

# The Man Who Once Was Whizzer White

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When Byron R. White was nominated to the Supreme Court on April 3, 1962, the *New York Herald Tribune's* headline captured the glamour of the appointment: "WHIZZER WHITE TO SUPREME COURT—LAWYER, NAVAL OFFICER, FOOTBALL STAR." Seldom in public life has a nickname and a curriculum vitae so dogged a public servant. Even President Clinton's tribute to the Justice on the day his retirement was announced—"He has had a truly remarkable life"<sup>1</sup>—seemed to recall the pre-Court biography as much as three decades of public service. Justice White may have enjoyed fame, honor and (briefly) riches in youth, but he paid for it, often in subtle ways, the rest of his career. To the extent that the legend distorts our appreciation of the public service, it would be a courtesy to clarify where myth and man depart, and why he loathes the sobriquet that made him famous long ago.

Byron White attended the University of Colorado on a scholarship awarded to the valedictorian of each accredited state high school. The grant was for tuition only; room and board required work or wealth, and few of the 3,500 students in the depths of the Depression could avoid part-time jobs. The University was in a period of rapid expansion, but it was still largely rural in composition and parochial in outlook. Intercollegiate athletics were a focal point for the social life of the school, but they, too, were in a period of transition. What began as recreational activity at the turn of the century was quickly becoming lucrative business, thanks largely to the entrepreneurship of Knute Rockne at Notre Dame and romantic news accounts of such players as the "Wheaton Ice-Man," better known as the "Gallopig Ghost"—Harold "Red" Grange of Illinois. White had played football at tiny Wellington High School (enrollment 100, grades 8-12) and enjoyed moderate success, but others came with more imposing reputations, built on keener competition between much bigger schools. Lean and unimpressive in repose, White did not make

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1. Remarks of President Clinton to Reporters Prior to Departure for Andrews Air Force Base, Federal News Service, March 19, 1993, available in LEXIS, Nexis Library, Federal News Service File.

the freshman starting lineup. Then came the traditional Colorado-Denver University freshman game. Leonard Cahn, a sportswriter for the *Denver Post*, remarked to a colleague that young White was “a real whizzer” that afternoon and, taken with his inspiration, promptly printed the observation the next day.<sup>2</sup>

The name, to say the least, stuck. Thus, at the age of 17, Byron White had an identification he did not seek, did not like and could not shake. Since that autumn day in 1934, except in the most formal publications, Byron White has always been three names, parentheses or quotations marks depending on editorial taste. The name lent itself to reductionistic explanations of almost anything, from manner to values; for later critics of his judicial views, the name allowed condescension and even ridicule to be packaged in a single snappy phrase.

With the nickname came expectations, but White’s sophomore year ended after the first game when he blew out his knee. Already, however, the name was taking its toll. His replacement at tailback, W.C. “Kayo” Lam told a teammate that he was “lucky to beat out the great Whizzer White.”<sup>3</sup> The remark may have been good-natured, but the name and the attention it attracted began to constitute a friction spot for White and his teammates. White’s junior year was the first step on his road to national prominence: he played well enough to receive all-conference honors, and his stature as a three-sport star (basketball and baseball, too), combined with a straight-A average, made him the most famous man on campus and the logical choice for the faculty committee who annually selected the President of the Student Body.

When his senior year began, White was already being mentioned as a potential All-American. Grantland Rice, the Phi Beta Kappa turned sports columnist, mentioned on his radio show that “‘Whizzer’ White is the ideal moniker for a triple threat tailback,” and he believed “the man with that name was going to live up to it,”<sup>4</sup> ordaining national stature never before enjoyed by any player in the Rocky Mountain region. White’s performance during the 1937 season was “arguably, the greatest season statistically of any back in 50 years of NCAA rankings,”<sup>5</sup> according to the NCAA. He led the country in almost everything, but it took drama to be famous, and he rose to the occasion against Utah in Salt Lake City. Less than 48 hours before game time, he was notified of his election to Phi Beta Kappa. He then proceeded to score all the team’s 17 points and provided the margin of victory, but, more important to his legend, he pulled off a 97-yard punt return that included a retreat of more than 15 yards into his own territory, a zig-zag across the field, and then a

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2. See Leonard Cahn, *White Was Straight-A on Field*, in *Classroom*, ROCKY MOUNTAIN NEWS, Feb. 9, 1965, at 42.

