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Search and Seizure in the Newsroom - Constitutional Implications for the First and Fourth Amendments - Zurcher v. the Stanford Daily

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SEARCH AND SEIZURE IN THE NEWSROOM— CONSTITUTIONAL IMPLICATIONS FOR THE FIRST AND FOURTH AMENDMENTS— *ZURCHER V. THE STANFORD DAILY*

On April 9, 1971, nine police officers were injured while attempting to remove a large group of demonstrators from the administrative offices of the Stanford University Hospital.[1] The officers were only able to identify two of their assailants.[2] Subsequently, however, photographs appearing in a special edition of the University's student newspaper, The Stanford Daily, indicated that a student photographer could have photographed the assault on the officers.[3] The following day, a search warrant was secured by the local District Attorney's Office for the purpose of obtaining negatives, film, "or any pictures which display the events and occurrences" at the University hospital on the evening of the demonstration.[4] An extensive search of the Stanford Daily's offices was conducted later that afternoon.[5]

In response to the search, the Stanford Daily and seven of its staff members filed suit on May 13, 1971 in the U.S. District Court for the Northern District of California, alleging that under color of state law they had been deprived of rights guaranteed by the First, Fourth and Fourteenth Amendments to the United States Constitution.[6] The district court granted them declaratory relief on a motion for summary judgment, and they subsequently

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1. Zurcher v. The Stanford Daily, 98 S. Ct. 1970, 1974 (1978). According to police affidavits, the attackers were armed with sticks and chair legs. One policeman was "struck repeatedly on the head; another suffered a broken shoulder. All nine were injured." Extensive damage to the offices resulted from both "the occupation and removal of the demonstrators." *Id.* at n.1.

2. *Id.*

3. *Id.*

4. Brief for Petitioners Zurcher, Bonader, Desinger, Martin and Peardon at 21-22 [hereinafter cited as Brief for Petitioner Zurcher]. There was no question as to the defendant magistrate's finding of probable cause, at least insofar as that term had been defined until this case. *See* note 56 *infra*. For a conventional analysis of the term, *see* Carrol v. United States. 267 U.S. 132, 161-62 (1925).

5. The facts of the search were somewhat in dispute. *Compare* Brief for Petitioner Zurcher at 10 and Brief for Petitioners Bergna and Brown at 9-10 [hereinafter cited as Brief for Petitioner Bergna] *with* Brief for Respondents at 2-3. All parties agreed, however, that the search included an examination of file cabinets, waste baskets, desks and drawers, and that the officers were in a position to have read confidential material. Whether they in fact did so was disputed. Ironically, the search proved to be futile, since the only photographs found by the police were those which had been previously published. *Id.*

6. The suit was brought under 42 U.S.C. § 1983 (1970), with jurisdiction conferred by 28 U.S.C. § 1343(3) (1970). Named as defendants in the original complaint were the judge who had issued the warrant, the district attorney, a deputy district attorney who had helped secure the warrant, the officers who conducted the search, and their chief of police. 98 S. Ct. at 1975 n.4. Upon a motion by the plaintiffs, the action against the judge was dismissed. *Id.*

received an award of $43,000[7] in attorney's fees. The U.S. Circuit Court of Appeals for the Ninth Circuit adopted the district court's opinion and affirmed per curiam.[8] Upon appeal, however, the United States Supreme Court in a 5-3 decision, reversed.

