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Problems in Defining the Institutional Status of the Press

Andrew A. Jaxa-Debicki
University of Richmond

PROBLEMS IN DEFINING THE INSTITUTIONAL STATUS OF THE PRESS

This comment will deal with the concept of freedom of the press within the context of recent Supreme Court rulings which have directly or indirectly involved definitions of the role of the organized press in the governmental framework established by the Constitution. Specifically, the focus will be in the areas of the law dealing with defamation, testimonial privilege and the fair trial-free press controversy. The purpose will be to discern whether the Supreme Court is developing a concept of freedom of the press which is distinguishable from the general guarantee of freedom of speech and which derives its rationale from the recognition of the special institutional function of the press in a democratic society. The conclusion will summarize the results of this analysis, point out tendencies to limit the recognition of institutional press rights and discuss a theory upon which to base the recognition of a differentiated guarantee of freedom of the press.

I. INTRODUCTION: RECOGNIZING THE ROLE OF THE PRESS

Concurring in *Whitney v. California*,[1] Mr. Justice Brandeis elegantly described the reasons compelling constitutional protection of free speech.[2] The description enunciated, essentially, three basic justifications for freedom of speech. First, without free speech there can be no democratic dialogue, the open exchange of ideas necessary to the education and enlightenment of a self-governing people. Second, freedom of expression is a means for self-fulfillment and, as such, is an end in itself. Third, freedom of speech is a stabilizing factor, a safety valve providing a means for the

1. 274 U.S. 357, 372 (1927).

2. Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness . . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine, that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.

Id. at 375 (Brandeis, J., concurring).

peaceful venting of discontent.[3] The first and third justifications directly serve governmental purposes. The second recognizes that individual self-fulfillment which results from freedom of expression is a special benefit of liberty and should be protected.

However, the first amendment states that Congress shall make no law abridging freedom of speech, *or of the press*,[4] and the question raised is whether the inclusion of a separate clause naming the press is more than a redundancy.[5] Are the justifications Brandeis advanced for freedom of speech equally applicable to freedom of the press? Historical inquiry has not provided an unequivocal answer. The evidence available indicates that political writers with whom the Framers were familiar did not distinguish freedom of speech from freedom of the press.[6] Records of debates which preceded adoption of the first amendment are fragmentary and give no hint as to why the press was referred to in a separate clause.[7] Nevertheless, inferences can be drawn from the circumstances which produced the Bill of Rights. The men who drafted it were certainly aware of the political uses of language, and the lawyers among them presumably understood the niceties of legal drafting. That such men, meeting with the express purpose of writing in guarantees designed to assure those who feared the Constitution did not provide sufficient protection for individual liberties, chose to refer to freedom of the press in a separate clause suggests a recognition that freedom of the press represents more than another expression of a general concept of freedom of expression.[8]

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3. For an expanded discussion of these justifications see Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968).

4. U.S. CONST. amend. I.

5. Arguments in favor of the recognition of a differentiated guarantee of freedom of the press are found in Nimmer, *Introduction— Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975) [hereinafter cited as *Freedom of the Press—A Redundancy*]; Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631 (1975) [hereinafter cited as *Or of the Press*].

6. L. LEVY, LEGACY OF SUPPRESSION 174 (1960).

7. *Freedom of the Press—A Redundancy, supra* note 5, at 640.

8. James Madison's first version of what became the first amendment makes the distinction between freedom of the press and freedom of speech much clearer: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." 1 ANNALS OF CONG. 452 (1789) (remarks of James Madison). The arrangement of the words as well as their content clearly implies that, while the guarantees of free speech and free press are intertwined, they are also distinguishable and severable. Moreover, the characterization of the press as a bulwark of liberty denotes recognition of the importance of the press as an institution performing a special role within a democratic society.

Functional differences between free speech and free press can be demonstrated by applying Justice Brandeis' justifications for free speech to both concepts.[9] It is immediately apparent that freedom of the press is equally important to the maintenance of a democratic dialogue. First amendment opinions involving the press are replete with ritualistic invocations of the principle that a free press is an essential component of American democracy.[10] On the other hand, while the press may provide a medium for self-expression, or serve as a safety valve for those who wish to publicize dissent,[11] these rationales do not appear to be particularly relevant to the press as an institution.

The differences between free speech and free press are also brought into relief by those cases where the two are in conflict. *Columbia Broadcasting System, Inc. v. Democratic National Committee*[12] and *Miami Herald Pub-*

9. *See Freedom of the Press—A Redundancy, supra* note 5, at 653-54.

10. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (per curiam); New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964); Associated Press v. United States, 326 U.S. 1, 20 (1945); Near v. Minnesota, 283 U.S. 697, 719-20 (1931).

11. The prison visitation cases, Pell v. Procunier, 417 U.S. 817 (1974) and Saxbe v. Washington Post Co., 417 U.S. 843 (1974), illustrate the safety valve and self-fulfillment functions. The cases involved challenges by journalists to state and federal regulations restricting press-prisoner interviews. Both press and prisoners sought the same result—greater press access to prisoners and, consequently, greater publicity for the prisoners' point of view. While both sought the same end, the prisoners were also interested in increased opportunities to express themselves and to voice their complaints. In other words, separate speech and press interests happened to coincide in favor of the same goal.

For more on the right of the press to have access to sources of information see Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505 (1974) [hereinafter cited as *Rights of Public and Press*]; Comment, *The Right of the Press to Gather Information after Branzburg and Pell*, 124 U. PA. L. REV. 166 (1975) [hereinafter cited as *After Branzburg*].

12. 412 U.S. 94 (1973). It should be pointed out that the Supreme Court has consistently tended to view the broadcast media as a special case:

> The power of a privately owned newspaper to advance its own political, social and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers. A broadcast licensee has a large measure of journalistic freedom but not as large as that exercised by a newspaper. A licensee must balance what it might prefer to do as a private entrepreneur with what it is required to do as a public trustee.

Id. at 117-18. *See also The Supreme Court, 1972 Term*, 87 HARV. L. REV. 56, 178 (1973).

The basic assumption is that since there is only a limited number of broadcast frequencies, the air waves should be considered part of the public domain. To avoid chaos it is necessary that the government step in and guarantee that use of this limited resource be apportioned fairly. However, this raises a very complex set of problems. The government's power to license access to the air waves must not be allowed to function as a device for censoring what is broadcast. At the same time, the agency charged with regulating broadcasting must not be

lishing Co. v. Tornillo[13] are two examples. In the former, the Court upheld an FCC ruling that refusals by broadcasters to sell time for editorial advertisements did not violate either the Communications Act[14] or the first amendment. *Tornillo* involved a "right of reply" statute making it a misdemeanor for a newspaper to refuse equal space to political candidates who had been the subject of editorial criticism and affording such candidates a private cause of action for injunctive relief and damages. The statute was held to violate the first amendment guarantee of a free press. In both cases, the claims of those asserting that freedom of speech embraces a right of access to the press[15] conflicted with the view that freedom of the press requires freedom from interference with editorial decisions. The Court's judgment that implementation and enforcement of a right of access would involve a constitutionally unacceptable degree of governmental interference with editorial freedom[16] contained at least an implied recognition of institutional press rights which are different from and may even conflict with the right of free speech.[17]

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rendered inflexible by rigid and simplistic constitutional standards. Achievement of these goals necessarily involves very complex problems. For a discussion of the history and theory of public regulation of the air waves see Columbia Broadcasting Systems, Inc. v. Democratic National Committee, 412 U.S. 94, 100-21 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375-86 (1969). *See also* Interview with Chief Justice Burger by Burnett F. Anderson in 61 A.B.A.J. 1352 (1975) [hereinafter cited as Burger Interview].

Nevertheless, despite the special first amendment problems which pertain to the broadcast media, there is no fundamental difference between electronic and print media. As used here, the term "press" includes a newspaper entitled to second class mailing privileges; a magazine or periodical of general distribution; a national or international news service; a radio or television network or station. This is the definition adopted by the Bureau of Prisons and cited by Justice Powell in his dissent in Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974).

13. 418 U.S. 241 (1974).

14. 47 U.S.C.A. § 151 *et seq.* (Supp. 1976).

15. In the *Tornillo* case, the appellees argued that decreased competition and increased consolidation had resulted in the emergence of vast, unresponsive media empires which could manipulate public opinion at will. Moreover, the same economic factors which had led to the decrease in the number of media outlets virtually prohibited the entry of new competitors into the media market. The only way to insure that the public would not be deprived of open and uninhibited discussion of important issues would be for the government to take affirmative action to force the press to fulfill its obligation to provide a forum for diverse points of view. 418 U.S. at 248-54.

16. *Id.* at 256-58; Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. at 126-31.

