Supplementary Material

Chapter 9: Liberalism Divided—Democratic Rights/Free Speech/Media

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Zurcher v. Stanford Daily, 436 U.S. 547 (1978)

On April 12, 1971, four police officers, acting with a warrant, searched the offices of the Stanford Daily, *looking for photographs of a demonstration that had taken place three days earlier at the Stanford University Hospital. The officers who obtained the warrant made no allegations that any member of the* Stanford Daily *had committed a crime. They alleged only that a photographer from the Stanford Daily may have taken pictures that would help the police identify persons who had illegally trespassed on hospital property. After the search revealed no photographs other than those already published by the student newspaper, members of the student newspaper sued James Zurcher, the chief of police in Palo Alto, and the police officers who conducted the search. Their suit claimed that the search of a consensually innocent party violated the Fourth Amendment and that the use of a search warrant rather than a subpoena, which would have enable the paper to contest the search, violated the First Amendment. The district court agreed that the police should have sought a subpoena rather than a warrant and found for the* Stanford Daily. *After a federal appeals court affirmed that decision, the police appealed to the Supreme Court of the United States. The United States, seventeen states, an association of police officers, and an association of district attorneys all filed amicus briefs urging the justices to reverse the lower court ruling. The brief for the United States contended that*

> *serious First Amendment questions are raised by the search of a newspaper office or any comparable media facility. This Court has acknowledged on a variety of occasions that the protections afforded by the Fourth Amendment must be applied with special stringency in situations where First Amendment values may be at stake. . . . The careful weighing of interests that the Constitution requires is best accomplished, however, through a neutral magistrate's evaluation of the facts presented in particular warrant applications, not through adoption of a new procedural requirement, indiscriminately applicable whenever First Amendment interests are arguably involved.*[1]

An association of various media organizations and an association of criminal defense lawyers filed amicus briefs supporting the Stanford Daily. *The brief for the media organizations asserted that*

> *surprise searches of news offices thwart the statutory protections expressly made available to the press by reporters' privilege laws in California and 25 other states. Many of these laws were passed in direct response to this Court's suggestion in* Branzburg v. Hayes *. . . that appropriate protection for confidential press sources could be fashioned by legislation. These "shield" laws generally protect the press against forced disclosure of confidential information when the information is sought by subpoena. Neither the* Branzburg *Court nor the state legislatures conceived of the possibility that such laws could be evaded by resort to a search warrant, enabling the police to descend on news offices without notice, to seize confidential information, and thus to*

[1] Note that Justice White uses almost identical language in the crucial section of his opinion. Indeed, much of Justice White's opinion paraphrases or lifts without attribution passages verbatim from the brief of the United States. This is common practice in Supreme Court opinions. Should you, however, imitate Supreme Court justices in your academic writing, you will be guilty of academic dishonesty.

> *destroy any opportunity for the invocation of state shield laws or any other constitutional protection against compelled disclosure.*

Zurcher *was one of several cases decided during the 1970s in which the Supreme Court rejected claims that the First Amendment provided distinctive protections for the organized press as opposed to ordinary citizens.* Branzburg v. *Hayes (1972) held that "the First Amendment does not give reporters a right to refuse to divulge their confidential sources in grand jury hearings. Justice White's majority opinion held that*

> *(f)air and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.*

Justice Stewart's dissent insisted that the news gathering responsibilities of reporters justified a higher constitutional standard for grand jury testimony.

> *when a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the government must (1) show that there is probable cause to believe that the newsman 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.*

Pell v. Procunier *(1974) held that the first amendment does not give reporters greater access to prisoners than members of the general public. Justice Stewart's majority opinion declared,*

> *[t]he First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally. It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public, that he is entitled to some constitutional protection of the confidentiality of such sources . . . and that government cannot restrain the publication of news emanating from such sources. . . . It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally. That proposition finds no support in the words of the Constitution or in any decision of this Court.*

The justices had more difficulty determining press rights in Houchins v. KQED, Inc. *(1978). The issue in that case concerned whether the media had rights to interview inmates at a prison, and take film and sound records for later broadcasts. Chief Justice Burger, speaking for Justice White and Rehnquist, thought the matter a straightforward application of* Pell v. Procunier.

