seen *Branzburg* as a rejection of any privilege for journalists in criminal proceedings. The Massachusetts Supreme Judicial Court, for example, has declined to rule that journalists have a qualified privilege to refuse to reveal confidential information relevant to a court proceeding, deciding instead that the First Amendment imports neither a qualified or absolute privilege.³²¹ More directly, the New Jersey Supreme Court has expressly declined to read Justice Powell's concurring opinion in *Branzburg* as a fifth vote for a qualified privilege. *In re Farber*,³²² the court, seeing no disagreement between Justice Powell's concurrence and the *Branzburg* plurality opinion, found that five United States Supreme Court members concluded that the First Amendment affords no privilege to a newsman to refuse to testify before a grand jury about relevant information he possesses, even though doing so may divulge confidential sources. The court specifically eschewed any responsibility on its part to weigh or to balance conflicting interests in the issue because, in its view, a higher court performed the weighing and balancing.³²³

Farber illustrates the confusion left in the wake of *Branzburg*. Although refusing to find a qualified reporter's privilege not to provide confidential information pursuant to a subpoena duces tecum of a criminal defendant, the majority in *Farber* nevertheless held the journalist entitled to a full hearing on the issues of relevance, materiality and overbreadth; the decision rested on New Jersey's News Media Privilege Act,³²⁴ a "shield law" intended to "protect the confidentiality and secrecy of sources from which the media derive information."³²⁵ The "shield law" required such a hearing, the majority said, even though both the Sixth Amendment's and the New Jersey Constitution's provisions guaranteeing an accused's

321. *Dow Jones & Co. v. Superior Court*, 364 Mass. 317, 303 N.E.2d 847, 849 (1973). It appears, however, that even Massachusetts requires that the inquiries made of journalists be "relevant and reasonable." *Id.* at 321, 303 N.E.2d at 849. There is no requirement in Massachusetts, however, that there be no other source for the information sought or that there be a compelling need for it. Although *Dow Jones* was a libel case involving the subpoenaed journalist's publication, the decision therein was based on a previous Massachusetts decision involving a subpoena to appear and testify before a grand jury, which was afforded in the *Branzburg* decisions. *In re Pappas*, 358 Mass. 604, 266 N.E.2d 297 (1971), *aff'd, sub nom.* *Branzburg v. Hayes*, 408 U.S. 665 (1972).

322. 78 N.J. 259, 394 A.2d 330, *cert. denied*, 439 U.S. 997 (1978).

323. 78 N.J. at 268, 394 A.2d at 334.

324. N.J. STAT. ANN. § 2A:84A-21 (West 1976).

325. 78 N.J. at 276, 394 A.2d at 338.

right to have compulsory process for obtaining witnesses "prevails" over the statute.³²⁶

One of the dissenters in *Farber*, Justice Handler, agreed with the majority that journalists do not have a First Amendment privilege to refuse to provide confidential information but nevertheless argued that the reporter's conduct in obtaining and recounting news is entitled to constitutional protection. The reporter's pursuit and presentation of news should not needlessly be hobbled.³²⁷ Despite his rejection of even a qualified privilege, Justice Handler was unwilling to sustain the reporter's contempt citation because the record below did not establish the relevance and necessity of the reporter's information.

The *Farber* opinions, then, sharply focus how *Branzburg* fails to guide lower courts in reporters' privilege cases. *Farber* also illustrates how far demands on journalists' information have come since *Branzburg*. Whereas the reporters involved in the cases decided in *Branzburg* were asked by a grand jury to provide, essentially, only the names of one or a few confidential sources, the reporter in *Farber* had to produce, pursuant to the defendant's subpoena duces tecum, more than 5,000 documents, including all his notes. For refusing to do so, the journalist spent forty days in jail, and his newspaper paid \$285,000 in fines on contempt charges.³²⁸

Branzburg has also left a controversy as to its applicability to civil cases. Although generally reluctant to require nonparty journalists to reveal confidential sources or information obtained therefrom in civil cases,³²⁹ the courts have done so, where the information sought was necessary to the case, other means of obtaining the information were exhausted, and the subpoenaing party's position was not patently frivolous.³³⁰ The courts have more willingly compelled journalists to reveal their sources and other confidential

326. *Id.* at 274, 394 A.2d at 337. The majority held that the required hearing had taken place and that the record below was sufficient to require the journalist to comply with the subpoena and to support his contempt citation for refusing to comply. *Id.* at 277, 394 A.2d at 339.

327. *Id.* at 300, 394 A.2d at 350 (Handler, J., dissenting).

328. *The press after Farber*, *The Quill*, March 1979, at 22.

329. *See, e.g.*, Democratic Nat'l Comm. v. McCord, 356 F. Supp. 1394 (D.D.C. 1973); Baker v. F & F Inv., 339 F. Supp. 942 (S.D.N.Y.), *aff'd*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

330. Winegard v. Oxberger, 258 N.W.2d 847 (Iowa 1977), *cert. denied*, 436 U.S. 905 (1978).

information where the journalist or his employer is a libel defendant; but even there some showing has generally been required that the information is relevant and goes to the heart of the case, other sources have been exhausted, and the plaintiff's suit is not frivolous.³³¹ A notable exception to such a requirement, as we have seen, is Massachusetts.³³² So far, the Burger Court has declined to consider the issue of the reporter's privilege in civil cases, except to the extent that it was touched upon in *Herbert v. Lando*,³³³ discussed immediately below.

The case law of the journalists' privilege remains in complete disarray, complicated further by passage of various state "shield laws," often designed to provide protection to the media after *Branzburg*. While such laws have afforded some protection for journalists,³³⁴ they have also been narrowly construed³³⁵ and, in at least one case,³³⁶ have been declared unconstitutional.

Most state and federal courts forced to wrestle with *Branzburg* have explicitly or implicitly recognized some kind of qualified privilege in most circumstances, some requiring a showing of need on the part of the party requesting the information, some performing a balancing test. The wheels of justice have not ground to a halt, at least not for this reason. It is accordingly hoped that the Burger Court will take an early opportunity to rethink *Branzburg* and to recognize some kind of qualified privilege of its own. At the very least, in view of the obvious need for prompt clarification of this entire area, it should endeavor to create order out of the chaos its decision has caused.

331. See, e.g., *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), cert. denied, 409 U.S. 1125 (1973); *Goldfeld v. Post Publishing*, 4 MED. L. RPTR. 1167 (Conn. Super. Ct. 1978); cf. *Ammerman v. Hubbard Broadcasting, Inc.*, 91 N.M. 250, 572 P.2d 1258 (Ct. App.), cert. denied, 91 N.M. 249, 572 P.2d 1257 (1977), cert. denied, 436 U.S. 906 (1978) (remanding with instructions that an in camera proceeding be held to determine the veracity of informants' reports).

332. *Dow Jones & Co. v. Superior Court*, 364 Mass. 317, 303 N.E.2d 847 (1973). See also *Caldero v. Tribune Publishing Co.*, 98 Ida. 288, 562 P.2d 791, cert. denied, 434 U.S. 930 (1977) (similarly finding no privilege not to testify in either the civil or criminal context).

333. 441 U.S. 153 (1979).

334. See, e.g., *Jenoff v. Hearst Corp.*, 3 MED. L. RPTR. 1911 (D. Md. 1978).

335. See, e.g., *In re Investigative File*, 4 MED. L. RPTR. 1865 (Mont. Dist. Ct. 1978) ("shield law" applies only to an individual reporter and not to his employer); *New York v. Le Grand*, 4 MED. L. RPTR. 1897 (N.Y. Sup. Ct. 1979) ("shield law" does not apply to authors of books).

336. *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976) (statutory privilege relating to news sources and information violates state constitutional provision vesting in the supreme court exclusive power to prescribe rules of evidence and procedure).

D. *Protection of Journalists' Thoughts*

In *Herbert*³³⁷ the Burger Court rejected the claim of a media libel defendant of a First Amendment privilege not to disclose during discovery matters relating to his state of mind prior to publication of the alleged libel and to the editorial process that preceded publication. The case involved a libel action filed by former Army Colonel Anthony Herbert, who had received considerable attention in 1969-70 after accusing his superior officers of covering up reports of atrocities and other war crimes in Vietnam. CBS broadcasted a report on Herbert and his accusations on February 4, 1973, in a *60 Minutes* segment that Herbert claimed defamed him and portrayed him as a liar. The program was produced and edited by Barry Lando, who later published a related article in *Atlantic Monthly* magazine.

Herbert conceded that he was a "public figure" for purposes of the action, which meant that he could not prevail without a showing that the publication about him was published with actual malice, which is with knowledge that it was false or with reckless disregard of whether it was false or not.³³⁸ Absent a showing of a knowing falsehood, the public figure libel plaintiff must prove that the media defendant acted recklessly or entertained serious doubts about the truth of his publication.³³⁹

In an effort to establish actual malice, Herbert deposed Lando and, *inter alia*, asked a number of questions relating to Lando's personal conclusions during his research and investigations regarding people or leads to pursue or to ignore prior to publication, Lando's prepublication conclusions about the veracity of various interviewees and the truth of the facts they had provided, Lando's conversations with his colleagues about matters to include or to exclude from the broadcast, and Lando's "intentions as manifested by his decision to include or exclude certain material."³⁴⁰ Lando refused to answer Herbert's questions in these areas on the ground that the First Amendment precluded "inquiry into the state of mind of those who edit, produce, or publish, and precluded in-

337. 441 U.S. 153 (1979).

338. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964) (announcing the "actual malice" requirement in the context of a libel action by a public official); see *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (extending the requirement to libel actions by "public figures"). See text accompanying notes 354-450 *infra*.

339. *St. Amant v. Thompson*, 390 U.S. 727, 731, 732 (1968).

340. *Herbert v. Lando*, 568 F.2d 974, 983 (2d Cir. 1977), *rev'd*, 441 U.S. 153 (1979).

quiry into the editorial process.”³⁴¹ The trial court disagreed,³⁴² but, on interlocutory appeal, the United States Court of Appeals for the Second Circuit held, two-to-one, such matters constitutionally privileged.³⁴³

The Burger Court, in an opinion written by Justice White, reversed the Second Circuit and refused to recognize the evidentiary privilege urged by Lando. The thrust of Justice White’s reasoning was that the thoughts and editorial processes of the alleged defamer must be open to examination in order to prove liability.³⁴⁴ The majority viewed the actual malice requirement as a balance struck between the protection of press freedoms (by requiring public figure libel plaintiffs to prove knowing or reckless falsehood) and the protection of the individual’s interest in his reputation (by permitting public figure plaintiffs to recover in libel cases upon a showing of actual malice). It saw no reason to upset this balance by holding that public figure libel plaintiffs could be barred from establishing reckless disregard of the truth with direct evidence obtained through inquiry into the thoughts, opinions and conclusions of the publisher. Inasmuch as actual malice must be proven with convincing clarity,³⁴⁵ the majority felt that restricting plaintiffs’ proof to “objective evidence from which the ultimate fact could be inferred” would be untenable.³⁴⁶

Two dissenting Justices, Brennan³⁴⁷ and Marshall,³⁴⁸ argued in favor of some kind of editorial privilege while Justice Stewart dissented with the argument that, constitutional privilege or no, the material sought by Herbert was irrelevant as a matter of procedural law when the actual malice test is read properly.³⁴⁹

The attention Colonel Herbert received when he levelled his charges paled by comparison to the attention his Supreme Court victory received. Media condemnation was prompt.³⁵⁰ Yet Profes-

341. 441 U.S. at 157 (footnote omitted).

342. 73 F.R.D. 387, 395 (S.D.N.Y. 1977).

343. 568 F.2d at 984.

344. 441 U.S. at 160.

345. *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964).

346. 441 U.S. at 170.

347. *Id.* at 180-99 (Brennan, J., dissenting in part).

348. *Id.* at 202-10 (Marshall, J., dissenting).

349. *Id.* at 199-202 (Stewart, J., dissenting).

350. The chairman of the Washington based Reporters Committee for Freedom of the Press, for example, called the decision a “‘major defeat for the First Amendment.’” Brandon, *Probing of journalists’ ‘state of mind’ is permissible, Supreme Court holds*, *Publishers’ Auxiliary*, Apr. 23, 1979, at 1. Even before the decision, *Publishers’ Auxiliary* editorialized: “Those who do not agree with the [Second Cir-

sor Marc Franklin has described the *Herbert* decision as an adherence to the Court's prior decisions and to the way lawyers had universally conducted such litigation. He intimates that the Supreme Court considered the issue raised by the case only to correct the "aberrational stance" of the Second Circuit.³⁵¹ The attention and shrill reactions given to *Herbert*, Franklin suggests, derived from the media's attaching too much importance to it solely because it was a media case, their inability to recognize the infirmities of the Second Circuit's opinion that should have warned them of an impending reversal, and their failure to "distinguish between cases in which the Court has withdrawn an existing protection from the press and those in which novel media theories have been rejected."³⁵² Viewed in a proper light, he argues, *Herbert* signifies little except what the reactions to it teach us about the relationship between the press and the legal profession.³⁵³

The media may well have done themselves, and their lawyers, a disservice by spreading the idea in the public, and among plaintiffs' lawyers and judges who have not read the decision, that *Herbert* represented a startling and alarming new development that armed libel plaintiffs with weapons they never had before. To Professor Franklin's list of reasons for the media's overreaction,

cuit] appeals court's opinion don't want a free press. They want a subservient press." *Herbert v. Lando*, Publishers' Auxiliary, Nov. 13, 1978, at 6.

351. Franklin, *Reflections on Herbert v. Lando*, 31 STAN. L. REV. 1035, 1042 (1979).

352. *Id.* at 1051.

353. Professor Franklin's colleague, Professor Jack H. Friedenthal, believes that *Herbert* may prove to have some troubling significance in the area of pretrial discovery in civil cases. Professor Friedenthal is concerned that certain remarks by the majority, to the effect that federal trial judges should not "neglect their power to restrict discovery," 441 U.S. at 177, coupled with separate remarks by Justices Powell and Marshall, "could be read to convey the vague impression that the Court has now narrowed the traditional scope of discovery" by intimating that "'relevancy' for discovery purposes is dependent to some extent on a balance between the need for information and the substantive harm resulting from disclosure." In particular, Professor Friedenthal viewed with some alarm Justice Powell's "position that relevance for discovery purposes in defamation cases should be determined not by whether information may or may not lead to admissible evidence, but by whether, on balance, the need for the information sought outweighs the danger that such discovery will interfere with the public interest in maintaining a 'free flow of news and commentary,'" 441 U.S. at 179-80 (Powell, J., concurring), and Justice Marshall's "closely analogous position with regard to discovery of information outside the scope of the very narrow constitutional privilege he would impose." Professor Friedenthal could find "little justification and must potential harm" in such a balancing approach to relevancy in pretrial discovery. Friedenthal, *Herbert v. Lando: A Note on Discovery*, 31 STAN. L. REV. 1059, 1061, 1062 (1979).

however, one can add the paranoia that the various anti-press cases collected in this article have created in the media. If *Herbert* had been but a single raindrop falling from an otherwise sunny sky, it no doubt would not have received the media outcry that it did. But as one in a series of drops deftly administered in the classic water torture, it produced automatic cries of anguish disproportionate to the pain it produced itself. Standing alone, however, *Herbert* is "unremarkable," both because it plows no new ground and because it retains a sensible balance of the interests involved in public figure media libel cases.

The media may take some perverted comfort, however, in one thing: It appears that *Herbert* will apply to a relatively small number of cases because, as shown in part V, the Burger Court has drastically reduced the number of libel plaintiffs having to prove "actual malice."

V. LIBEL—THE CONSTITUTIONAL PRIVILEGE

The Burger and Warren Courts' respective approaches to the concept of a constitutional privilege in libel cases involving media defendants present a striking contrast. While the Warren Court initiated and consistently expanded the notion that certain constitutional protections pertain to the media in defamation cases, the Burger Court has seized virtually every available opportunity to constrict these constitutional protections, denying they exist in all but the most extreme cases.

Prior to 1964, libelous statements generally were viewed as beyond the scope of the First Amendment, enjoying no constitutional protection regardless of the speaker's status. In 1942, Justice Murphy summarized the prevailing wisdom in his oft-quoted passage from *Chaplinsky v. New Hampshire*:³⁵⁴

There are certain well-defined and narrowly limited classes of speech, *the prevention and punishment of which have never been thought to raise any Constitutional problem*. These include the lewd and obscene, the profane, *the libelous*, and the insulting or "fighting" words. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.³⁵⁵

354. 315 U.S. 568 (1942).

355. *Id.* at 571-72 (footnotes omitted) (emphasis added).

Through its landmark decision in *New York Times Co. v. Sullivan*,³⁵⁶ the Warren Court endeavored to put an end to that view as it applied to libelous statements by the media. *Sullivan* involved a libel action brought by the police commissioner of Montgomery, Alabama, against *The New York Times* and others arising from an advertisement appearing in the *Times*. The advertisement, placed by a prominent civil rights organization, attacked police practices in Alabama and solicited contributions for the organization's programs. Certain statements in the advertisement referring to the police commissioner's performance of his official duties contained minor factual errors. The Alabama Supreme Court affirmed a jury verdict for the police commissioner, stating that libelous publications are not protected by the First Amendment.³⁵⁷ The Warren Court, through Justice Brennan, reversed, declaring that libel actions against the press must be judged by standards that satisfy the First Amendment.³⁵⁸ The majority opinion concluded that a public official is prohibited from recovering damages from the media for defamatory falsehoods relating to official conduct unless he can prove that the statement was made with actual malice, that is, with knowledge that it was false or with reckless disregard as to whether it was false.³⁵⁹ Justice Brennan viewed this conclusion as being consistent with a "background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."³⁶⁰ That commitment, he said, must protect even erroneous statements if freedom of expression is to have the "breathing space" it requires.³⁶¹

While the holding of *Sullivan* was limited to defamation actions by public officials against the media for statements relating to official conduct, its implications were enormous. For the first time, libel judgments against the media, at least in certain circumstances, were required to meet some constitutional standards. The most remarkable aspect of the *Sullivan* decision, in view of what

356. 376 U.S. 254 (1964).