The issue facing the Court in *Zurcher v. The Stanford Daily*[9] was whether the Fourth Amendment,[10] either by itself or in concert with the First Amendment,[11] prohibits searches of newsrooms pursuant to a warrant where no member of the newspaper staff is suspected of involvement in the crime giving rise to the search. The Court held that neither amendment forbade law enforcement officials from obtaining warrants to search the possessions of *any* non-suspect, *i.e.*, third party, so long as there existed probable cause to believe that fruits, instrumentalities, or other evidence of a crime would be found at a specified location.[12]

The Court found no authority for the district court's holding that 1) searches of all third parties were forbidden unless state law enforcement officials could establish the impracticality of issuing subpoenas; and 2) when the third party was a newsroom staff, the standard rose to "a clear showing that important materials will be destroyed or removed from the jurisdiction."[13] According to the Court, such standards were categorically unsup-

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7. The Stanford Daily v. Zurcher, 353 F. Supp. 124 (N.D. Cal. 1972). Because the Supreme Court reversed on the substantive claim, it did not reach the issues of the amount or propriety of the attorney's fees award. 98 S. Ct. at 1975 n.3. These issues had been extensively briefed by both petitioners and respondents. *See* Brief for Petitioner Bergna at 26-35; Brief for Petitioner Zurcher at 35-45; Brief for Respondents at 54-68. Respondents also sought a permanent injunction against future searches but were denied relief. The district court reasoned that such relief was unnecessary because it was expected that the petitioner law enforcement officers would honor the declaratory decision. 353 F. Supp. at 136.

8. 550 F.2d 464 (9th Cir. 1977).

9. 98 S. Ct. 1970 (1978). Justice White delivered the majority opinion, in which Justices Rehnquist, Blackmun and Powell joined. Justice Powell also filed a concurring opinion. Justice Stewart was joined by Justice Marshall in his dissent, while Justice Stevens filed a separate dissent. Justice Brennan did not participate in the consideration or decision of the case.

10. U.S. CONST. amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

11. U.S. CONST. amend. I provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

12. 98 S. Ct. at 1976. In so holding, the Court was applying the traditional judicial interpretation of the Fourth Amendment's warrant requirements to third party searches. *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523, 534-35 (1967). Note the federal law in this area. FED. R. CIV. P. 12. *See also* United States v. Ventresca, 380 U.S. 102, 105 n.1 (1965). At least one commentator has indicated that the traditional rule does in fact apply to third parties. *See* T. TAYLOR, TWO STUDIES OF CONSTITUTIONAL INTERPRETATION [hereinafter cited as TAYLOR]. Most, however, have noted the rule without mentioning the issue of the searched party's culpability. *See, e.g.* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 358 (1974).

13. 98 S. Ct. at 1976-78, *quoting* The Stanford Daily v. Zurcher, 353 F. Supp. 124 at 127, 135. In setting out this standard the district court quoted at length from two state court deci-

ported by prior case law.[14] In addition, they would impose an undue burden upon law enforcement efforts without a concomitant protection of any significant First or Fourth Amendment interests.[15]

This decision is particularly significant in light of the virtually unanimous claim by the media that the Supreme Court's holding would severely inhibit the functioning of the press.[16] The case is also important because it reflects a continuation of the Court's recent trend limiting Fourth Amendment protection of private papers.[17]

The purpose of this Note is to critically evaluate the Court's opinion and assess its impact upon privacy rights and press freedoms. The Note will commence by briefly describing the background of the Fourth Amendment. It will then analyze the Court's use of precedent and policy considerations in

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sions: Owens v. Way, 141 Ga. 796, 82 S.E. 132 (1914) and Commodity Mfg. Co. v. Moore, 198 N.Y.S. 45 (Sup. Ct. 1923), 353 F. Supp. at 128.

The *Commodity* court, in what was clearly dictum, did address the issue directly, stating that the seizure of evidence from an innocent party, even with a search warrant, "would open the door to grave abuses of invasion of property rights." 198 N.Y.S. at 47. Some commentators have expressed the view that this statement rested on the now-discredited "mere evidence rule." *See* Note, *Searches and Seizures–Warranted Search of Party Not Suspected of Criminal Behavior Is Unreasonable When Subpoena Not Shown to Be Impractical*, 86 HARV. L. REV. 1317, 1319 n.15 (1973) [hereinafter referred to as Harvard Note]. The *Commodity* court, however, never referred to, nor implied, any reliance upon the rule.