3. Interview with O.T. Nuttall, in Boulder, Colo. (June 16, 1993).

4. SILVER & GOLD (Boulder), Sept. 28, 1937, at 4.

5. *Morning Briefing: Fifty Years Later, Whizzer White is Still Hard to Catch*, L.A. TIMES, Nov. 18, 1987, § 3, at 2 (quoting Jim Van Valkenburg, Director of Statistics, NCAA).

series of near-miss tackles that some old-timers talk about even today. The event might have been ephemeral, or the stuff merely of local legend, but for the presence of one of Rice's competitors, Henry M'Lemore of United Press, whose vivid, if rather self-important, report of the play and the entire performance made White a national sports figure overnight.<sup>6</sup>

Within weeks, what today might be described as Whizzermania erupted. The team defeated Denver University and was invited to the second annual Cotton Bowl; White was named to every All-American team on the books; and *Life* magazine dispatched a photographer to Boulder to record what the papers were now calling the Phi Beta Kappa All-American. The Cotton Bowl invitation enraptured the University with the team and its leader, but confounded both White and President of the University, George Norlin, who taught classics, expounded Isocrates, and thought athletics a potential impediment to liberal learning. White feared that the Cotton Bowl would interfere with academics in general, final examinations in particular and his pursuit in mid-December of the Rhodes Scholarship, which his older brother had won three years before. The problems were solved when Colorado's opponent was identified as Rice Institute, which satisfied Dr. Norlin's intellectual standards, and when White received permission to join the team late after interviews in Denver, and if successful there, in San Francisco.

The Rhodes candidacy, more visibly than other episodes that fall, brought out White's growing unease with the spotlight and especially with the practices of the press. Although routinely in demand after home football games, he declined to attend fraternity parties, because he preferred to study, or perhaps to be alone. When he became a finalist for the scholarship after the Denver interviews, he blew up at the journalists who tracked him to his Pullman car and demanded that he be photographed "prepping" for the final interviews: "Here's the way it is. . . . I don't want all this tied in with the scholarship exams. Members of the committee might think I'm getting the big head or something, getting pictures taken of me every time I turn around."<sup>7</sup> Despite the complaint, the *Rocky Mountain News* ran a photo of White shaking hands with a schoolmate as he boarded the train.<sup>8</sup> After White was awarded the scholarship, he took a train to Fort Worth, where the team was preparing for the Cotton Bowl, and a week later Colorado lost to Rice 28-14, with White scoring all of the team's points.

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6. Both the *Rocky Mountain News* (*McLemore Thinks White Used Mirrors in Long Run*) and the *Denver Post* (*Colorado's Great Back Has Everything, Says Columnist*) carried M'Lemore's 600-word column, which was not filed until two days after the event: Nov. 8, 1937. According to the campus newspaper, M'Lemore's account ran in 412 newspapers nation-wide. *Henry McLemore Suspects White Of Using Mirrors on Long Run*, SILVER & GOLD (Boulder), Nov. 9, 1937, at 4.

7. *C.U. Gridders Leave for Texas Sunday*, DENVER POST, Dec. 18, 1937, at 13.

8. Gorman Hogan, *White Leaves for Coast, Seeks Scholastic Goal: Whizzer Will Take Final Exams for Rhodes Award Monday in Frisco*, ROCKY MOUNTAIN NEWS, Dec. 18, 1937.

The defeat did no more than temporarily cool the media's appetite for "Whizzer" White. The New York Basketball Writers' Association established a tournament, and invited an above-average Colorado team to be one of the six teams in what became the first National Invitational Tournament. The experience imposed substantial emotional costs on the team, especially White. No one was prepared for the New York fans (bellowing "Whizzah! Whizzah! Whizzah!" as the team ran down the runway to and from the floor of Madison Square Garden), nor for the press, who demanded one photo opportunity after another, heckled the players when they would not answer questions, and then ridiculed them in print when they did. White never forgot the abuse. Nearly a quarter-century later, he would say, in terse understatement: "The New York newspapers put out quite a bit of publicity about the team and about me. I figured it the same way I always had—it was their job and they probably knew what they were doing, but I didn't like it, even so."<sup>9</sup>

Colorado lost to Temple in the finals, and White, exhausted by both the athletics and the attention of the previous six months, chose not to play baseball his senior year. He explained he was making time to learn recreational sports; in fact, he dithered much of the spring over whether to go to Oxford on the Rhodes Scholarship or instead to accept an offer from Arthur Rooney for \$15,800 to play professional football for Pittsburgh. The salary was not only the highest in the National Football League, but three times what Rooney had paid for the team a few years before and at least twice what established stars such as "Slinging Sammy" Baugh were then making.

