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Potter Stewart: An Analysis of His Views on the Press as Fourth Estate

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I. Introduction

When Justice Potter Stewart retired from the United States Supreme Court in 1981, he left a legacy of support for the rights of the press. During his tenure, landmark decisions were handed down on press freedom, and without assuming an absolutist stance, Stewart in-

1. Stewart served on the Supreme Court for 23 years, until his retirement on July 3, 1981. He had received a recess appointment from President Eisenhower in 1958, and served in that capacity until his official appointment was approved by the Senate on May 5, 1959. By a vote of 70-17, his nomination was confirmed, 105 CONG. REC. 7472 (1959), and at age 43, Stewart became the second-youngest Court appointee since the pre-Civil War period. Israel, Potter Stewart, in 4 THE JUSTICES OF THE U.S. SUPREME COURT, 1789-1969: THEIR LIVES AND MAJOR OPINIONS 2921, 2923 (L. Friedman & F. Israel eds. 1969).

Stewart announced publicly, two weeks before his retirement, that a query from a midwestern high school student persuaded him to retire. In her letter to Justice Stewart, Donna Gallus wrote:

Letter from Donna Gallus to Justice Potter Stewart (February 19, 1980), partially reprinted by the Associated Press from a Supreme Court handout, as (AP Laserphoto) (WX30-June 19) (rf61925ho) 1981.

In Stewart's response, he said he had not become eligible to retire until late in the last month. "Under these circumstances," he wrote, "it has not occurred to me, at least so far, that I have remained as a member of the Supreme Court an unduly long time . . ." Letter from Justice Potter Stewart to Miss Donna Gallus (February 29, 1980), reprinted by the Associated Press from a Supreme Court handout, as (AP Laserphoto) (WX30-June 19) (rf61925ho) 1981.

2. As to the first amendment, an absolutist believes that "all utterances and publications [should be protected] without distinction or discrimination, so long as they remain in the realm of expression and do not pass over into the area of conduct." Canavan, Freedom of Speech and Press: For What Purpose? in TAKING THE CONSTITUTION SERIOUSLY 305, 309-10 (G.L. McDowell ed. 1981).

The absolutist philosophy is grounded in the premise that the framers of the Constitution, having succinctly stated, "Congress shall make no law . . . abridging the freedom of speech, or of the press," U.S. CONST. amend. I, deliberately excluded speech and press from government interference. Justice Hugo L. Black (retired, 1971) and Justice William O. Douglas (retired, 1975) were probably the best known of the modern absolutists. "One gets the impression," Canavan stated, "that for Justice Black and particularly for Justice Douglas, anything that is uttered by a human voice or comes off a printing press . . . is an 'idea' and as such is entitled to the protection of the First Amendment." Id. at 310.

In an article originally published in the New York University Law Review in 1960, Justice Black said that it was his belief "that there are 'absolutes' in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be
dicated in judicial opinions and extrajudicial commentary that he believed that the press\(^3\) deserves a special place among American institutions.\(^4\)

Stewart's judicial approach to the freedom of press clause will be the focus of this note, with particular emphasis on his analysis of some problems pertaining to defamation,\(^5\) free press versus fair trial,\(^6\) prior restraint,\(^7\) newsman's privilege,\(^8\) and newsroom search.\(^9\) What some critics have perceived as somewhat surprising concurrences and dissents by Stewart will be analyzed here, in light of his narrow reading of the freedom of press clause and his perception of its purpose. Evidence will emerge to prove that he maintained attitudinal consistency toward the press as Fourth Estate.


3. It should be noted here that the Supreme Court has held that newspapers, magazines, pamphlets, films, and broadcasting are included in the term "press." CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (broadcasting); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (motion pictures); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948) (motion pictures, newspapers, radio); Lovell v. City of Griffin, 303 U.S. 444 (1938) (pamphlets and leaflets). As the Court in *Lovell* noted, "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." 303 U.S. at 452.

4. In a speech to the Yale Law School Sesquicentennial Convocation in November, 1974, Stewart outlined his views on the press. Making that address only three months after Richard M. Nixon resigned as President of the United States, Stewart applauded the performance of the press in the Viet Nam era and the Watergate scandal. He said that the American press had performed "precisely the function it was intended to perform by those who wrote the First Amendment of our Constitution." Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975) [hereinafter cited as *Or of the Press*].


II. STEWART’S GENERAL APPROACH

Having had journalism experience himself,10 Stewart advocated a preferred position for the organized press, which he understood the framers of the Constitution to have intended in order to assure the press’ autonomy. In a seminal speech to the Yale Law School in 1974,11 Stewart stated that “the Free Press clause extends protection to an institution,”12 unlike other provisions in the Bill of Rights that “protect specific liberties or specific rights of individuals.”13 He indicated that the freedom of the press clause did not simply guarantee freedom of expression to newspaper publishers, because if that were so, the “Free Press guarantee . . . would be a constitutional redundancy.”14

Stewart thus developed his theory that the press was constitutionally granted a “preferred status,” a tenet roundly criticized by some commentators.15 But this was an important element of Stewart’s view

10. Justice Stewart once told an interviewer that, having served as chairman of the Yale Daily News, and having worked two summers for the Cincinnati Times-Star, he “flirted” with the idea of getting a job as a journalist after graduating from Yale. But, he said, “I didn’t seriously flirt with it.” Volk, Interview with Potter Stewart, 29 HARV. LAW REC. 12 (1959).

11. Or of the Press, supra note 4.
12. Id. at 633.
13. Id.
14. Id.

Professor Nimmer supported the idea of a constitutionally protected press in an article written before he had become aware of Stewart’s speech. Nimmer, Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?, 26 HASTINGS L. REV. 639, 639 n.1 (1975). Nimmer indicated that freedom of the press “as a right recognizably distinct from that of freedom of speech is an idea whose time is past due.” Id. at 658. Striking a tone similar to that of Stewart, Nimmer said, “As nature abhors a vacuum, the law cannot abide a redundancy.” Id. at 640.

Professor Lange disagreed with the view of both Stewart and Nimmer. Lange, The Speech and Press Clauses, 23 U.C.L.A. L. REV. 77 (1975) [hereinafter cited as Lange]. “Divorcing speech from the press,” Lange said, “means ripping away the essential underpinnings of the press as well.” Id. at 107. He predicted that the recognition of a separate constitutional status for the institutional press would present “distinct threats to freedom of expression which can best be avoided by serious efforts to reconcile, rather than to distinguish, the freedoms of speech and press.” Id. Lange was, therefore, “persuaded that the first amendment ought not to be read the way Professor Nimmer and the Justice propose.” Id. at 77.


15. Stewart’s address at Yale elicited responses ranging from the highly positive to the highly negative, with some commentators registering general agreement while noting minor flaws in his reasoning.

Professor Bezanson noted that a new theory of press freedom had indeed begun to emerge from the Supreme Court. He said that Stewart’s “Fourth Estate approach affords that degree of constitutional protection necessary to maintain an independent press capable of monitoring government in every respect.” Bezanson, The New Press Guarantee, 63 VA. L. REV. 731, 753 (1977) [hereinafter cited as Bezanson]. While he found that Stewart’s theory “does not comport com-
of the press as Fourth Estate. In his speech at Yale, entitled *Or of the Press*, he observed, "The primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches. . . . The relevant metaphor, I think, is the metaphor of the Fourth Estate."16

Strictly speaking, Stewart's application of the Fourth Estate metaphor to the constitutional provision for the press was anachronistic; although the term is now commonly used as a simple synonym for the press,17 it was in fact a school of thought developed in Great Britain completely with the decided cases or with the precise contours of the theory advanced in this article," Bezanson said that it "serves effectively as a vehicle for understanding many of the Court's opinions." *Id.* at 754.


One commentator said that the basic question to be considered was whether the press, however it is defined, was "entitled to any different treatment because it is the 'press'?" Abrams, *The Press IS Different: Reflections on Justice Stewart and the Autonomous Press, 7 Hofstra L. Rev.* 563, 570 (1979) [hereinafter cited as Abrams]. Abrams answered this question affirmatively, and agreed with Stewart that the press is different, owing to its significance in American life.

Anthony Lewis, on the other hand, opposed Stewart's views. Lewis, *A Preferred Position for Journalism, 7 Hofstra L. Rev.* 595 (1979) [hereinafter cited as Lewis]. Stewart had said that the primary purpose of the constitutional guarantee of a free press was to create a Fourth Estate as a check on the three official branches. This theory of press as Fourth Estate, Stewart claimed, was the "constitutional understanding . . . that provides the unifying principle underlying the Supreme Court's recent decisions dealing with the organized press." *Or of the Press, supra* note 4, at 635. Lewis argued, however, that "No Supreme Court decision has held or intimated that journalism has a preferred constitutional position." Lewis, *supra*, at 605. Lewis referred to Stewart's analysis of the Supreme Court's holdings in libel cases starting with *New York Times*, Co. v. Sullivan, 376 U.S. 254 (1964), and characterized Stewart's explanation of the *New York Times* case as "well, breathtaking." *Id.* at 600. He observed that Professor Shiffrin considered that Stewart's explanation of *New York Times* did "violence to the language and underlying philosophy" of the case. *Id.* at 601.

Robert Sack, in addition to discussing the Supreme Court's treatment of the freedom of press clause, and offering a perspective on confidential news sources, analyzed the term "institutional press." Sack, *Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press, 7 Hofstra L. Rev.* 629 (1979). Sack suggested that arguments about the definition of "press" were ill-founded because, in any event, "If what the press does receives sufficient protection, who the 'institutional press' is becomes unimportant." *Id.* at 632-33.

Judge James L. Oakes discussed Stewart only briefly in a lengthy article which focused on the actual malice rule, the rule that provides the standard of recovery for public officials and public figures in libel actions. Judge Oakes criticized Stewart's thesis in terms of "the absence of secure historical support for the differentiation of the clause." Oakes, *Proof of Actual Malice in Defamation Actions: An Unsolved Dilemma, 7 Hofstra L. Rev.* 655, 675 (1979). Oakes acknowledged, however, that,

Justice Stewart's emphasis on the functional aspects of the press, particularly its role as a "Fourth Estate," is nonetheless valuable. The real contribution of the Justice's thesis is to demonstrate the principal role that the "checking function" plays in first amendment theory and the system of free expression generally.

*Id.* at 676.

16. *Or of the Press, supra* note 4, at 634.

during the nineteenth century when the British press attempted to establish its role as "a link between public opinion and the governing institutions of the country." Having suffered a history of governmental interference that obviously antedated but also followed the growth of the American press, British newspaper publishers and pamphleteers alike strove to "stake a claim for a recognised and respectable place in the British political system . . . and to justify breaking away from government repression and subsidies." The journalists' goal was to be perceived as a fourth, independent branch of government, *i.e.*, the popular voice of policy and law-making outside Parliament.

And, despite opposition from government leaders who saw the press as a font of mischief and corruption, independent newspapers gained a stronghold in public consciousness. Its advocates trumpeted the success, frequently with hyperbole, as did one nineteenth-century commentator who referred to the newspaper as "the Giant which now awes potentates."!

*States*, 17 J. PUB. LAW 68 (1978); Bone, *Corrections and the Fourth Estate*, 32 FED. PROBATION 50 (1968). Both authors used the term "Fourth Estate" in the texts of their articles simply to refer to the news media.

And in *J. Drewry, Concerning the Fourth Estate* (1942), the author examined in thirteen chapters such topics as *What's Wrong With the Editorial Page?—Some Complaints and Remedies*, and *Can You Read a Newspaper?—The Aims and Functions of Journalism*. Despite the book's title, the author never explained the historical underpinnings of the term Fourth Estate.

19. *Id.* at 26-27.
20. With reference to a member of the House of Lords, a parliamentary historian said that Lord North had asserted in 1776 that:

> the prevailing avidity for reading newspapers arose, not from any praiseworthy desire for self-improvement but from an idle and foolish curiosity, and that newspapers were therefore luxuries which ought to and could very well bear additional taxation. He said that he despised the abuse showered upon him daily by the Press.


Aspinall also described the attitude of one William Cobbett, "an unrepentant anti-Jacobin Tory journalist," who said that "the newspaper Press, corrupt and degraded, had always been and always would be the curse of the country. To it we owed the American and French Revolutions, the Irish Rebellion and the Bonapartist usurpation." *Id.* at 10.

Cobbett, said Aspinall, also warned against letting newspapers into the hands of military men. Cobbett advised:

> I appeal to any commanding officer who has continued long settled with his regiment, or to any captain of a man-of-war, whether your "scholars", as they are called, are not in general the worst of soldiers and sailors. The conceit makes them saucy; they take the lead in all matters of mischief; they are generally dirty and drunkards, and the lash drives them to desert.

*Id.* at 11.

Andrews acknowledged that it had taken the press a while to get to the point of inspiring awe in potentates, however. He said that the press, "Dependent as it was on the progress of public enlightenment, liberality, of general liberty and knowledge; checked by the indifference of a people or the caprices of a party; suppressed by a king, persecuted by a parliament, harassed by a
Probably the best-known of the Fourth Estate advocates was Thomas Carlyle, who declared in 1829 that even the functions of the Church of England were becoming "more and more superseded" by the press because "[t]he true Church of England, at this moment, lies in the Editors of its Newspapers." And it was Carlyle whom Stewart quoted in his speech at Yale: "Burke said there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all." The Fourth Estate view was eventually "Americanized" to suit our system of government; whereas the three estates in England had been the clergy, nobility, and House of Commons, the three estates in American terminology became the executive, legislative, and judicial branches of government. This Fourth Estate role has not gone un-criticized by legal scholars and commentators, especially in its pure sense as "fourth branch of government." But the essence of the Fourth Estate concept is the press' independence from governmental licensor, burnt by a hangman, and trampled by a mob," had been "slow in climbing to its present height." 