357. *New York Times Co. v. Sullivan*, 273 Ala. 656, 676, 144 So. 2d 25, 40 (1962), *rev'd*, 376 U.S. 254, 256-58 (1964).

358. 376 U.S. at 269.

359. *Id.* at 279-80. Moreover, such actual malice must be established with convincing clarity. *Id.* at 285-86. The Court later explained that reckless disregard for the truth requires at least sufficient evidence that the defendant in fact entertained serious doubts as to the truth of his publication. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

360. 376 U.S. at 270.

361. *Id.* at 272.

has since taken place, is that the only dispute among the Justices was whether the constitutional privilege recognized therein was qualified or absolute; there was no question that some constitutional protection existed. Moreover, the Warren Court wasted little time in expanding the new *Sullivan* doctrine to other contexts. The Court extended its constitutional analysis to cases involving criminal libel,³⁶² appointed public official plaintiffs,³⁶³ public figure plaintiffs³⁶⁴ and candidates for public office.³⁶⁵

Sullivan declined to determine how low in the government hierarchy the public official designation would extend, leaving open the question of which officials trigger application of the actual malice standard.³⁶⁶ Later decisions of the Warren Court, however, left a clear impression that constitutional protection of the media in cases involving public officials or public figures required broad construction of those classifications. As a result, the constitutional privilege came to be extended to actions by such public officials as school teachers,³⁶⁷ school principals,³⁶⁸ auditors of municipal utilities,³⁶⁹ police officers,³⁷⁰ court-appointed attorneys for indigents,³⁷¹ county motor pool administrators,³⁷² social workers,³⁷³ and companies with government contracts.³⁷⁴ Similarly, the category of public figures has been held to include Nobel Prize winners,³⁷⁵ businessmen who hold political party offices,³⁷⁶ college athletic coaches,³⁷⁷ per-

362. *Garrison v. Louisiana*, 379 U.S. 64 (1964).

363. *Rosenblatt v. Baer*, 383 U.S. 75 (1966).

364. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). Public figures were defined as persons who were not public officials but who commanded substantial independent public interest at the time of publication. *Id.* at 154.

365. *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971).

366. 376 U.S. at 283 n.23.

367. *Sewell v. Brookbank*, 119 Ariz. 422, 581 P.2d 267 (Ct. App. 1978).

368. *Reaves v. Foster*, 200 So. 2d 453 (Miss. 1967).

369. *Kruteck v. Schimmel*, 27 App. Div. 2d 837, 278 N.Y.S.2d 25 (1967).

370. *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Time, Inc. v. Pape*, 401 U.S. 279 (1971); *Suchomel v. Suburban Life Newspapers, Inc.*, 84 Ill. App. 2d 239, 228 N.E.2d 172 (1967).

371. *Steere v. Cupp*, 4 MED. L. RPTER. 1138 (Kan. Dist. Ct. 1978).

372. *Clawson v. Longview Publishing Co.*, 91 Wash. 2d 408, 589 P.2d 1223 (1979).

373. *Press, Inc. v. Verran*, 569 S.W.2d 435 (Tenn. 1978).

374. *Artic Co. v. Loudoun Times Mirror*, 4 MED. L. RPTER. 1947 (E.D. Va. 1978).

375. *Pauling v. Globe-Democrat Publishing Co.*, 362 F.2d 188 (8th Cir. 1966), *cert. denied*, 388 U.S. 909 (1967).

376. *News Journal Co. v. Gallagher*, 233 A.2d 166 (Del. 1967).

377. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Time, Inc. v. Johnston*, 448 F.2d 378 (4th Cir. 1971) (former professional basketball player currently engaged in coaching).

sons claiming to have cures for maladies,³⁷⁸ former *Playboy* playmates,³⁷⁹ the sons of Ethel and Julius Rosenberg,³⁸⁰ persons with alleged ties to organized crime,³⁸¹ and prominent dabblers in state politics.³⁸²

The scope of constitutional protection for libelous statements by the media reached its apparent pinnacle in 1971 with the plurality opinion in *Rosenbloom v. Metromedia, Inc.*,³⁸³ the first significant media libel case to be decided by the Supreme Court under Chief Justice Burger. *Rosenbloom* stood, for a time, for the proposition that purportedly libelous statements by the media concerning matters of general or public interest enjoyed constitutional protection subject to the *Sullivan* actual malice test of liability regardless of the plaintiff's status. The plurality of three Justices³⁸⁴ felt that the plaintiff's status bore little relation to the values protected by the First Amendment and that media discussions of matters of public concern should be protected even when they involved little known persons. The two other Justices comprising the majority concurred in the result for very different reasons.³⁸⁵ Justices Harlan, Stewart and Marshall dissented from the plurality opinion on the ground that the public interest test was unworkable.

By 1974, following the appointments of Justices Powell and Rehnquist, the balance of opinion with respect to the scope of constitutional protection in media libel cases had clearly shifted. If *Rosenbloom* stood at the summit, the climb down began with *Gertz v. Robert Welch, Inc.*,³⁸⁶ in which three significant developments occurred. First, the majority explicitly rejected the plurality view in *Rosenbloom* that media statements concerning matters of public or general interest were entitled to *Sullivan* protection regardless of the plaintiff's status. The constitutional privilege an-

378. *Lewis v. Reader's Digest Ass'n*, 366 F. Supp. 154 (D. Mont. 1973).

379. *Cochran v. Indianapolis Newspapers, Inc.*, 372 N.E.2d 1211 (1978).

380. *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977).

381. *Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440 (S.D. Ga. 1976).

382. *Whitaker v. Denver Post, Inc.*, 401 F. Supp. 60 (1975), *reversed sub nom. Anselmi v. Denver Post, Inc.*, 552 F.2d 316, *cert. denied*, 432 U.S. 911 (1977).

383. 403 U.S. 29 (1971).

384. The three Justices were Justice Brennan, author of the opinion, Chief Justice Burger and Justice Blackmun.

385. Justice Black maintained his position that the Constitution permits no liability for defamation in any case. *Id.* at 57. Justice White felt that it was not necessary to reach the plurality's view because, in his mind, the plaintiff in *Rosenbloom* was a public official. *Id.* at 59. Justice Douglas did not participate in the decision.

386. 418 U.S. 323 (1974).

nounced in *Sullivan* was held to apply only in cases involving a public official or public figure plaintiff.

Second, the Court began a process it has since pursued with relish: greatly limiting the scope of those two categories so that fewer and fewer libel plaintiffs will fit into them. Public figures, the *Gertz* majority said, are of two kinds: (1) persons with such "pervasive fame or notoriety" that they may be considered public figures for all purposes; and (2) persons who have thrust themselves into the vortex of some specific public controversy, thus becoming public figures for a limited range of issues.³⁸⁷ The plaintiff in *Gertz*, a prominent Chicago attorney long active in community and professional affairs and a publisher of several books and articles on legal subjects,³⁸⁸ was found to fit under neither of those standards. (In sharp contrast, a local real estate developer engaged in controversial negotiations with a city council had been found by the Warren Court to be a public figure.³⁸⁹ Clearly, times had changed.)

Finally, the majority in *Gertz* did recognize some limited constitutional protection for the media even in private figure plaintiff cases. While the states need not apply the *Sullivan* actual malice test in such cases, they may not impose liability on the media for defamation without some showing of fault. Before liability is established, the states, at a minimum, must require a showing that the media defendant has been negligent.³⁹⁰ As a result, the states have

387. *Id.* at 351.

388. *Id.* One author believes that *Gertz* would have been considered a public figure under pre-*Gertz* decisions because he had authored four books, thousands of articles, had been the subject of over 40 articles in Chicago papers, and had made many television and radio appearances. Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199, 222 (1976) (footnotes omitted).

389. *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970). Although the plaintiff in *Greenbelt* was also a state legislator who represented a neighboring county, the allegedly libelous statement about him did not involve his performance in public office.

390. 418 U.S. at 347-48. The majority also declared, however, that states may not permit recovery of presumed or punitive damages when liability is not based on at least a showing of knowledge of falsity or reckless disregard for the truth. *Id.* at 349. It has been consistently held, however, that, when actual malice has been shown by a private figure plaintiff, he may recover punitive damages. See *Maheu v. Hughes Tool Co.*, 569 F.2d 459 (9th Cir. 1978); *Appleyard v. Transamerican Press, Inc.*, 539 F.2d 1026 (4th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Davis v. Schuchat*, 510 F.2d 731 (D.C. Cir. 1975). This appears to be true even if the forum state does not require a showing of actual malice to establish liability.

imposed widely varying standards of fault in defamation cases between private individual plaintiffs and media defendants. The standard of liability ranges from negligence,³⁹¹ to gross negligence,³⁹² to malice,³⁹³ and to some form of actual malice.³⁹⁴

Justice Powell wrote, and Justice Rehnquist adopted, the *Gertz* majority opinion. The other two Nixon appointees, who had formed two-thirds of the plurality in *Rosenbloom*, abruptly switched their positions in *Gertz*. Justice Blackmun, in a separate concurring opinion, announced that, had his vote not been needed to create a majority in *Gertz*, he would have adhered to his view in *Rosenbloom*. Believing that the Court's sharp divisions in *Rosenbloom* had left too much uncertainty and that a definitive ruling was paramount, he abandoned *Rosenbloom* and joined the *Gertz* majority.³⁹⁵

Chief Justice Burger went even further. Although he had subscribed to the plurality opinion in *Rosenbloom* that the actual malice test should be applied to all publications involving matters of public or general concern regardless of the plaintiff's status, he dissented in *Gertz* and announced that he would have reinstated a jury verdict based on a libel *per se* instruction.³⁹⁶ The Chief Just-

391. *E.g.*, Peagler v. Phoenix Newspapers, Inc., 114 Ariz. 309, 560 P.2d 1216 (1977); Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 330 N.E.2d 161 (1975); Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809 (Tex. 1976). One court in Connecticut found that *Gertz* permitted a return to state law as it existed prior to *Rosenbloom* in private figure cases. The court seemingly adopted a negligence standard, but the issue is not settled in that state. *See* Corbett v. Register Publishing Co., 33 Conn. Supp. 4, 356 A.2d 472 (Super. Ct. 1975).

392. Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975).

393. Direct Import Buyers Ass'n v. KSL, Inc., 538 P.2d 1040 (Utah 1975) defined malice as simply an improper motive such as a desire to do harm or that the defendant did not honestly believe his statements to be true or that the publication was excessive. *Id.* at 1042.

394. *E.g.*, Patten v. Smith, 360 N.E.2d 233 (1977); LeBoeuf v. Times Picayune Publishing Corp., 327 So. 2d 430 (La. Ct. App. 1976); Newspaper Publishing Corp. v. Burke, 216 Va. 800, 224 S.E.2d 132 (1976). While Colorado has adopted an actual malice standard requiring a showing that the defendant knew his statement was false or published with reckless disregard for the truth, Colorado's requirement in private figure cases is not the same as that set forth in *Sullivan* and its progeny. Reckless disregard in Colorado means only acting "wantonly, with indifference to consequences." Walker v. Colorado Springs Sun, Inc., 188 Colo. App. 86, 99 n.2, 538 P.2d 450, 457 (1975). In adopting this standard, the Colorado Supreme Court explicitly rejected the "serious doubts as to the truth of his publication" definition of reckless disregard applicable to public official and public figure cases. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *see* note 6 *supra*.

395. 418 U.S. at 354 (Blackmun, J., concurring).

396. *Id.* at 355 (Burger, C.J., dissenting).

ice rejected a negligence standard in private figure cases as being too vague and without guiding precedent. He urged instead that the law be allowed to continue to evolve as it had up to that point with respect to private citizens.³⁹⁷

While *Gertz* is generally viewed as significant because of its rejection of *Rosenbloom* and its imposition of a fault standard for private figure plaintiffs, the decision is also important because it narrowed the definition of public figure for purposes of requiring a showing of actual malice. One commentator rightly concluded that *Gertz* contracted the class of public figures and signaled a narrowing of the public figure category.³⁹⁸ *Gertz* continued to recognize the two major characteristics of public figures identified in *Curtis v. Butts*³⁹⁹ and its companion case, *Associated Press v. Walker*.⁴⁰⁰ Public figures ordinarily can gain access to communications media in order to rebut defamatory charges, and they have voluntarily exposed themselves in a meaningful sense to an enhanced risk of defamation. *Gertz*, however, differed in its application of these criteria to the facts.⁴⁰¹ The clear implication of *Gertz* is that the plaintiff will not incur public figure status without voluntarily seeking publicity⁴⁰² with respect to the subject matter of the purportedly libelous article⁴⁰³ unless his name is already a household word.

The descent begun in *Gertz* accelerated two years later with *Time, Inc. v. Firestone*.⁴⁰⁴ *Time* magazine reported that Russell Firestone had obtained a divorce from his wife on grounds of adultery. The divorce court's record was confused, but it appeared that the actual ground for the divorce decree was lack of domestication. Mrs. Firestone brought and won a libel suit against *Time, Inc.* Although she clearly had access to the communications media and had voluntarily opened herself to publicity in a meaningful

397. *Id.*

398. Robertson, *supra* note 388, at 221, 222.

399. 388 U.S. 130 (1967).

400. *Id.*

401. Robertson, *supra* note 388, at 221-22. See note 378 *supra* and accompanying text.

402. Robertson, *supra* note 388, at 222-23.

403. While *Gertz* purported to recognize the possibility that involuntary involvement in a matter of public or general concern may make a plaintiff a public figure, it clearly left the door open only a crack. Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. 418 U.S. at 345.

404. 424 U.S. 448 (1976).

sense,⁴⁰⁵ the Burger Court found that she was not a public figure and had to shoulder the burden of proving only negligence.⁴⁰⁶ It reached this conclusion by adding a new wrinkle to the general analysis: access to the media and voluntary exposure to publicity make a plaintiff a public figure only if the subject matter of the article is a genuine public controversy. Dissolution of a marriage was found to be beyond the purview of public controversy as referred to in *Gertz*, even though some members of the reading public would be interested in the topic.⁴⁰⁷ Thus, a new threshold question was added, and *Rosenbloom* was not only in disgrace but turned on its head. Under *Firestone*, if a matter was not of legitimate public interest according to the Court's standards, the actual malice test would not be applicable, regardless of the plaintiff's status.⁴⁰⁸

The latest, though probably not the final, blows to the applicability of the actual malice test came in 1979 with *Wolston v. Reader's Digest Association*⁴⁰⁹ and *Hutchinson v. Proxmire*.⁴¹⁰ *Wolston* concerned a book published in 1974 which asserted that the plaintiff was among a group of persons convicted of espionage, falsifying information, perjury, contempt charges following espionage indict-

405. Mary Firestone sought publicity and engaged in activities that attracted the attention of the public. With her husband a member of America's wealthier industrial families, she was prominent among the "400" of Palm Beach society, and an active member of the "sporting set." Moreover, she did not shy away from publicity and even subscribed to a press clipping service. The Firestones' marital difficulties were known and their divorce suit became a *cause celebre* in social circles across the country. The divorce trial lasted 17 months, attracted national news coverage and fostered numerous articles in the Miami and Palm Beach newspapers. During the course of these proceedings, Mary Firestone held several press conferences. Note, *Public Figures, Private Figures and Public Interest*, 30 STAN. L. REV. 157, 172 (1977) (footnotes omitted). See notes 401-02 *supra* and accompanying text.

406. Justice Rehnquist wrote the plurality opinion, adopted by Chief Justice Burger and Justice Blackmun. Justice Powell, joined by Justice Stewart, filed a concurring opinion that did not discuss the public figure issue. Justices Brennan, White and Marshall dissented. The newly appointed Justice Stevens did not take part in the decision.

407. 424 U.S. at 454.

408. The majority tried to portray Mrs. Firestone as a private figure in any event, arguing that she was compelled to go to court to seek a divorce so her involvement was not voluntary. *Id.* Moreover, her few press conferences did not make her a public figure because they could not have been calculated to affect the outcome of the matter in controversy, the divorce proceedings. *Id.* at n.3. The Court's analysis is unsatisfying, however, ignoring as it does the totality of Mrs. Firestone's public activities.

409. 99 S. Ct. 2701 (1979).

410. 99 S. Ct. 2675 (1979).

ments or of fleeing to the Soviet bloc to avoid prosecution.⁴¹¹ Although the plaintiff had been convicted of contempt of court in 1958 for failing to appear before a grand jury investigating Soviet espionage, he had never been indicted for any of the other listed offenses.

Finding the plaintiff a public figure⁴¹² who had failed to establish the publisher's actual malice, the district court granted, and the court of appeals affirmed, summary judgment for the defendant. In an opinion written by Justice Rehnquist, the Burger Court reversed, concluding that the plaintiff was a private figure so that a lesser standard of liability than actual malice was required.⁴¹³

At least three significant points in the Court's analysis led to this conclusion. First, the Court explicitly rejected the contention "that any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on a limited range of issues relating to his conviction."⁴¹⁴ While perhaps surprising to some that this Court would so solicitously treat the rights of criminals in preference to the rights of others, and while an argument can be constructed that persons who engage in certain types of criminal conduct have voluntarily thrust themselves into a matter of legitimate public concern, this determination is at least easily understood and applied. Moreover, it probably does not present a tremendous problem to those who may wish to publish articles about highly visible criminal figures engaged in illegal activity of wide public interest. Presumably, there is more about them than their convictions that makes them public figures.

What is disturbing, however, is the reasoning used to justify this decision. Plaintiff Wolston, the majority found, did not seek public attention to influence the resolution of the issues involved, nor were his activities calculated to draw attention to himself in or-

411. 99 S. Ct. at 2703.

412. The district court concluded that the plaintiff, by failing to appear before the grand jury and subjecting himself to a citation for contempt, became involved in a public controversy that invited attention and comment, and created in the public an interest in his connection with espionage. *Wolston v. Reader's Digest Ass'n*, 429 F. Supp. 167, 177 n.33 (D.D.C.), *aff'd*, 578 F.2d 427 (D.C. Cir.), *rev'd*, 99 S. Ct. 2701 (1979). The court of appeals found that, by refusing to comply with the subpoena, the plaintiff "stepped center front into the spotlight focused on the investigation of Soviet espionage." 578 F.2d at 431. In short, by his voluntary action he invited attention and comment in connection with the public questions involved in the investigation of espionage. *Id.*

413. 99 S. Ct. at 2704.

