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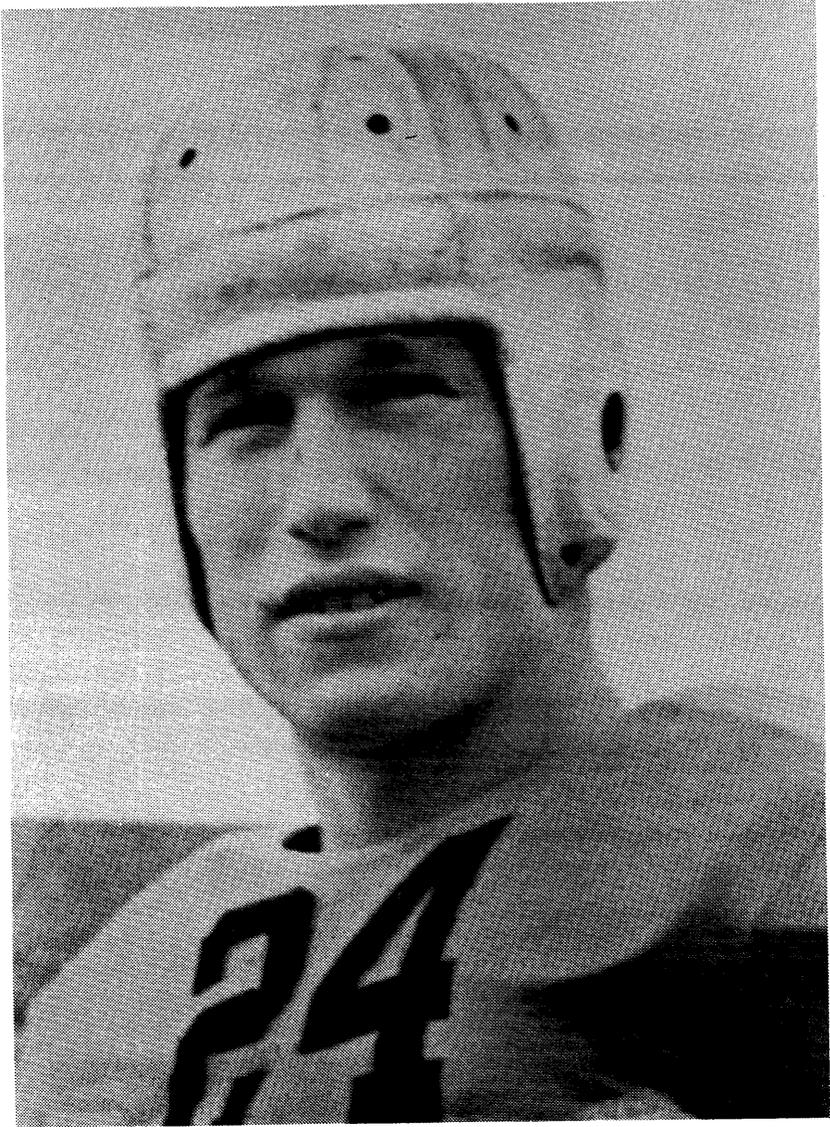


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And He Can Take a Hit Too: Justice White's Utah Connection*

It should be obvious. Surely every American knows these two simple rules of conduct: (1) When you are playing football, it's okay to put a hit on a member of the opposing team. It's one of those rare times when hitting someone with the full force of your body weight is not prohibited. And (2) you may never—regardless of your body weight—hit a Justice of the United States Supreme Court, even if he or she is wearing pads. This rule first appeared in one of those “bright line” decisions handed down by the Court of Star Chamber during the fourteenth century and has been adopted as common law by every state in the Union but Louisiana.¹

Despite *stare decisis*, *nonjusticio tacklisis*, and any other Latin phrase you can think of, somehow, in Utah, these two rules reversed themselves. On the occasions of their reversal, Justice Byron R. White was the cynosure²—first, when White avoided tackles while visiting the Utah gridiron as an all-American football star and second, when he took a couple of “late hits”—very late hits—while visiting Utah as a Justice of the Supreme Court.