> *The public importance of conditions in penal facilities and the media's role of providing information afford no basis for reading into the Constitution a right of the public or the media to enter these institutions, with camera equipment, and take moving and still pictures of inmates for broadcast purposes. This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control.*

Justice Stewart, while agreeing that government could ban all members of the public from prisons, insisted that government officials must consider the special needs of the media in circumstances where prisons were open to the general public.

> *A person touring Santa Rita jail can grasp its reality with his own eyes and ears. But if a television reporter is to convey the jail's sights and sounds to those who cannot personally visit the place, he must use cameras and sound equipment. In short, terms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see.*

Justice Steven's dissent took a different tack. In his view, prison officials had no constitutional power to bar either the press or the general public. The First Amendment, in his view, prohibited government secrecy unless good reasons existed for preventing disclosure. The Stevens dissent stated that

> *[t]he record demonstrates that both the public and the press had been consistently denied any access to the inner portions of the Santa Rita jail, that there had been excessive censorship of inmate correspondence, and that there was no valid justification for these broad restraints on the flow of information. An affirmative answer to the question whether respondents established a likelihood of prevailing on the merits did not depend, in final analysis, on any right of the press to special treatment beyond that accorded the public at large. Rather, the probable existence of a constitutional violation rested upon the special importance of allowing a democratic community access to knowledge about how its servants were treating some of its members who have been committed to their custody. An official prison policy of concealing such knowledge from the public by arbitrarily cutting off the flow of information at its source abridges the freedom of speech and of the press protected by the First and Fourteenth Amendments to the Constitution.*

The Supreme Court did recognize a general right of access to trials. In Richmond Newspapers, Inc. v. Virginia *(1980), an 8–1 judicial majority ruled that a judge could not normally close a trial to the public, even when both parties preferred privacy.*[2] *Chief Justice Burger's majority opinion stated,*

> *The Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open. Public access to trials was then regarded as an important aspect of the process itself; the conduct of trials "before as many of the people as chuse to attend" was regarded as one of "the inestimable advantages of a free English constitution of government." . . . In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees.*

Note, however, that Richmond Newspapers grants everyone a right of access, that the case provides no special access rights for the press.

The Supreme Court did not have the final legal say on many of these issues. Two years after Zurcher *was handed down, Congress passed the Privacy Protection Act of 1980. Under the heading, "First Amendment Privacy Protection," the statute declared,*

> *SEC. 101. (a) Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce; but this provision shall not impair or affect the ability of any government officer or employee, pursuant to otherwise applicable law, to search for or seize such materials, if—*
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> *(1) There is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate. . . .*

[2] A more divided Court in *Gannett Co. v. DePasquale* (1979) ruled that the press and general public could be excluded from a pre-trial hearing on whether evidence was admissible at trial.

(2) *There is reason to believe that the immediate seizure of such materials is necessary to prevent the death of, or serious bodily injury to, a human being.*[3]

Many local officials responded to Branzburg *by protecting reporters under state law. Sixteen states passed new laws limiting the power of courts to require reporters to testify about their confidential sources. Thirty-three states have such laws at present. In all but one of the states lacking a shield law, state courts have provided legal or constitutional protections to reporters. The Supreme Court of New Hampshire in* Opinion of the Justices *(NH 1977) referred to state law when finding a constitutional right not to reveal confidential sources.*

> *Our constitution quite consciously ties a free press to a free state, for effective self-government cannot succeed unless the people have access to an unimpeded and uncensored flow of reporting. News gathering is an integral part of the process. One study showed that more than ninety percent of the reporters surveyed believed protection of identity was more important than protection of contents.*

Consider the congressional and state responses when reading Zurcher. *Given the power of the media, was this a case in which the justices correctly left matters to elected officials and localities, who could best balance the rights in question? Alternatively, does the congressional response indicate that the judicial majority had too crabbed a conception of constitutional rights? On what basis might the press claim special First Amendment privileges? Do you believe those arguments sound as applied to any of the cases discussed in this section?*

JUSTICE WHITE delivered the opinion of the Court.

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The critical element in a reasonable search is not that the owner of the property is suspected of crime, but that there is reasonable cause to believe that the specific "things" to be searched for and seized are located on the property to which entry is sought. . . .

. . .