The *Zurcher* district court also relied heavily on Bacon v. United States, 449 F.2d 933 (9th Cir. 1971), and analogized from *Bacon's* holding that a material witness may not be arrested without a demonstration of probable cause that it is impracticable to secure his presence at a grand jury hearing by subpoena. For an analysis of the district court's reliance on *Bacon*, *see* Harvard Note *supra*, at 1319-22.

The majority opinion in *Zurcher* justifiably dismissed the significance of these cases in a footnote. 98 S. Ct. at 1975-76 n.5. It should be noted, however, that the Supreme Court could not find a single case concerned with the issue of third party searches that supported their holding. Those cases that relate to third party searches have, in the past, been concerned exclusively with the question of a defendant's standing to raise constitutional objections to the introduction of the fruits of such searches. *See, e.g.*, Brown v. United States, 411 U.S. 223 (1973); Alderman v. United States, 394 U.S. 165, 171-76 (1969); Wong Sun v. United States, 371 U.S. 471, 492 (1963). *See generally* White & Greenspan, *Standing to Object to Search and Seizure*, 118 U.PA. L. REV. 333 (1970); Comment, *Jus Tertii–Standing to Invoke Violation of Constitutional Rights of a Third Party*, 38 TENN. L. REV. 538 (1971).

14. 98 S. Ct. at 1975-80.

15. 98 S. Ct. at 1979-80.

16. The Court's decision was roundly condemned in numerous newspapers. *See, e.g.*, N.Y. Times, June 1, 1978, col. 1 at 47; Chicago Tribune, June 1, 1978, col. 1 at 50; Washington Post, June 1, 1978, col. 1 at 42.

17. *See* Andresen v. Maryland, 427 U.S. 463 (1976) (Fourth Amendment does not forbid the seizure of one's business records, nor does the Fifth Amendment prohibit their introduction at trial); Warden v. Hayden, 387 US. 294 (1967) (the distinction prohibiting seizure of items of only evidential value and allowing seizure of instrumentalities, fruits, or contraband is no longer accepted as being required by the Fourth Amendment). *See generally* Note, *Private Papers Now Subject to Reasonable Search And Seizure*, 26 DEPAUL L. REV. 848 (1977) [hereinafter cited as DePaul Note]; Comment, *The Search and Seizure of Private Papers, Fourth and Fifth Amendment Considerations*, 6 LOY. L.A. L. REV. 274 (1963).

deciding that neither third parties in general nor third party newsrooms in particular should be accorded any greater constitutional protections against searches and seizures than are given to persons suspected of criminal involvement. Finally, it will suggest an alternative holding and offer some observations concerning the possible ramifications of the decision.

ANALYSIS OF THE DECISION

Third Party Searches in General:

Fourth Amendment Considerations

In drafting the Fourth Amendment, the Framers were influenced in large part by the memory of the pernicious and invidious intrusions which had been suffered by English and colonial citizens from their government's use of general warrants and writs of assistance.[18] These warrants and writs allowed officers discretion to search among the most private possessions of a citizen.[19] The Fourth Amendment was designed not only to prevent a revival of such measures, but to guarantee to all individuals the sanctity of their homes and the privacy of their lives.[20]

While obviously aware of these historical facts, the Court believed that a third party's Fourth Amendment interests would be adequately protected by the general rule governing search warrants. This rule requires prosecutors to establish probable cause that evidence of a crime is located at a specified place.[21] The Court's holding was predicated upon its belief that prior case law had demonstrated the applicability of this rule to all parties, including those not suspected of criminal involvement.[22] To this end, the Court expressly relied upon three prior decisions.[23]

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18. Such writs were generally obtained by revenue officers in order to search for smuggled goods, while the warrants were used for the seizure of books and papers in an attempt to substantiate a charge of seditious libel. 2 T. PATERSON, LIBERTY OF THE SUBJECT (1877); *see* Boyd v. United States, 116 U.S. 616 (1886).