23. Id. at 191.

Professor David Lange surmised that it was T.B. Macaulay who first referred to the reporters at Parliament as the Fourth Estate in an essay, published in 1828 in Hallam's Constitutional History, which appeared in the Edinburgh Review. Lange said that Carlyle's attributing the remark about the Fourth Estate to Burke was made "evidently . . . in error, since the statement itself does not appear in Burke's writings." Lange, supra note 15, at 90 n.79.

24. The Estates of the Realm were the Lords Spiritual, the Lords Temporal, and the Commons, "although the term is now anachronistic." BREWER'S DICTIONARY OF PHRASE AND FABLE 383 (rev. ed. 1970).

25. D. CATER, THE FOURTH BRANCH OF GOVERNMENT 10 (1959) [hereinafter cited as CATER]. Cater said the American Fourth Estate "operates as a de facto, quasiofficial fourth branch of government, its institutions no less important because they have been developed informally and, indeed, haphazardly." Id. at 13. Cater explained that the reporter in Washington is not only a recorder of government, but is also a participant. Cater continued:

He as much as anyone, and more than a great many, helps to shape the course of government. He is the indispensable broker and middleman among the subgovernments of Washington. . . . He can illumine policy and notably assist in giving it sharpness and clarity; just as easily, he can prematurely expose policy and, as with an undeveloped film, cause its destruction. 

Id. at 7.


Boyce considered the Fourth Estate philosophy a "mythical view." He observed:

It was true that the press was replacing the pamphlet and the public meeting as influencers of public opinion; that the House of Commons was often out of touch with public feeling; that the journalist in the nineteenth century was a respected, even a formidable figure, who had acquired for himself rights to search out and publish political information. . . . [but] it was an undeniable fact that the press, or at least a large section of it, was by no means free from the influence of the other "estates."
influence, interference, and control in order that unbiased, provocative commentary might be made. This seems to be what Stewart meant when he used the metaphor, for he never literally advocated a fourth branch of government. Nevertheless, he remained firmly committed to his view of the press as instigator of debate, watchdog of governmental functions, and adversary of governmental figures when occasion demands.

As such, Stewart’s perception of the Fourth Estate seems rooted in what Professor Vincent Blasi called the “checking” value that “free speech, a free press, and free assembly can serve in checking the abuse of power by public officials.” To bolster the checking function, Stewart argued that the press was a constitutionally protected business. In his speech at Yale, he observed, “The publishing business is, in short, the only organized private business that is given explicit constitutional protection.” Because autonomy is a crucial element of the classic Fourth Estate, Stewart regarded institutional autonomy as a necessity. Once the press’ autonomy is threatened or otherwise compromised, its power is considerably diluted; the lot of the Soviet press probably best

Boyce, supra note 18, at 26.

In Boyce’s view, the only time that the press successfully functioned as Fourth Estate was during World War I when, because of the party truce in Parliament, it was left to the press “to initiate policy, criticise its application, control the executive, and act as an organ of public opinion.”

However, Boyce maintained that the financial bases of newspapers created an inherent dependence on others, a point also addressed by David L. Paletz and Robert M. Entman when they referred to the “passion” of media corporations “for maximum profits.”

In addition, Paletz and Entman observed:

27. Blasi, The Checking Value in First Amendment Theory, AM. BAR FOUND. RESEARCH J. 521, 527 (1977) [hereinafter cited as Checking Value]. Blasi’s theory of the checking value is evidently what Stewart deemed the primary function of the Fourth Estate. But when Anthony Lewis criticized Stewart’s Or of the Press, he remarked, “The press is not a separate estate in the American system. Its great function is to act for the public in keeping government accountable to the public.” Lewis, supra note 15, at 626. This illustrates what appears to be a semantic problem with the term “Fourth Estate” and the way Stewart understood it. Of course, Lewis had other quarrels with Stewart’s “institutional autonomy” idea that went far beyond terminology. See note 15 supra.

28. Or of the Press, supra note 4, at 633.
illustrates this point.\textsuperscript{29}

In order to contribute to the safeguarding of the press' autonomy, Stewart argued that the members of the press were entitled to privileges pertaining to their workplaces and work products. For example, in one dissent, he maintained that police searches of newsrooms were unconstitutional, and that subpoenas should be required for investigators to gain access to newsroom files.\textsuperscript{30} He was also convinced that reporters were entitled to the privilege of withholding information from investigative bodies.\textsuperscript{31}

Stewart's approach was functional insofar as it enabled him to justify protecting the press from governmental interference. Nevertheless, in order to maintain philosophical consistency, he occasionally took positions on the Court that not only appeared to be dramatic departures from majority positions, but also suggested that he responded uncertainly to situations in which the press was not serving its traditional Fourth Estate functions of enlightening the public on governmental matters, or otherwise generating public debate on policy and politics.

With the historical basis of the press' development in mind, Stewart could readily address issues that even smattered of governmental interference with the press' functions. Evaluating conflicts out of that realm proved troubling, however, and Stewart appeared ill-equipped to cope with variations. For example, Stewart was at first inflexible in his consideration of the actual malice rule which provides the test for recovery of damages in libel suits brought by public officials or public figures.\textsuperscript{32} While he could easily justify the rule's application to government officials—traditional Fourth Estate targets—he was strongly opposed to its extension to other types of plaintiffs who evidently needed neither watchdogs nor adversaries (such as a book vendor, an athletic director and a retired Army general turned political activist).\textsuperscript{33}

In some respects, Stewart remained the dissenter, his views unper-

29. The Soviet press, said Cater, "is an instrument of state and party for the 'education' of the people." \textit{Cater, supra} note 25, at 19.

One example of Soviet news judgment is shown by former Soviet premier Nikita Khrushchev's response to a query from Western reporters on why a particular May Day speech made in West Berlin by an American trade-union official was not broadcast or published in Russia. "We only publish speeches that contribute to friendly relations between countries," he said. \textit{Mr. Khrushchev and the Trade-Unionists of America}, \textsc{N.Y. Times}, Sept. 22, 1959, quoted in \textsc{Versions of Censorship} 126 (J. McCormick & M. Maclnnes eds. 1962).


suasive both to the Court majority and to critics. Nonetheless, because of the framework in which Stewart operated, he did maintain an attitudinal consistency that is exemplified by his performances in the cases treated here.

III. LIBEL: LIMITING ACTUAL MALICE

Throughout the Supreme Court’s development of guidelines for state libel laws, Stewart clearly indicated his belief that the press’ right to criticize the government, government officials, and their policies should be far-reaching. He showed a marked reluctance, however, to extend to the press the same constitutional protection for reporting on non-governmental public issues. He made known his view that media discussion of non-governmental public issues demands a different set of standards in order to protect the reputations of private persons who have no bearing on government or governmental policy, but who are drawn into the glare of publicity.

A. The Court heeds rising voices, and libel law is changed.

In line with his philosophical distinctions, Stewart supported the Court’s New York Times Co. v. Sullivan decision, which enunciated the actual malice rule and made it applicable to public officials seeking to recover damages for libel from critics of their official conduct. Such plaintiffs, said the Court, must prove “that the [defamatory falsehood] was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” This ruling was especially meaningful in that it was formulated to protect the press in reporting on matters of public concern involving government.

35. See, e.g., Abrams, supra note 15, at 572; Lewis, supra note 15.
Abrams noted:

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

Lewis, supra note 15, at 572 (citations omitted).

37. Id. at 279-80.
In *New York Times*, a libel suit arose from factual errors in an editorial advertisement taken out in support of Dr. Martin Luther King and a demonstration by blacks at an Alabama college. Although L.B. Sullivan, one of three elected commissioners of Montgomery where the demonstration occurred, was not named in the advertisement, he said that he would be identified by the citizens as responsible because of his position as commissioner of public affairs. He filed suit, claiming that the alleged offensive behavior at the campus would be attributed to him and would thereby harm his reputation.

Because Sullivan was a public official and the matter was of public concern, the Court held that unless he could prove that the defendant acted with actual malice, he could not recover damages. Stewart joined the court in addressing what may be considered a Fourth Estate-inspired aim of freedom to criticize government openly.

**B. Stewart seeks some limits, and alternatives are urged.**

The Court, in responding to the "spectre of seditious libel" raised in *New York Times*, had established precedent for the burden of proof required of government officials in order to recover damages in civil libel proceedings. But, Stewart's Fourth Estate view apparently made it difficult for him to deal consistently with the rule's evolution. His perception of a watchdog, perhaps even adversary, press would mandate the use of such a strict standard of recovery only for the government officials who should be scrutinized. Thus, for some time after enunciation of the actual malice rule, Stewart approved its use only in the limited context of defamation actions by public officials.

38. D. Gillmor & J. Barron, Mass Communication Law: Cases and Comment 244 (3d ed. 1979) [hereinafter cited as GILLMOR & BARRON]. The authors remarked that "Attorneys for the Times had definitely raised the spectre of seditious libel, and the court responded." *Id.*

Dean Leonard W. Levy provided an invaluable discussion of seditious libel in his book *Freedom of Speech and Press in Early American History: Legacy of Suppression* 1-17 (1963) [hereinafter cited as *LEVY*]. Developed at common law, seditious libel was a misdemeanor crime actionable against "any comment about the government which could be construed to have the bad tendency of lowering it in the public's esteem or of disturbing the peace... thereby subjecting the speaker or writer to criminal prosecution." *Id.* at 10.

Levy noted that the prevailing view was that a libel against a government official was a greater offense than a libel against a private individual, and the truth or falsity of the libel was immaterial, according to a Star Chamber ruling of 1606. *Id.* at 9.

"Indeed," Levy pointed out, "[judges] proceeded on the theory that the truth of the libel made it even worse because it was more provocative, thereby increasing the tendency to breach of the peace or exacerbating the scandal against the government." *Id.* at 13.

39. *New York Times* was a civil libel proceeding, but the same year, Stewart voted with the majority in Garrison v. Louisiana, 379 U.S. 64 (1964), to hold that the actual malice standard was applicable to criminal libel cases as well. Thus, states were prohibited from imposing "criminal sanctions for criticism of the official conduct of public officials" unless actual malice were shown. *Id.* at 67.
For example, Stewart concurred with the Court's decision in *Rosenblatt v. Baer*, in which the majority stated that the "public official" designation should apply to "government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." But, in a separate opinion, Stewart signalled his resistance to the application of the actual malice rule to libel plaintiffs involved in non-governmental issues.

Expressing concern about the extent to which the standard might be taken, Stewart stressed that the actual malice rule should be applied only when "a State's law of defamation has been unconstitutionally converted into a law of seditious libel." Stewart was referring, of course, to the common-law crime of seditious libel which historian Leonard W. Levy has described as an "accordion-like concept" that consisted of "criticizing the government: its form, constitution, officers, laws, symbols, conduct, policies, and so on." Prosecutions for seditious libel, Levy said, "became the government's principal instrument for controlling the press."

Stewart later abandoned this strict criterion, and he readily applied the actual malice rule when writing for the Court in a series of cases that dealt with public affairs reporting. Most significantly, Stewart said that candidates for public office, like incumbents, should be required to prove actual malice in defamation actions. In *Monitor Patriot Co. v. Roy*, Stewart stated for the majority that charges of criminal conduct, "no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office for purposes of application of the 'knowing falsehood or reckless disregard' rule of *New York Times Co. v. Sullivan*.

Addressing a similar problem in *Ocala Star-Banner Co. v. Damron*,

41. *Id.* at 85.
42. *Id.* at 93 (Stewart, J., concurring).
44. *Id.* at 11.
47. *Id.* at 277.
Stewart said that public discussion about a candidate for public office "presents what is probably the strongest possible case for application of the *New York Times* rule." It was therefore obvious that Stewart could justify expanding the rule's use to candidates, in what might be considered a classic Fourth Estate approach. In this sense, the press was empowered to facilitate public debate on elections and participate to a significant extent in the electoral process without fear of large judgments lodged against it in case of error.

Having thus championed the use of the actual malice rule in suits brought by public officials and candidates, Stewart resisted the notion that other types of plaintiffs should bear the same burden of proof as to defamatory matter. This view was evidenced by his joining Harlan's plurality opinion in companion cases *Curtis Publishing Co. v. Butts* and

49. *Id.* at 300-01.
50. Commentary on and evaluation of candidates for public office should actually be considered one of the more elementary functions of the Fourth Estate. The political candidate, openly seeking public attention and support, should expect to be fair game for the press. See generally Boyce, *supra* note 18.
51. Stewart pointed out in *Time, Inc. v. Pape*, 401 U.S. 279 (1971), that one result of the *New York Times* rule was its addition, to the tort law of the individual states a constitutional zone of protection for errors of fact caused by negligence. The publisher who maintains a standard of care such as to avoid knowing falsehood or reckless disregard of the truth is thereby given assurance that those errors that nonetheless occur will not lay him open to an indeterminable financial liability. *Id.* at 291.
52. Stewart joined the Court majority to find that nondefamatory matter, even as to private individuals, summons up the actual malice rule when the plaintiff seeks to recover damages under a theory of "false light" privacy invasion. *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974); *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

False-light actions closely resemble libel because a false-light invasion presents to the public an untrue image of a person who finds it offensive. Pember and Teeter observed that the false-light form of privacy action "is actually a disguised libel action, which would not pass muster if cast as the latter." Pember & Teeter, *Privacy and the Press Since Time, Inc. v. Hill*, 50 WASH. L. REV. 57, 76 (1974).

In *Hill*, the actual malice standard was held applicable to false-light actions because the material in question was both nondefamatory and a matter of public interest. In that case, the James Hill family sued the publishers of *Life* magazine because, they said, an article and photo essay concerning their experiences while held hostage in their home had misrepresented the situation, putting them into a false light and invading their privacy. Although the Hills had unwillingly become public figures, the *New York Times* standard must be applied, the Court said.

Stewart joined the *Hill* ruling, even though he had said only a year earlier that actual malice should be applied only when "a State's law of defamation has been unconstitutionally converted into a law of seditious libel." *Rosenblatt v. Baer*, 383 U.S. 75, 93 (1966) (Stewart, J., concurring).