I. UTAH V. COLORADO: “SNAKE-HIPPED WHITE”³ STUPEFIES NATION

It was the 1937 college football season. Justice White was Byron “Whizzer” White, the celebrated quarterback, kicker, punt and kick-off returner for the Colorado University Buffa-

* J.D., J. Reuben Clark Law School, Brigham Young University, 1994. The author wishes to thank Professor Dennis J. Hutchinson, Senior Lecturer in Law at The University of Chicago, and Stan A. Mortensen for supplying ideas and materials for this Article.

1. I felt compelled to drop a footnote in support of this proposition.

2. This is the only difficult word used in this Article, except for “Snake-hipped.” “Cynosure” also appears later in the Article in a quote from a 1937 newspaper. If, like me, you thought it described a sort of atmospheric disturbance, you're wrong. It is defined as “[a]n object that serves as a focal point of attention and admiration.” THE AMERICAN HERITAGE DICTIONARY, 360 (2d ed. 1982). Footnotes like this serve the primary purpose of making an Article longer.

3. Mack Corbett, *Whizzer White Whole Show in Buff Triumph; Redskins Play Great Ball*, DESERET NEWS, Nov. 9, 1937, at 14.

loes.⁴ The upcoming game for the Buffaloes was against their Rocky Mountain Conference challengers, the University of Utah Running Redskins in Utah's homecoming game.⁵ At that point in the season, Byron "Whizzer" White was the top scorer in the Rocky Mountain Conference with sixty-two total points.⁶

Mack Corbett, sportswriter for the *Deseret News*, a Salt Lake City newspaper, anticipated the game in a series of week-day articles prior to the Saturday, November 6th match. Corbett's prophetic articles seemed to foretell the fate of the Utah team and what would be White's stunning performance. On Tuesday, November 2nd, in an article entitled "Whizzer White is Marked Man," Corbett reported that Utah's "Coach Armstrong is carefully schooling his kickers in avoidance of the famous Call-to-White punting play which scored so many touchdowns for C. U. last year at Boulder."⁷ Thursday, November 4th, brought a ten-inch photograph of White on the front page of the sports section with the following caption:

Whizzer White of the Colorado football forces will be the cynosure⁸ of all eyes Saturday, including those of the Utah team. Taking for granted Utah will be at pains not to kick off or punt to this elusive young man, the big problem confronting the Redskins is how much to concentrate on the Whizzer. Will he be used to draw a red herring across the Ute trail, or will he continue to dish out poison himself?⁹ Either way, [Colorado] Coach Bunny Oakes has in his great triple theater an ace-in-the-hole of rare deceptive possibilities.¹⁰

On Friday, the *Deseret News* ran another large photograph of White and his coach, Bunny Oakes, with the caption, "Introducing the masterminds and artists of the undefeated, unscored-on (in the R.M.C.) Colorado University football team as they ar-

4. White was given the sobriquet "Whizzer" by Leonard Cahn, a sportswriter for the *Denver Post* when he referred to young White as "a real whizzer." See Dennis J. Hutchinson, *The Man Who Once Was Whizzer White*, 103 YALE L.J. 43, 43 (1993) (citing Leonard Cahn, *White Was Straight-A on Field, in Classroom*, ROCKY MOUNTAIN NEWS, Feb. 9, 1965, at 42).

5. The University of Utah has since dropped "Redskins" in favor of "Utes."

6. *White Is Second High Scorer in U.S.*, DESERET NEWS, Nov. 9, 1937, at 14.