17. A newspaper is more than a passive receptacle or conduit for news, comment and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial

The gradual emergence of a distinct congeries of rights derived from the general guarantee of a free press is also apparent in decisions which have accorded protection to activities essential to the operation of press organizations.[18] For example, the Supreme Court has recognized the rights to publish anonymously[19] and without prior restraint,[20] and to circulate[21] or individually distribute[22] printed matter. The rule that public figures cannot recover from a publisher for libel without a showing that untruths harmful to the plaintiff were maliciously printed[23] is designed to insulate editorial decision making from the possible chilling effect of the laws of defamation. In what is potentially the most significant development of all, the Court has tentatively recognized a right of the press to gather information.[24] A unifying factor in all these cases is the Court's perception that interference with the business of the press is no less pernicious than the direct imposition of controls upon the content of what is published.

Another development with a significant bearing on freedom of the press is contained in the line of cases in which the Supreme Court has acknowledged that the first amendment protects the right to receive information.[25] The Court first hinted at the existence of this right in *Grosjean v. American Press Co.*,[26] but stated the proposition more directly seven years later when it invalidated an ordinance prohibiting the door-to-door distribution of

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process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

418 U.S. at 258.

If the Court did not view its decision in terms of a choice of press over speech, it did appear to accept the proposition that editorial independence is a component of freedom of the press.

18. Freedom of the press in general was applied to the states through the fourteenth amendment in Gitlow v. New York, 268 U.S. 652, 666 (1925).

19. Talley v. California, 362 U.S. 60 (1960).

20. New York Times Co. v. United States, 403 U.S. 713 (1971); Near v. Minnesota, 283 U.S. 697 (1931).

21. Grosjean v. American Press Co., 297 U.S. 233 (1936).

22. Marsh v. Alabama, 326 U.S. 501 (1946); Martin v. City of Struthers, 319 U.S. 141 (1943); Lovell v. City of Griffin, 303 U.S. 444 (1938).

23. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

24. Branzburg v. Hayes, 408 U.S. 665, 681, 707 (1972). Justice Powell made a fleeting reference to a constitutional right to gather news in his concurring opinion, *id.* at 709, but the most serious treatment of such a right occurred in the dissents. *Id.* at 720-24 (Douglas, J., dissenting) and *id.* at 727-28 (Stewart, J., dissenting). For an extensive discussion of the right to gather information see *After Branzburg*, *supra* note 11, and *Rights of Public and Press*, *supra* note 11.

25. *See* Board of Pharm. v. Virginia Citizens Consumer Council, 96 S. Ct. 1817 (1976), and cases cited therein, at 1823.

26. 297 U.S. 233, 243, 247 (1936). The Court stated that the public had a right to be informed fully on public issues.

handbills because, in addition to abridging free speech and free press, it interfered with the rights of those willing to accept the appellant's leaflets.[27] The Court has also recognized a right to receive political literature from abroad,[28] the rights of the addressees of prisoners' mail to receive uncensored letters[29] and the right of academics to hear the views of foreign colleagues.[30] In a different context, recent decisions have struck down statutory and administrative restrictions on advertising which conveys information of strong interest to both individual consumers and society in general.[31] Finally, the right to receive has been invoked as the basis for upholding the FCC's "fairness doctrine."[32]

It has been stated that the purpose of the first amendment is to assure "the widest possible dissemination of information from diverse and antagonistic sources . . . ."[33] The amendment is intended ". . . to maintain the opportunity for free political discussion, [so] . . . changes, if desired, may be obtained by peaceful means."[34] The underlying assumption is that democratic government requires the widespread availability of information on all subjects of public interest. The right to receive is therefore essential, for without protected listeners, speakers, even if their own expressions are protected, can be denied an audience, and the democratic dialogue will cease. Furthermore, a right to receive implies a right to acquire information, since it can only be exercised by those who act affirma-

27. Martin v. City of Struthers, 319 U.S. 141, 148-49 (1943). *See generally* Comment, *The Right to Receive and the Commercial Speech Doctrine: New Constitutional Considerations*, 63 GEO. L.J. 775 (1975).

28. Lamont v. Postmaster General, 381 U.S. 301 (1965).

29. Procunier v. Martinez, 416 U.S. 396, 408-09 (1974).

30. Kleindienst v. Mandel, 408 U.S. 753 (1972). While holding that it would not look behind an exercise of the executive's delegated power to exclude aliens where the Government had a bona fide reason for deciding not to admit someone, the Court was at great pains to stress that its decision in no way denigrated the plaintiffs' right to hear the views of foreign academics. In effect, the Court made it clear that it was not basing its decision on first amendment grounds but, rather, on its traditional policy of deference to Congress and the executive in immigration matters. *Id.* at 762-65.

31. Board of Pharm. v. Virginia Citizens Consumer Council, 96 S. Ct. 1817 (1976) (ban on advertising of prescription drug prices invalid in that it keeps public ignorant of information of general interest); Bigelow v. Virginia, 421 U.S. 809 (1975) (statute making it a misdemeanor to encourage the procuring of an abortion by sale or circulation of any publication interfered with first amendment rights where advertisement conveyed information of general interest and value).

32. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). The "fairness doctrine" requires broadcasters to provide equal opportunities for the use of their facilities to the representatives of differing points of view on issues of public importance. *See* Barrow, *The Fairness Doctrine: A Double Standard for Electronic and Print Media*, 26 HASTINGS L.J. 659 (1975).

33. Associated Press v. United States, 326 U.S. 1, 20 (1945).

34. De Jonge v. Oregon, 299 U.S. 353, 365 (1937).

tively to place themselves in a position to obtain the desired information.[35] Viewed in this perspective, restrictions on the press, which serves as the primary gatherer and disseminator of information about public issues, constitute interference with the public's right to receive.[36]

In effect, recognition of the right to receive is a basis upon which to construct a concept of freedom of the press differentiated from freedom of speech. This concept rests on two premises. First, the purpose of the first amendment is served by protection of the right to receive as well as free speech.[37] Second, since it is the predominant collector and disseminator of information on issues of general interest, the press is an essential means through which citizens exercise their right to receive. Thus, the press serves a specialized function, and, in the process of serving that function, promotes ends contemplated by the first amendment. It is because the press is so important to the individual citizen's exercise of first amendment rights that freedom of the press means more than just freedom of expression for publishers or broadcasters. It is, in essence, a structural provision of the Constitution.[38] As everyone, the press is guaranteed freedom of speech, but it derives rights peculiar to it from its institutional role. In its reportorial capacity, it serves as a forum for public debate and, in its editorial capacity, as a contributor to debate.[39] In sum, when the press

35. *See Rights of Public and Press, supra* note 11, at 1505-06.

36. The role of the press as the representative of the public charged with the acquisition of information which is to be relayed back to those unable to acquire it for themselves has been recognized in a variety of contexts. For example, the press has been admitted to trials closed to the general public. *See* United States *ex rel.* Orlando v. Fay, 350 F.2d 967 (2d Cir. 1965), *cert. denied*, 384 U.S. 1008 (1966); Lancaster v. United States, 293 F.2d 519 (D.C. Cir. 1961) (per curiam). With varying degrees of certainty, some courts have suggested that the press enjoys a right of special access to news sources. *See, e.g.*, Schnell v. Chicago, 407 F.2d 1084 (7th Cir. 1969); Worthy v. Herter, 270 F.2d 905 (D.C. Cir.), *cert. denied*, 361 U.S. 918 (1959); Trimble v. Johnston, 173 F. Supp. 651 (D.D.C. 1959). In addition, State Department regulations provide for granting reporters special permission to travel to otherwise restricted areas for the purposes of gathering information which will be made available to the public. 22 C.F.R. § 51.73 (1975). It has also been argued that allowing the press into urban areas which have been sealed off to contain civil disturbances is beneficial in that the press can report on official excesses, ascertain the truth or falsehood of rumors and provide an alternative means for rioters to express their grievances. *See* REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDER 362 (Bantam ed. 1968). For a general discussion of whether the press should be accorded a right of special access to news sources see Comment, *Has Branzburg Buried the Underground Press?*, 8 HARV. CIV. RIGHTS - CIV. LIB. L. REV. 181, 184-85, 191-93 (1973).

37. As the Supreme Court stated in Board of Pharm. v. Virginia Citizens Consumer Council, 96 S. Ct. 1817, 1823 (1976), "the protection afforded is to the communication, to its source and to its recipients both."

38. *See Or of the Press, supra* note 5, at 633.

39. The Supreme Court appeared to reject the view that the press enjoys special rights

engages in activities essential to its civic functions, those activities, insofar as they are protected, receive this protection by virtue of the specific guarantee of the press clause and not from a vague, generalized right of free speech.

Unfortunately, the conclusion that the Supreme Court is systematically developing a differentiated concept of freedom of the press is not justified by a survey of the case law. A number of the decisions treat free speech and free press under the general rubric of freedom of expression and thereby fail to draw important distinctions.[40] Nevertheless, the Court has held that certain activities necessary to the function of an independent press are protected by the first amendment.[41] Moreover, the Court has repeatedly emphasized that the essential purpose of the first amendment is to maintain the free flow of information about matters of public concern.[42] The remaining question is whether these perceptions, together with a recognition that the press is an indispensable feature of the political system contemplated by the first amendment,[43] will be translated into a concept of institutional press rights.