In *Cantrell*, the plaintiffs won in the district court under an actual malice standard, and Stewart wrote for the Court to affirm the judgment without questioning the propriety of requiring proof of actual malice by private plaintiffs cast in a false light before the public. Stewart said that because the knowing-or-reckless-falsehood instruction was approved by the litigating parties, the case presented "no occasion to consider whether . . . the constitutional standard announced in *Time, Inc. v. Hill* applies to all false-light cases." 419 U.S. at 250-51.
In these two cases, Harlan differentiated between the standard of recovery he advocated for public officials and for public figures, i.e., those persons who are “involved in issues in which the public has a justified and important interest.” As to the latter, Harlan recommended holding public figures to a showing of “highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers,” instead of actual malice.

Harlan’s standard was geared toward allowing recovery for recklessness in reporting on public figures, without requiring plaintiffs to sustain the burden of proof demanded of public officials. However, Harlan’s opinion did not command a majority, either in the five-to-four *Butts* decision or the unanimous *Walker* ruling. Warren voted with the majority in *Butts* in order to allow the plaintiff to recover substantial damages, but he also joined the minority to reject Harlan’s standard. And in *Walker*, Warren was one of five justices who relied on the actual malice standard. As a result, the *Butts/Walker* decisions set actual malice as the controlling standard for public figures.

Both Wallace Butts and Edwin Walker were public figures who were seeking damages for alleged libels published about them. Butts had been a university athletic director falsely charged by the *Saturday Evening Post* with participating in a scheme to fix a football game. Because the *Post* could have foreseen the harm to Butts’ career from the false story and because the *Post* had had adequate time to corroborate the sinister allegations in it but had not done so, Harlan characterized the publication of the story as “highly unreasonable conduct.”

In *Walker*, plaintiff Walker was a former Army general who was erroneously described by the Associated Press news service as having led a charge against federal marshals during a racial disturbance at the University of Mississippi. Whereas Butts “may have attained [public

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54. *Id.* at 134.
55. *Id.* at 155.
56. In referring to Harlan’s standard, Warren said:

> I cannot believe that a standard which is based on such an unusual and uncertain formulation could either guide a jury of laymen or afford the protection for speech and debate that is fundamental to our society and guaranteed by the First Amendment. . . . I therefore adhere to the *New York Times* standard in the case of “public figures” as well as “public officials.”

*Id.* at 163-64 (Warren, C.J., concurring).

57. Warren, Black, Douglas, Brennan, and White found actual malice to be the appropriate standard. *Id.* at 163 (Warren, C.J., concurring); *Id.* at 170 (Black, J., dissenting) (joined by Douglas); *Id.* at 172 (Brennan, J., concurring in part and dissenting in part) (joined by White).
Harlan said that Walker had purposefully thrust himself into "the 'vortex' of an important public controversy," commanding attention in the midst of the disturbance. Stewart joined Harlan in voting to reverse the lower court ruling for Walker because he did not consider the Associated Press' conduct to be "highly unreasonable."

However, the Associated Press apparently had not acted with actual malice, either, so Stewart's insistence on the "highly unreasonable conduct" standard was no doubt an effort to avoid applying actual malice outside of the public official context. Despite the news story's having been part of a significant social drama, a certain topic for Fourth Estate evaluation, Stewart sought to maintain a definite distinction between those individuals who hold public office and those who do not.

In *Rosenbloom v. Metromedia*, Stewart continued his stand against application of the *New York Times* rule to plaintiffs other than public officials. In *Rosenbloom*, the plaintiff had been arrested and charged with criminal obscenity in connection with magazines he distributed. A local radio station had broadcast news of the arrest and had, in effect, prejudged the obscenity of the material in his possession. Plaintiff Rosenbloom, a private individual, was acquitted of the charges, and he sued for libel. The jury awarded him damages, but the court of appeals reversed; the Supreme Court upheld the appellate decision which ruled that *New York Times* was applicable.

With the Supreme Court plurality deeming the actual malice standard appropriate for private individuals involved in matters of public interest, it was not surprising that Stewart should join Marshall's dissent, which stressed among other points that recovery of damages by private citizens should not depend on proof of actual malice. After distinguishing the facts in *Rosenbloom* from those in *New York Times*, Marshall quoted in part from Stewart's *Rosenblatt* concurrence:

> Here, unlike the other cases involving the *New York Times* doctrine, we are dealing with an individual who held no public office, who had not taken part in any public controversy, and who lived an obscure private life. . . . The protection of the reputation of such anonymous persons "from unjustified invasion and wrongful hurt reflects

58. Id. at 155.
59. Id.
60. 403 U.S. 29 (1971).
61. Id. at 31-32.
62. Marshall's major points were that recovery of damages by private citizens should not be dependent upon proof of actual malice, that individual states should determine standards of fault in private defamation actions, and that recovery of damages should be based on proven injury. Id. at 79-87 (Marshall, J., dissenting).
no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.”

But Stewart’s concern for the private individual was countered by his support of the press as autonomous institution; he and Marshall perceived a threat to press freedom because of the way in which juries were allowed to award punitive damages in almost any amount without any proof of actual loss. A jury’s “free wheeling discretion,” Marshall said, “presents obvious and basic threats to society’s interest in freedom of the press.” In order to resolve the apparent inequity of mandating a private individual’s recovery on the same standard as a public official’s, yet restrain juries from awarding “windfalls” on a lesser standard with a resultant threat to press freedom, Marshall suggested that individual states should determine standards of fault in defamation actions, and that recovery of damages should be based on proven injury.

This approach seemed best to solve Stewart’s quandary. By restricting awards by juries to a showing of proved, actual injuries by the plaintiff, the jury’s “wide-ranging discretion” should be eliminated and the press would not impose self-censorship due to fears of large judgments. “At the same time,” Marshall noted, “society’s interest in protecting individuals from defamation will still be fostered.”

C. The majority reworks actual malice, as a compromise is found.

Stewart found this approach consonant with his dual concerns, and he rejoined the Court majority when it adopted some of the elements of Marshall’s *Rosenbloom* reasoning in *Gertz v. Robert Welch, Inc.* There, the Court redefined the term public figure, and modified the standard of recovery for private individuals involved in public issues. The Court ruled that private plaintiffs must prove actual malice for recovery of presumed and punitive damages—i.e., damages awarded because of the presumed harm done to the plaintiff without proof to substantiate it, and damages awarded simply to punish the

63. *Id.* at 78 (Marshall, J., dissenting) (footnotes omitted).
64. *Id.* at 84 (Marshall, J., dissenting).
65. *Id.* at 86 (Marshall, J., dissenting).
66. *Id.* at 84 (Marshall, J., dissenting).
68. The Court stated that persons who attain the status of public figure, 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.

*Id.* at 345.
defendant. However, private plaintiffs need not prove actual malice to recover for actual injury done because of the defamation, and assessment of actual injury, the Court said, would not be limited to "out-of-pocket loss." In addition, each state was to establish its own standards of media liability as to private individuals as long as the state did not impose liability without fault.

Stewart evidently was satisfied with the compromise, finding the limited reach of actual malice to private individuals appropriate. Having attempted unsuccessfully to separate completely the private persons, public figures, and public officials, reserving the New York Times standard exclusively for the latter, Stewart found such strict classifications to be unworkable. The compromise seemed to be the most efficient manner in which to combine protection for the press in its Fourth Estate pursuits, with protection for the defamation plaintiff who was not part of the government.

Although the actual malice rule had evolved far beyond the New York Times holding only as to public officials, Stewart voted with the majority in libel cases for the remainder of his tenure, the single ex-

69. Id. at 350.

70. Id.

71. Id. at 347.

72. After Stewart had accepted the actual malice standard for public figures, he was concerned that "public figure" be properly defined. He joined the Court in delineating aspects of public-figure status in Time, Inc. v. Firestone, 424 U.S. 448 (1976); Hutchinson v. Proxmire, 443 U.S. 111 (1979); and Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979).

In Firestone, Time magazine had erroneously reported in its "Milestones" column that a divorce had been granted Mary Alice and Russell Firestone on the grounds that Mary Alice had committed adultery. Having unsuccessfully demanded a retraction, Mrs. Firestone sued for libel.

Stewart joined Rehnquist's opinion for the Court which vacated and remanded the case to the Florida Supreme Court on the ground that a proper showing of petitioner's fault had not been made in the Florida courts. Rehnquist rejected Time's claim that Mrs. Firestone was a public figure, 424 U.S. at 453-55; he denied that Time had complete protection for reporting matters pertaining to judicial proceedings when actual malice had not been established, id. at 455-57; and he denied that Mrs. Firestone had relinquished her right to collect damages because she did not claim injury to her reputation, id. at 460.

Stewart also joined Justice Powell's concurring opinion that focused on whether Time had been irresponsible. Powell and Stewart were not convinced that Time had acted negligently, proof of which was necessary, Powell said, before damages could be awarded to Mrs. Firestone. Id. at 470 (Powell, J., concurring).

In Hutchinson and Wolston, two separate decisions handed down on the same day, the Supreme Court elaborated on Gertz and Firestone in determining that neither Hutchinson nor Wolston was a public figure. Stewart joined both opinions.

Hutchinson was a research scientist who filed suit against U.S. Senator William Proxmire of Wisconsin, after being named recipient of Proxmire's "Golden Fleece Award." Proxmire had criticized the use of federal funds for Hutchinson's work on aggressive behavior in monkeys. In a speech to Congress, which was distributed to some 275 members of the news media, and in highlights of this speech, which were distributed via newsletter to about 100,000 people, Proxmire
ception being *Herbert v. Lando.*\textsuperscript{73} In *Herbert*, Stewart dissented and expressed outright annoyance with the Court’s approval of inquiry into the editorial process as an aspect of establishing proof of actual malice, the focal point of the Court’s decision.

The case concerned retired Army officer Anthony Herbert, who served in Viet Nam and became a public figure after accusing his military superiors of gross wrongdoing, and publishing a book that recounted his wartime experiences. He was later the subject of a television news documentary produced for CBS television by Barry Lando, who also wrote a related article for *Atlantic Monthly*. Herbert objected to Lando’s treatment of the issues and the portrayal of him, and he filed suit for libel against Lando, CBS, Mike Wallace (narrator of the documentary) and *Atlantic Monthly*.

Having conceded that he was a public figure, Herbert set about constructing his case to meet the actual malice test for recovery of damages. In order to prove actual malice, he attempted to illuminate Lando’s “editorial processes” by compelling him to answer questions regarding his state of mind during program and article preparation.

Lando resisted Herbert’s attempts, claiming first amendment protection. The Supreme Court majority agreed with the trial court’s finding for Herbert and held that “*New York Times* and its progeny made it essential to proving liability that the plaintiff focus on the conduct and state of mind of the defendant.”\textsuperscript{74} Stewart dissented from the Court’s holding on the grounds that inquiring into the editorial process was unnecessary to prove actual malice. He contended that a libel suit addresses only what is published; “What was not published has nothing

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\textsuperscript{73} 441 U.S. 153 (1979).

\textsuperscript{74} *Id.* at 160.
Common-law malice, Stewart said, was indeed determined by inquiring "why" of an actor's motives. But actual malice, he continued, "has nothing to do with hostility or ill will, and the question 'why' is totally irrelevant." And, "totally irrelevant pretrial discovery is intolerable," he maintained.

Although the majority argued that the actual malice element of knowing falsity is difficult to prove with only objective evidence, Stewart apparently thought this difficulty necessary to protect publishers—and perhaps he understood the *Herbert* decision to sanction the mingling of "malice" terms. Such ambiguity, from Stewart's standpoint, could conceivably result in curtailment of press freedom through self-censorship, and would be best avoided by maintaining a clear distinction between common-law malice and actual malice.

This view was yet another manifestation of Stewart's Fourth Estate philosophy, which served him well while actual malice was confined to public officials and aspirants to public office. So long as those types of defamation plaintiffs were severed from the public figure and private individual classifications, Stewart was able to apply the rule handily in the interests of open and vigorous discussion of governmental affairs by an independent institution. Of the seven cases immediately following *New York Times*, all of which addressed either the public official or public figure question, or the definition of actual malice, Stewart wrote the majority opinion for four and concurred in one.

In contrast to his prolificacy on public officials, Stewart wrote no opinions on the public figure/private individual defamation recovery issues. This suggests that he may have been uncomfortable with articulating the balance he struck between his traditional ideas on press freedom and his sensitivity to the needs of persons who have no bearing on

75. Id. at 200 (Stewart, J., dissenting).
76. Id. at 199 (Stewart, J., dissenting).
77. Id. at 202 (Stewart, J., dissenting).
78. Id. at 170.
government or governmental policy, but nonetheless become objects of media attention. It seems likely that Stewart was unsure of what would be appropriate approaches to the complexities of those issues, owing to his somewhat singleminded perception of the actual malice rule vis-a-vis the Fourth Estate. Notwithstanding his Herbert dissent, it is evident that once the Court went beyond the seemingly rudimentary elimination of seditious libel remnants, Stewart was either unwilling or unable to express conclusory views independent of the justices whose opinions he joined.

IV. Free Press Versus Fair Trial: Opening Wider the Courtroom Doors

The first amendment's guarantee of press freedom has sometimes been perceived to conflict with the sixth amendment's guarantee to a criminal defendant of a speedy and public trial by an impartial jury. The sixth amendment has been secured to the states by the fourteenth amendment's guarantee that no person shall be deprived of "life, liberty, or property, without due process of law." Recognizing the importance of protecting both rights, Stewart showed a willingness to provide the press with much-needed latitude, to be curtailed only when due process appeared to be in actual jeopardy.

The press theoretically has the right to report on any trial proceedings as part of its coverage of government. The Supreme Court stated in Craig v. Harney, "There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it."