414. *Id.* at 2708. "To hold otherwise would create an 'open season' for all who sought to defame persons convicted of a crime." *Id.* at 2708-09.

der to invite public comment. In short, the majority found no basis whatsoever for concluding that Wolston had relinquished his interest in protecting his own name.⁴¹⁵ One wonders how many persons engaged in criminal activity conduct themselves so as to draw attention to themselves or to influence the public.⁴¹⁶ The message to reporters investigating persons allegedly connected with organized crime appears to be that, despite the high degree of public concern with such matters, the subjects of investigation are private figures; therefore, the actual malice standard will be unavailable should the reporter err. If *Gertz* endangered the involuntary public figure species,⁴¹⁷ the reasoning, if not the holding, of *Wolston* appears to have rendered it extinct.⁴¹⁸

The second significant point of the *Wolston* decision is its treatment of what constitutes a matter of public controversy, an important question since *Firestone*.⁴¹⁹ In a footnote to his discussion of the involuntary nature of Wolston's involvement in the investigation of Soviet espionage in the United States, Justice Rehnquist offered this analysis:

It is difficult to determine with precision the "public controversy" into which . . . [Wolston] is alleged to have thrust himself. Certainly, there was no controversy or debate in 1958 about the desirability of permitting Soviet espionage in the

415. *Id.* at 2708. Wolston's failure to appear before the grand jury was apparently due to poor health. The opinion suggests that, had Wolston invited a citation for contempt with the intention of using it to create public discussion about the investigation, it might have been a different case. *Id.*

416. *See* *Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440 (S.D. Ga.), *aff'd*, 580 F.2d 859 (5th Cir. 1978). The plaintiff, identified in the defendant's article as a "California mobster" with underworld ties, argued that he was a private figure because he had not thrust himself voluntarily into the vortex of any public issue. Although the plaintiff had never been convicted of any crime, he admitted that he was personally acquainted with many of the persons identified by the staff at a United States Senate Committee investigating organized crime, as members of the underworld. He had also been the subject of governmental investigations and criminal prosecutions. He had been mentioned in over 40 articles relating to alleged underworld contacts and involvements. The court concluded that the plaintiff had "voluntarily engaged in a course that was bound to invite attention and comment" and was therefore a public figure. *Id.* at 445.

417. *See* note 403 *supra* and accompanying text.

418. In the view of Justices Blackmun and Brennan, the Court seemingly held that "a person becomes a limited-issue public figure only if he literally or figuratively 'mounts a rostrum' to advocate a particular view," a definition of "public figure" they believed to be unnecessarily "restrictive." 99 S. Ct. at 2709 (Blackmun, J., concurring).

419. *See* note 407 *supra* and accompanying text.

United States; all responsible United States citizens understandably were and are opposed to it.⁴²⁰

The implications of permitting any court to decide that there can be no controversy because no "responsible" citizen could take a particular view are enormous. Had *Wolston* been handed down in 1965, one can easily envision a lower court picking up on Justice Rehnquist's language and determining that there was no controversy over the Vietnam War because no "responsible" citizen could oppose the decision of his President to commit United States troops to the fight against communism. Moreover, Justice Rehnquist's broad definition of the controversy involved in *Wolston* invites absurd results. One court could determine that SALT II is not a matter of controversy because there can be no debate about the undesirability of a nuclear holocaust. Another court could reason that SALT II is uncontroversial because there can be no debate about the desirability of keeping a strong deterrent to Soviet military might.

Third, the Court declined to decide the issue of whether the passage of time may convert a public figure into a private figure. Because the issue was not pursued in *Wolston* and because the majority concluded that he was not a public figure even in 1958, the Court did not decide "whether or when an individual who was once a public figure may lose that status by the passage of time."⁴²¹ The Justices, filing separate opinions, however, did express themselves on the question. In dissent, Justice Brennan argued that *Wolston* qualified as a public figure "for the limited purpose of comment on his connection with, or involvement in, espionage in the 1940's and 1950's"⁴²² and that mere lapse of time was not decisive of his status.⁴²³ Justice Blackmun, joined by Justice Marshall in a concurring opinion, argued that the lapse sixteen years rendered consideration of *Wolston's* original public figure status unnecessary.⁴²⁴ Any argument that *Wolston* had assumed the

420. 99 S. Ct. at 2707 n.8. The majority was willing to accept, *arguendo*, the publisher's characterization of the public controversy as involving the propriety of the law enforcement officials' conduct in investigating and prosecuting suspected Soviet agents because it was clear that *Wolston* failed to meet the *Gertz* public figure criteria. The majority did not think much of this definition of the controversy involved. Justice Brennan, in dissent, adopted the court of appeals' view that the issues of national security and *Wolston's* involvement in espionage were legitimate topics of debate in 1958 and remain vital today. *Id.* at 2710.

421. *Id.* at 2707 n.7.

422. *Id.* at 2710 (Brennan, J., dissenting) (quoting *Wolston v. Reader's Digest Ass'n*, 578 F.2d at 431).

423. *Id.*

424. *Id.* at 2709 (Blackmun, J., concurring).

risk of public scrutiny was negated by his deliberate efforts to regain anonymity during the sixteen years intervening between his conviction and publication.⁴²⁵ Quite obviously, the passage of time issue remains unresolved.

Finally, there is *Hutchinson v. Proxmire*,⁴²⁶ a case that did not involve a media defendant but that nonetheless further restricted the meaning of public figure in media defamation cases.⁴²⁷ Hutchinson was a recipient of grants from the National Aeronautics and Space Administration (NASA) and the Navy for his work as a research behavioral scientist. The grants Hutchinson had received to study aggressive behavior patterns of certain animals approached half a million dollars. NASA and the Office of Naval Research received one of Senator William Proxmire's "Golden Fleece of the Month" awards, made by the Senator to publicize what he viewed to be examples of grossly wasteful government spending. Various communications by the Senator and members of his staff concerning this particular award included disparaging comments about Hutchinson's work and its value. As a result, Hutchinson sued Proxmire for defamation.⁴²⁸ Both the United States District Court in Wisconsin⁴²⁹ and the United States Court of Appeals for the Seventh Circuit⁴³⁰ had ruled, *inter alia*, that Hutchinson was a public figure,⁴³¹ that the *Sullivan* test, therefore, applied, and that Hutchinson had not proven actual malice.

The Burger Court's decision in *Hutchinson* sent new shivers

425. *Id.* As a result of this analysis one might be considered a public figure during contemporaneous reporting of an event, yet not be a public figure for purposes of later historical commentary on the same occurrence. Justice Blackmun did not object to subjecting historians to greater liability for a defamation because historians work under different conditions than their media counterparts. *Id.* at 2709-10. *Cf.* *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977) (the sons of Ethel and Julius Rosenberg were held to be public figures for purposes of a defamation action concerning a book published 20 years after their parents' executions there being no suggestion that the passage of those 20 years may have made any difference to the plaintiffs' status).

426. 99 S. Ct. 2675 (1979).

427. The Supreme Court has never decided whether the *Sullivan* standard applies to cases involving non-media defendants. Its conclusion that the plaintiff in *Hutchinson* was neither a public official nor a public figure made it unnecessary to decide that question. *Id.* at 2687 n.16.

428. *Id.* at 2677-78.

429. *Hutchinson v. Proxmire*, 431 F. Supp. 1311 (W.D. Wis. 1977), *aff'd*, 579 F.2d 1027 (7th Cir. 1978), *rev'd*, 443 U.S. 111 (1979).

430. *Hutchinson v. Proxmire*, 579 F.2d 1027 (7th Cir. 1978), *rev'd*, 443 U.S. 111 (1979).

431. The district court also found Hutchinson to be a public official. 431 F. Supp. at 1327-28. The court of appeals did not decide that issue.

down the spines of media lawyers for at least two reasons. First, although not called upon to discuss it, the majority said that it felt constrained to cast some doubt on the notion that summary judgments in favor of defamation defendants ought to be the rule, rather than the exception, in public figure and public official cases where actual malice has not been shown. Because proof of actual malice calls into question the defendant's state of mind, the majority reasoned, it does not readily lend itself to summary disposition.⁴³²

Second, *Hutchinson* radically contracted the public figure category and cast new doubt on the scope of the public official class. At the time of the award, Hutchinson was director of research at the Kalamazoo State Mental Hospital, operated by the Michigan State Department of Mental Health. During most of the time of his research, he was also an adjunct professor at Western Michigan University. Over a seven year period, while in these and other public employment positions, Hutchinson applied for and received \$500,000 in grants from the federal government.⁴³³

The proper expenditure of government funds is a matter of public concern, which has become more pronounced in recent years.⁴³⁴ Nevertheless, eight Supreme Court Justices agreed⁴³⁵

432. 99 S. Ct. at 2680 n.9. The majority quickly noted, however, that the posture of the case did not require concern with the propriety of dealing with such complex issues by summary judgment. *Id.*

Nevertheless, the footnote has had its apparently intended effect. In *Nader v. de Toledano*, 5 MED. L. RPTR. 1550 (D.C. Cir. 1979), for example, the District of Columbia Circuit recognized the emphasis placed by courts and commentators on the utility of summary judgment in First Amendment libel cases to avoid harassment of the press and promote free speech by doing away with vexatious defamation claims by public figures before they become unnecessarily costly to the defendant. Nonetheless, the circuit court overturned a summary judgment granted a newspaper columnist against a public figure plaintiff, quoting the infamous footnote nine and remarking that the Supreme Court had recently sounded a note of caution in the area of summary judgments. *Id.* at 1558.