[I]t is untenable to conclude that property may not be searched unless its occupant is reasonably suspected of crime and is subject to arrest. And if those considered free of criminal involvement may nevertheless be searched or inspected under civil statutes, it is difficult to understand why the Fourth Amendment would prevent entry onto their property to recover evidence of a crime not committed by them, but by others. As we understand the structure and language of the Fourth Amendment and our cases expounding it, valid warrants to search property may be issued when it is satisfactorily demonstrated to the magistrate that fruits, instrumentalities, or evidence of crime is located on the premises. . . .

. . .

It is true that the struggle from which the Fourth Amendment emerged "is largely a history of conflict between the Crown and the press," . . . and that, in issuing warrants and determining the reasonableness of a search, state and federal magistrates should be aware that "unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." . . . Where presumptively protected materials are sought to be seized, the warrant requirement should be administered to leave as little as possible to the discretion or whim of the officer in the field.

. . . Neither the Fourth Amendment nor the cases requiring consideration of First Amendment values in issuing search warrants, however, call for imposing the regime ordered by the District Court. Aware of the long struggle between Crown and press and desiring to curb unjustified official intrusions, the Framers took the enormously important step of subjecting searches to the test of reasonableness and to the general rule requiring search warrants issued by neutral magistrates. They nevertheless did not

[3] 94 *U.S. Stat.* 1879 (1980).

forbid warrants where the press was involved, did not require special showings that subpoenas would be impractical, and did not insist that the owner of the place to be searched, if connected with the press, must be shown to be implicated in the offense being investigated. Further, the prior cases do no more than insist that the courts apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by the search. As we see it, no more than this is required where the warrant requested is for the seizure of criminal evidence reasonably believed to be on the premises occupied by a newspaper. Properly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices.

There is no reason to believe, for example, that magistrates cannot guard against searches of the type, scope, and intrusiveness that would actually interfere with the timely publication of a newspaper. Nor, if the requirements of specificity and reasonableness are properly applied, policed, and observed, will there be any occasion or opportunity for officers to rummage at large in newspaper files or to intrude into or to deter normal editorial and publication decisions. The warrant issued in this case authorized nothing of this sort. Nor are we convinced, any more than we were in *Branzburg v. Hayes* (1972), that confidential sources will disappear and that the press will suppress news because of fears of warranted searches. Whatever incremental effect there may be in this regard if search warrants, as well as subpoenas, are permissible in proper circumstances, it does not make a constitutional difference in our judgment.

. . .

Respondents also insist that the press should be afforded opportunity to litigate the State's entitlement to the material it seeks before it is turned over or seized, and that, whereas the search warrant procedure is defective in this respect, resort to the subpoena would solve the problem. The Court has held that a restraining order imposing a prior restraint upon free expression is invalid for want of notice and opportunity for a hearing, and that seizures not merely for use as evidence but entirely removing arguably protected materials from circulation may be effected only after an adversary hearing and a judicial finding of obscenity. . . . But presumptively protected materials are not necessarily immune from seizure under warrant for use at a criminal trial. Not every such seizure, and not even most, will impose a prior restraint. . . . And surely a warrant to search newspaper premises for criminal evidence such as the one issued here for news photographs taken in a public place carries no realistic threat of prior restraint, or of any direct restraint whatsoever on the publication of the Daily or on its communication of ideas. The hazards of such warrants can be avoided by a neutral magistrate carrying out his responsibilities under the Fourth Amendment, for he has ample tools at his disposal to confine warrants to search within reasonable limits.

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JUSTICE BRENNAN took no part in the consideration or decision of these cases.

JUSTICE POWELL, concurring.

. . .

If the Framers had believed that the press was entitled to a special procedure, not available to others, when government authorities required evidence in its possession, one would have expected the terms of the Fourth Amendment to reflect that belief. . . .

This is not to say that a warrant which would be sufficient to support the search of an apartment or an automobile necessarily would be reasonable in supporting the search of a newspaper office. As the Court's opinion makes clear, . . . the magistrate must judge the reasonableness of every warrant in light of the circumstances of the particular case, carefully considering the description of the evidence sought, the situation of the premises, and the position and interests of the owner or occupant. While there is no justification for the establishment of a separate Fourth Amendment procedure for the press, a magistrate asked to issue a warrant for the search of press offices can and should take cognizance of the independent

values protected by the First Amendment—such as those highlighted by JUSTICE STEWART—when he weighs such factors. . . .