The decision, framed as an either/or choice, proved paralyzingly difficult, and the monthly, then weekly, press speculation clearly frayed the young man's nerves. He finally decided in June to forgo the money and go to Oxford, a choice celebrated editorially in state newspapers. Six weeks later, thanks to patient inquiry and diplomacy by his older brother, who was then finishing his pre-medical degree at Oxford, White discovered that he could matriculate there in January of 1939, one term late. He quickly accepted the Pittsburgh offer and reported to the team's summer camp.

Although Oxford's bureaucracy had allowed White to have both the objects of his desire, the decision caused both relief and remorse. A month after announcing what critics unkindly called a reversal of field, White wrote a fellow Rhodes Scholar explaining the decision:

There are of course many drawbacks to the course I have taken. I expect to encounter numerous difficulties and be called upon to pay in more than one way for having things my way for the time being.

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9. Alfred Wright, *A Modest All-America Who Sits on the Highest Bench*, *SPORTS ILLUSTRATED*, Dec. 10, 1962, at 85, 90.

But I am willing to face this, for I am not getting paid \$15,000 for my football abilities alone.<sup>10</sup>

The letter, written in a young, round hand on stationery of the Hotel Fort Pitt, which Rooney used as team headquarters, is poignant for its self-realization. White assumed that Oxford could be accommodating but unforgiving, and he knew that Rooney hoped to be hiring both athletic and gate power. Newspapers seemed to take the double bet: headlines for the next year in Pittsburgh and for two subsequent seasons in Detroit routinely identified White with team fortunes, usually with the abbreviated nickname that fit so neatly in headline type.

White led the league in rushing and was named to the all-league team in 1938, but the team had a losing season. After visiting his parents in Wellington, he traveled to Oxford in time, a few days late, for Hillary Term 1939. When he arrived at the Oxford train station, he was met by reporters from London newspapers, mainly tabloids. The crowd was eager not to see Whizzer White for once, but, perhaps worse, to get a photograph of the flesh-and-blood incarnation of the *Yank at Oxford*, an extremely popular 1938 film depicting the cultural clash between a brash Nebraskan scholar-athlete and quirky but confident interwar Oxford. (Some even thought later that the film was inspired by White; in fact, A.P. Garland's book from which the film was adapted was written while White was in grade school.) White obliged the London *Chronicle* by posing in cap and gown aboard a bicycle, thereby putting himself behind a golden eight-ball: it was bad enough that he was a certified professional, as he was quickly if discreetly informed, but he was also ostentatious, which was bad form. To top it off, the Oxford law course was doctrinally antiquarian and front-loaded with Roman law, a disappointment to most of its American customers, and the rumor of war hung over Oxford in a growing pall.

If the University was less than expected, the diversions were greater. White took tea with Lady Astor and George Bernard Shaw in the Astor townhouse in London. During vacations he managed trips to the Continent. He went to France after the first term, and during the summer spent time in Munich, Germany with young Jack Kennedy, whom he had met at American Embassy parties in London. (Kennedy would write of the summer: "You had the feeling of an era ending, and everyone had a very good time at the end."<sup>11</sup>) September brought war and American Rhodes Scholars were shipped home.

White had planned to go to law school at least since his early days in college, but suddenly he had to choose a school. He was tempted by Harvard,

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10. Letter from Byron R. White to Gerald Brown (Sept. 10, 1938) (on file with author).

11. LEO DAMORE, *THE CAPE COD YEARS OF JOHN FITZGERALD KENNEDY 50* (anniversary ed., Four Walls Eight Windows 1993) (1967).