II. "GAG" ORDERS, PRIVILEGES AND LIBELS

A. *"Gag" Orders*

The trial and conviction that resulted from the infamous Lindbergh kidnapping[44] demonstrated in spectacular, if unsettling fashion, how elec-

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under the first amendment when it declared that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." Branzburg v. Hayes, 408 U.S. 665, 684 (1972). However, the Court was dealing within the limited context of a newsman's assertion of a privilege not to reveal confidential sources balanced against the need of a grand jury conducting an investigation of criminal activity to develop fully the evidence. Moreover, by equating the press' right of access with a public right of access, the Court seems to have defined one unknown in terms of another. *Rights of Public and Press, supra* note 11, at 1507. *But see* Pell v. Procunier, 417 U.S. 817, 834 (1974), where the Court states that there is no constitutional authority for the proposition that there is an affirmative duty to make available to journalists sources of information not available to members of the public generally.

40. This issue is discussed in *Freedom of the Press - A Redundancy, supra* note 5, at 641-44, 647-50, 655, 658 and *After Branzburg, supra* note 11, at 173-76. *See also* Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838, 840-43 (1971).

41. *See* cases cited in notes 19-24 *supra*.

42. *See* note 10 *supra*.

43. Chief Justice Burger has referred to the media as a fourth branch of government in a de facto sense. Burger Interview, *supra* note 12, at 1352. Justice Stewart has espoused the view that the press clause establishes the press as a constitutionally protected institution, a de jure fourth estate. *Or of the Press, supra* note 5, at 633-37.

44. The conviction of the defendant was affirmed in 115 N.J.L. 412, 180 A. 809, *cert.*

tronic communications could generate an atmosphere of public excitement fatal to the orderly conduct of a criminal proceeding. Again, in the 1960's the growth of political and social turbulence accompanied by the establishment and consolidation of nationwide television networks capable of instantaneously focusing public attention on a given subject or event revived worries about insulating the courts from disruptive publicity.[45] The Supreme Court's holding in *Sheppard v. Maxwell*,[46] that the massive, pervasive and prejudicial publicity attending the petitioner's prosecution for the murder of his wife[47] had denied him a fair trial consistent with due process spawned renewed efforts to reach an accommodation between the rights to a fair trial and the rights of a free press.[48]

The issues posed by *Sheppard* were not new to the Supreme Court. As early as 1878, the Court held in *Reynolds v. United States*[49] that the finding by a trial court that the jury's impartiality had not been affected by pretrial publicity could not be set aside on review in the absence of manifest error. Sounding a distinctly modern theme, the Court stated that expanded communications and universal literacy made the search for jurors totally unfamiliar with a case a hopeless and needless task.[50] Similarly, in *Stroble v. California*[51] the Court ruled that the mere fact that inflamma-

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denied, 296 U.S. 649 (1935), *motion to file a petition for a writ of habeas corpus denied*, 297 U.S. 693 (1936).

Publicity at the time of the trial was intense. Newspapers had argued the case before the trial commenced and published the results of street polls reflecting the general consensus that the defendant was guilty. Some 700 reporters and 130 photographers were present, and the entire spectacle was captured on sound film by a camera crew. To this day the Lindbergh kidnapping trial remains the most widely publicized trial ever held in this country.

For an account of the events of the trial see Hallman, *Some Object Lessons on Publicity in Criminal Trials*, 24 MINN. L. REV. 453 (1940).

45. *See, e.g., Free Press and Fair Trial, Hearings on S. 290 Select Committee on the Judiciary*, 89th Cong., 1st Sess. 81 (1965); FREE PRESS—FAIR TRIAL, REPORT OF THE PROCEEDINGS OF A CONFERENCE ON PREJUDICIAL NEWS REPORTING IN CRIMINAL CASES (Conducted by Northwestern School of Law and Medill School of Journalism, Fred E. Inbau, ed., 1962); *Report of the Comm. on the Operation of the Jury System on the "Free Press—Fair Trial" Issue*, 45 F.R.D. 391 (1968); *Special Commission on Radio Television and the Administration of Justice of the Assn. of the Bar of the City of New York, Freedom of the Press and Fair Trial* (1967). *See also* Jaffe, *Trial by Newspaper*, 40 N.Y.U.L. REV. 504 (1965); Powell, *The Right to a Fair Trial*, 51 A.B.A.J. 534 (1965).

46. 384 U.S. 333 (1966). The sixth amendment has been made applicable to the states through the fourteenth amendment. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968).

47. There are many striking similarities between the facts of the *Sheppard* case and the Lindbergh kidnapping trial.

48. *See* note 45 *supra*.

49. 98 U.S. 145 (1878). *See also* the discussion of the Aaron Burr trial in Nebraska Press Ass'n. v. Stuart, 96 S. Ct. 2791, 2797-98 (1976).

50. 98 U.S. at 155-56.

51. 343 U.S. 181 (1952). *See also* Beck v. Washington, 369 U.S. 541 (1962).

tory reports about the case had been published did not necessarily make it impossible for the defendant to have a fair trial. While the *Reynolds* rule that prior knowledge does not inevitably prejudice a juror retains its viability,[52] the Court has cautioned that the presumption of impartiality does not preclude inquiry as to whether pretrial publicity has denied the defendant a trial consistent with due process of law.[53] In addition, the Court has ruled that television coverage of courtroom proceedings is unavoidably disruptive and, therefore, inherently violative of due process.[54] In effect, the Court's view that a *"responsible* press has always been regarded as the handmaiden of effective judicial administration . . ."[55] contemplates the possibility that in certain circumstances courts may be required to take steps to protect the defendant from irresponsible (prejudicial) press coverage.[56]

There are a number of remedies which courts can apply when faced with the problem of prejudicial publicity.[57] A court can grant a change of venue,[58] allow a continuance while the effects of pretrial publicity dissipate[59] or employ careful *voir dire* examination to discover and exclude prejudiced jurors.[60] All of these can be classified as passive remedies in that

52. *See, e.g.*, Murphy v. Florida, 421 U.S. 794 (1975).

53. Irvin v. Dowd, 366 U.S. 717, 723 (1961). *See also* Turner v. Louisiana, 379 U.S. 466 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963); Marshall v. United Statee, 360 U.S. 310 (1959) (per curiam).

54. Estes v. Texas, 381 U.S. 532 (1965). The *Estes* ruling was an expansion of the Court's earlier holding in Rideau v. Louisiana, 373 U.S. 723 (1963), that televising the defendant in the act of confessing to a crime was inherently invalid under the due process clause even without a showing of prejudice or a demonstration of a nexus between the televised confession and the trial. *See* 373 U.S. at 729-33 (Clark, J., dissenting).

55. Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) (emphasis added).

56. From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.

Id. at 362.

57. *See generally id.* at 357-62; *Report of the Comm. on the Operation of the Jury System on the "Free Press—Fair Trial" Issue*, 45 F.R.D. 391 (1968).

58. *See, e.g.*, Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961). In each case, the failure to move the trial to a jurisdiction at some distance from the scene of the crime resulted in reversals of convictions.

59. *See* Hudon, *Freedom of the Press versus Fair Trial: The Remedy Lies with the Courts*, 1 VAL. U.L. REV. 8, 19-20 (1966).

60. *See* Murphy v. Florida, 421 U.S. 794 (1975); Beck v. Washington, 369 U.S. 541 (1962); Irvin v. Dowd, 366 U.S. 717 (1961). The proper or improper use of *voir dire* was an element in all of these decisions.

a court reacts to the fact of publicity by attempting to neutralize its effects. Active remedies, by which a court acts affirmatively to restrict the flow of publicity, range from the relatively mild expedient of limiting the number of reporters allowed in the courtroom[61] to prohibiting any extrajudicial statements by any lawyer, party, witness or court official.[62] The dangers inherent in the use of such active remedies is illustrated by one of the most drastic, the court's power to punish for contempt.[63] If exercised without restraint, that power can become an instrument for the intimidation of those who report and comment upon legal proceedings. The end result is the suppression of information of public interest. Consequently, the Supreme Court has set strict limits on judicial discretion to issue contempt citations against those who publish items critical of judges and their administration of the legal system.[64]

In *Nebraska Press Association v. Stuart*,[65] the Supreme Court had its first opportunity to deal with what it characterized as "one of the most extraordinary remedies known to our jurisprudence,"[66] the "gag" order.[67] The case arose out of events surrounding an arrest and prosecution for the murder of six members of a single family in Sutherland, Nebraska. The crime immediately attracted considerable coverage by both local and national media. After the county court granted the prosecution's motion for an order prohibiting the press from reporting certain information about the case, the petitioners applied to the district court for leave to intervene and began the litigation which culminated in the Supreme Court's ruling.[68]

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61. Sheppard v. Maxwell, 384 U.S. 333, 358 (1966).