But unlike the legislative and executive branches, the judicial

83. U.S. Const. amend. XIV, § 1.
84. Contrary to the majority view, Stewart opposed the use of prior restraints on any trial information. See Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).
In the Editor's Introduction to a law review symposium on Nebraska Press Ass'n v. Stuart, the author said:
For years the so-called fair trial/free press issues raised in [Nebraska Press Ass'n v. Stuart] have prompted intense debate within the legal profession and the popular press. . . . As such, the debate is characterized not only by the predictable positions taken by some members of the interested groups on both sides of the debate—the media and the criminal defense bar—but also by a high degree of interesting unpredictability among other members of these groups as well as among judges, academicians, and others.

The symposium offered viewpoints from eighteen authors on the matter of fair trial/free press and on the Nebraska Press case itself.
85. 331 U.S. 367 (1947).
86. Id. at 374.
branch has private citizens as major participants in some proceedings, and their constitutional rights must be safeguarded. In the view of some, pretrial and trial press coverage can deny the defendant his constitutional right to a fair trial.\(^8\)

Stewart's Fourth Estate philosophy embraced coverage of trials and made a significant difference to his consideration of free press versus fair trial issues. Although he recognized the importance of protecting a defendant's due process rights,\(^8\) and was unwilling to find a constitutional basis for reporters to cover closed pretrial judicial proceedings,\(^9\) Stewart found himself decidedly in the minority when it came to prior restraints on information salient to a trial\(^9\) and television coverage of trials in progress.\(^9\)

**A. Courts identify the conflict, and its parameters are defined.**

As a circuit judge, Stewart first addressed the free press/fair trial issues in *Briggs v. United States*,\(^9\) which provided an introduction for Stewart's first such case at the Supreme Court, *Marshall v. United States*.\(^9\)

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87. Two empirical studies suggest that, aside from publicizing a defendant's confession, the most prejudicial information is simply the announcement of a suspect's arrest. Tans & Chaffee, *Pretrial Publicity and Juror Prejudice*, 43 *Journalism Q.* 647 (1966) and Riley, *Pretrial Publicity: A Field Study*, 50 *Journalism Q.* 17 (1973). Riley noted that there is little the media can do about that, "short of refraining from mentioning the suspect altogether." *Id.* at 23.


90. Stewart joined Justice Brennan's concurring opinion in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), in which Brennan stated that prior restraints on trial reporting were an unconstitutional method of enforcing the defendant's right to a fair trial. *Id.* at 572 (Brennan, J., concurring).


92. 221 F.2d 636 (6th Cir. 1955).

Defendant Harry Russell Briggs was on trial for falsifying claims to the Veterans' Administration in connection with a school he operated. Two witnesses for the prosecution were charged with perjury, and local newspapers reported the charge. Newspapers were available to jurors during their overnight recess, but jurors were not questioned as to whether they had indeed read the articles. The circuit court decided that a mistrial should be declared.

Stewart and Chief Judge Simons joined Judge Miller's opinion, which acknowledged that newspaper coverage of trials could be valuable and that unfavorable publicity was "not necessarily grounds for setting aside a verdict." *Id.* at 638. Miller pointed out, however, that some newspaper publicity conceivably could prejudice the jurors, as in this case. And, although there was no direct evidence that the jurors did read the articles, "it is obvious that one or more of the jurors probably did," he wrote. *Id.* at 639.
As he had in *Briggs*, Stewart joined the majority in *Marshall* to reverse the defendant's conviction because prejudicial publicity was made available to jurors. In similar fashion, Stewart joined the majority in *Irvin v. Dowd*, in which the Supreme Court reversed a state ruling because two-thirds of the jury were shown to have believed the defendant guilty before the trial began.

Stewart wrote his first opinion in a free press/fair trial case in *Rideau v. Louisiana*. Speaking for the Court, Stewart said that due process had been denied defendant Rideau because of a televised interrogation of the defendant in a Louisiana parish jail, in which Rideau, without counsel and in response to leading questions, confessed to a series of murders. Stewart wrote, "Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." Due process, he said, required a trial before a jury of persons who had not seen the defendant's "interview."

Stewart's frame of reference for free press/fair trial issues was clearly established at that point: he would not tolerate the jeopardizing of due process rights by media reports. But one of his recurring themes, applicable here, was that when potentially harmful information should be safeguarded, "[t]he responsibility must be where the power is." Thus, Stewart maintained that trial judges should bear the burden of ensuring juror impartiality and proper courtroom decorum through measures available to them. Two cases are illustrative: *Sheppard v. Maxwell*, a classic case of throwing "due process to the headlines," and *Nebraska Press Association v. Stuart*, which ques-

95. The voir dire records revealed the prejudicial nature of the pretrial publicity. In Clark's majority opinion, he noted the almost 90 percent of the prospective jurors had "entertained some opinion as to guilt," and of the selected jurors, "eight out of the 12 thought petitioner was guilty." *Id.* at 727.

Clark wrote:

with [Irvin's] life at stake, it is not requiring too much that [he] be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt. *Id.* at 728.

97. Rideau's jailhouse interrogation was televised three times, reaching thousands of viewers. Rideau was not granted a change of venue, however, and at trial he was found guilty and sentenced to death. *Id.* at 724-25.
98. *Id.* at 726.
99. *Id.* at 727.
tioned the constitutionality of a restraining order placed on media coverage of a multiple murder case.

Stewart joined the majority opinion of Justice Clark in *Sheppard*, which held the trial judge to blame for the "bedlam [that] reigned at the courthouse" during the trial of a murder defendant.\(^{104}\) Even before the trial had begun, no measures were taken to curb the press' egregious behavior; for example, the coroner's inquest was held in a high school gymnasium packed by newsmen. And despite media saturation of defendant Sam Sheppard's home area, the trial judge denied motions for a continuance and a change of venue. At trial, the *Sheppard* majority opinion noted, "[N]ewsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard."\(^{105}\)

Justice Clark stated that there were a number of procedures that the judge should have followed, including restriction of the movement and number of newsmen in the courtroom, insulation of witnesses and jurors, and control of information released to the media. Most importantly, in terms of analyzing Stewart's approach, Clark pointed out that had such procedures been followed,

Sheppard's right to a trial free from outside interference would have been given added protection without corresponding curtailment of the news media. Had the judge, the other officers of the court, and the police placed the interest of justice first, the news media would have soon learned to be content with the task of reporting the case *as it unfolded in the courtroom*—not pieced together from extrajudicial statements.\(^{106}\)

There was no suggestion that the press itself be regulated, but when the question of prior restraints\(^{107}\) arose in the *Nebraska Press* trial setting, only Stewart and Brennan would declare all prior restraints on reporting impermissible. There, a trial judge sitting in a multiple murder case, fearful that pretrial publicity would impinge on the fairness of defendant Erwin Charles Simants' trial, clamped a "gag order" on the media until the jury was impaneled. The judge prohibited reporting on Simants' confession to the police and other persons, the contents of a note Simants wrote on the night of the murders, certain statements regarding medical testimony, the nature of Simants' as-

\(^{103}\) 427 U.S. 539 (1976).
\(^{104}\) 384 U.S. at 355.
\(^{105}\) *Id*.
\(^{106}\) *Id* at 362 (emphasis added).
\(^{107}\) Prior restraint is the suppression by government of information prior to its publication, in contrast to subsequent punishment which is effected after information has been printed. This topic is discussed in Section V of this note. *See* notes 149-230 and accompanying text *infra*. 
saults, the names of Simants' victims, and even the restraining order.108

The Nebraska Supreme Court modified the exhaustive order somewhat, but held much of it valid. The court prohibited publication or broadcast of all confessions and admissions made to investigators and third parties, except for media representatives, and "[o]ther information strongly implicative of the accused as perpetrator of the slayings."109

Stewart did not join Chief Justice Burger's opinion for the Court in the unanimous reversal. Burger said that although prior restraint was not justifiable in this case, prior restraints on pretrial news accounts could be justified in grave situations. Disagreeing with that premise, Stewart joined Brennan's concurrence which recognized the value of a fair trial by an impartial jury, but noted that "resort to prior restraints on the freedom of the press is a constitutionally impermissi-

Brennan saw no conflicts between the first and sixth amendments that could not be resolved through judicial action short of restraining orders. And he warned:

There is . . . a clear and substantial damage to freedom of the press whenever even a temporary restraint is imposed on reporting of ma-
terial concerning the operations of the criminal justice system, an in-
stitution of such pervasive influence in our constitutional scheme.
And the necessary impact of reporting even confessions can never be so direct, immediate, and irreparable that I would give credence to any notion that prior restraints may be imposed on that rationale.111

Certainly this view is consistent with Stewart's Fourth Estate stan-
dards, which he was unwilling to compromise. And, even as to the Sheppard recommendations for restricting the media's access to extra-
judicial information and the courtroom itself, it cannot be said that Stewart departed from his philosophy. However, in order to reconcile what might appear to be curbs on press autonomy, it is necessary to take into account the inherent differences among the executive, legisla-
tive, and judicial branches. Executive and legislative determinations are known to be considered and debated outside of their official cham-
bers; members of the public and government officials seem mutually dependent on media discussion of all aspects of political and legislative debate.112

108. 427 U.S. at 543-44.
109. Id. at 584 (Brennan, J., concurring).
110. Id. at 572 (Brennan, J., concurring).
111. Id. at 612 (Brennan, J., concurring).
112. Cater observed:
For the judicial branch, however, impartiality is the keystone of effective functioning; great care is necessarily taken by trial participants to ensure objectivity for the jury and bench. As far as the Fourth Estate is concerned, its scrutiny is, strictly speaking, properly limited to the events taking place within the courtroom during the course of the trial itself. Therefore, restrictions on what may be disclosed to the press extrajudicially do not in fact affect Fourth Estate functions. It should follow, then, that Stewart would advocate opening the courtroom doors even for civil trial proceedings. In doing so, Stewart found his views contrasting with those of the majority.

In *Richmond Newspapers, Inc. v. Virginia,* a first amendment question arose in a trial closure order that was approved by the Virginia Supreme Court. Chief Justice Burger, joined by Justice White and Justice Stevens, announced the Court’s judgment and said that even when unopposed by the defense counsel, a trial court may not close its proceedings to the public without a showing that the closure is necessary to protect either the defendant’s right to a fair trial, or some other overriding interest articulated in the findings.

Stewart, concurring in the Court’s judgment, filed an opinion which departed from Burger’s reasoning on the matter of what Stewart perceived to be a right of access for public and press both to criminal and civil trials. "With us," Stewart said, "a trial is by very definition a proceeding open to the press and to the public."

Qualifying this right, however, Stewart noted that because a trial courtroom must be quiet and orderly, the right of access could not be considered absolute. Thus, a judge could impose “reasonable limitations upon the unrestricted occupation of a courtroom” by press and

For the politician and the bureaucrat the headline inch frequently serves as the day-to-day measure of public opinion on a great number of issues. By their responses to this synthetic public opinion they stimulate further publicity and so commences a reflexive cycle that has been known to move news stories from the inside to the front page and to reshape policies as surely as if public opinion had exerted its sovereign will.


113. *Cf.* Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (pretrial injunction against news media from publishing name of photograph of minor charged with delinquency by second-degree murder held unconstitutional because information widely disseminated and obtained by media at open public hearing) (per curiam).


115. *Id.* at 581.

116. Stewart was willing to declare without reservation that civil trials should be open. *Id.* at 599 (Stewart, J., concurring).

Burger said that the case gave no opportunity for the Court to consider whether there was a right to attend civil trials, but historically, civil as well as criminal trials had been presumptively open. *Id.* at 580 n.17.

117. *Id.* at 599 (Stewart, J., concurring).
public, just as legislatures may impose reasonable time, place, and manner restrictions on the exercise of other first amendment freedoms, he said.118

B. Estes shuts courtroom cameras, but Stewart argues for exposure.

Despite the qualification, Stewart had no support from other Court members on this approach. But at least on the matter of television coverage of trials, Stewart was able to enjoy seeing his 1965 dissent in Estes v. Texas119 become law sixteen years later in Chandler v. Florida.120 The Court majority indicated that Chandler significantly limited the meaning of Estes, the landmark case that mandated reversal of a criminal conviction because television coverage before and during trial denied the defendant due process.121 However, in Stewart's view, Chandler simply overruled Estes.122

In Estes, Stewart had voiced reluctance to restrict or ban a news medium from the courtroom. He found objectionable the plurality's attitude that the presence of television cameras during trial nullified due process, as expressed by Clark in his opinion announcing the Court's judgment. Stewart stated that there had been no violation of fourteenth amendment rights in this trial,123 and, as to general prohibitions of television cameras in state courtrooms while criminal trials were in progress, he said, "I can find no such prohibition in the Fourteenth Amendment or in any other provision of the Constitution."124

Stewart's views directly contrasted with those of Clark's, in whose opinion was cited a number of ways in which televising a trial "might

118. Id. at 600 (Stewart, J., concurring).
121. Over the objections of defendant Billie Sol Estes, portions of his trial for swindling charges were broadcast. Estes claimed that the broadcasting had denied him due process, and the Supreme Court agreed. In Clark's plurality opinion, he said that the use of television could not be said to contribute materially to the judiciary's function of ascertaining the truth. 381 U.S. at 544.
122. 449 U.S. at 586 (Stewart, J., concurring).
123. 381 U.S. at 601 (Stewart, J., dissenting).
124. Id. at 614 (Stewart, J., dissenting).
cause actual unfairness—some so subtle as to defy detection by the accused or detection by the judge.”

Clark’s overriding concern appeared to be the potential for alteration of the trial participants’ states of mind; from juror to defense counsel, according to Clark, all conceivably could be so adversely affected by television coverage as to render the trial altogether unfair.

Especially perturbing to Clark was the probable impact on the jury, “the nerve center of the fact-finding process.” Presuming that publicity would be heavy and ongoing after the announcement that a trial would be televised, Clark indicated that jurors would feel pressured to return a verdict to comport with public sentiment. Moreover, Clark said, a juror being telecast would be aware of that fact throughout the trial, and “[h]uman nature being what it is, not only will [his] eyes be fixed on the camera, but also his mind will be preoccupied with the telecasting rather than with the testimony.” In addition, jurors would be subjected to comments and criticism from friends, relatives, and “inquiring strangers who recognized them on the streets.”