Similarly, in *Church of Scientology v. Siegelman*, 5 MED. L. RPTR. 2021 (S.D.N.Y. 1979), summary judgment was denied a media defendant whose defense was that the statements he made concerning a public figure plaintiff were made without actual malice. The court, again citing footnote nine, ruled that the actual malice defense could not be decided at the time because footnote nine had cast doubt on the propriety of granting summary judgment where actual malice had been alleged. The court, still left open the possibility of a future summary judgment motion following additional, though unspecified, discovery. *Id.* at 2024, 2025.

433. 99 S. Ct. at 2678.

434. Expenditure of public funds is not a controversy if one follows Justice Rehnquist's reasoning in *Wolston* and concludes that there is no controversy here because all responsible citizens oppose government waste. That is precisely what

with Chief Justice Burger's opinion that Hutchinson was not a public figure. The majority opinion, noting that the court of appeals had not determined Hutchinson's status as a public official, expressed no opinion. It expressed the view that the category of public officials cannot be thought to include all public employees.⁴³⁶ The Court, in 1966, said that the public official designation applies at the very least to those who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.⁴³⁷ The term "public official" has been said to include those public employees whose positions are so important that the public has an independent interest in the office holders' qualifications and performance.⁴³⁸ These definitions guided lower court opinions for thirteen years.

By finding that a director of research at a state mental hospital who was also an adjunct professor at a state university is not a public official for purposes of application of the *Sullivan* standard, the Court has brought into serious question the vitality of numerous cases finding school teachers, school principals, police officers and other public employees to be public officials for libel purposes.⁴³⁹ The breadth of the term public official has been greatly contracted by *Hutchinson*, further limiting the application of the *Sullivan* standard. Uncertainty in the newsroom has correspondingly increased.

In addition, the *Hutchinson* opinion continued to erode the involuntary public figure concept, already diminished by *Wolston*. The district court's and court of appeals' conclusion that Hutchinson was a public figure was premised on two grounds: Hutchinson's successful application for federal grants had been reported in local newspapers; and he had access to the media, as witnessed by publication of his response to the Golden Fleece award.⁴⁴⁰ The Supreme Court was unimpressed with either

the Court did, if Hutchinson were a public figure, everyone receiving one of the myriad public grants would be classified as such. *Id.* at 2688.

435. Although Justice Brennan dissented from the result, he did not do so on the basis of the public figure issue. His view was that Proxmire was shielded from liability by the speech or debate clause. *Id.* at 2689. Justice Stewart joined the majority opinion in its entirety excepting only a footnote dealing with the application of speech or debate clause immunity to communications between members of Congress and federal agencies. *Id.* at 2688-89 (Stewart, J., concurring).

436. *Id.* at 2680 n.8.

437. *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

438. *Id.* at 86.

439. See notes 367-374 *supra* and accompanying text.

440. 99 S. Ct. at 2688.

ground. The Court pointed out that Hutchinson's published writings reached a relatively small category of professionals concerned with research in human behavior and did not become a matter of controversy until Senator Proxmire brought them to the public's attention through his announcement of the Golden Fleece award. Hutchinson's alleged defamers, the Court reasoned, could not create a defense for themselves by making Hutchinson into a public figure.⁴⁴¹ Second, the Court held that Hutchinson had not thrust himself into a public controversy because no controversy existed. He reasoned that almost every member of the general public was concerned about government spending.⁴⁴² Neither Hutchinson's applications for federal grants nor his publications in professional journals invited sufficient public attention and comment to transform him into a public figure.⁴⁴³ No one dissented from the conclusion that Hutchinson was not a public figure and that the constitutional protection afforded by the *Sullivan* standard did not apply.

It bears repeating that the *Sullivan* standard was devised to assure that *debate on public issues* be "uninhibited, robust, and wide-open."⁴⁴⁴ Constitutional protection of even erroneous statements made in the context of such debate is necessary in order to guarantee that freedoms of expression have the "breathing space" they need to survive.⁴⁴⁵ To suggest, as *Hutchinson* does, that comment about the performance of public officials in their official capacities merits the strongest available constitutional protection, yet comment about the expenditure of public funds does not warrant such protection, creates a curious line of demarcation. If anything stirs the blood of the American public more than malfeasance in public office, it is the waste of taxpayers' dollars. Surely the wisdom of any governmental expenditure must be the subject of "uninhibited, robust, and wide-open" debate.⁴⁴⁶ It is no answer that discussions of particular expenditures are not controversies because everyone opposes waste. The subject of debate is whether the particular expenditure is wasteful, not whether waste is undesirable.

A plurality of the Supreme Court became convinced, after

441. *Id.*

442. See note 434 *supra* and accompanying text.

443. 99 S. Ct. at 2688.

444. *New York Times Co. v. Sullivan*, 376 U.S. at 270.

445. *Id.* at 271-72.

446. *Id.* at 270.

only four years of experience with the public figure category, that focus on the plaintiff's status bore little relation to the values protected by the First Amendment. The distinction that public figures have voluntarily exposed themselves to public inspection while private individuals have kept their lives hidden from view was rejected as a legal fiction.⁴⁴⁷ The three Justices making up the *Rosenbloom* plurality determined that the *Sullivan* standard should be extended to all matters of public or general concern without regard to the eminency or anonymity of the persons involved.⁴⁴⁸

Although a majority of the Court has rejected the plurality opinion in *Rosenbloom* on repeated occasions,⁴⁴⁹ and two of the three Justices making up the *Rosenbloom* plurality have switched their positions,⁴⁵⁰ the propriety of the *Rosenbloom* approach is made abundantly clear by the result reached in *Hutchinson*. Wrestling with the ponderous question of whether Hutchinson invited sufficient attention to his applications for federal grants to warrant imposition of an actual malice standard of liability for statements made about him is misdirected. Instead, the Court should follow the *Rosenbloom* plurality and focus on the values the First Amendment is designed to protect. Since discussion of public expenditures goes to the heart of those values, Dr. Hutchinson should not complain if comments about his use of federal money are given the highest constitutional protection. It seems just as fair to expect recipients of federal grants to assume the risk of public debate as it is to expect public officials to incur such risk.

A return to the *Rosenbloom* standard would represent a revival of rationality. What constitutes a matter of general interest or concern needs to be refined first, to provide certainty as to which matters should receive maximum constitutional protection. The Court may wish to establish a line between "concerns" and "controversies" to protect the Mrs. Firestones of the world to some degree. It may well be that discussion of a wealthy couple's marital problems does not require the same protection as do discussions of official malfeasance or public expenditures. But if "controversy" is to be the standard, the Court will have to do better in defining it than it has in *Wolston* and *Hutchinson*.

447. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 47, 48.

448. *Id.* at 44.

449. *E.g.*, *Wolston v. Reader's Digest Ass'n*, 99 S. Ct. at 2708; *Gertz v. Robert Welch, Inc.*, 418 U.S. at 346.

450. *See* notes 395 & 396 *supra* and accompanying text.

VI. INVASIONS OF PRIVACY

Since Louis D. Brandeis and Samuel D. Warren crafted the tort ninety years ago,⁴⁵¹ invasion of privacy has become a burgeoning field, to the alarm of media lawyers.⁴⁵² Privacy law has grown from its humble beginnings to encompass at least four widely divergent subcategories: Appropriation of likeness,⁴⁵³ publication of private facts,⁴⁵⁴ intrusion⁴⁵⁵ and false light.⁴⁵⁶ A fifth category, the proprietary right of publicity, is now developing as a spin-off from appropriation of likeness.⁴⁵⁷ Despite the expansion of the invasion of privacy tort, the United States Supreme Court has had few occasions to analyze the nature and scope of the tort and its various categories.

451. See Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

452. See, e.g., Abrams, *The Press, Privacy and the Constitution*, N.Y. Times Magazine, Aug. 21, 1977, at 11; Schwartz, *Danger: Pendulum Swinging*, 239 THE ATLANTIC 29 (1977).

453. One who appropriates to his own use or benefit the likeness or name of another is subject to liability to the other for invasion of privacy. See, e.g., *Friedan v. Friedan*, 414 F. Supp. 77 (S.D.N.Y. 1976) (use of photograph to promote magazine sales); *Namath v. Sports Illustrated*, 48 App. Div. 487, 371 N.Y.S.2d 10 (1975), *aff'd*, 39 N.Y.2d 897, 352 N.E.2d 584, 386 N.Y.S.2d 397 (1976) (use of photograph to promote subscriptions).

454. One who gives publicity to matters concerning the private life of another, of a kind highly offensive to a reasonable man, is subject to liability to the other for invasion of privacy. See, e.g., *Sidis v. F-R Pub. Corp.*, 113 F.2d 806 (2d Cir. 1940) (description of former celebrity's current private life in "Where Are They Now?" feature); *Daily Times Democrat v. Graham*, 276 Ala. 380, 162 So. 2d 474 (1964) (news photograph revealing plaintiff's undergarments); *Briscoe v. Reader's Digest Ass'n*, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971) (description of reformed convict's eleven year old crime).