62. *Id.* at 359, 361.

63. *See* Patterson v. Colorado, 205 U.S. 454 (1907) (upholding contempt convictions of publishers of articles and cartoons critical of the Supreme Court of Colorado). *See generally* Jaffe, *Trial by Newspaper*, 40 N.Y.U. L. REV. 504, 505 (1965).

64. *See* Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941), in which the Court established the rule that contempt citations against the authors and publishers of critical commentary directed at the courts violate freedom of the press when such criticism poses no clear and present danger to the fair administration of justice. *See also* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), which reiterated the specific holding in *Craig*, that it is inconsistent with the first and fourteenth amendments to impose sanctions on the accurate publication of what has taken place in a public judicial proceeding.

65. 96 S. Ct. 2791 (1976).

66. *Id.* at 2804.

67. As used here, the term "gag" order, or more properly, closure, refers to those orders whereby courts prohibit the press from making public certain facts about a case. In the form it reached the Supreme Court, the order in the *Nebraska Press* case prohibited reporting the existence and nature of any of the defendant's confessions to law enforcement officers any confessions made to any third parties, except members of the press, and any other facts "strongly implicative" of the accused. *Id.* at 2796.

68. The litigation which preceded the Supreme Court's hearing of the case was quite

After first holding that the expiration of the challenged order had not rendered the case moot,[69] the majority opinion[70] discussed the history of the free press—fair trial controversy. Acknowledging the complexity of the issues raised, Chief Justice Burger stated that since the function of a court is not to write codes, it would not attempt to resolve all the problems involved. Rather, the Court would look to the facts of this particular case and the legal context in which they arose.[71]

The Court began its discussion by examining previous cases in which pretrial publicity had been a factor. Referring to the trial court's "duty to protect the defendant's constitutional right to a fair trial,"[72] the Court cited with approval the admonition in *Sheppard v. Maxwell*[73] that, in view of the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of jurors, courts should take strong measures to preserve the fairness of their proceedings.[74] But the Court also

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extensive. The county court's issuance of the original order was followed by petitioners'-newspapers, broadcasters, journalists, news media associations and wire services - application to intervene in the district court. Leave was granted, but the district court refused to vacate the county court's order, choosing instead to issue its own order modifying the original. Petitioners then asked the district court for a stay and applied to the Supreme Court of Nebraska for a stay, a writ of mandamus and an expedited appeal. Meanwhile, petitioners also applied to Justice Blackmun as Circuit Justice for a stay of the district court's order. He postponed a ruling out of deference to the Nebraska Supreme Court. 423 U.S. 1319 (Blackmun, Circuit Justice, 1975) (in chambers). However, upon concluding that delay was no longer tolerable, Justice Blackmun entered an order which partially stayed the district court's order. 423 U.S. 1327 (Blackmun, Circuit Justice, 1975) (in chambers). The Nebraska Supreme Court issued its opinion shortly thereafter and upheld the order as modified. State *ex rel.* Nebraska Press Ass'n. v. Stuart, 194 Neb. 783, 236 N.W.2d 794 (1975). Subsequently, the full Supreme Court denied petitioner's application for a more extensive stay, 423 U.S. 1027 (1975), and the case on the merits came before the Court in that posture. The history of the litigation is treated in detail in the case itself. 96 S. Ct. at 2809-14 (Brennan, J., concurring).

69. The Court found that the underlying dispute between the parties was one "capable of repetition yet evading review," Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911), in that, if the defendant's conviction was reversed and a new trial ordered, the district court might enter another order, (since the Nebraska Supreme Court's decision authorized state prosecutors to seek such orders), and if a new order was entered, it too might expire after a short period and review would be evaded. 96 S. Ct. at 2797.

70. Chief Justice Burger delivered the opinion of the Court, in which Justices White, Blackmun, Powell and Rehnquist, joined. Justices White and Powell filed concurring opinions. Justice Brennan filed an opinion concurring in the judgment, in which Justices Stewart and Marshall joined. Justice Stevens filed an opinion concurring in the judgment.

71. 96 S. Ct. at 2799.

72. *Id.*

73. 384 U.S. 333, 362-63 (1966).

74. 96 S. Ct. at 2799.

75. The cases cited by the Court were Murphy v. Florida, 421 U.S. 794 (1975); Beck v.

noted that cases like *Sheppard* were relatively rare. Other cases[75] demonstrated that ". . . pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial,"[76] as long as the trial judge took the proper measures to mitigate its effects. Consequently, the issue was not whether the Nebraska courts had erred in perceiving a threat to the defendant's rights, "but whether in the circumstances of this case the means employed were foreclosed by another provision of the Constitution."[77]

The heart of the Court's opinion was its discussion of first amendment principles. Classifying gag orders as prior restraints on speech,[78] it restated the standard formula that any prior restraint on speech comes before the court with a heavy presumption against its constitutional validity.[79] As the Court stated, "prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights."[80] If the press is to continue as the " 'handmaiden of effective judicial administration' " and a watchdog guarding against miscarriages of justice, then "the protection against prior restraint should have particular force as applied to reporting of criminal proceedings . . . ."[81] Furthermore, while the extraordinary protection afforded the press by the first amendment carries with it something in the nature of a fiduciary duty not to exercise press rights to the detriment of a criminal defendant, recognition of the danger inherent in even the most well intentioned governmental interference should militate against validating any form of prior restraints.[82] The

Washington, 369 U.S. 541 (1962); Stroble v. California, 343 U.S. 181 (1952).

76. 96 S. Ct. at 2800.

77. *Id.*

78. *Id.*

79. *Id.* at 2802. The classic prior restraint case is Near v. Minnesota, 283 U.S. 697 (1931) (invalidating a statute authorizing abatement of nuisance suits against periodicals deemed to regularly publish "malicious, scandalous and defamatory" matter). Recent cases involving prior restraints include Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546 (1975) (denial of license to present a musical in a municipal auditorium); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (injunction against distribution of leaflets attacking respondent's real estate practices); Carroll v. Princess Anne, 393 U.S. 175 (1968) (injunction against white supremacist rally); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) (commission established by state legislature exercising informal restraints on distribution of allegedly obscene literature). A forerunner of the *Nebraska Press* case was the grant of a stay of an order restricting media coverage of a rape-murder trial in Louisiana which was entered by Justice Powell in Times-Picayune Publishing Corp. v. Schulingkamp, 419 U.S. 1301 (Powell, Circuit Judge, 1974) (in chambers). Another celebrated recent prior restraint case is the "Pentagon Papers" case. New York Times Co. v. United States, 403 U.S. 713 (1971).

80. 96 S. Ct. at 2802.

81. *Id.* at 2803, *quoting* Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).

82. *Id.* at 2803, *citing* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 259 (1974) (White, J., concurring).

Court concluded by refusing to do what the Founders had also not done—establish a priority between the first and sixth amendments—but repeated that barriers to prior restraint remain high.[83]

Having invoked the doctrine of prior restraint, the Court then examined the facts to determine whether they justified the imposition of so drastic a remedy. It first found that, while the trial judge could have reasonably concluded that publicity might impair the defendant's right to a fair trial, the conclusion as to the prejudicial effect on jurors was speculative.[84] Second, the record failed to disclose whether the Nebraska courts had given sufficient consideration to less drastic alternatives before concluding that nothing short of prior restraint would have protected the defendant's rights.[85] Third, the Court questioned the efficacy of the order in view of the district court's limited jurisdiction and the probability that in a small town like Sutherland news and rumors would spread by word of mouth, restraints on the press notwithstanding.[86] Finally, evaluating the order as a whole, the Court ruled that it violated established law by prohibiting the reporting of what actually occurred in the courtroom[87] and that its ban on the publication of any "implicative" information was too broad and vague to withstand scrutiny.[88] The opinion concluded with a summary of the holding:

> We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact. We hold that, with respect to the order entered in this case prohibiting reporting or commentary on judicial proceedings held in public, the barriers have not been overcome; to the extent that this order restrained publication of such material, it is clearly invalid. To the extent that it prohibited publication based on information gained from other sources, . . . the heavy burden imposed as a condition to securing a prior restraint was not met . . . .[89]

All of the Justices concurred in the judgment, but disagreed as to the circumstances in which they would uphold a gag order. Justice Brennan maintained that prior restraints should be held a constitutionally imper-

83. *Id.* at 2803-04.

84. *Id.* at 2804.

85. *Id.* at 2804-05.

86. *Id.* at 2806.

87. *Id.* at 2807, *citing* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966); Craig v. Harney, 331 U.S. 367 (1947).