Clark also stated that the impact on witnesses of appearing on television was “simply incalculable,” and that it “might render them reluctant to appear and thereby impede the trial as well as the discovery of the truth.” And even judges themselves, particularly those in jurisdictions where they are elected officials, would be affected adversely, Clark predicted. As to the defendant himself, being required to face the camera would amount to harassment, “resembling a police line-up or the third degree,” and intrusions into the attorney-client relationship because of the telecasting would render counsel ineffective.

In a concurring opinion, Warren agreed with Clark’s points, but he emphasized that television had no place whatsoever in the “hallowed sanctuary” of the courtroom. Warren indicated that television representatives “have only the rights of the general public, namely, to be present, to observe the proceedings, and thereafter, if they choose, to

125. Id. at 545.
126. Id.
127. Id.
128. Id. at 546.
129. Id.
130. Id. at 547.
131. Id.
132. Id. at 548.
133. Id. at 549.
134. Id.
135. Id. at 586 (Warren, C.J., concurring).
report them.”136

Stewart rebutted both opinions with a dissent that reflected his Fourth Estate view. Although his majority opinions on media access to non-public areas were yet to come,137 he made it clear that the trial courtroom was definitely a site from which television cameras could not be constitutionally banned. Seeming to equate the camera with a reporter’s notebook as a means for conveying information about a trial, Stewart said:

136. Id.

In support of this proposition, Clark, in his plurality opinion, noted, “All [reporters] are entitled to the same rights as the general public. The news reporter is not permitted to bring his typewriter or printing press. When the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case.” Id. at 540.

137. Stewart wrote for the Court in the landmark “prison access” cases, Pell v. Procunier, 417 U.S. 817 (1974), and Saxbe v. Washington Post Co., 417 U.S. 843 (1974), in which he drew a sharp distinction between the press’ right to gather and convey news, and the government’s duty to provide the information. In both cases, Stewart was unwilling to grant the media access to prisons beyond the limits accorded the general public; his opinions in these cases, and his concurrence in Houchins v. KQED, Inc., 438 U.S. 1, 16 (1978) are analogous to Stewart’s approach to camera coverage in courtrooms.

It appears that Stewart first determined whether the premises sought are open to the public; if so, then the press naturally should have equal access. But once obtaining that access, newsmen should be allowed to convey information obtained on site by means of audiovisual equipment, even if members of the public do not have the same privilege. Stewart’s “press exceptionalism” theory surfaces in this respect.

In Pell, three journalists joined four inmates of the San Quentin State Penitentiary in challenging the constitutionality of a California statute that prohibited press and other media interviews with specific inmates. The journalists argued that denial of access abridged their press freedom, and the inmates argued that the statute abridged their free speech rights. The district court found for the inmates, but dismissed the journalists’ claim.

Stewart, writing for the Court, reversed the finding for the inmates and affirmed as to the journalists. He wrote that, “[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public.” 417 U.S. at 834. Here, as well as in Saxbe, the prisons were closed with certain exceptions granted at the discretion of prison officials.

In Saxbe, a case “constitutionally indistinguishable” from Pell, Stewart again wrote for the majority and held that federal prison regulations did not abridge first amendment rights of newsmen. 417 U.S. at 850. He concluded that so long as access restrictions were evenly applied to both the public and press, the press’ rights were not abridged. Id.

Professor Bezanson made a most interesting observation that comports with Stewart’s press autonomy view. As to the Pell and Saxbe rulings, Bezanson said, “By giving special visitation rights to the press that are not equally available to the general public, the government would be promoting dependence of the press on government, which would be destructive of the very purpose of the press clause.” Bezanson, supra note 15, at 755.

Thus, in Stewart’s view, wherever the public may go, the press may go, including television reporters with cameras. In Houchins v. KQED, Inc., 438 U.S. 1 (1978), Stewart said in his concurring opinion that admitting a television crew and its requisite baggage to a prison facility did not violate the concept of equal access, even though members of the public could not bring such audiovisual equipment on tours of the jail. Unable to accept the Houchins plurality view that equal access should be regarded strictly, Stewart said that the concept “must be accorded more flexibility in order to accommodate the practical distinctions between the press and the general public.” Id. at 16 (Stewart, J., concurring). What may be a reasonable restriction on individual members of the public may be unreasonable as applied to journalists, he noted. Id. at 17 (Stewart, J., concurring).
The suggestion that there are limits upon the public's right to know what goes on in the courts causes me deep concern. The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms.  

Stewart warned against premature judgments concerning the electronic media, which had not yet been fully developed. He acknowledged that the use of television in the courtroom, at least in the then present state of the art, was "an extremely unwise policy that invited constitutional risks." He also pointed out that the presence of television crews detracted from the dignity of the courtroom. But, Stewart cautioned that, when discussing television, it is important to remember that we move in an area touching the realm of free communication, and for that reason, if for no other, I would be wary of imposing a per se rule which, in the light of future technology, might serve to stifle or abridge true First Amendment rights.

The Estes decision was not, however, an absolute ban on cameras in the courtroom because it was a plurality opinion. Justice Harlan wrote a concurring opinion in which he stated that to permit television in the courtroom had "mischievous potentialities," but to forbid it "would doubtless impinge upon one of the valued attributes of our federalism by preventing the States from pursuing a novel course of procedural experimentation." Harlan maintained that television should be banned only when due process required it; that is, if the presence of television should substantially detract from the goal that the accused be accorded a fair trial, "due process requires that its use be forbidden." Harlan pointed out that "[t]he probable impact of courtroom television on the fairness of a trial may vary according to the particular kind of case involved."

C. Chandler views Stewart's Estes approach through the lens brightly.

Considerable experimentation by states with televising trials

139. Id. at 601 (Stewart, J., dissenting).
140. Id.
141. Id. at 604 (Stewart, J., dissenting).
142. Id. at 587 (Harlan, J., concurring).
143. Id.
144. Id. at 589 (Harlan, J., concurring).
145. Id. at 590 (Harlan, J., concurring).
146. Some states that had experimented with camera coverage of judicial proceedings prior to Chandler were: Alabama, Florida, Kentucky, Massachusetts, Minnesota, North Dakota, Nevada
then followed, and it was Florida's approach that was challenged and approved on the Supreme Court level in *Chandler v. Florida*.

Stewart joined the Court's judgment, but he could not accept its rationale.

Stewart addressed one of the points raised by the *Chandler* majority, which was the premise that the technological advancements made in television had erased the prejudicial problems for the accused. But, Stewart said in *Chandler* that it appeared to him that the *Estes* decision had been rendered not because of what the Court perceived to be technological difficulties with television in the courtroom, but because of an inherent prejudice to the defendant as a result of the camera's very presence. Therefore, he reasoned, the medium's technological advancements were irrelevant to the prejudice problem. "It does not follow," he wrote, "that the 'subtle capacities for serious mischief' [described in *Estes*] are today diminished, or that the 'imponderables of the trial arena' are now less elusive."

Stewart said, "I have no great trouble agreeing with the Court today, but I would acknowledge our square departure from precedent" established by *Estes*. He viewed the majority opinion as a "wholly unsuccessful effort" to distinguish *Chandler* from the *Estes* holding. He would have preferred instead to "flatly overrule it."

Having decried the notion in *Estes* that camera should be banned because of inherent prejudice to the defendant, Stewart evidently would have liked the *Chandler* majority to admit the *Estes* error and perhaps acknowledge that Stewart had been right all along. For, although Stewart never advocated an absolute right of television access to courtrooms without regard for the trial judge's supervision, Stewart nevertheless perceived camera coverage to be the adjunct of general reporting on the open courtroom. In any event, the *Chandler* decision

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148. Burger's majority opinion analyzed the *Estes* decision on which petitioners relied. Burger said that, although then-Chief Justice Warren's concurring opinion lent strong support to petitioner's view, the *Estes* decision nonetheless had not declared unconstitutional the presence of television during trial. *Id.* at 570-74.

Burger pointed out that there were six separate opinions filed in *Estes*, and that Harlan had limited his crucial fifth vote to the circumstances of Estes' individual situation. Harlan's opinion, Burger said, defined the scope of the ruling, and as a result, the *Estes* decision had not announced "a constitutional rule barring still photographic, radio and television coverage in all cases and under all circumstances." *Id.*

149. *Id.* at 584 (Stewart, J., concurring).

150. *Id.* at 585 (Stewart, J., concurring).

151. *Id.*

152. *Id.* at 583 (Stewart, J., concurring).

153. *Id.*
concluded for Stewart a career-long advocacy that the courtroom, like any other arena for conducting government business, should be subject to the scrutiny of the watchdog press.

V. PRIOR RESTRAINT: LIFTING GOVERNMENT'S HEAVY HAND

Prior restraint is censorship, government suppression of information or ideas before they reach the public. Given Justice Stewart's advocacy of the press' role as Fourth Estate, it should come as no surprise that he vehemently opposed the use of prior restraint on publications, except in situations in which national security was threatened. "Though Government may deny access to information and punish its theft," he has said, "Government may not prohibit or punish the publication of that information once it falls into the hands of the press, unless the need for secrecy is manifestly overwhelming."\footnote{154}

\begin{enumerate}
\item Government interests and freedom to publish—the contest is established.
\end{enumerate}

The protection against prior restraint has been considered an essential aspect of press freedom since the framers of the Constitution, influenced by the ignominious history of suppression of speech and publication in England,\footnote{155} included the freedom of press clause in the first amendment.\footnote{156}

This is not to say that, in the interests of liberty, virtually every-

\begin{enumerate}
\item Zechariah Chafee, Jr., said that the free speech idea "was formed out of past resentment against the royal control of the press under the Tudors, against the Star Chamber and the pillory, against the Parliamentary censorship which Milton condemned in his Areopagitica, by recollections of heavy newspaper taxation, [and] by hatred of the suppression of thought which went on vigorously on the Continent during the eighteenth century." \textit{Z. CHAFEE, FREE SPEECH IN THE UNITED STATES} 29 (1964) [hereinafter cited as \textit{CHAFEE}].
\item In \textit{Areopagitica}, John Milton argued against licensing of the press and prior restraint schemes. He asked, "[H]ow can we more safely, and with lesse danger scout into the regions of sin and falsity than by reading all manner of tractats, and hearing all manner of reason?" John Milton, \textit{Areopagitica}, in \textit{VERSIONS OF CENSORSHIP} 8, 13 (J. McCormick & M. Maclnnes eds. 1962).
\item Perhaps Milton's best-known comment on free discussion is: "Let [Truth] and Falsehood grapple; whoever knew Truth put to the wors, in a free and open encounter. Her confuting is the best and surest suppressing." \textit{Id.} at 31.
\item Chief Justice Hughes, writing for the majority in \textit{Near v. Minnesota}, 283 U.S. 697 (1931), said, "In determining the extent of constitutional protection [for freedom of the press], it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication." \textit{Id.} at 713.
\item In that opinion, Hughes quoted James Madison who said, "[T]he] security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also." \textit{Id.} at 714.
\end{enumerate}
thing capable of being communicated should or can be; indeed, as Sir William Blackstone observed in 1803, one who publishes "what is improper, mischievous, or illegal . . . must take the consequences of his own temerity." 157 But in the interests of press autonomy, subsequent punishment is preferable to prior restraint, even though chilling effects result from both. 158

There are different forms of prior restraint, as described by first amendment scholar Thomas Emerson, 159 and two in particular have commanded the attention of the Court in press cases. The first system of prior restraint, governmental limitation by statute or other regulation, emphasizes prior approval of material and is enforced by criminal prosecution. 160 The second system is based on the injunctive process, whereby the government calls for suppression of a publication, and backs up its command with the threat of contempt proceedings. 161

Proof that a prior restraint order has been violated rests only on


But Blackstone pointed out that dangerous or offensive writings must be "adjudged of a pernicious tendency" only after a fair and impartial trial. Id.

Although Blackstone is often quoted on the subject of liberty of the press, Chafee argued that Blackstone "is notoriously unfitted to be an authority on the liberties of the American colonists, since he upheld the right of Parliament to tax them, and was pronounced by one of his own colleagues to have been 'we all know, an anti-republician lawyer.'" CHAFEESUPRA NOTE 155, AT 9. 158. Thomas Emerson argued, "A system of subsequent punishment, applying severe criminal sanctions in the first instance, may prove a greater obstruction to legitimate expression where ruthlessly enforced," Emerson, The Doctrine of Prior Restraint, 20 L. & CONTEMP. PROB. 648, 660 (1955) [hereinafter cited as Prior Restraint].


159. In addition to statutory and injunctive restraints, Emerson said that there are legislative restraints requiring compliance with specific conditions, which are enforced by criminal prosecution. Examples are those laws requiring lobbyists to register, and imposing taxes on newspapers. There are also "indirect" restraints where one's expressions of personal convictions are used as tests for holding office or gaining a position of influence. PRIOR RESTRAINT, SUPRA NOTE 158, AT 656.

160. Into this category fell a 1930's tax scheme imposed on Louisiana newspapers with more than 20,000 weekly circulation, Grosjean v. American Press Co., 297 U.S. 233 (1936). The Supreme Court deemed the system an unconstitutional prior restraint, and compared it to the infamous English newspaper stamp tax. Id. at 245-51. The Court pointed out that "with the single exception of the Louisiana statute . . . no state during the one hundred fifty years of our national existence" has undertaken such a tax provision. ID. AT 250-51.

Probably the best known examples of statutory limitations are censorship and licensing laws pertaining to obscenity. See note 177 infra.