19. William Pitt wrote in opposition to general warrants:

> The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail - its roof may shake - the wind may blow through it - the storm may enter, the rain may enter - but the King of England cannot enter - all his force dares not cross the threshold of the ruined tenement.

T. HANSARD, 15 PARLIMENTARY HISTORY OF ENGLAND (1753-1765) 1307 (1816). James Otis denounced the writs of assistance as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundumental principles of law, that ever was found in an English law book" because they placed "the liberty of every man in the hands of every petty officer." Boyd v. United States, 116 U.S. 616, 625 (1886).

20. *Id.*

21. *See* note 12 *supra*.

22. 98 S. Ct. at 1975-77.

23. It is important to note at the outset that the Court's treatment of Fourth Amendment precedent is permeated by an inconsistent, and generally incorrect interpretation of the district court's holding. The district court held that unless a subpoena is impractical, warrants may not issue to search the possessions of one "not suspected of a crime." 353 F. Supp. at 127. On one

The first, *Carrol v. United States*,[24] discussed the difference between the preconditions for search and seizure and those for arrest. *Carrol* held that the validity of a warrantless search of an automobile for illicit liquor and the subsequent seizure of such liquor was not dependent upon the right to arrest the occupants of the automobile.[25] From this the majority in *Zurcher* concluded that the "critical" element of a reasonable search was whether probable cause existed for believing that the evidence to be seized was located at the place to be searched, and not that the owner or possessor of this evidence was criminally suspect.[26]

The problem with this conclusion, however, is two-fold. First, the holding of *Carrol* is clearly restricted to the narrow issue of automobile searches for contraband, and hence is inapposite as precedent for any general Fourth Amendment principles.[27] More importantly, the majority plainly misreads this holding. For although *Carrol* establishes that probable cause to arrest is not a prerequisite for conducting an automobile search, it does not suggest that suspicion of illegal activity is likewise unnecessary. On the contrary, by requiring a seizing officer to possess "reasonable cause" to believe that "the contents of the automobile *offend against the law*,"[28] the Court in *Carrol* indicates that suspicion of criminal conduct is an essential predicate.[29] Thus,

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occasion the Court explicitly misstates this, asserting that the holding conditions the "state's entitlement to a search warrant" on its "right to arrest" the possessor of property. 98 S. Ct. at 1976. The Court implicitly relies on its mistaken interpretation several other times. *See* 98 S. Ct. at 1976-79, particularly n.6. Occasionally, the Court correctly states the holding. ("The Fourth and Fourteenth Amendments forbid the issuance of a warrant to search for materials in possession of one *not suspected of a crime*. . . .") 98 S. Ct. at 1975 (emphasis supplied).

This misinterpretation clearly undermines the validity of the majority's analysis, for by claiming that the district court's rule requires the state to show *probable cause to arrest* rather than *suspicion of criminal activity*, they present an argument which is easier for them to rebut. After all, since probable cause to arrest is a more stringent standard than suspicion, it is *ipso facto* more difficult to support, and hence, more easily defeated.

Because this Note finds that the cases cited by the Court during this section of its opinion are both factually distinguishable from the instant case and objectionable on other grounds, *see* notes 24-44 and accompanying text *infra*, it assumes arguendo that the Court did not commit this interpretative error.

24. 267 U.S. 132 (1925) (warrantless seizure of contraband liquor transported by automobile held not to be in violation of Fourth Amendment). *See also* Husty v. United States, 282 U.S. 694, 700-01 (1931).

25. 267 U.S. 132 at 158-59.

26. 98 S. Ct. at 1977.

27. *See, e.g.*, the Court's discussion of *Carrol* in Chambers v. Maroney, 399 U.S. 42, 48-52 (1970). In referring to the very quotation which the *Zurcher* Court cites with approval, *see* 98 S. Ct. at 1977, the *Chambers* Court points out that "[t]he *Carrol* Court also noted that the search of an *auto* . . . proceeds on a theory wholly different from that justifying the search incident to arrest." 399 U.S. at 49 (emphasis supplied).