7. Mack Corbett, *Whizzer White Is Marked Man*, DESERET NEWS, Nov. 2, 1937, at 12.

8. Here it is!

9. The editors of this newspaper were apparently not instructed on the impropriety of mixed metaphors.

10. DESERET NEWS, Nov. 4, 1937, at 14.

rived to take up the cudgels with Utah tomorrow afternoon. White quarterbacked the powerful Buffaloes, and how! Oakes coaches them, and how!"¹¹ In another article, Corbett recounted the Buffaloes' arrival into Salt Lake City for the game, "Thirty-eight Colorado University Football players and Coach Bunny Oakes, who brushed aside photographers and newshawks with a curt 'We can't be bothered, we haven't even had breakfast yet,' arrived this morning . . ."¹² Corbett's characterization of White's arrival was more complimentary, "Byron (Whizzer) White, the Boulder team's ace triple threat and Rhodes scholar who last night made Phi Beta Kappa, was more amiable. Likable in fact. He grinned at his coach's irritability and obligingly looked at the birdie."¹³

At noon on Saturday, November 6th, 18,500 to 20,000 fans¹⁴ funneled through the turnstiles to watch the awaited Homecoming match between the Buffaloes and the Redskins.¹⁵ The game that ensued has become the legend of "a great individual star, a money player if there ever was one."¹⁶ For three quarters, a "fiercely-determined Utah team" held White and the Buffaloes to three points while scoring seven points themselves.¹⁷ Then, with only fourteen minutes left to play, "the Whizzer . . . chose the blackest moment in the spectacular ball game to show his mettle."¹⁸ "What happened next was not only impossible, but hundreds of witnesses STILL swear it's a lie."¹⁹ In the words of Mack Corbett:

Hemmed in by a lateral line of seven Utah men who had plenty of time to get down under Snow's punt, the C. U. quar-

11. DESERET NEWS, Nov. 5, 1937, at 14.

12. Mack Corbett, *Oakes Desires Fast Field for Wonder Team in Conference [sic] Showdown*, DESERET NEWS, Nov. 5, 1937, at 14.

13. *Id.* The *Salt Lake Tribune* ran similar articles the week of the game—Wednesday, *Utah University Builds Defense to Stop 'Whizzer' White*, Nov. 3, 1937, at 26; Thursday, *Utah Must Bottle Up Colorado's Brilliant White—Or Else!*, Nov. 4, 1937, at 19.

14. The *Deseret News* reported 18,500 in attendance, Corbett, *supra* note 3, at 14, while the *Salt Lake Tribune* reported 20,000 in attendance, J.C. Darks, *As J.C.D. Sees It*, SALT LAKE TRIB., Nov. 9, 1937, at 15.

15. Fans paid only 10 cents to see the game. Richard P. Lindsay, *Feed My Sheep*, Address Given in the Church of Jesus Christ of Latter-day Saint's General Priesthood Session of General Conference (Apr. 2, 1994), in *THE ENSIGN OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS*, May 1994, at 45.

16. Corbett, *supra* note 3, at 14.

17. *Id.*

18. *Id.*

19. *Id.*

terback took the high spiral on his 14-yard line near the west sideline. Sizing up the situation, he decided to reverse his field. He headed for the far side of the field, and one by one sidestepped Utah tacklers. But he lost ground with every evasion until he found himself in the southeast coffin corner. There, the Whizzer headed for the Utah goal down the east sideline.

By this time, the justly famous downfield blocking of Coach Bunny Oakes' well-schooled eleven had wheeled up its guns and promptly went into action. Three more red-shirts closed in on the flying No. 24 to force him out of bounds but were cut down by a wall of Silver and Gold blockers. Another red shirt pursued the Whizzer but was outdistanced, and White trotted across the goal line trailed by a rear guard of three team-mates.²⁰

Corbett estimated that, including his reverse, his zigzag across the field, and his final straightaway, White ran a total distance of at least 135 yards. J.C. Darks of the *Salt Lake Tribune* declared that it was "not less than 140 yards."²¹

But this run was not enough for Whizzer. Late in the fourth quarter, White "galloped 57 yards around his own right end" for another magnificent touchdown.²² "In this run, there were two doubtful moments," reported Corbett:

Once when White sidestepped Paul Snow, Utah's deadliest tackler, with a change of pace worthy of Red Grange. He showed Paul his hips then took 'em away as the Ute left his feet. 15-yards down the field, Tom Corey took a sideswipe at the flying Buff Star but the Whizzer slithered from his grasp.²³