Stewart repeatedly expressed the view that prior restraints by injunction could be justified only when national security was threatened. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 849 (1978) (Stewart, J., concurring); Pittsburgh Press Co. v. Pittsburgh Comm'n on
prima facie evidence that the communication was made. Objections to content at that point are unnecessary, and specific harm caused by the publication need not be proved. By contrast, in a system of subsequent punishment, a publisher against whom charges are brought is made accountable only for those aspects of his publication falling outside the area of protected expression.\textsuperscript{6}

The advantages for the press of subsequent punishment over prior restraint are obvious. Not only is less communication subjected to governmental interference, but as Emerson noted:

\begin{quote}
Under a system of subsequent punishment, the communication has already been made before the government takes action; it thus takes its place, for whatever it may be worth, in the market place of ideas. Under a system of prior restraint, the communication, if banned, never reaches the market place at all.\textsuperscript{163}
\end{quote}

Thus, the Supreme Court with few exceptions has upheld the rights of communicators to disseminate freely information covering a wide range of topics and issues, from the mundane to the volatile. While the commitment to freedom of expression is not absolute, the Court has shown a clear concern to make the imposition of prior restraint difficult.

Given the historical backdrop for the first amendment’s freedom of expression provisions,\textsuperscript{164} Justice Stewart seemingly should have been most eloquent in his opposition to prior restraint. But, although prior restraint was an especially appropriate area for Stewart’s expression of Fourth Estate philosophy, he was surprisingly reserved in his argumentation and exposition until some time after the Court had established its modern framework, as expressed by Justice Brennan in \textit{Bantam Books, Inc. v. Sullivan}:

\textit{Any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity.}\textsuperscript{165}


The Supreme Court has dealt with only three cases where an injunction was challenged: Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); New York Times Co. v. United States, 403 U.S. 713 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971). In none of those cases was the injunction upheld.

\textsuperscript{162} A case that treated a state’s scheme for subsequent punishment was Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978).

\textsuperscript{163} \textit{Prior Restraint, supra} note 158, at 657.


\textsuperscript{165} 372 U.S. 58 (1963).

\textsuperscript{166} Id. at 70.
This "heavy presumption," although arguably built into the first amendment, was a relatively recent product of Supreme Court thought, as it was not until after the passage and subsequent interpretation of the fourteenth amendment that most provisions of the Bill of Rights were held applicable to the states. Justice Stewart pointed out that in the fifty years following the passage of the fourteenth amendment, there was "a great outpouring of First Amendment litigation. . . . But, with few exceptions, neither these First Amendment cases nor their commentators squarely considered the Constitution's guarantee of a free press." 

One of these exceptions was the landmark case Near v. Minnesota, which not only established fourteenth amendment incorporation of the freedom of press clause, but was also the first prior restraint case to reach the Supreme Court. Even though the Court struck down a prior restraint law, it also said that "the protection even as to previous restraint is not absolutely unlimited." Topics that could conceivably be banned from publication, Chief Justice Hughes said in dictum, were those which could endanger national security, especially during wartime, disrupt local law and order, offend the primary requirements of decency, or abridge the exercise of private rights in courts of equity.

Chief Justice Hughes said, however, that in cases like Near, the course to follow was a legal action to impose subsequent punishment, not prior restraint. He stated:

The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege.

Although government's suppression of the publication of political

167. "[T]he central thrust of the First Amendment was to curtail, if not to prohibit, prior restraint of speech and press." Barron & Dienes, supra note 164, at 33.
168. Or of the Press, supra note 4, at 631.
169. 283 U.S. 697 (1931).
170. At issue in Near was the constitutionality of a Minnesota statute that prohibited regular production, circulation, possession, distribution or publication of "an obscene, lewd, and lascivious newspaper, magazine, or other periodical, or . . . a malicious, scandalous, and defamatory newspaper, magazine, or other periodical." Minn. Stat. §§ 10123-1 to 10123-3 (Mason 1927). See 283 U.S. at 702.
171. 283 U.S. at 716. The Court specifically held that the fourteenth amendment incorporated the first amendment, after having said so only in dicta in Gitlow v. New York, 268 U.S. 652, 666 (1925). There, the Court had addressed a matter of subsequent punishment in upholding convictions based on violations of New York Penal Laws relating to criminal anarchy.
172. 283 U.S. at 716.
173. Id. at 720.
and public affairs information has been the central concern of those championing freedom of the press, some of the most eloquent articulations of prior restraint theory have come from cases in which the "requirements of decency" mentioned in Near have been the major issue. Because obscenity was ruled unprotected expression in 1957, and thus subject to suppression, courts have been especially concerned to ensure that censorship of protected expression does not occur as a result of such suppression. The difficulty of judging what is obscene inheres in the application of its definition, which allows variance based on community standards.

When a film exhibitor in New York was denied a license to show


175. Roth v. United States, 354 U.S. 476 (1957). At that time, the determination of obscenity was based on "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Id. at 489.

176. As Professor Chafee pointed out, "[T]he low character of speakers and writers does not necessarily prevent them from uttering wholesome truths about politics." Chafee, Book Review, 62 HARV. L. REV. 891, 899 (1949) (reviewing A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948)).

177. In Jacobellis v. Ohio, 378 U.S. 184 (1964), Brennan wrote for a plurality in adhering to the Roth formula, but he emphasized that social importance of the publication was the determining factor. In a separate opinion, Stewart maintained that only hard-core pornography should be unprotected expression; however, he said, "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." Id. at 197 (Stewart, J., concurring).

In 1966, the Court again attempted to define obscenity. In A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413 (1966), Brennan wrote for a plurality in declaring that three elements must coalesce in order for the publication or motion picture to be deemed outside first amendment protection: the dominant theme of the material taken as a whole must appeal to the prurient interest in sex; the material must be patently offensive in affronting contemporary community standards relating to the description or representation of sexual matters; and the material must be utterly without redeeming social value. Id. at 418.

For reasons Stewart explained in dissent in Ginzburg v. United States, 383 U.S. 463, 497 (1966) and Mishkin v. New York, 333 U.S. 502, 518 (1966), Stewart concurred in the Memoirs judgment. 383 U.S. at 421 (Stewart, J., concurring). This amounted to a finding that because Memoirs was not hard-core pornography, the book was entitled to first amendment protection.

In Ginzburg, Brennan wrote that in "close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the Roth test." Id. at 474.

The Ginzburg defendant had been convicted on a criminal obscenity charge, not because the publications were deemed obscene, but because of the manner in which they were distributed. Brennan said that the Court viewed the publications "against a background of commercial exploitation of erotica solely for the sake of their prurient appeal." Id. at 466.

Stewart objected that only hard-core pornography should be unprotected expression anyway. "[I]f the First Amendment means anything," he said, "it means that a man cannot be sent to prison merely for distributing publications which offend a judge's esthetic sensibilities, mine or any other's." Id. at 498 (Stewart, J., dissenting). Stewart also objected to Ginzburg's conviction
“Lady Chatterley’s Lover” because it presented immoral acts in an attractive manner,178 Stewart said for the Court that the statute prescribing the censorship “struck at the very heart of constitutionally protected liberty”179 because the first amendment’s basic guarantee was of “freedom to advocate ideas.”180 Four years later, in Bantam Books, Inc. v. Sullivan, the Supreme Court struck down a Rhode Island censorship scheme because the state was indirectly practicing prior restraint.

The Rhode Island state legislature established the “Rhode Island Commission to Encourage Morality in Youth,” which reviewed publications and notified vendors if the publications were “manifestly tending to the corruption of the youth.”181 The commission recommended prosecution of vendors who did not heed warnings to stop sales. Because there had been no judicial determination that the vendors’ sale offerings were unprotected expression, the vendors shouldered the burden of making the judgments under threat of prosecution. Stewart joined Brennan’s opinion for the Court which held the Rhode Island censorship scheme unconstitutional. Judicial review of questionable publications was necessary, Brennan said, before any restraints could be put on them.

In another censorship case, Freedman v. Maryland,182 the lack of judicial participation in a prior-restraint order was again the major issue. The Maryland State Board of Censors had the power to evaluate films and “views,” with the exception of newsreels, and to license those which were “moral and proper,” as well as to disapprove those which were “‘obscene, or such as tend, in the judgment of the Board, to de-

on due process grounds, in that he was never charged with pandering, the offense for which he was convicted. Id. at 500 (Stewart, J., dissenting).

The Court held in Miller v. California, 413 U.S. 15 (1973), that triers of fact in state courts must judge obscenity on the basis of three factors: “(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” Id. at 24.

Stewart later abandoned his hard-core pornography standard; he and Marshall joined Brennan’s dissent in Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), in which Brennan said that neither the Supreme Court, Congress, nor state legislatures could express a satisfactory formula to distinguish obscene, unprotected expression from protected expression. Id. at 85 (Brennan, J., dissenting).

179. Id. at 688.
180. Id.
base or corrupt morals or incite to crimes.’”

Stewart joined Brennan’s majority opinion which held Maryland’s statute “an invalid previous restraint.” Brennan provided guidelines for courts, adherence to which should provide procedural safeguards in order to avoid “constitutional infirmity” and thereby “obviate the dangers of a censorship system.” Freedman thus required that the burden of proving a film’s obscenity must rest on the censor; only a judicial determination could restrain the showing of a movie; and the judicial decision must be prompt and final, “to minimize the deterrent effect of an interim and possibly erroneous denial of a license.”

Although the subject matter in question in Bantam Books and Freedman was not within the realm of discussion on public affairs, the Court’s attitude toward censorship which was manifested in these

183. Id. at 52 n.2.
184. Id. at 60.
185. Id. at 58.
186. Id. at 59.

The rules announced in Freedman were later held applicable to prior restraints on speech, as well. In Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975), Stewart joined the majority in deciding that the same procedural safeguards necessary for restraint on the press were applicable to the showing of a dramatic performance that combined speech with conduct. Id. at 559-60.

In that case, promoters of the musical “Hair” were prohibited from engaging either a private or municipal facility in Chattanooga, Tennessee, for production of the musical because of the nature of its contents. After a five-month delay, owing to the respondents’ belated answer to the promoters’ complaint, the district court denied a preliminary injunction to the promoters as to the use of the private facility (under long-term lease to the city). Id. at 548-49. Some weeks later, the district court, after a hearing on the issue of obscenity, denied a permanent injunction as to the use of the municipal facility. Id. at 550-52. The appellate court affirmed, and the Supreme Court granted certiorari “[b]ecause of the First Amendment overtones.” Id. at 552.

The Supreme Court reversed, stating that the Freedman standards had not been met, insofar as the system of review did not provide a procedure for and, indeed, there had not been, the requisite “prompt judicial review.” Id. at 561.


187. In Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), the topic of discussion was relevant to racial relations and segregationist tactics employed by the realtor. This was, then, a “public affairs” matter in that the residents of the community had a vested interest in the outcome of a private action that had been bolstered by government intervention, i.e., the preliminary injunction granted against residents in their protests against the realtor’s practices.

From a Fourth Estate view, this sort of expression is encouraged because it reflects community sentiment and conceivably could affect government decisions to alter status quo. In other words, matters deemed “public affairs” bear some sort of relationship to the welfare of the citizenry, though these matters need not directly involve the actions of government officials. It seems safe to say, however, that comment on public affairs would eventually involve comment on government action if it were not so included at the outset.

Of course, the term “public affairs” has been much discussed in the context of libel actions, insofar as “public figures” are involved. For example, when defining “public figure” in Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974), the Supreme Court referred to the frequency with which public figures “thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.” See note 68 supra. But in Time, Inc. v. Firestone, 424 U.S. 448 (1976), the Court majority noted that the libel plaintiff, Mrs. Firestone, was
cases provided a touchstone in *Organization for a Better Austin v. Keefe*, in which comment on a community controversy was questioned. In *Keefe*, Burger, writing for the Court, reiterated and directly quoted some of Brennan's statements in the *Bantam Books* opinion.

The Organization for a Better Austin had been peacefully distributing in respondent Keefe's residential district pamphlets that protested his real estate practices in the Chicago neighborhood of Austin. Arguing that his privacy had been invaded, Keefe obtained a temporary injunction against further distribution by the organization. The injunction was upheld by the Illinois Appellate Court, and an appeal was made directly to the United States Supreme Court, which ruled the injunction invalid. Burger said, "Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity. Respondent thus carries a heavy burden of showing justification for the imposition of such a restraint. He has not met that burden." 

Keefe's claim of privacy invasion was insufficient, Burger said, because Keefe was not trying to stop the flow of information into his own household, he was trying to stop the flow of information to the public. Although Keefe claimed the pamphlets were coercive, Burger stated that peaceful pamphleteering was protected first amendment expression, and "so long as the means are peaceful, the communication need not meet standards of acceptability." 

**B. The Court shuffles Papers and the papers go to press.**

The *Keefe* case thus illustrated for the Court a situation in which governmental authority was being utilized to suppress the publication (and distribution) of public affairs information, giving the Court the opportunity to apply principles of prior restraint and censorship theory not a public figure because dissolution of a marriage was "not the sort of 'public controversy'" that *Gertz* referred to. *Id.* at 454; see note 72 supra.

189. The Illinois Supreme Court was bypassed in this matter, probably because of the first amendment question. In a footnote, the United States Supreme Court said that it could rule on the case, even though the injunction sought had been temporary. The Court said:

We see nothing in the record that would indicate that the Illinois courts applied a less rigorous standard in issuing and sustaining this injunction than they would with any permanent injunction in the case. Nor is there any indication that the injunction rests on a disputed question of fact that might be resolved differently upon further hearing. . . . Moreover, the temporary injunction here, which has been in effect for over three years, has already had marked impact on petitioners' First Amendment rights.

*Id.* at 418 n.1.
190. *Id.* at 419 (citations omitted).
191. *Id.*
that had developed in settings unrelated to the actual conduct of government business. Yet, it was slight preparation for what awaited the Court in *New York Times Co. v. United States*, popularly known as the "Pentagon Papers" case. In a grand clash with the press, the United States government tried to suppress a publication on national security grounds for the first time in American history.

The controversy began when documents comprising a classified Pentagon report entitled "History of U.S. Decision-Making Process on Viet Nam Policy" were turned over to the *New York Times* by one of its authors, Dr. Daniel Ellsberg. The *Washington Post* also gained access to the papers, and both newspapers began to publish material from the report.