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JUSTICE STEWART, with whom JUSTICE MARSHALL joins, dissenting.

It seems to me self-evident that police searches of newspaper offices burden the freedom of the press. The most immediate and obvious First Amendment injury caused by such a visitation by the police is physical disruption of the operation of the newspaper. Policemen occupying a newsroom and searching it thoroughly for what may be an extended period of time will inevitably interrupt its normal operations, and thus impair or even temporarily prevent the processes of newsgathering, writing, editing, and publishing. By contrast, a subpoena would afford the newspaper itself an opportunity to locate whatever material might be requested and produce it.

But there is another and more serious burden on a free press imposed by an unannounced police search of a newspaper office: the possibility of disclosure of information received from confidential sources, or of the identity of the sources themselves. Protection of those sources is necessary to ensure that the press can fulfill its constitutionally designated function of informing the public, because important information can often be obtained only by an assurance that the source will not be revealed. . . . And the Court has recognized that, "*without some protection for seeking out the news, freedom of the press could be eviscerated.*" . . .

Today, the Court does not question the existence of this constitutional protection, but says only that it is not "convinced . . . that confidential sources will disappear and that the press will suppress news because of fears of warranted searches." . . . This facile conclusion seems to me to ignore common experience. It requires no blind leap of faith to understand that a person who gives information to a journalist only on condition that his identity will not be revealed will be less likely to give that information if he knows that, despite the journalist's assurance, his identity may in fact be disclosed. And it cannot be denied that confidential information may be exposed to the eyes of police officers who execute a search warrant by rummaging through the files, cabinets, desks, and wastebaskets of a newsroom. Since the indisputable effect of such searches will thus be to prevent a newsman from being able to promise confidentiality to his potential sources, it seems obvious to me that a journalist's access to information, and thus the public's, will thereby be impaired.

A search warrant allows police officers to ransack the files of a newspaper, reading each and every document until they have found the one named in the warrant, while a subpoena would permit the newspaper itself to produce only the specific documents requested. A search, unlike a subpoena, will therefore lead to the needless exposure of confidential information completely unrelated to the purpose of the investigation. The knowledge that police officers can make an unannounced raid on a newsroom is thus bound to have a deterrent effect on the availability of confidential news sources. The end result, wholly inimical to the First Amendment, will be a diminishing flow of potentially important information to the public.

. . .

It is well to recall the actual circumstances of this litigation. The application for a warrant showed only that there was reason to believe that photographic evidence of assaults on the police would be found in the offices of the Stanford Daily. There was no emergency need to protect life or property by an immediate search. The evidence sought was not contraband, but material obtained by the Daily in the normal exercise of its journalistic function. Neither the Daily nor any member of its staff was suspected of criminal activity. And there was no showing that the Daily would not respond to a subpoena commanding production of the photographs, or that, for any other reason, a subpoena could not be obtained. Surely, then, a subpoena *duces tecum* would have been just as effective as a police raid in obtaining the production of the material sought by the Santa Clara County District Attorney.

. . .

[A] subpoena would allow a newspaper, through a motion to quash, an opportunity for an adversary hearing with respect to the production of any material which a prosecutor might think is in its

possession. . . . If, in the present litigation, the Stanford Daily had been served with a subpoena, it would have had an opportunity to demonstrate to the court what the police ultimately found to be true—that the evidence sought did not exist. The legitimate needs of government thus would have been served without infringing the freedom of the press.

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 abridgment by government. It does explicitly protect the freedom of the press.

JUSTICE STEVENS, dissenting.

. . .

. . . The only conceivable justification for an unannounced search of an innocent citizen is the fear that, if notice were given, he would conceal or destroy the object of the search. Probable cause to believe that the custodian is a criminal, or that he holds a criminal's weapons, spoils, or the like, justifies that fear, and therefore such a showing complies with the Clause. But if nothing said under oath in the warrant application demonstrates the need for an unannounced search by force, the probable cause requirement is not satisfied. In the absence of some other showing of reasonableness, the ensuing search violates the Fourth Amendment.

In this case, the warrant application set forth no facts suggesting that respondents were involved in any wrongdoing or would destroy the desired evidence if given notice of what the police desired. I would therefore hold that the warrant did not comply with the Warrant Clause and that the search was unreasonable within the meaning of the first Clause of the Fourth Amendment.