88. *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

89. 96 S. Ct. at 2808.

missible method of enforcing the right to a fair trial.[90] Justice White wondered if, since the Court's ruling made it highly unlikely that any order restraining the press could ever be justified, it might not have been better to avoid unnecessary future litigation by simply prohibiting gag orders.[91] On the other hand, Justice Powell stated that in his judgment there were circumstances which could justify the imposition of prior restraint but stressed that the party seeking the order bears a unique burden of showing the necessity for it.[92] Justice Stevens stated that, on the whole, he agreed with Justice Brennan, but that he would prefer to hear more argument before concluding that restrictive orders are never permissible.[93]

The majority's reliance on the doctrine of prior restraint meant that the Court viewed the central issue in terms of a press right of free speech[94] rather than in terms of any institutional rights of the press. While referring to the press as the " 'handmaiden of effective judicial administration' " and acknowledging its role as a guardian against miscarriages of justice,[95] the Court's opinion did not turn on the recognition that restrictive orders prevent the press from performing its special constitutional functions as gatherer and disseminator of information.

By contrast, Justice Brennan's concurrence was much more sensitive to the role of the press in a democratic system:

> '[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations. . . . Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.'[96]

Justice Brennan also took account of the public's right to have access to certain information, particularly where it aided in evaluating the conduct of those who govern.[97] Recognition of judicial authority to impose prior restraint would interfere with that right because the exercise of such au-

90. *Id.* at 2809.

91. *Id.* at 2808.

92. *Id.*

93. *Id.* at 2830. With Justices Stevens and White apparently leaning towards the position of Justices Brennan, Stewart and Marshall, there is a potential majority in favor of prohibiting gag orders.

94. The Court refers to prior restraints *on speech* in a number of instances. *See, e.g., id.* at 2801, 2802. In the summary of its holding, the Court refers to prior restraint within the context of the "freedom to speak and publish," and "freedom of expression." *Id.* at 2808.

95. *Id.* at 2803, *quoting* Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).

96. *Id.* at 2821, *quoting* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92 (1975).

97. *Id.* at 2816, 2825.

thority requires judges to evaluate whether the public interest in receiving information outweighed the speculative impact its release might have on a defendant's rights.[98] In effect, judges would be cast in the role of censors, and an intolerable burden would be placed on first amendment rights, for "in the context of prior restraints on publication, the decision of what, when and how to publish is for editors, not judges."[99]

It is unfortunate that the *Nebraska Press* case may prove to have settled nothing.[100] As Justice White implied,[101] the Court's decision to leave open the possibility that in some circumstances a gag order could be justified simply sets the stage for more litigation. It is suggested that a shift from reliance on prior restraint, essentially a speech doctrine, to a method of analysis which recognizes specific press rights will provide a basis upon which to break the current impasse.

B. *Newsman's Privilege*

The rationale for testimonial privileges is the protection of interests or relationships which are considered of sufficient social importance to justify not developing evidence which would be of value to a judicial proceeding.[102] The general interest fostered by a newsman's privilege not to reveal confidential sources would be the free flow of information, since it would presumably make persons fearful of exposure to investigation, prosecution or reprisal more inclined to confide in journalists.[103] Information gained in this manner could then serve as the basis for reports to the public on important matters which might not otherwise have come to light. In effect, by enhancing the ability of the press to gather information, recognition of some form of newsman's privilege would promote the public's interest in receiving information.[104]

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98. *Id.* at 2825.

99. *Id.* at 2828.

100. For one assessment of the impact of the *Nebraska Press* decision from the point of view of the press see *Media and Law*, 52 NEW YORKER, July 12, 1976, at 26.

101. 96 S. Ct. at 2808.

102. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 72 (2d ed. 1972).

103. For a study of the importance of a guarantee of confidentiality to working reporters see Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229 (1971).

104. *See generally* Beaver, *The Newsman's Code, The Claim of Privilege and Everyman's Right to Evidence*, 47 ORE. L. REV. 243 (1968); D'Alemberte, *Journalists Under the Axe: Protection of Confidential Sources of Information*, 6 HARV. J. LEGIS 307 (1969); Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U.L. REV. 18 (1969); Nelson, *The Newsmen's Privilege Against Disclosure of Confidential Sources and Information*, 24 VAND. L. REV. 667 (1971); Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317 (1970).

The issues in *Branzburg v. Hayes*[105] were whether the first amendment supported the claim of a reporter who had witnessed a crime that he could not be required to testify before a grand jury as to what he had seen and whether he could be compelled to appear before the grand jury in order to assert the privilege not to testify.[106] These issues had arisen out of four separate cases which had been consolidated on appeal to the Supreme Court.[107] All involved refusals by reporters either to appear or testify before grand juries which had subpoenaed them after the publication of stories in which they had described criminal activity. Each of the petitioners argued for a qualified privilege to withhold the names of sources and unpublished information gathered in the course of preparing their articles. There was also general agreement that the government should be required to make a showing that it had a compelling interest in the information sought in order to defeat the claim of privilege.[108]

The Court faced the issues raised in *Branzburg* in some disarray. A plurality of four Justices[109] supported by the concurring opinion of Justice Powell held that, in general, newsmen were required to appear before a grand jury which had subpoenaed them and answer all relevant questions asked of them during a criminal investigation. On the issue of appearance, the plurality also rejected the compelling interest standard proposed by the petitioners.[110] Three of the dissenters adopted a qualified privilege and would require that it remain in effect unless the government could show the relevance of the information sought, its unavailability from alternate sources and a compelling interest in obtaining it.[111] Justice Douglas argued for an absolute privilege.[112]

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105. 408 U.S. 665 (1972).

106. Branzburg, a reporter for a Louisville, Kentucky newspaper, had argued that the privilege should include a right not to appear at secret grand jury proceedings, for his sources would have no way of verifying whether he had asserted his privilege or revealed confidential information. *See* Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709, 710 (1975) [hereinafter cited as *Developing Qualified Privilege*].

107. The cases are: Application of Caldwell, 311 F. Supp. 358 (N.D. Cal.), *rev'd in part sub nom*, Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970); Branzburg v. Meigs, 503 S.W.2d 748 (Ky. Ct. App. 1971); *In re* Pappas, 358 Mass. 604, 266 N.E.2d 297 (1971); Branzburg v. Pound, 461 S.W.2d 345 (Ky. Ct. App. 1970).

108. For a summary of the positions taken in the briefs of the petitioners and the amici curiae see *Developing Qualified Privilege*, *supra* note 106, at 714.

109. The plurality opinion was by Justice White, who was joined by Chief Justice Burger and Justices Blackmun and Rehnquist without opinion, and by Justice Powell who filed a concurring opinion.

110. 408 U.S. at 708.

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

112. *Id.* at 712.

Because of this split, Justice Powell's opinion was the critical one; it is also the most difficult to analyze.[113] It appears that Justice Powell did not all together reject a qualified privilege: "The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources."[114] However, he refused to extend the privilege to include protection of a reporter from appearing.[115] As for limits on the qualified privilege recognized, Justice Powell would require a showing of relevance by the state[116] and would favor protective orders where a reporter established that the information sought was "without a legitimate need of law enforcement."[117]

Since Justice Powell refused to rule out the recognition of a privilege in all circumstances, a numerical majority of the *Branzburg* Court adopted positions favoring at least a qualified newsman's testimonial privilege. But, the limits of that privilege are unclear.[118] Assuming that neither Jus-

113. Justice Stewart's dissent described the Powell opinion as "enigmatic." *Id.* at 725.

114. *Id.* at 709.

115. "The newsman witness, like all other witnesses, will have to appear; he will not be in a position to litigate at the threshold of the State's very authority to subpoena him." *Id.* at 710 (footnote).

116. *Id.* at 710. Justice Powell would quash a subpoena if "the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation . . . ."

117. *Id.*

118. In *Developing Qualified Privilege, supra* note 106, at 716-19, it is argued that in the *Branzburg* decision a rule supported by the numerical majority can be discerned. It is suggested that the rule is that reporters have a qualified privilege dependent on their showing that (1) the testimony sought would be irrelevant, (2) it would further no compelling state interest in that it was not sought for legitimate law enforcement purposes, or (3) that it is not required by other unspecified forms of balancing such as exhaustion of alternate sources. This interpretation is arrived at by tailoring Justice Powell's concurrence to fit the elements of the three part test which the dissent by Justice Stewart proposed the government should be required to meet in order to defeat a claim of privilege. See note 111, *supra* and accompanying text. There is, however, an obvious weaknesses in this argument, notably Justice Powell's complete silence as to the second element in the Stewart test, nevertheless, it is argued that Justice Powell's opinion is not incompatible with that of the non-absolutist dissenters.

This analysis appears to be erroneous for several reasons. First, by attempting to fit Justice Powell's opinion within the structural framework established by the dissent's three-part test, the analysis stretches the opinion by Justice Powell too far. Second, in the footnote to his opinion, Justice Powell specifically states that "[t]he new constitutional rule endorsed by . . . [the] dissenting opinion would, as a practical matter, defeat . . . a fair balancing and the essential societal interest in the detection and prosecution of crime would be heavily subordinated." 408 U.S. at 710 (footnote). Thus, while it is true that Justice Powell adopts a qualified privilege, he seems to go no further. The limits Justice Powell places upon the privilege do not correspond to those proposed by the dissent. This is so because Justices

tice Douglas' nor the plurality's absolutist rules will be adopted in the future, it remains to be seen whether the Court will place the burden of proof on the party asserting the privilege or on the party seeking to obtain confidential information.