In the end, White scored all of his team's points, successfully converting on two point-after attempts and one field goal. As quarterback, White took the ball twenty-three times for a total of 187 yards, an average of 8.1 yards per drive; he completed two of his four passes; he averaged twenty-five yards on punt returns; he averaged thirty-nine yards on his own punts and had two kicks that were fifty-four yards a piece.²⁴ White's seventeen points brought his season point total to seventy-nine,

20. *Id.*

21. Darks, *supra* note 14, at 15.

22. Corbett, *supra* note 3, at 14.

23. *Id.*

24. Darks, *supra* note 14, at 15 (quoting Jimmie Hodgson).

"enabling him to pass the mid-western leader, Wayne Sheley of Augustana, [South Dakota] and take second place in the national tabulation behind Bill (Big Boy) Tranavitch, of Rutgers."²⁵

Henry McLemore of United Press wrote a 600-word article recounting White's mythical punt return that, according to the University of Colorado's campus newspaper, was carried in 412 papers nationwide.²⁶ McLemore's article, in which he insisted that White used mirrors to pull off his run, catapulted White into the national limelight. "Within weeks, what today might be described as Whizzermania erupted."²⁷

II. ILLEGAL PROCEDURE: WHITE TAKES A LATE HIT

On July 15, 1982, nearly forty-five years after his fabled punt return, Byron "Whizzer" White was back in Utah, this time, however, as a Justice of the United States Supreme Court. Justice White was in Salt Lake City to address a meeting of the Utah State Bar.

As the distinguished Justice was about to take the podium at the Marriott Hotel, "a man rushed up to the stand and repeatedly struck the still-sitting Justice in the jaw."²⁸ The man was quickly overpowered by members of the audience. Justice White, sixty-five years of age at the time, "was not seriously injured in the attack. The Justice . . . merely rubbed his jaw and looked around in surprise, then rose and presented his prepared speech without reference to the incident."²⁹

As the attacker struck the Justice, he shouted that he was angered by the Supreme Court's decisions on pornography. The assailant's wife told the *Deseret News* that the attack was made "to strike a blow against obscenity and all other dastardly things the Supreme Court has done."³⁰ After he was seized, the man told a reporter, "He's causing four-letter words to come into my living room through the TV set."³¹ "The only way I

25. *White Is Second High Scorer in U.S.*, *supra* note 6, at 14.

26. Hutchinson, *supra* note 4, at 45 n.6 (citing *Henry McLemore Suspects White of Using Mirrors on Long Run*, SILVER & GOLD (Boulder), Nov. 9, 1937, at 4).

27. *Id.*

28. Vicki Varela & Jerry Spangler, *Justice White Struck During Utah Speech*, DESERET NEWS, July 15, 1982, at A1.

29. *Id.*

30. *Id.*

31. *Id.*

know how to stop it is to go to the source," declared the man.³² Little did the assailant know that he had just struck his ideological friend on the Court. Justice White's opinions have not given pornography and obscenity expansive First Amendment protection.³³

When asked, after the speech, whether he was all right, Justice White replied, "I regret the incident earlier in the day, but I think everything went off pretty well."³⁴ "I thought it was unfortunate, but I knew what was happening," continued Justice White, "If someone hadn't grabbed him, I probably would have."³⁵ In apparent reference to his earlier feats on the Utah gridiron, Justice White quipped that he had been "hit harder" in Utah before.³⁶ Ironically, he probably hadn't.

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32. *Id.*

33. *See, e.g.,* *New York v. Ferber*, 458 U.S. 747 (1982); *United States v. Reidel*, 402 U.S. 351 (1971). What makes this already bizarre occurrence even more ironic is that six years after the attack, the assailant, who had apparently moved to Utah from Memphis Tennessee to avoid forced bussing, pleaded guilty "to reduced charges of attempted forcible sexual abuse of a child and showing harmful material to a minor." UPI, August 15, 1988, available in LEXIS, Nexis Library, ARCNWS File.

34. *See* Varela & Spangler, *supra* note 28, at A2.

35. *Id.*

36. UPI, July 15, 1982, available in LEXIS, Nexis Library, ARCNWS File.