To prevent further publication, the government sought injunctions against the newspapers from the United States District Court for the Southern District of New York and the United States District Court for the District of Columbia. While the government argued that national security was endangered, the newspapers argued that the documents were historical in nature and would cause only embarrassment at worst.

Both district courts denied injunctive relief to the government, which then appealed the rulings. The United States Court of Appeals for the District of Columbia Circuit affirmed the lower court to deny the injunction, but the United States Court of Appeals for the Second Circuit reversed to grant the injunction, and remanded the case to the district court for further hearings. These conflicting holdings could have resulted in the *Washington Post's* being allowed to publish the so-called "Pentagon Papers," and the *New York Times'" being un-

194. In Washington, the government first moved for a temporary restraining order that the district court denied. On appeal, the court reversed, but Judge Skelly Wright dissented. He said, "This is a sad day for America. Today, for the first time in the two hundred years of our history, the executive department has succeeded in stopping the presses. It has enlisted the judiciary in the suppression of our most precious freedom. As if the long and sordid war in Southeast Asia had not already done enough harm to our people, it now is used to cut out the heart of our free institutions and system of government." United States v. The Washington Post Co., 446 F.2d 1322, 1325 (D.C. Cir. 1971) (Wright, J., dissenting).

However, when the government asked for a preliminary injunction against the *Washington Post*, the district court denied it and the appellate court affirmed. It was this judicial action that put the *New York Times* and the *Washington Post* on unequal footing. 446 F.2d at 1327.
able to do so; however, the Supreme Court entered stays on the orders, pending consideration of the cases.

In what Justice Harlan called a "frenzied train of events," the cases came to the Court just a week before its summer recess. Because of the differences in the lower court rulings and the magnitude of the issues presented, the Supreme Court granted certiorari, and extended its term for the first time in fourteen years. The Court heard oral arguments only thirteen days after the New York Times had published its first installment of the purloined documents.

The Court produced a per curiam opinion stating that the government had not justified the prevention of publication of the “Pentagon Papers.” That opinion represented the views of Stewart, Black, Douglas, Brennan, White, and Marshall, and was accompanied by six concurrences and three dissents.

Although this was a dramatic stage set for Stewart to exalt the Fourth Estate, he was quite moderate in his approach. Time constraints and the complexities of the issues apparently forced him to restrain from waxing eloquent on the topic and instead to focus on a satisfactory, succinctly-stated resolution. Prior to Pentagon Papers, questions of prior restraint had been presented in the context of a publisher’s efforts to maintain autonomy in his editorial expression. But the substance of the material at issue here was not an independent editorial work product, but, rather, classified government documents.

This difference required Stewart to evaluate the areas of national security and international relations in light of the Fourth Estate function to enlighten the public on governmental policy, and the government’s responsibility to maintain secrecy where required. Stewart indicated that the Executive had a seemingly disproportionate amount of power to make decisions on such matters, with the result that checks and balances were all but eliminated from those areas. As such, he said:

[the only effective restraint upon executive policy and power . . . may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the

196. 403 U.S. at 753 (Harlan, J., dissenting).
198. The Purloined Pentagon Papers, supra note 193, at 96.
199. 403 U.S. at 727 (Stewart, J., concurring).
But Stewart acknowledged that the press could not print whatever it desired if indeed the security of the country or its position in diplomatic relations were threatened. "[I]t is elementary," he said, that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.

Confidentiality required in the areas of diplomacy and executive policy-making seemed thereby to present a dilemma: the press must be autonomous, but certain matters requiring utmost secrecy should be excluded from the marketplace of ideas. The dilemma’s solution, Stewart said, was in requiring the Executive, which had “a large degree of unshared power” in this respect, to assume the “largely unshared duty” to control the flow of sensitive information within and without its ranks.

Although the Executive’s duty was “largely unshared,” Stewart nonetheless saw roles for Congress and the courts. Responsibility for enacting laws to protect sensitive information was vested in Congress, which had already assumed this to some degree; several laws “are of very colorable relevance to the apparent circumstances of these cases,” he said.

Although he did not elaborate, Stewart apparently was speaking of laws that provide subsequent punishment in the form of fines or imprisonment, or both, for publication of sensitive information pertaining to military security, installations, codes, and communications systems. Were Congress to pass a specific law addressing a matter exemplified by the Pentagon Papers case, he continued, the Supreme Court might then decide on its constitutionality.

200. Id. at 728 (Stewart, J., concurring).
201. Id.
202. Id. at 729 (Stewart, J., concurring).
203. Id.
204. Id. at 730 (Stewart, J., concurring).
However, there appeared to Stewart to have been a breakdown in the process, with the Executive attempting to foist on the Court the responsibility of rectifying executive error. Stewart noted, "[W]e are asked neither to construe specific regulations nor to apply specific laws. We are asked, instead, to perform a function that the Constitution gave to the Executive, not the Judiciary."\(^{206}\)

Consequently, Stewart was obliged to assess the content of the "Pentagon Papers" by his standard for material that could justify imposition of a prior restraint: that is, information that by its disclosure would "surely result in direct, immediate, and irreparable damage to our Nation or its people."\(^{207}\) And, in his opinion, publication of the "Pentagon Papers" would not have that result.

Stewart's touchstone for justifiable prior restraint was certainly harmonious with the Fourth Estate view. A "fourth branch of government," independent of the three official branches, provides a means for enlightening the public but, more importantly, must serve the interests of the people. Thus, giving the communications media carte blanche to publish anything and everything, irrespective of the society's resultant destruction, would clearly be counterproductive, to say the least.

But Stewart's opinion lacked specificity on how the Executive and Congress could best approach the prior restraint problem in situations such as this. Thus, a reading of White's opinion, which Stewart joined, is necessary in order to close some gaps in Stewart's concurrence. While Stewart criticized the Executive's temerity in asking the Judiciary to proscribe publication of the "Pentagon Papers," White recommended alternative courses for the Executive to follow in maintaining security within its ranks and discouraging the press from courting national disaster.

White said he concurred with the per curiam opinion "only because of the concededly extraordinary protection against prior restraints"\(^{208}\) that the press enjoys. Some of the "Pentagon Papers," White said, could "do substantial damage to public interests"\(^{209}\) and probably had done so already. But, he noted that the Executive's move to suppress the documents was not based on a statute, and the inherent powers of the Executive and the courts simply did not reach "so far as to authorize remedies having such sweeping potential for inhibiting

\(^{206}\) Id. at 730 (Stewart, J., concurring).
\(^{207}\) Id.
\(^{208}\) Id. at 730-31 (White, J., concurring).
\(^{209}\) Id. at 731 (White, J., concurring).
publications by the press.'"210 Congressional power to authorize such an injunction "for prior restraints in circumstances such as these"211 obviously had not been utilized.

White made congressional action and inaction the cornerstone of his opinion. He indicated that Congress had deliberately avoided giving the President broad powers to suppress documents by deleting such a clause from Espionage Act considerations in 1917,212 and apparently had been satisfied up to that point "to rely on criminal sanctions and their deterrent effect on the responsible as well as the irresponsible press."213 Although he would not ban prior restraints altogether, an injunction was inappropriate here because the burden of justification had not been met.214 White argued that despite the government's not having met that burden, however, its failure in doing so "does not measure its constitutional entitlement to a conviction for criminal publication. That the government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way."215

White cautioned the newspapers that they were now "on full notice" of the laws applicable in this case, and he noted relevant sections of the criminal code dealing with military and diplomatic communications.216 He stated, "I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint."217 With the "Pentagon Papers" in their hands, White said, the newspapers could judge for themselves whether or not they would be held criminally responsible for communication of information detrimental to the national defense.

Because Stewart never advocated absolute protection for the press, White's recommendations for criminal prosecution were not inconsistent with Stewart's pronouncements on press freedom. Stewart, after all, had said that the press "may publish what it knows"218—but he did not say that the press could do so with impunity. In Stewart's view, if the executive branch fulfilled its duties in protecting confidential infor-

210. Id. at 732 (White, J., concurring).
211. Id. at 731 (White, J., concurring).
212. Id. at 733-34 (White, J., concurring).
213. Id. at 740 (White, J., concurring).
214. Id. at 731 (White, J., concurring).
215. Id. at 733 (White, J., concurring).
216. Id. at 735-40 (White, J., concurring).
217. Id. at 737 (White, J., concurring).
218. Or of the Press, supra note 4, at 636.
mation, that material which would cause "grave and irreparable harm" would not reach a publisher at all. But, in the event that it did, a publisher should not have to speculate on likely effects of publication and the extent of the attendant punishment if indeed Congress had enacted laws clearly defining the bounds of permissible publication.

Stewart's Pentagon Papers opinion, reinforced by White's, was reminiscent of his free press/fair trial analysis; again, he underscored the duty of a government branch to assume ultimate responsibility for preserving integrity within its own realm. In the free press/fair trial cases, it will be recalled, Stewart deemed the trial judge responsible for ensuring preservation of due process rights of the defendant.219 In Pentagon Papers, it was the executive branch that was directed to confine its sensitive information to designated recipients so that prior restraint need not be effectuated except in dire emergencies. And, although the threat of subsequent punishment may also result in stifling expression, it necessarily allows a publisher to exercise his own discretion in communicating information—which is one aspect of the autonomy that the Fourth Estate requires.

C. The classifieds unclassified—a different look at layout.

Having had to rely partially on White in Pentagon Papers, Stewart later gathered momentum and burst forth independently in Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,220 to illuminate his views in a dissenting opinion. Contrary to the Court majority, Stewart and three other justices221 viewed the case as a matter of prior restraint.222

The question before the Supreme Court was whether a Pittsburgh sex discrimination ordinance which mandated the elimination of male-female categories in newspapers' classified advertisements layouts so restricted a newspaper's editorial judgment that the ordinance amounted to a prior restraint. The Court ruled that there was no prior restraint.223

221. In addition to filing his own dissent, Douglas joined Stewart's opinion. Burger and Blackmun also filed separate dissents.
222. The Pittsburgh Commission on Human Relations brought criminal charges against the Pittsburgh Press, because the newspaper used male and female job category designations in its classified section. This violated a city ordinance that prohibited sex discrimination by employers and prohibited other individuals or parties from aiding in sex discrimination. 413 U.S. at 377-81.
223. Id. at 389-90.
Powell, speaking for the Court, observed that there had been no suggestion that the ordinance had been passed "with any purpose of muzzling or curbing the press." The newspaper advertisements, he said, were "classic examples of commercial speech" and as such were unprotected expression at the time this case was handed down.

Pointing out that prior restraint's "special vice" was the suppression of communication before an adequate determination could be made of its first amendment protection, Powell said, "The present order does not endanger arguably protected speech. Because the order is based on a continuing course of repetitive conduct, this is not a case in which the Court is asked to speculate as to the effect of publication."

Stewart strongly disagreed. He reasoned that employers were to abide by the rules of fairness in hiring, but that the newspapers should not be required to design its classified advertisements section according to a system prescribed by government. Stewart said:

Those who think the First Amendment can and should be subordinated to other socially desirable interests will hail today's decision. But I find it frightening. For I believe the constitutional guarantee of a free press is more than precatory. I believe it is a clear command that government must never be allowed to lay its heavy editorial hand on any newspaper in this country.

Stewart thought that the only question presented by the case was whether a governmental agency on any level could tell a newspaper in advance what it could and could not print. "Under the First and Fourteenth Amendments, I think no Government agency in this nation has any such power," he stated.

Stewart qualified this declaration with a footnote reading: "I put to one side the question of governmental power to prevent publication of information that would clearly imperil the military defense of our Nation."

This footnote, in which he cited Near v. Minnesota, provided a key to understanding Stewart's attitude toward justifiable prior re-
straint, which even a Fourth Estate view could tolerate. With such a reference to Near, it seems apparent that when Stewart spoke of a publication that could do "irreparable harm to our Nation," he meant information that could cause physical damage or destroy the military defenses.

Stewart later joined Brennan's concurrence in Nebraska Press Association v. Stuart,232 in which Brennan advocated a total ban of prior restraints on open trial coverage.233 And, in Landmark Communications, Inc. v. Virginia,234 Stewart reiterated his feeling, in a concurring opinion, that an immediate national security threat should be the "most obvious justification" to trigger a constitutional prior restraint.235

233. Id. at 572 (Brennan, J., concurring).
235. Stewart concurred with the Court's judgment that a Virginia statute was an unconstitutional encumbrance on first amendment freedoms. A newspaper was convicted of violating that statute, which prohibited divulgence by any person of information on judicial inquiry proceedings.

Stewart disagreed with the majority as to the statute's constitutionality. He said that the statute was valid as applied to individuals violating the confidentiality of the judicial inquiry proceedings, but invalid as to a newspaper publishing information supplied by such a violator. Id. at 849.

Although Stewart did not refer to his oft-stated belief that the press should be free to report on Government and governmental proceedings, his view of "press exceptionalism" is clearly manifest here. In addition, the fact that the statute curtailed press freedom in reporting on one branch of governmental activity was probably most persuasive to him. Thus, a scheme for subsequent punishment, like prior restraint, must overcome a "heavy presumption" against its constitutionality. Or of the Press, supra note 4, at 634.

See Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979), where the Court held unconstitutional a West Virginia statute that made criminal the publication without court approval of the name of any youth charged as a juvenile offender. However, the statute did not apply to the electronic media, so although at least three radio stations broadcast the name of an accused juvenile offender, only the community newspapers were indicted for statute violation.

Stewart joined Chief Justice Burger's opinion for the Court, which said that the state's interest was not substantial enough to justify application of criminal penalties to the newspapers when the information was lawfully obtained. Id. at 106. Furthermore, if the state's purpose was to protect the juvenile's anonymity, the statute could not serve its intended purpose because there were no sanctions on the electronic media. Id. at 105. The majority did not decide whether the statute amounted to prior restraint or subsequent punishment because both types of sanction would require "the highest form of state interest to sustain [their] validity," which the state had not demonstrated. Id. at 102.