Michigan and the University of Colorado, but he chose Yale, thanks largely to the critical mass of fellow Rhodes Scholars who already had attended Yale Law School for at least one year or who had planned to start there anyway. (Nearly a dozen were eventually in residence for the fall term.) White arrived four days after the others, no longer the Yank at Oxford, once again “Whizzer” White. He delayed his return, his classmates thought, to avoid professional football scouts and officials who were sighted on campus, and when he did return, he paid his \$450 tuition bill on the spot to suggest that he did not need a new contract to finance his legal education.

White seemed determined to shed his past and to establish both a new career and, it may not be too much to say, a new identity. Behind his back, some skeptical classmates ridiculed Wellington, Colorado and professional football, and suggested that a rude shock awaited the most famous member of the first-year class. Other classmates recall even today a rather still figure, sitting erect in the library, frequently with green eye-shade, reading for hour after hour seemingly without a break: the combination of intensity and concentration was eerie. At the end of the year, White was awarded the Cullen Prize for the highest grades in the class.

White returned to Colorado to attend summer school at the University of Colorado, and even waited tables briefly, as he had done all through college. Although he called Yale “the most stimulating intellectual experience I had had up to that time,”<sup>12</sup> he was not yet ready to abandon the pleasures of professional football, which included comradeship and physical challenge as well as pay. At the end of the first academic year, he was courted by Tim Mara, owner of the New York Giants. During the summer, the new owner of the Detroit Lions, Fred Mandel, Jr., enticed White to sign a two-year contract. Once again, White led the league in rushing on a losing team. An early *Detroit Times* headline could have been left in standing type for frequent reuse: “White is a Whiz.”

White returned to Yale full-time in the spring of 1941 and nominally was also a full-time student in the fall semester of the year, but he spent his weekends playing for the Lions. With the draft looming, he tried to enlist in the Marine Corps but failed the color blindness test and was rejected. The 1941 season ended November 30, and the December 1 papers reported that White had enlisted in naval intelligence and was awaiting assignment.<sup>13</sup> Within a week, the gravity of commitment grew a thousandfold, and, for the next three years, although Colorado newspapers would occasionally refer to “Whizzer White’s Exploits in the South Pacific” or the like, White was part of the massive mobilization that provided commonality if not anonymity to its

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12. Wright, *supra* note 10, at 92.

13. Lewis H. Walter, *White’s Farewell: Whizzer Is Brilliant as He Leads Lions to Victory in His Final Football Game*, *DETROIT TIMES*, Dec. 1, 1941, at 15; *Whizzer Ends His Days as a Lion*, *DETROIT EVENING NEWS*, Dec. 1, 1941, at 17.

participants. His remarkable and distinguished service record produced, if anything, more rather than less public diffidence after the war. Even close acquaintances remember White denying heroism in a sentence—"a short one"<sup>14</sup>—part genuine modesty, part, possibly, fear that the military counterpart to Grantland Rice lurked under a nearby rock. (Only years later would anyone find significance in the fact that he wrote the Navy intelligence report analyzing the loss under fire of PT-109.)

After the war, White returned to Yale and graduated *magna cum laude*, first in his class academically, in 1946. His clerkship with Chief Justice Vinson for October Term 1946 was not the foregone conclusion that many have assumed, and it came more from accident and luck than from design. Wesley Sturges became Dean of Yale Law School in 1945, and within two years had installed procedures that might be called a one-student-one-Justice system for recommending students as law clerks. At the time of White's application, the new system was not in place and it was every man for himself. White applied to Justices Harold Burton and William O. Douglas, with whom he interviewed in March. Douglas was wavering over his established policy of hiring clerks only from Ninth Circuit law schools, but his meeting with White appears primarily to have been a favor to friends on the Yale faculty.

Chief Justice Harlan F. Stone died suddenly on April 22, and President Truman named Fred M. Vinson to replace him June 6. Without missing a beat, Douglas wrote Vinson a day later recommending

White, who comes from Colorado and who is finishing at Yale Law School this summer. You have probably read of him in the sport section of newspapers. He was an All-American football player whose nickname was Whizzer White. He played professional football. He was in the service for a couple of years. He has led his class at Yale Law School for three years. Members of the faculty tell me he is the most outstanding man they have had for a long time. As a matter of fact, he probably will have an all-time scholastic record at Yale Law School. He is a delightful, person of great charm and poise.<sup>15</sup>

Douglas disavowed knowledge of White's plans, but volunteered to "see that he gets down here right away"<sup>16</sup> for an interview if Vinson wished.