455. One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another, or his private affairs or concerns, is subject to liability to the other for invasion of his privacy if the intrusion would be highly offensive to the reasonable man. See, e.g., *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973) (harassment by photographer); *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971) (entry by journalists into private office under false pretenses); *LeMistrol, Inc. v. Columbia Broadcasting Sys.*, 61 App. Div. 2d 491, 402 N.Y.S.2d 815 (1978) (uninvited entry of restaurant by television reporter and camera crew).

456. One who gives to another publicity that places the other before the public in a false light of a kind highly offensive to a reasonable man is subject to liability to the other for invasion of privacy. See, e.g., *Sinatra v. Wilson*, 2 MED. L. RPTER. 2008, 2010 (S.D.N.Y. 1977) (unauthorized biography containing "false and fabricated" facts); *Hinish v. Meier & Frank Co.*, 166 Or. 482, 113 P.2d 438 (1941) (false statement that plaintiff signed political nomination petition). False light privacy differs from defamation in that, in the former, proof of harm to plaintiff's reputation is not required.

457. *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 728 (S.D.N.Y. 1978).

A. "False Light" Privacy

The principal Supreme Court privacy opinion preceding the Burger Court decisions was a false light privacy case, *Time, Inc. v. Hill*.⁴⁵⁸ In *Hill*, the Warren Court purported to hold that the constitutional protections afforded to the media in defamation cases extended to false light privacy actions as well. *Hill* temporarily pushed the media's protection in false light privacy cases ahead of the protection available in defamation cases because it anticipated the later plurality opinion in *Rosenbloom*.⁴⁵⁹ In *Hill*, the Court held that, absent proof of actual malice, the First Amendment precluded redress of false reports of matters of public interest, regardless of the plaintiff's status as a public or private figure.⁴⁶⁰

Because the *Rosenbloom* standard has been repudiated in defamation cases and the Burger Court has held that only public official and public figure libel plaintiffs need prove actual malice,⁴⁶¹ the continuing vitality of *Hill* in private figure plaintiff false light cases is in some doubt. When presented with the opportunity to do to *Hill* what it had done to *Rosenbloom*, however, the Burger Court declined to do so. *Cantrell v. Forest City Publishing Co.*,⁴⁶² decided after *Gertz*, involved a false light privacy action by a mother and son whose husband and father, respectively, had been killed in a bridge collapse. By almost any standard, and certainly by the *Gertz* standard, the plaintiffs in *Cantrell* were private figures. The article which the defendants published about the impact of the death on the plaintiffs' lives contained several admitted inaccuracies and false statements about the plaintiffs. An Ohio jury, after receiving an actual malice instruction,⁴⁶³ awarded the plaintiffs damages under a false light theory. The United States Court of Appeals for the Sixth Circuit reversed on the ground that the evidence was insufficient to support a finding of actual malice.⁴⁶⁴

The Burger Court, had it been so inclined, could have used *Cantrell* as the vehicle to announce that proof of actual malice was

458. 385 U.S. 374 (1967).

459. 403 U.S. 29 (1971).

460. 385 U.S. at 387-88. Actual malice is defined as knowledge of falsity or reckless disregard of the truth.

461. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 334; see notes 485-488 *infra* and accompanying text.

462. 419 U.S. 245 (1974).

463. *Id.* at 250 n.3.

464. *Cantrell v. Forest City Publishing Co.*, 484 F.2d 150 (6th Cir. 1973), *rev'd*, 419 U.S. 245 (1974).

not required of private false light privacy plaintiffs even in cases involving matters of public interest. Instead, it noted that no one had objected to the trial court's actual malice instruction⁴⁶⁵ and found no prejudice, even assuming error in the instruction. The Court disagreed with the Sixth Circuit's decision of insufficient actual malice evidence to sustain the jury's verdict.⁴⁶⁶ It reinstated the verdict, and the plaintiffs prevailed even under a standard that may have been too high. The Court declined to decide whether the *Hill* actual malice standard, or a more relaxed standard, applied in false light cases between media defendants and private individuals.⁴⁶⁷

Considering the Burger Court's refinements of the constitutional privilege in defamation cases, it is probable that the Court would have seized the opportunity to do away with the actual malice standard for private figure false light plaintiffs had the *Cantrell* jury found for the defendant under its actual malice instruction. The Court's admirable restraint leaves some hope for the media. Even if the *Rosenbloom* standard⁴⁶⁸ is never revitalized in defamation cases, several reasons exist for requiring a higher standard of proof in false light privacy cases than in defamation cases.

First, the injuries redressed by the two torts are quite different. By definition, defamation assails a plaintiff's reputation and arouses "hatred, contempt, scorn, obloquy or shame," and the like."⁴⁶⁹ False light invasions of privacy, on the other hand, focus not on the impact of the publication on the plaintiff's reputation but on the plaintiff's internal reactions to it.⁴⁷⁰ Second, it is probably easier for a journalist developing a story to recognize a potentially defamatory statement than one that would cause his subject

465. 419 U.S. at 250. This should not have been surprising since the trial was held before *Gertz* was announced and the *Rosenbloom* plurality opinion was still acceptable even in defamation cases.

466. *Id.* at 252-55.

467. *Id.* at 250; *cf.* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (the states are not bound by the actual malice test but may define for themselves the appropriate standard of liability for defamation of private individuals).

468. See text accompanying notes 383 & 385 *supra*.

469. *Grant v. Reader's Digest Ass'n*, 151 F.2d 733, 735 (2d Cir. 1945).

470. For example, the focus of the *Cantrell* false light case was on the outrage, shame, mental distress and humiliation suffered by the family. 419 U.S. at 248. In distinguishing false light invasion of privacy cases from right of publicity cases, however, the Court has said that the interest protected in the former is clearly that of reputation, with the same overtones of mental distress as in defamation. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1978). But if the interests to be protected are the same, one must wonder why separate torts are recognized.

to suffer inward humiliation. The Warren Court acknowledged this in *Hill*. Requiring certainty about nondefamatory facts, the Court contended, would saddle the press with an impossible burden and would seriously impair our free press because the words carry no warning that they are potentially harmful.⁴⁷¹ The Warren Court thus stressed in *Hill* that the actual malice test was being applied to false light privacy cases upon consideration of the factors comprising such privacy cases, not through blind adherence to *Sullivan*.⁴⁷²

B. *Publication of Matters of Public Record*

The Burger Court's second major privacy decision, in *Cox*,⁴⁷³ involved an entirely different question. *Cox* concerned the disclosure of private facts during a telecast in which the identity of a rape and murder victim, the plaintiff's daughter, was published. The plaintiff sued the television station for invasion of privacy under a Georgia statute⁴⁷⁴ which makes it a misdemeanor to publish or broadcast the name of a rape victim. The station's reporter had learned the victim's identity by examining indictments of the alleged assailants made available for his inspection in the courtroom during preliminary hearings on the case.⁴⁷⁵ There was no dispute that the victim's identity appeared in the indictments or that the indictments were public records available for inspections.⁴⁷⁶

The Court did not use *Cox* as a forum for deciding a question left open by *Hill*, that is, whether truthful publication of private matters unrelated to public affairs could be constitutionally proscribed.⁴⁷⁷ Instead, it viewed *Cox* as presenting the much narrower question of whether a state could impose sanctions on the accurate reporting of the name of a rape victim which was a matter of public record.⁴⁷⁸ The Court concluded that the state may not impose such sanctions. It appeared to extend the *Cox* decision to public records in general, stating that publication of public records

471. 385 U.S. at 389.

472. *Id.* at 390.

473. 420 U.S. at 469.

474. GA. CODE ANN. § 26-9901 (1972).

475. The hearings took place some eight months after the crime. Despite extensive press coverage of the crime the identity of the victim had not been disclosed pending trial. 420 U.S. at 471.

476. *Id.* at 472-73.

477. *Id.* at 491.

478. *Id.*

cannot be forbidden because the subject's sensibilities might be offended.⁴⁷⁹

The Court premised its decision on two basic factors. First, the state must have determined that the public interest was being served by placing the information in the public domain.⁴⁸⁰ Second, individual citizens must necessarily rely upon the press to bring to them in convenient form the facts of the operations of government.⁴⁸¹ The Court summarized that freedom of the press to publish information contained in public records is of critical importance to our type of government in which the citizenry judges the propriety of the conduct of public business.⁴⁸²

The issue not addressed in *Cox* was the entitlement of the media to access to public records. The *Cox* majority hinted, however, that states wishing to protect privacy interests in judicial proceedings may do so by avoiding public documentation of private information.⁴⁸³ The Court, though, expressly disclaimed any implication that it had considered the constitutional questions behind state policies prohibiting access by the public and press to various kinds of official records.⁴⁸⁴ The *Cox* decision was by its terms limited to cases in which the state had placed the disputed information in the public domain. Since *Cox*, the Burger Court has held that the public's right to inspect and copy judicial records is not absolute, that the press has no right to information about a trial superior to that of the public, and that custodians of judicial records may exercise an "informed discretion" in deciding which records to release to the public.⁴⁸⁵

Cox did raise an additional, unanticipated issue. In discussing the tort of invasion of privacy, Justice White, writing for the majority, said that the Court had left open the question of whether the Constitution mandates that truth be recognized as a defense in a defamation action brought by a private person.⁴⁸⁶ Justice Powell, concurring in the *Cox* result, felt that the *Gertz* requirement of

479. *Id.* at 495-96.