But see Snepp v. United States, 444 U.S. 507 (1980), a per curiam opinion finding justifiable an administrative system of censorship that would seem to be prior restraint according to Emerson's classifications. See notes 158 and 159 supra. The CIA had filed suit against former agent Snepp, who had breached a contractual agreement not to divulge any classified information on CIA activities, and not to publish anything at all on the agency without its prior approval. Publication of Snepp's book was enjoined, and a constructive trust imposed on all royalties.

The majority viewed Snepp as a contract case in which the petitioner had breached a fiduciary obligation to his employer. "He deliberately and surreptitiously violated his obligation to submit all material for prepublication review," the Court stated. Id. at 511. That the material published proved to be unclassified information was not controlling. In contrast to Justice Stevens' dissent in which he found an unconstitutional prior restraint, the majority found first amendment interests minimal at best, and referred to them only in a footnote. Id. at 509 n.3.
Although Stewart did not fully utilize his opportunities to speak out forcefully on prior restraint, he nonetheless compiled a record of opposition to it. Although his Fourth Estate philosophy flourished in the classified advertisement setting of *Pittsburgh Press*, that dissent, which seemed substantially stronger than his concurrence in *Pentagon Papers*, gave him the opportunity to go on record with a bold stroke for the press.\textsuperscript{236}

VI. **NEWSMAN'S PRIVILEGE AND NEWSROOM SEARCH: DISDAINING SEARCH AND TELL**

Testimony from witnesses is crucial to grand jury inquiries and criminal and civil trials;\textsuperscript{237} the prevailing doctrine is, "The public . . . has a right to every man's evidence."\textsuperscript{238} But that right can clash with the news media's ability to obtain information, particularly when access is predicated on a promise to maintain confidentiality. Thus, Justice Stewart opposed forcing reporters to disclose information gained from confidential sources unless the government could show a compelling need for it; otherwise, the news gathering process, vital to the press' performance as autonomous institution, could be seriously impaired. It would follow, therefore, that without autonomy, the press' function as Fourth Estate would be drastically undercut.

Consequently, contrary to the Court's majority view,\textsuperscript{239} Stewart

\begin{enumerate}
\item 413 U.S. at 400 (Stewart, J., dissenting).
\end{enumerate}

Chief Justice Vinson, writing for the majority, said:

[Persons summoned as witnesses by competent authority have certain minimum duties and obligations which are necessary concessions to the public interest in the orderly operation of legislative and judicial machinery. A subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase. . . . We have iterated the importance of this public duty, which every person within the jurisdiction of the Government is bound to perform when properly summoned.]

\textit{Id.} at 331.

Some of the better-known exceptions to the rule to testify are the doctor-patient, attorney-client, and husband-wife privileges. However, these exceptions are not absolute, and vary from state to state. See, e.g., Saltzburgh & Redden, Federal Rules of Evidence Manual 203, 208 (2d ed. 1977).

\begin{enumerate}
\item Branzburg v. Hayes, 408 U.S. 665, 688 (1972).
\item According to Branzburg, there is no constitutional bar to requiring newsmen to appear before federal or state grand juries. The Court's only concession to the media in this respect was to declare that the shield laws of twenty-six states were not unconstitutional \textit{per se}. \textit{Id.} at 706.
\end{enumerate}

Stewart issued the first judicial opinion on whether the first amendment protected a reporter's privilege when, in 1957, as visiting appellate judge, he handed down the Second Circuit decision in Garland v. Torre, 259 F.2d 545 (2d Cir. 1958), which held that reporters were not constitutionally privileged to withhold information crucial to judicial proceedings.

Plaintiff Judy Garland, having been offended by an item published in Marie Torre's newspaper column, sought to bring suit for defamation against the Columbia Broadcasting System which
recognized a need for a newsman's privilege to facilitate the news gathering process. For example, when the rationale for a reporter's privilege was challenged in *Branzburg v. Hayes*,\(^{240}\) Stewart dissented from the majority opinion that said to require newsmen to appear before state or federal grand juries did not abridge the first amendment.

**A. Stewart calls for a corollary, and advocates a privilege.**

*Branzburg* combined three newsman's privilege cases: *Branzburg v. Hayes*,\(^ {241}\) *In re Pappas*,\(^ {242}\) and *United States v. Caldwell*.\(^ {243}\) In all Torre had allegedly quoted. However, because Torre would not reveal the name of her source, Garland was unable to pursue her libel claim successfully. Torre claimed a constitutional privilege to withhold the information. The district court held Torre in criminal contempt, and she appealed.

Garland had tried unsuccessfully to secure the information from other sources but had met only with denials of knowledge. Therefore, Stewart reasoned, in this case the testimony sought justified the impingement because "[t]he question asked of the appellant went to the heart of the plaintiff's claim." *Id.* at 550.

When Torre appealed to the Supreme Court, certiorari was denied, so Stewart's opinion, though a controlling precedent only for the Second Circuit, was nonetheless very significant for other courts. In fact, the Ninth Circuit relied on *Garland* when it reviewed Earl Caldwell's contempt order in *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970). The majority opinion cited the case, and Judge Jameson quoted it at length in his concurrence. *Id.* at 1091.


241. *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. Ct. App. 1971). The respondent in the Supreme Court case, Honorable John P. Hayes, was the successor of Judge J. Miles Pound, state trial court judge who heard Branzburg's case. 408 U.S. at 668 n.3.

242. *Pappas*, a television newsman-photographer, was allowed inside Black Panther party headquarters following a civil disturbance in New Bedford, Massachusetts. Pappas' entry was conditioned on his agreement not to disclose any of the activities within the headquarters except for an anticipated police raid that never took place.

243. *New York Times* reporter Earl Caldwell had been covering the activities of the Black Panthers and other reputedly militant groups in California. After having gained the Panthers' confidence, Caldwell was subpoenaed by a grand jury that ordered him to bring in tapes and notes he had accumulated over the months of his association with the organization. Caldwell refused, arguing that his grand jury appearance would destroy the relationship he had with the group's members.

The district court ruled that Caldwell must appear, but stated that his interrogation would be limited by a court-issued, protective order. Caldwell refused to appear at all, and appealed from an order holding him in contempt. The appellate court reversed and remanded, with instructions that the contempt judgment and order to appear before the grand jury be vacated. *Id.* at 1090.
three, reporters had asserted a right not to be compelled to testify before grand juries investigating the subjects of their respective news projects. Only newsman Caldwell was granted the privilege in lower court action.

The Supreme Court affirmed *Branzburg* and *Pappas* and reversed *Caldwell*. The majority questioned the seriousness of the "impairment of news flow" argument propounded by the journalists. Acknowledging that news gathering may indeed be hampered as a result, the majority nevertheless pointed out, "It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability." The Court noted that freedom of the press had flourished for centuries without a constitutionally-sanctioned reporter's shield. But, the Constitution could not be read to bar state courts from recognizing such privileges, it said.

Stewart referred to the Court's "crabbed view of the First Amendment" in his dissent, which Brennan and Marshall joined. He argued that a corollary of the right to publish must be the right to gather news, and that "[t]he full flow of information to the public protected by the free-press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated." Because informants are necessary to news gathering, and informants may refuse to cooperate unless confidentiality is assured, Stewart said, a privilege should be recognized that would be set aside only if a compelling need were shown. He argued that the rule for compulsory testimony before grand juries was not absolute anyway, inasmuch as the fourth and fifth amendments, as well as common-law evidentiary privileges, limited it. He said:

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244. *Branzburg*, 461 S.W.2d at 346; *Pappas*, 358 Mass. at 605, 266 N.E.2d at 298; *Caldwell*, 434 F.2d at 1082-83.
245. 434 F.2d at 1090.
246. 408 U.S. at 682.
247. *Id.* at 699-70, 706.
248. *Id.* at 725 (Stewart, J., dissenting).
249. *Id.* at 727 (Stewart, J., dissenting).
250. Stewart suggested a three-pronged test:

I would hold that the government must (1) show that there is probable cause to believe that the newsmen has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.

*Id.* at 743 (Stewart, J., dissenting) (footnotes omitted).
The sad paradox of the Court’s position is that when a grand jury may exercise an unbridled subpoena power, and sources involved in sensitive matters become fearful of disclosing information, the newsman will not only cease to be a useful grand jury witness; he will cease to investigate and publish information about issues of public import.251

B. Police search a newsroom, and it’s bad news for news.

Stewart emphasized protection for the news gathering and dissemination processes. Of greatest importance to him, it seems, was the ability of newsmen to maintain confidentiality once sources had been located. He reiterated this concern in Zurcher v. Stanford Daily,252 a case involving a police search of a newspaper office which investigators thought had contained information pertaining to a crime. The investigation was initiated despite the fact that there had been no indication that the newspaper would not provide the sought-after information upon request or subpoena; and, because none of the staff members was suspected of wrongdoing, the newspaper was a third party to the investigation.

The Zurcher majority, perceiving no threat to the press’ ability to gather and disseminate news, dismissed first amendment arguments for special protection of newsrooms from searches by police. The majority stated that had there been a need to exempt the press from searches, the framers would have included a constitutional provision for the press’ protection.253

Stewart dissented, joined by Marshall. Stewart advocated the use of subpoenas to obtain newsroom documents thought to be relevant to a government inquiry or investigation, instead of permitting the

251. Id. at 746 (Stewart, J., dissenting).

Blasi suggested that Stewart was “moved in Branzburg by the intuitions that underlie the checking value.” Checking Value, supra note 27, at 599.

First, Blasi said, Stewart’s dissent “did not rely on any quantitative effect press subpoenas might have on the flow of information; indeed, the opinion upbraided the majority for demanding such quantitative proof.” Id.

In addition, Blasi noted, Stewart, emphasized the danger posed by press subpoenas to “the historic independence of the press.” It is evident that even if the subpoena possibility could not have been shown to impair reporter-source relationships, Justice Stewart would have been deeply troubled by the phenomenon of news reporters regularly serving as government witnesses. He did not elaborate, however, on why this would be such an evil. One likely explanation is that any alignment of government with the press might undercut the adversary relationship between the two which is one of the key bulwarks against an overreaching and/or corrupt government.


253. Id. at 565.
newsrooms to be searched. As a practical matter, a subpoena would cause no physical disruption of the newsroom, he explained, and journalists would have the opportunity to locate for presentation the requested information, and to separate it from whatever confidential matter might accompany or be filed with it.254 This would be preferable, Stewart said, to forcing newspapers to allow investigators “to ransack the files . . . reading each and every document until they have found the one named in the warrant.”255

Stewart’s primary concern was for the protection of confidential material gained by reporters. He stated that journalists often can obtain sensitive information only by assuring sources that their identities would not be revealed.256 It would require “no blind leap of faith,” he said, to understand that a person giving information in confidence would be less likely to cooperate if he thought that “despite the journalist’s assurance his identity may in fact be disclosed.”257

The subpoena would serve both state interests and the newspaper’s interest, Stewart maintained. The newspaper would either have to produce the materials specified, or have the opportunity to demonstrate in an adversary hearing why such materials should be unavailable to the prosecutor. By contrast, a police search, even if later found unnecessary would have “irretrievably invaded”258 the constitutional protection of the newspaper. Had a subpoena been used in the instant case, Stewart stated, “[t]he legitimate needs of government thus would have been served without infringing the freedom of the press.”259

Stewart’s dissent was consonant with a point he had raised previously regarding the protection of the press as an institution.260 Having maintained his philosophy that the press was a constitutionally-protected business, Stewart said in Zurcher:

Perhaps as a matter of abstract policy a newspaper office should receive no more protection from unannounced police searches than, say, the office of a doctor or the office of a bank. But we are here to uphold a Constitution. And our Constitution does not explicitly protect the practice of medicine or the business of banking from all abridgement by government. It does explicitly protect the freedom of the press.261

254. Id. at 571 (Stewart, J., dissenting).
255. Id. at 573 (Stewart, J., dissenting).
256. Id. at 572 (Stewart, J., dissenting).
257. Id.
258. Id. at 576 (Stewart, J., dissenting).
259. Id.
260. Or of the Press, supra note 4, at 634.
261. 436 U.S. at 576 (Stewart, J., dissenting).
Thus, Stewart would provide special consideration for the reporter's workplace, based on the institutional autonomy that he understood the Constitution to require. Similarly, Stewart would veil the reporter's work product unless the information sought from the reporter went to the heart of the claim. Both of these operations Stewart considered necessary in order that the press could exert its power as investigator and adversary.

VII. Conclusion

During his twenty-three years on the Supreme Court, Justice Potter Stewart made significant contributions to certain aspects of interpretations of the freedom of the press clause of the first amendment. His customary approach was to allow the press considerable latitude in fulfilling its potential as Fourth Estate by asserting its institutional autonomy, an approach that put him out of the majority in many cases. Apparently, he based his decisions in favor of the press on whether in a given situation the press was acting as a "formidable check on official power."262

It may be because of this Fourth Estate approach that he will be remembered in the realm of press law, especially for the normative principles of his dissents in Estes v. Texas, Branzburg v. Hayes, and Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations. This approach was unique in that Stewart applied the first amendment to modern media problems, yet from an historical perspective. With what appeared to be a serious effort to effectuate what Stewart perceived to be the intentions formed in eighteenth-century minds, Stewart ended his Supreme Court tenure as he began it: with a Fourth Estate philosophy that pervaded the opinions he wrote and those he joined. And, although the term "Fourth Estate" may have been unknown to the framers when they drafted the amendment, Stewart would argue they were attempting to provide for its functional equivalent. (In other words, perhaps they had not defined it, but they knew it when they saw it.263)

The Freedom of Press Clause, Stewart contended, was a structural provision of the first amendment, which the framers thought necessary in order to assure "openness and honesty in government... an adequate flow of information between the people and their representatives

262. Or of the Press, supra note 4, at 634.
263. See Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). See also note 172 supra.
... [and] a sufficient check on autocracy and despotism." 264 As he said in his speech at Yale in 1974, "If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy." 265

264. *Or of the Press*, supra note 4, at 636.
265. *Id.* at 633.