Douglas knew his quarry. Vinson was a dignified but down-to-earth Kentuckian who was a former semipro baseball player and serious sports fan. White's resume was the perfect combination for Vinson, but the real matchmaker was Karl Price, whom White knew at both Oxford and Yale and whom Vinson hired as a law clerk from the Treasury. Price convinced White

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14. Interview with Ira Rothgerber, in Boulder, Colo. (June 14, 1993).

15. Letter from William O. Douglas to Fred M. Vinson (June 7, 1946), box 254, William O. Douglas Papers, Library of Congress, reprinted in MELVIN I. UROFSKY, *THE DOUGLAS LETTERS* 48 (1987).

16. *Id.*

to apply for one of the two remaining jobs, and on September 30, *Time* magazine reported the appointment, accompanied by a photograph captioned, "Whizzer White *Enrolled*."<sup>17</sup>

The clerkship with Vinson has been underestimated, I think, in terms of its influence on White's views of the role of the court, the impact of personality on decisionmaking and, to a lesser extent, even on doctrine. (October Term 1946, after all, was the year of *Everson v. Board of Education*,<sup>18</sup> *Adamson v. California*,<sup>19</sup> and the *United Mine Workers Case*,<sup>20</sup> three cases of great significance, as well as the macabre episode in *Louisiana ex rel. Francis v. Resweber*.<sup>21</sup> Fifteen years later, when White returned as Associate Justice, the consequences of *Everson* and the reverberations of Justice Black's Pyrrhic defeat in *Adamson* were still at the center of the Court's agenda.) Vinson was a dignified man with broad experience in government. He also has been perceptively described by former clerks as someone with earthy common sense but no feel for either the doctrinal details or the dynamics of the Supreme Court. White seems to have admired Vinson's "solid wisdom," which, as far as I can tell from the rich oral history project at the University of Kentucky, consisted primarily of the concession about his judicial office that "You can't run the world from this chair."<sup>22</sup> Vinson was not close to his clerks, never entertained them at home, and maintained a professional, rather formal, relationship both during and after their tenure with him. Only one written exchange between Vinson and White survives. On March 5, 1948, more than six months after finishing his clerkship, White wrote Vinson a two-page letter detailing his practice and commenting on the merger of his firm. Two months later, Vinson managed a reply. He chided White for "wait[ing] so long to write," but complimented his decision to return to Denver and the "indications that you must have landed in the right spot." The letter, kind if perfunctory, is addressed "Dear Whizzer:"—no quotation marks, no apologies.<sup>23</sup>

When Byron White returned to Colorado in 1947, he devoted his energy to the private practice of law and to a variety of civic activities that seemed almost calculated to maximize his contribution to society and to minimize his public profile. But he was still one of the best-known public figures in the state, and some Democratic Party leaders suggested more than once that he run

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17. *People*, *TIME*, Sept. 30, 1946, at 48.

18. 330 U.S. 1 (1947).

19. 332 U.S. 46 (1947).

20. *United States v. United Mine Workers of Am.*, 330 U.S. 258 (1947).

21. 329 U.S. 459 (1947).

22. Transcript of a Recorded Interview with Howard J. Trienens and Newton N. Minow 29 (Feb. 27, 1975) (Fred M. Vinson Oral History Project, available at University of Kentucky Library) (quoting Howard J. Trienens).

23. Letter from Fred M. Vinson to Byron White (May 17, 1948), box 216, Fred M. Vinson Papers, University of Kentucky.



for Congress or even for Governor. White was disinclined to choose among the party factions, and perhaps had deeper reasons for declining all invitations to stand for office. He later told a close friend: "I thought I could get elected to office. Once."<sup>24</sup> The import of the cryptic revelation was twofold: he knew he was too stubborn to compromise or merely to represent constituent interests, and further that his patience with the press and public speaking was not necessarily adequate to the task. (The campus joke a decade before, inaccurate but apt, was that White had only one B in college, in public speaking, and that it was a gift.)