Recognition of a qualified newsman's privilege is potentially an important step in the development of a differentiated concept of freedom of the press, because it confers upon the press a special right to protect its ability to acquire information. That the plurality recognized some of the implications is evidenced by Justice White's admission that denial of the privilege would place some burden on news gathering,[119] even if the effect were speculative.[120] Justice White also wrote that "without some protection for seeking out the news, freedom of the press could be eviscerated,"[121] and stated in his conclusion that "news gathering is not without its First Amendment protections . . . ."[122] But the plurality refused to concede that the special informative function performed by the organized press entitled it to any special form of protection:[123] "Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals.' "[124] Reporters, like other citizens, must respond to relevant questions put to them during a valid grand jury investigation or criminal trial.[125]

Once again it fell to the dissenters to explore how the press fits into the governmental scheme contemplated by the first amendment. Justice Douglas maintained that the central purpose of the first amendment is to preserve the ability of the citizenry to acquire the information it needs in order to exercise intelligently the right to self-government.[126] One of the principles which can be derived from this understanding of the amend-

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Stewart's and Powell's opinions begin with different premises. The former proceeds from a presumption in favor of privileges, and the limits on privilege are structured accordingly; the latter regards newsmen's interests in confidentiality and society's interests in the detection and prosecution of crime as equally weighted and will determine which is to prevail on a case by case basis.

119. 408 U.S. at 680.

120. The Court went to great lengths to discount the practical effect its ruling might have on newsmen's ability to gather information. *Id.* at 693-95.

121. *Id.* at 681.

122. *Id.* at 707. Some commentators have focused on the Court's lengthy discussion of the respective rights of the press and the grand jury and have concluded that part of the holding in *Branzburg* is that information gathering by the press is entitled to constitutional protection. *See, e.g., After Branzburg, supra* note 11, at 178-81.

123. 408 U.S. at 705.

124. *Id.* at 704, *quoting* Lovell v. Griffin, 303 U.S. 444, 450, 452 (1938).

125. *Id.* at 691-92.

126. *Id.* at 713-14, *quoting* Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 254.

ment is that there can be no self-government "unless the people are immersed in a steady, robust, unimpeded and uncensored flow of opinion and reporting which are continuously subjected to critique, rebuttal, and reexamination."[127] The status of the reporter as news gatherer makes him an integral part of this crucial process.[128] Consequently, failure to recognize a newsman's privilege ultimately weakens the people's ability to govern.[129]

While Justice Stewart did not adopt Justice Douglas' absolutist position, he too insisted that "[t]he reporter's constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of information to the public."[130] Moreover, a right to gather news implies a right of confidentiality, since, in its present state, the process of news gathering requires the services of informants.[131] The existence of a subpoena power unchecked by a constitutional guarantee of confidentiality would interfere with the operations of the press by deterring sources from divulging information and reporters from gathering and publishing it.[132] Thus, "valuable information will not be published and the public dialogue will inevitably be impoverished."[133]

Despite the holding in *Branzburg*, the Court was not wholly unsympathetic to the special needs of the organized press. The plurality acknowledged that the use of the grand jury as a means for harassment of the press would violate constitutional prohibitions,[134] and it did not dismiss the contention that compelling reporters to testify to a grand jury could detract from their ability to gather information.[135] Perhaps, when the Supreme Court hears another newsman's privilege case, these perceptions will have developed to the point of recognizing more fully what Justice Stewart has termed "the critical role of an independent press in our society."[136]

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127. *Id.* at 715.

128. *Id.*

129. Today's decision will impede the wide-open and robust dissemination of ideas and counter-thought which a free press both fosters and protects and which is essential to the success of intelligent self-government.

. . . .

The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know.

Id. at 720-21.

130. *Id.* at 725.

131. *Id.* at 728-29.

132. *Id.* at 728.

133. *Id.* at 736.

134. *Id.* at 707-08.

135. *Id.* at 693-94.

136. *Id.* at 725.

C. *Libel*

Prior to 1964, the publishers of printed materials ran a high risk. Their defenses were limited to consent,[137] truth[138] or a very narrowly defined privilege.[139] The so-called "public interest" defense recognized by the Restatement of the Law of Torts[140] applied in only a few situations, and, as the comments made clear, did not protect those who published "false defamatory statements of fact about public officers or candidates for office."[141] In effect, the law of defamation had developed a rule of strict liability for the publication of false defamatory matter.[142] On the constitutional level, the Supreme Court had held that libelous statements were not protected by the guarantees of freedom of speech and press.[143] But, the Supreme Court's ruling in *New York Times Co. v. Sullivan*[144] altered these previously settled principles in the law of defamation by introducing additional safeguards for first amendment freedoms.[145]

The specific holding in the *Times* case was that in a state libel trial a public official bears the burden of establishing a defendant publisher's "malice" in order to recover damages for defamatory statements about his conduct in office.[146] Malice was defined as a knowing falsity or reckless

137. RESTATEMENT OF TORTS § 583 (1938).

138. *Id.* § 582.

139. *Id.* § 598.

140. *Id.*

141. *Id.* comment *a. See also id.* comment *b.* The common law of torts did recognize a privilege to make "fair comment" on issues of public concern. The privilege applied to comments on public officials, political candidates, prominent figures in the private sector, persons who took positions on matters of public interest and those who offered themselves to the public for approval, namely artists, athletes and actors. The privilege did not apply to misstatements of fact, and it protected only opinions. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 118, at 819-20 (4th ed. 1971) [hereinafter cited as PROSSER]. The central issue was whether a statement was a fact or an opinion, a distinction which confused the courts. *See* Titus, *Statement of Fact Versus Statement of Opinion—A Spurious Dispute in Fair Comment*, 15 VAND. L. REV. 1203 (1962).

142. PROSSER, *supra* note 141, § 113 at 773.

143. *See* Roth v. United States, 354 U.S. 476, 483 (1957) (dictum); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952).

144. 376 U.S. 254 (1964). For comment on the case see Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

145. Justice Brennan wrote for the Court and was joined by Chief Justice Warren and Justices Clark, Harlan, Stewart and White. Justices Black and Goldberg filed concurring opinions, and both were joined by Justice Douglas.

146. 376 U.S. at 283. The "reckless disregard" standard was explained as requiring a "high degree of awareness of . . . probable falsity" in St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

disregard for the truth. This rule was based on the premise that the traditional defense of truth did not adequately protect freedom of the press.[147] Consequently, the Court adopted the more stringent malice standard and applied it to the facts of the case. On that basis, the Court determined that affirmance of the verdict in favor of Sullivan would be to countenance unacceptable interference with freedom of expression.[148]

The underlying rationale for the *Times* decision was the Court's desire to maintain "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ."[149] To that end, it was better to risk some danger of press abuse in order to eliminate the chilling effect created by the threat of large damage awards.[150] Where libel laws operated to promote self-censorship which inhibited discussion of public issues, they would have to yield to the constitutional requirement of free and open debate.[151]

The development of constitutional limitations on the law of defamation was continued in the decade following the *Times* decision[152] and may be summarized as follows:[153] (1) "public officials" must prove "actual malice," *i.e.*, knowing or reckless falsity, to recover damages for defamatory falsehoods; (2) "public officials" must also prove knowing or reckless falsity before recovering for defamatory statements respecting their public involvement; (3) the standard of "actual malice" does not mean "malice" or "recklessness" as these were defined at common law. It means knowing or reckless falsity and does not denote motive or intent. Reckless disregard is established where the evidence permits the conclusion that the defendant in fact had serious doubts as to the truth of the matter published;

147. 376 U.S. at 278-79.

148. *Id.* at 283-92.

149. *Id.* at 270.

150. *Id.* at 279.

151. *Id.* at 279.

152. There are a dozen cases constituting the progeny of *New York Times v. Sullivan*: Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971); Time, Inc. v. Pape, 401 U.S. 279 (1971); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971); Greenbelt Coop. Publishing Ass'n. v. Bresler, 398 U.S. 6 (1970); Pickering v. Board of Educ., 391 U.S. 563 (1968); St. Amant v. Thompson, 390 U.S. 727 (1968); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Rosenblatt v. Baer, 383 U.S. 75 (1966); Henry v. Collins, 380 U.S. 356 (1965); Garrison v. Louisiana, 379 U.S. 64 (1964).

153. This summary is taken from Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEXAS L. REV. 199, 202-04 (1976) [hereinafter cited as *Defamation and the First Amendment*]. *See also* Anderson, *Libel and Press Self-Censorship*, 53 TEXAS L. REV. 422 (1975); Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and the First Amendment*, 26 HASTINGS L.J. 777 (1975).

and (4) where the utterance involves an issue of public or general concern, private persons must also prove actual malice. In effect, the decisions established a specialized definition of malice applicable in defamation cases and expanded the class of persons against whom the first amendment privilege provided immunity.