480. *Id.* at 495.

481. *Id.* at 491.

482. *Id.* at 495.

483. *Id.* at 496.

484. *Id.* at 496 n.26.

485. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 603 (1978) (White House tapes in court custody). *Cox* was found to be inapplicable because the records sought by the media in *Nixon* were not available to the general public. *Id.* at 608.

486. 420 U.S. at 490.

fault in private figure plaintiff cases was dispositive of the issue since the standard could not be satisfied unless the statements were false.⁴⁸⁷ Truth, therefore, could be a defense. Justice Powell's logic seems impeccable, but further developments from the Court are required to determine if a real issue exists as to whether truth can be a defense.⁴⁸⁸

C. *The Proprietary Right of Publicity*

Ironically, the subspecies of the right of privacy receiving the closest examination by the Supreme Court is the one most recently developed, the proprietary right of publicity. While most commentators tend to class an invasion of the right of publicity as a form of misappropriation,⁴⁸⁹ the two are not necessarily synonymous.

The classic misappropriation case is *Roberson v. Rochester Folding Box Co.*,⁴⁹⁰ which involved the use of the plaintiff's likeness on flour boxes and advertisements. The plaintiff was simply a very pretty girl whose pleasing looks, the defendants evidently thought, would help sell the flour boxes on which her face appeared. She was not a famous person, and there was no commercial value in implying that she endorsed the product. The plaintiff sued because she felt humiliated and distressed. Though she lost the suit because the New York Court of Appeals in 1902 was unwilling to recognize the tort of invasion of privacy, the decision led to the enactment of a statute prohibiting the unauthorized use of a person's likeness or name "for advertising purposes, or for the purposes of trade."⁴⁹¹ Thus, the tort of invasion of privacy by misappropriation was born in New York.

Roberson involved a private plaintiff humiliated by having her picture plastered over flour boxes and posters. Invasion of the proprietary right of publicity involves something a little different. While triggered by the unauthorized use of a person's name or likeness, right of publicity plaintiffs are not private persons who

487. *Id.* at 499 (Powell, J., concurring).

488. Chief Justice Burger concurred in the result without opinion. Justice Douglas concurred, saying the government has no power to suppress "news of the day." *Id.* at 501. Justice Rehnquist dissented on procedural grounds. Justice Rehnquist argued that, no final judgment having been appealed from, the Court lacked jurisdiction to hear the case. *Id.* at 502-12. The majority had concluded otherwise. *Id.* at 475-87.

489. See, e.g., J. BARRON & C. DIENES, *HANDBOOK OF FREE SPEECH AND FREE PRESS* § 7:8, at 72 (1979).

490. 171 N.Y. 538, 64 N.E. 442 (1902).

491. N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney Cum. Supp. 1979).

simply want to be left alone. On the contrary, they are public figures who have exploited their names and likenesses for their own commercial purposes and do not want others to capitalize on their notoriety without paying them for the privilege. Another difference is that the interests protected by misappropriation generally do not survive the plaintiff,⁴⁹² but in some jurisdictions, heirs and assignees may sue to enforce the right of publicity even after the death of the celebrity.⁴⁹³

The Burger Court examined the right of publicity in *Zacchini v. Scripps-Howard Broadcasting Co.*⁴⁹⁴ The plaintiff had a fifteen second "human cannonball" act that was filmed by a television station and was broadcast on the local news in the community where the plaintiff was performing. Suing the station for unlawful appropriation of professional property,⁴⁹⁵ the plaintiff complained that the unauthorized publication of his act damaged him commercially. The majority of the Ohio Supreme Court felt constitutionally constrained by *Hill* to rule against the plaintiff. The Burger Court, however, distinguished *Hill* as involving an entirely different tort from the right of publicity which was at issue in *Zacchini*.⁴⁹⁶

The interest protected in false light cases differs from that asserted in right of publicity cases. False light cases concern the plaintiff's mental distress, but right of publicity actions focus on the right of the individual to reap the reward of his endeavors, being analogous to the goals of patent and copyright law.⁴⁹⁷ Another distinction is that false light causes of action seek to minimize the publication of information to the public. Right of publicity plaintiffs, on the contrary, do not object to widespread publication as long as they get the commercial benefit of such publication.⁴⁹⁸

The majority, in an opinion written by Justice White, saw no constitutional impediment to enforcing the plaintiff's right of publicity, even against the news media. Justice White equated broadcasting a performer's entire act without his consent with broadcasting a copyrighted dramatic work without compensating the

492. The New York Civil Rights Law, for example, is limited by its terms to the misappropriation of the names and likenesses of "living person(s)." *Id. see Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 App. Div. 2d 620, 396 N.Y.S.2d 661 (1977).

493. *See, e.g., Factors, Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978) (assignee of Elvis Presley's "transferable property right" of publicity).

494. 433 U.S. 562 (1977).

495. *Id.* at 564.

496. *Id.* at 571.

497. *Id.* at 573.

498. *Id.*

owner. He found nothing in the Constitution that could prevent states from requiring media defendants to pay plaintiffs for transmitting their entire act to the public.⁴⁹⁹ Justice Powell's dissent, which Justices Brennan and Marshall joined, expressed doubt that the language "a performer's entire act" provided a clear enough standard for resolution of this case.⁵⁰⁰ He concluded, in any event, that the use of the film was undeniably for news purposes and, therefore, was constitutionally privileged.

On remand, the Ohio Supreme Court decided that if the United States Constitution did not protect the media here, neither did the Ohio Constitution; and the court remanded the case for trial.⁵⁰¹

VII. CONCLUSION

The great expansion of press rights and privileges under the Warren Court has been followed by the Burger Court's constriction of journalists' constitutional perquisites. A clue to the reasons behind the curtailment of press rights is in Chief Justice Burger's concurring opinion in *First National Bank v. Bellotti*,⁵⁰² a case ostensibly not involving press freedoms.

In *Bellotti*, a five-justice majority overturned a Massachusetts statute prohibiting business corporations from spending money to influence votes on referenda unless the issue materially affected the business or assets of the corporation.⁵⁰³ In support of the statute, Massachusetts argued, *inter alia*, that it was necessary to preserve the integrity of the electoral process and the individual citizen's confidence in government. It reasoned that without restrictions on spending, corporations might "drown out other points of view."⁵⁰⁴ The majority rejected this argument as being unsupported either by the record or by the authorities.⁵⁰⁵

In his concurring opinion, the Chief Justice expressed concern that Massachusetts' argument, if taken to its logical extreme, might jeopardize the First Amendment rights of the mass communica-

499. *Id.* at 574-75.

500. *Id.* at 579 (Powell, J., dissenting) (footnote omitted). Justices Powell, Brennan and Marshall dissented on substantive grounds. Justice Stevens dissented on procedural grounds.

501. *Zacchini v. Scripps-Howard Broadcasting Co.*, 54 Ohio St. 2d 286, 376 N.E.2d 582 (1978).

502. 435 U.S. 765 (1979).

503. *Id.* at 784.

504. *Id.* at 787.

505. *Id.* at 789-90.

tions businesses, particularly the large media conglomerates who do business in the corporate form.⁵⁰⁶ This was so, he asserted, because of the difficulty of distinguishing, in fact and in law, between media corporations and others conducting business in the corporate form. The thrust of Chief Justice Burger's argument was that there was no distinction between the First Amendment rights of media corporations and those of other corporate entities. In so finding, the Chief Justice was simply reasserting his position in the host of cases in which he had declared that the press had no greater rights than the public to gather or to disseminate information. He has consistently rejected the theory that the press, under the First Amendment, has a special role to play in the constitutional scheme.

More revealing about this particular opinion, however, is the Chief Justice's portrayal of the media. He referred to the "vast wealth and power" amassed by some media enterprises and suggested that such media conglomerates pose a much more realistic threat than business corporations which generally are not concerned with shaping popular opinion on public issues.⁵⁰⁷ He repeated his finding in *Tornillo* that modern media empires place the power to shape public opinion and to influence the American people in the hands of very few.⁵⁰⁸

It is entirely possible to read too much into the *Bellotti* opinion, but it is equally possible that the Chief Justice revealed an attitude toward the media that has colored his view of all first Amendment issues to reach his Court. Whether the other Justices who have more or less consistently voted to restrict press rights share this attitude is highly conjectural. It is a question worthy of some study.

The Chief Justice and a majority of his Court have clearly rejected the notion that the press has a special constitutional role which cannot be carried out without special rights and privileges. Government secrecy is immune from media investigations while press secrecy does not enjoy similar immunity from government probing. The media may publish what they learn, but they have no constitutional right to be educated. It is in this framework that journalists must now do their job. It can only be hoped that they can rise to the task.

506. *Id.* at 796 (Burger, C.J., concurring).

507. *Id.*

508. *Id.*