When White decided to volunteer for John F. Kennedy's presidential campaign in 1959, his name was back in the headlines: "Whizzer Carries the Ball for Kennedy."<sup>25</sup> Whatever the quality of his political advice, and opinions still differ today, White was a vital symbol of the New Frontier—fit, energetic and passionately committed to public service. His blunt pragmatism and unpretentiousness made him a natural partner for Robert Kennedy, and their intimacy, born of mutual inclination and forged in the Department of Justice, was much deeper than that of White and the President. So warmly was White identified with the new administration that Jack Foster, the editor of the *Rocky Mountain News* even wrote a column charitably, if vainly, suggesting that "we should discontinue referring to [the] Deputy Attorney General" as "Whizzer," out of respect for White's wishes and for the sake of the dignity of both man and office.<sup>26</sup> Other stories of White's hostility to the nickname were printed, with no effect other than to burnish the legend of the publicity-shy once and future celebrity (e.g., when a waitress in Washington asked, "Aren't you 'Whizzer' White?" the answer came, "I was"<sup>27</sup>). White eventually earned high marks from the press in 1961 for his on-site handling of the Birmingham freedom march. His principal legacy as Robert Kennedy's Deputy, however, was what Robert L. Stearns, President of the University of Colorado (and White's father-in-law), privately called his management of a "high-class employment agency":<sup>28</sup> White had primary responsibility for staffing the Department of Justice at both the Assistant Attorney General and collateral staff levels, and the final roster was conceded by all to be distinguished.

The appointment to the Supreme Court, which White at the time remarked to a colleague was like being prematurely "put out to pasture,"<sup>29</sup> had an unanticipated perquisite. It provided Byron White with the luxury of

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24. Interview with Ira Rothgerber, *supra* note 15.

25. Robert L. Perkin, *ROCKY MOUNTAIN NEWS*, Nov. 22, 1959, at 8.

26. Jack Foster, *Quit Referring to Him as Whizzer*, *ROCKY MOUNTAIN NEWS*, May 27, 1961, at 25.

27. Jim Mann, 'Whizzer' Prefers Obscurity: Press Rulings Focus Attention on White, *L.A. TIMES*, Aug. 7, 1978, at 4,5.

28. Robert L. Stearns, Family Letter (Feb. 14, 1961), box 8, folder 6, Stearns Papers, Western Collections and Archives, Norlin Library, University of Colorado at Boulder.

29. Mann, *supra* note 28.

controlling public appearances, and especially relations with the media, on his own terms. No longer would he need to submit to the press as part of his official responsibilities. He could, and did, refuse interviews with impunity. Not that he granted none; indeed, during his first year on the Court, he granted multiple-day interviews to three free-lance journalists who produced both revealing and discerning portraits. The location of the stories inadvertently carried a hint of self-parody: *Sports Illustrated*, *Sport and True: The Man's Magazine*. All three focus primarily on his athletic experiences, although only the *Sport* profile is restricted to White's athletic career. As time went on, the *Washington Post*, the *New York Times*, and the *Wall Street Journal* would seek interviews in vain, sometimes even without acknowledgment of the request; at the same time, Mr. Justice White would occasionally attend the White House Correspondents' dinner and grant interviews to the *Boulder Daily Camera*, the Wellington-Fort Collins *Triangle Review*, the *Colorado Daily* (the campus newspaper), and other journals tied more closely to his roots. Journalists in the New York-Washington corridor can be forgiven for wondering what imp of the perverse dictated the Justice's policy, to the extent it can be called that.

If Justice White seemed to treat the press in an arbitrary manner, he discovered, not for the first time, that a price must be paid for not caring what others think of you, especially if they have access to a printing press. Press coverage displayed at best a chilly respect for the Justice's energy and technical proficiency. Beginning midway through his second decade on the Court, columnists began to castigate White for not seeing the First Amendment issues—especially shield laws and libel—through their lens. Those who wished to twist the knife reached back into the Justice's past. For example, Charles McCabe, a columnist for the *San Francisco Chronicle*, called White “a jock . . . named [by] another jock” to the Supreme Court: “17 years after his appointment, the former All-American is known chiefly as the Javert of the American press.”<sup>30</sup> Tom Gavin of the *Denver Post*, who covered White for almost three decades, wrote in 1988:

Is it possible to trade in a Supreme Court justice? If so, I'd like to offer Byron White.

Yeah, the Whizzer. Our very own, home-grown, All-American, Rhodes scholar, Colorado *wunderkind*. Anything of value will be considered. An engine from a '37 Buick. A bushel of buttered popcorn. A person in touch with individual dignity and privacy.