The trend begun in the *Times* case came to an end in *Gertz v. Robert Welch, Inc.*[154] In a four-one-four decision,[155] the Court restructured the class of persons to whom constitutional privileges would apply, redefined the standard of liability and restricted the award of damages.[156] Though the *Times* "malice" standard was retained for public officials and public figures,[157] it was scrapped for private plaintiffs. So long as liability was not imposed without fault, the states were free to set the standard, provided that the substance of the offending statement made apparent substantial danger to the private plaintiff's reputation.[158] However, no plaintiff could recover punitive damages without meeting the *Times* knowledge of falsity or reckless disregard for the truth standard.[159]

The modified standards laid down in *Gertz* were recently applied in *Time, Inc. v. Firestone.*[160] The suit involved had resulted from a report in *Time* magazine stating that the respondent's former husband had been granted a divorce from the respondent on grounds of mental cruelty and adultery. In fact, though this was not clear from the decree, the divorce court had made no finding of adultery.[161] The Supreme Court held that

154. 418 U.S. 323 (1974). The case involved an article in a John Birch Society publication which had accused the plaintiff, a Chicago attorney, of participation in a Communist conspiracy to discredit the Chicago police by helping to frame an officer accused of murdering a youth. These allegations were prompted by Gertz's representation of the boy's family in a civil action against the officer, who was ultimately convicted of second degree murder. Most of the article's statements about Gertz were untrue.

155. Justice Powell wrote the plurality opinion and was joined by Justices Stewart, Marshall and Rehnquist. Justice Blackmun concurred specially, stating that he was voting with the others only to create a majority. 418 U.S. at 354. Chief Justice Burger and Justices Douglas, Brennan and White each wrote a dissenting opinion.

156. *Defamation and the First Amendment, supra* note 153, at 212.

157. 418 U.S. at 342.

158. *Id.* at 347-49.

159. *Id.* at 349.

160. 96 S. Ct. 958 (1976).

161. The divorce court's final judgment discussed the sensational accusations of adulterous conduct which both parties had made at some length, *id.* at 963, but did not specify its reason for granting the divorce. On appeal, the Supreme Court of Florida concluded that the divorce had been granted on the improper ground of lack of domestication, but sustained the divorce on grounds of extreme cruelty. *Id.* at 967. This was four years after the original divorce had been granted and reported. In his concurring opinion, Justice Powell pointed out that a

since the respondent was not a public figure, the rule of the *New York Times* case did not apply.[162] It was also held that the *Times* rule did not automatically extend to all reports of judicial proceedings.[163] However, while the trial court had found evidence to support an award of compensatory damages, it had not made a finding of fault as required by *Gertz*.[164] The case was therefore remanded.

Justice Powell has stated that the *Gertz* rule "sought to shield the press and broadcast media from a rule of strict liability that could lead to intolerable self-censorship and at the same time recognize the legitimate state interest in compensating private individuals for wrongful injury from defamatory falsehoods."[165] However, the question raised by *Gertz* is whether the establishment of a problematical distinction between public and private plaintiffs does not increase the likelihood of self-censorship by the press. Given the fact that the concept of a "public figure" is not well defined,[166] there is no guarantee that where one court perceives notoriety another will find nonentity. For example, how are courts to deal with the modern phenomenon of the instant celebrity?[167] Does he become a public

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reasonably prudent reporter could have been misled by the ambiguity of the divorce court's opinion into believing that the divorce had been granted on the grounds of adultery. *Id.* at 972.

162. *Id.* at 965-66.

163. *Id.* The Court also refused to apply the rule of Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), that a state cannot impose civil liability for the publication of information accurately obtained from court records on the ground that the information was in reality not true. In view of the facts discussed in note 161 *supra*, this is a very technical argument.

164. *Id.* at 970.

165. *Id.*

166. In *Gertz*, the Court stated that designation as a public figure would rest on either of two alternative bases:

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case, such persons assume special prominence in the resolution of public questions.

418 U.S. at 351.

167. One objection to the pre-*Gertz* standard has been that it allowed for "bootstrapping" by the media in that, simply by focusing attention on a given individual, the media could make him into a public figure. In effect, in the very act of defaming an individual the media could place him within the class of plaintiffs from whom it is protected by constitutional privilege. *See Defamation and the First Amendment, supra* note 153, at 205-08, 220-23. *See also* Beytagh, *Privacy and a Free Press: A Contemporary Conflict in Values*, 20 N.Y.L.F. 453, 467-68 (1975); Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc., and Beyond*, 6 RUTGERS-CAMDEN L.J. 471 (1975). The argument is not without internal logic. However, given the development of modern communications technology and its ability to focus public attention on a person or event, it is very difficult to restrict publicity once a person becomes the object of media attention.

figure for first amendment purposes? When one considers first, that the circumstances which produce instant "media heroes" are likely to attend dramatic, sudden events, and second, that these are precisely the kinds of situations where the possibility that the press will unintentionally defame someone is the highest, the answers to these questions are quite important, since they will establish the standard of liability. By leaving these questions open, the Court has introduced a new element of uncertainty into journalistic decision making. It has increased the potential for costly mistakes, and the "[f]ear of guessing wrong must inevitably cause self-censorship and thus create the danger that the legitimate utterance will be deterred."[168]

Furthermore, Justice Powell's assertion that the *Gertz* rule would strike a proper balance between the protection of press freedom and individual reputations was not borne out by the *Firestone* case. First, *Firestone's* holding that the respondent was not a public figure was questionable. High society divorces involving allegations of sexual misconduct have always been the subject of public interest and have been reported by all types of news publications. Admittedly, some of the reports emphasize the sensational and demonstrate little evidence of good taste, but the style of reporting should not determine whether it receives constitutional protection.[169]

Moreover, while there is admittedly some danger of abuse in allowing the media to decide in all circumstances who is or is not a public figure, the alternative of having judges second guess media decisions raises the problem of allowing punishment for the exercise of editorial freedom.

As for the specific problem of the instant celebrity or media hero, the language of the *Gertz* decision is subject to differing interpretations. At one point, the Court stated that designation as a public figure would occur where an individual was "drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." 418 U.S. at 351. However, at another point the Court stated that while it was "hypothetically" possible for someone to become a public figure through no purposeful action of his own, the likelihood of this happening was "exceedingly rare." The Court went on to state that

> [f]or the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

Id. at 345.

This second formula does not contemplate individuals who are "drawn into" public controversies. Significantly, the second formula was the one cited as the basis for the *Firestone* holding that the respondent was not a public figure. 96 S. Ct. at 965.

168. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 50 (1971).

169. 96 S. Ct. at 965. The Court stated that "[d]issolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading

Second, the respondent's classification as a private plaintiff triggered application of the *Gertz* rule that so long as liability was based on some standard of fault, the plaintiff did not have to make a showing of "malice" as defined by the *New York Times* case.[170]

The dangers inherent in this restriction of the scope of the *Times* malice standard are illustrated by the treatment which the *Firestone* case had received in the Florida courts. Two appellate courts dealing with the same facts and purportedly applying the same negligence standard reached opposite conclusions as to *Time* Magazine's liability.[171] When viewed in this context, the end result of *Gertz* is not balance but uncertainty. Press uncertainty as to potential liability for erroneous reporting even in circumstances where error was at least plausible, if not inadvertent,[172] does not seem likely to encourage independent and courageous reporting.

III. Conclusion: Other Limiting Considerations and an Alternative Theory

The conclusion to be drawn from recent first amendment decisions is that at present a majority of the Supreme Court remains committed to the methodology of balancing individual and social interests in freedom of expression against competing interests which seek to place restrictions on expression.[173] While the Court acknowledges the important role the organized press plays in a democratic society, this is not a basis for recognizing

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public." This appears to be more of a value judgment than a statement of law. Assuming there is a legitimate purpose served by libel law, it is not as a means for the imposition of judicial tastes as to what constitutes a suitably dignified subject for public discussion. Certainly, the constitutional guarantee of freedom of the press should not be dependent on whether the subject reported is a political debate or a marital squabble.

It should also be noted that the respondent, Mrs. Firestone, was not uninterested in the fact that she was the object of press attention. She was a subscriber to a press clipping service and she held press conferences during the course of the divorce proceedings. *Id.* at 980. (Marshall, J., dissenting). This latter fact would seem to place her within the class of persons who "have thrust themselves to the forefront of particular public controversies . . . ." Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

170. 418 U.S. at 347-49. States "may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehoods injurious to a private individual." *Id.* at 347.

171. Time, Inc. v. Firestone, 254 So. 2d 386 (Fla. Dist. Ct. App. 1971) (publisher not negligent); Firestone v. Time, Inc., 271 So. 2d 745 (Fla. 1972) (publisher was clearly and convincingly negligent).

172. In his concurring opinion in *Firestone*, Justice Powell himself stated that "there *was* substantial evidence supportive of Time's defense that it was not guilty of actionable negligence." 96 S. Ct at 973 (emphasis in original).

173. *See generally*, Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877 (1963); Frantz, *The First Amendment in the Balance*, 71 Yale L.J. 1424 (1962).

any special rights which the press derives from that role. Rather, within the Court's present scheme of analysis, freedom of the press is treated as freedom of speech exercised by the press.[174] Consequently, a claim by the press that it is asserting a right protected by the first amendment will be balanced against the competing interests apparent in the particular set of circumstances which gave rise to the claim. Freedom of expression is, in essence, limited to the extent that no protection is afforded this constitutional right when its exercise intrudes too deeply upon other rights.

Coming to grips with a balancing approach presents special problems in that the factors placed on one side of the scale or the other are not always readily discernible. The broad issue in a defamation case might be whether or not the general social interest in a free press should outweigh the state's interest in affording individuals compensation for injury to their reputations, but this process necessarily involves a number of hidden factors. A court might not be as solicitous of freedom of the press where the defendant is a tabloid and not a highly regarded metropolitan daily. The opprobrium which attaches to a particular kind of defamatory statement may vary. By its very nature as a process whereby constitutional interests are weighed in light of the facts, interest balancing allows for evaluations based on the personal preferences and opinions of the balancer. This does not mean that judges cannot honestly balance interests, but it must be acknowledged that they do not do so in a vacuum. Therefore, when a particular result is the product of interest balancing, the key to understanding that result may sometimes lie beneath the stated reasons.

There are some indications that one of the factors which the Court has taken into account when balancing freedom of the press against other interests is a concern with the harm which could result from an irresponsible exercise of press power.[175] For example, some traces of this concern may be present in the Court's explanation that the differentiation between public and private plaintiffs in defamation cases is predicated on the former's more ready access to the media to deny defamatory allegations.[176] In

174. *See, e.g.*, material cited in note 40 *supra*. In discussing the conflicting interests in the *Gertz* case, the Court stated that " 'some antithesis between freedom of speech and press and libel actions persists, for libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments. . . .' " 418 U.S. at 342, *quoting* Curtis Publishing Co. v. Butts, 388 U.S. 130, 152 (1967).

175. *See generally* Anderson, *A Response to Professor Robertson: The Issue Is Control of Press Power*, 54 TEXAS L. REV. 271 (1976); Shapo, *Media Injuries to Personality: An Essay on Legal Regulation of Public Communication*, 46 TEXAS L. REV. 650 (1968).

176. Gertz v. Robert Welch, Inc., 418 U.S. 323, (1974).

> Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to

another context, the Court has commented on the fiduciary responsibilities which attended the exercise of first amendment rights by the press.[177] It is also interesting to note that one of the foremost proponents of a balancing approach to first amendment issues, the late Justice Frankfurter,[178] was also very concerned with the dangers posed by an abusive press.[179] In *Pennekamp v. Florida*[180] he made very strong statements against granting the press excessive privileges and in another case, concluded his opinion by warning that the Court had "not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade."[181]

> counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.
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> [T]he communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. . . . Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.

Id. at 344-45 (footnote omitted).

177. Nebraska Press Ass'n v. Stuart, 96 S. Ct. 2791 (1976).

> The extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly—a duty widely acknowledged but not always observed by editors and publishers. It is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the rights of an accused to a fair trial by unbiased jurors.

Id. at 2803.

In his concurring opinion, Justice Brennan noted that even if the press could not be enjoined from reporting certain information, no matter how shabby the means by which it was obtained, the press was still subject to civil liability under the libel laws or for invasion of privacy. *Id.* at 2816 n.25. Moreover Justice Stevens withheld his complete agreement with Justice Brennan's concurrence because he was not yet ready to grant the press absolute protection "no matter how serious an intrusion on privacy might be involved, no matter how demonstrably false the information might be, no matter how prejudicial it might be to the interests of innocent persons, and no matter how perverse the motivation for publishing it . . . ." *Id.* at 2830.

178. A classic formulation of the balancing doctrine is contained in Justice Frankfurter's concurring opinion in Dennis v. United States, 341 U.S. 494, 524-25 (1951).

179. *See generally* Haimbaugh, *Free Press Versus Fair Trial: The Contribution of Mr. Justice Frankfurter*, 26 U. PITT. L. REV. 491 (1965).

180. 328 U.S. 331, 355-57, 364-69 (1946) (Frankfurter, J., concurring). *See also* Frankfurter's dissenting opinions in Stroble v. California, 343 U.S. 181, 198 (1952); Bridges v. California, 314 U.S. 252, 279 (1941).

181. Irvin v. Dowd, 366 U.S. 717, 730 (1961) (Frankfurter, J., concurring).

Perhaps it is reading too much into scattered statements in recent decisions to perceive a continuation of Justice Frankfurter's concern with press power as an element in the balancing process employed by the current Court. But, given the difficulties in isolating all the factors which are weighed when balancing methodology is applied, it cannot be discounted. Moreover, a Court which favors balancing is likely to be sympathetic to a viewpoint which supports the proposition that all power should be subject to some restraint. Finally, a concern with checking unrestrained media power would be a logical basis upon which to restrict recognition of a special group of rights belonging to the press as an institution.

An alternative to interest balancing upon which to base a concept of freedom of the press differentiated from freedom of speech is to define the purposes of the first amendment and then to extend constitutional protection to those activities or expressions which further that purpose. This was the approach taken by the philosopher Alexander Meiklejohn,[182] and his theories will be used here as the basis for an alternative mode of dealing with the press clause of the first amendment.

Briefly stated, Meiklejohn's belief was that the Constitution established a system of self-government which the first amendment promotes by protecting the free exchange of ideas.[183] Therefore, the first amendment does not protect a freedom to speak, but rather those activities of communication and thought by which we govern.[184] The people exercise the power of self-government through the vote. This means that the quality of government is dependent upon the "intelligence, integrity, sensitivity and generous devotion to the general welfare" which each voter acquires.[185] It follows from this that the first amendment protects all those activities which are involved in the process of self-government. These activities include speech, press, assembly, petition and the vote. It also protects the "many forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express."[186] Activities from which the voter derives knowledge, intelligence, sensitivity and a capacity for sane and objective judgment include education, the achievements of philosophy and science, literature and the arts, public discussion of public issues together with the

182. *See* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).
183. *Id.* at 93-94.
184. Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255.
185. *Id.*
186. *Id.* at 256.

spreading of information and opinion bearing on those issues.[187] Consequently, these too are protected by the first amendment.

Taking Meiklejohn's theory of the first amendment as its first premise, the alternative theory proposed here would go on to derive a distinct group of press rights from the recognition that, as the predominant gatherer and disseminator of information, the press is an indispensable means through which the people acquire the information essential to enlightened self-government. This recognition of the functional importance of the press in a democratic society would have two consequences. First, as to the content of press reports, any report which contained information somehow contributive to the capability for self-government would be protected by the first amendment. For example, a report on a candidate's financial affairs would obviously be protected since it provides a basis for evaluating his fitness for office. A report on his sexual affairs might be less edifying, but could also be protected as having some bearing on the candidate's fitness for office. The main point is that the category of information somehow contributive to the capability for self-government should be a broad one.

The second consequence relates to the institutional viability of the press. It would extend first amendment protection to any activity which the press must pursue in order to continue serving the public's need for information which enhances its ability to govern. For example, the right to circulate would fall within this category of protected activities. So also would the right to gather information and the right to editorial independence. The latter would be interpreted broadly so as to exclude the press from liability under the libel laws. The paramount interest would be preservation of an independent uninhibited press.

It must be conceded that adoption of a definite or absolutist approach will not eliminate the need to balance.[188] The choice of what is to be included within the category of information which contributes to the capacity for self-government will inevitably involve some form of balancing. There are also dangers inherent in granting any institution, whether it be press or government, a license to exercise great power. A system which

187. *See* Note, *The Speech and Press Clause of the First Amendment As Ordinary Language*, 87 HARV. L. REV. 374 (1973). Meiklejohn's view has been interpreted as establishing a strict dichotomy between discussion of public and private issues. This has been attacked on the ground that there are public aspects to nearly every issue and that the distinction is therefore a dubious one. *Id.* at 380-81. A better view would seem to be that Meiklejohn realized that almost all issues are tinged with public interest, and, rather than seeking to establish a dichotomy, sought to establish the broadest possible area of constitutionally protected expression.

188. *Id.* at 380-81.

recognizes that the press has rights as an institution is taking a risk. It is opening itself up to the possibility that an arrogant, unrestrained and abusive press may cause it severe harm. However, an approach to first amendment issues which grants rights to the press because its freedom is essential to a governmental scheme which relies on the free flow of information is ultimately more attuned to the essential principles upon which this country was founded.

Andrew A. Jaxa-Debicki