Yes, someone who values privacy would be nice.<sup>31</sup>

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30. Charles McCabe, *Himself: The 'White Court,'* S.F. CHRON., May 23, 1979, at 45.

31. Tom Gavin, *Help Wanted,* DENVER POST, May 18, 1988, at 7B.

Even legal scholars got into the act. Robert Cover concluded in a 1979 op-ed piece, which displayed uncharacteristically cruel humor, that White and Jackie Jensen, the baseball player, were both “better as running backs.”<sup>32</sup>

The mutual hostilities between Justice White and the news media, especially print journalists, was first assayed by Murray Kempton in a column for the *National Review* in 1979:

A . . . residue of heat in the embers of his au[t]obiography may explain the zeal that Justice White brings to dismissing as effronteries so much of what journalism asserts as its immunities.

His glow as a judge may be a modest one; but he was an incandescent tailback at the University of Colorado and with the Pittsburgh Steelers. He thus bears the scars and cannot be blamed for still vividly resenting those awful Sunday afternoons when he stood in chilling locker rooms, his head ringing, his senses numbed, and his bruises bared while the writers had at him about why he had zipped when he might more politically have zagged.

The dressing room enforces a mutuality of degradation upon the sports journalists and the beef he prods; and Justice White can be pardoned if the memories of so many offenses to his dignity impede his respect for the dignity of the calling whose members inflicted them.<sup>33</sup>

The analysis is evocative and thoughtful and too neat to be true. Despite the patronization by the media for more than a generation and despite dignitary wounds real or imagined, Byron White’s performance as a Supreme Court Justice bore no direct causal link to his athletic career. Nor does that part of his biography help, as some think, to explain his distinctive public manner, especially on the bench, which can politely be described as abrupt. (Some have suspected that White brought his competitive drive to his chambers, but I have never seen any evidence to support that proposition, although deflated footballs and team pictures adorning his office have misled some.)

Kempton’s suspicion about the effect of the past on the doctrine of the present is refuted by a careful reading of Justice White’s opinions in *Branzburg v. Hayes*,<sup>34</sup> *Zurcher v. Stanford Daily*,<sup>35</sup> and *Herbert v. Lando*.<sup>36</sup> In each case, practical interests defeat hypothetical risks, and doctrinal structure is logically applied, which are both hallmarks for opinions by Byron White; criminal procedure, separation of powers and other issues receive the same

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32. Robert M. Cover, *Your Law-Baseball Quiz*, N.Y. TIMES, April 5, 1979, at A23.

33. Murray Kempton, *Thoughts Astray: Code Duello*, NAT’L REV., June 8, 1979, at 754.

34. 408 U.S. 665 (1972).

35. 436 U.S. 547 (1978).

36. 441 U.S. 153 (1979).

analytical treatment. If there were something to Kempton's point, one would have expected a display in *Cox Broadcasting Corp. v. Cohn*,<sup>37</sup> where the media claimed its invasion of privacy—clumsy, gratuitous and of no conceivable social utility—was protected by the First Amendment against civil liability. However, Justice White drew a bright line for the Court that vindicated the press claim, because the information had been acquired from the public record. For those who accept the view propounded by Charles McCabe, that White “has pursued our editors and publishers with the cold fury of the pursuer of Jean Valjean,”<sup>38</sup> the Cohn family's case presents an inconvenient instance of judicial detachment. The decision is all the more striking from someone who admits, “selfish[ly],” that one reason he has resisted telecasting of oral arguments in the Supreme Court is his wish to retain his anonymity in public.<sup>39</sup>

As to manner, it is tempting to dismiss the issue with the judgment of the Justice's old friend, Erwin Griswold, who lightly touches on White's personal manner when he concedes in an otherwise admiring essay that “he can give the appearance of brusqueness.”<sup>40</sup> Griswold also acknowledges what quickly developed as White's aggressive style of questioning during oral argument, but explains both traits on the ground that “his mind is so clear and quick.”<sup>41</sup> There is evidence, however, that Byron White has demonstrated a disinclination for felicity and small talk for some time. Before he died this summer, one of the Justice's oldest friends, Ira Rothgerber, observed that there are “two schools of thought about Byron White, one that he hasn't changed in terms of personality or character in sixty years, the other that Washington brought out the best and the worst in him. I'm foursquare in the first school.”<sup>42</sup>

So is Evelyn Schmidt Ely, who was Byron White's English teacher at Wellington High School for four years, grades eight through eleven. (Mrs. Ely, if I may say, deserves her own tribute. Her first teaching job was at Wellington High, which presented enormous problems for an English teacher: it had no books when she arrived in 1929 and no funds to buy them. She convinced the Fort Collins Public Library, eleven miles away, to allow her to check out sixty books for six-week periods on her personal card so that she could enrich the curriculum her first year.) Mrs. Ely remembers both White brothers vividly and places Byron White's manner in a revealing context:

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37. 420 U.S. 469 (1975).

38. McCabe, *supra* note 31.

39. Speaking at the Eight Circuit Judicial Conference last summer, “White offered a rare insight into the real reason why justices don't want oral arguments televised: ‘I am very pleased to walk around and very seldom am I recognized. It's very selfish, I know.’” Tony Mauro, *Courtly Duet*, LEGAL TIMES WASH., Sept. 6, 1993, at 9.

40. Erwin N. Griswold, *Reflections on Justice White*, 58 U. COLO. L. REV. 339, 346 (1987).

41. *Id.*

42. Interview with Ira Rothgerber, *supra* note 15.

He was always somewhat gruff, even in 8th grade. I think he was abrupt to hide his feelings . . . he struck me as very sentimental under it all. But he never liked to show emotions. I remember one day I was greasing our car—you had to do it yourself in those days—and Byron saw me (our houses were within eye-shot, it *was* a small town), and came over right away. All he said was, “Get outta the way; I’ll do it.” Other times, he would come over the house on a Sunday afternoon with two pieces of cake that his mother had just baked. He would say, “Which one do you want?” and we would sit down in my kitchen and eat them together. He was such a joy. He was remarkably tender and instinctively generous but neither wished to acknowledge it nor to have it recognized.<sup>43</sup>

Once one knits together all of the threads in Justice White’s background, the headlines and the personality—objects of so much attention—begin to recede into proper relief. What is left is something else, the character of a dedicated public servant whose principal defalcations were to connive at being misunderstood and to reject the conventional wisdom about the role of the Court shared by those who shape our opinions. To Ira Rothgerber, the twin pillars of that character were an almost religious commitment to public service and a consuming dedication to family. Justice White’s intense, even ferocious, protection of his privacy may have as much to do with the sanctity of his hearth as with his own past.

Measuring Justice White’s impact on the Supreme Court is neither easy nor fully discernible from on-line sources. His importance as a Justice was imbedded, to a great extent, in the interstices of the institution. Although he wrote many important opinions for the Court, as Kate Stith carefully documents,<sup>44</sup> his primary effect was neither obvious nor lapidary. He enjoyed remarkably developed twin powers of synthesis and doctrinal dexterity; unbeknownst to most, they were probably manifested more urgently in the conference room than in the spare, unpretentious opinions he issued. It was in the face-to-face debate with his colleagues that he thought reason and principle made their best stands, but, of course, we have no formal record of those moments. His opinions look outward to the public, and then first to bench and bar, not to the academy. Like the author, the opinions are precise, methodical and impatient to finish the job.

The literary style reflects the heart of the Justice. Part of the reason that Byron White seemed more to impress than to inspire is a conviction, both implicit in the strategy of his writings and manifest in their conclusions, that the role of the judge is a modest one, with authority discharged at retail and

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43. Interview with Evelyn Schmidt Ely, in Béalah, Colo. (June 11, 1993).

44. Kate Stith, *Byron R. White, Last of the New Deal Liberals*, 103 *YALE L.J.* 19 (1993).

not wholesale. He refused to be evangelical. It may be right, as others have suggested, that either legal realism or the political convictions of the New Deal supply the foundations of his judicial philosophy; it is certainly right that Justice White is skeptical of judicial primacy in the American polity.

The fruit of self-effacement is not glory. To those who have wondered why Justice White's legacy will be difficult to document or to explain in conventional categories, the answers, if the questions are worthy, reside in a number of choices made by the Justice from the very beginning of his judicial career—to be his own man, and not part of a bloc or a negotiating team; to treat his job very pragmatically, and not as a seminar for theorists; and, above all, viewed in the best light, to treat his judicial oath as a trust and not as an estate.