28. 267 U.S. 132 at 158-59 (emphasis added).

29. Objects which "offend against the law"(i.e. contraband) carry an unavoidable presumption of criminality, hence the possessor of such objects would have to be suspected of illegal activity. For a definition of contraband, *see* BLACK'S LAW DICTIONARY 393 (4th ed. 1951). *See also* State v. Butler, 148 S.C. 495, 146 S.E. 418, 419 (1890).

instead of supporting the majority's opinion, the *Carrol* decision might conceivably be used to rebut the *Zurcher* position, were it not for the fact that the *Carrol* holding is so limited.

The second case cited by the Court, *United States v. Manufacturers National Bank of Detroit*,[30] post-dated the *Zurcher* district court's decision and expressly rejected its holding.[31] The precedential value of this case, however, is particularly weak. In *Manufacturers*, the wife and daughter of a defendant claimed to be third parties and sued to recover monies and equipment which had been seized from a safety deposit box jointly owned by them.[32] The Sixth Circuit Court of Appeals rejected plaintiffs reliance upon *Zurcher* by merely asserting that warrants may issue once a magistrate has probable cause to believe that a crime has been committed and that evidence of the crime will be found in a specified location.[33] Since no prior decisions were cited and no argument was proffered in support of this assertion, *Manufacturers* appears to be devoid of any significant analytical value.[34]

In *Camara v. Municipal Court*,[35] the third case relied on by the majority, the Court held for the first time that administrative searches (*i.e.*, searches for violations of health codes, housing codes, or other civil statutes) came within the pale of the Fourth Amendment's warrant requirement.[36] This reversed an earlier decision, *Frank v. Maryland*,[37] which had allowed such searches to be conducted without a warrant. *Frank* was predicated upon the notion that the main purpose of the Fourth Amendment was to protect individuals against official intrusions designed to secure evidence against them for criminal prosecutions.[38] Despite the conflict between these cases, the

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An additional objection may be leveled against the majority's utilization of *Carrol*. By citing that case, the Court was implicitly relying on its misinterpretation of the *Zurcher* district court's holding. *See* note 23 *supra*. For even if one accepts the Court's reading of *Carrol*, it would compel only the conclusion that probable cause to *arrest* is not a prerequsite for conducting a search, and not that searches may be carried out in the absence of *any* showing of suspicion.

30. 536 F.2d 699 (6th Cir. 1976).

31. *Id.* at 703.

32. *Id.* at 700-01.

33. *Id.* at 703.

34. The majority also cited State v. Tunnel Citgo Servs., 149 N.J. Super. 427, 374 A.2d 32 (1977). However, the *State* court merely quoted the "reasoning" of the *Manufacturers* court. *Id.* at 433, 374 A.2d at 35.

35. 387 U.S. 523 (1967) (warrantless inspection of private premises for violation of San Francisco Housing Code held unconstitutional under the Fourth Amendment). *See also Camara's* companion case, See v. City of Seattle, 387 U.S. 541 (1967) (warrantless inspection of private commercial premises pursuant to Seattle Fire Code held constitutionally impermissible under Fourth Amendment).

36. 387 U.S. 523 at 527-28.

37. 359 U.S. 360 (1959) (Baltimore City Code permitting warrantless inspections for health hazards held not to violate Fourth Amendment). *See also* Eaton v. Price, 364 U.S. 263 (1960), which upheld the *Frank* decision.

38. Frank v. Maryland, 359 U.S. 360, 365-66 (1959). *But see* Justice Douglas's dissent: "The Court misreads history when it relates the Fourth Amendment to searches for evidence to be used in criminal prosecutions." *Id.* at 376 (Douglas, J., dissenting).

Zurcher Court believed that both *Frank* and *Camara* added support to its holding, since far from suggesting that the owner of property must be suspected of criminal involvement in order to be searched, they each sanctioned searches where criminal evidence was not even being sought.[39]

A more exacting analysis of *Frank* and *Camara*, however, manifests the sophistic nature of the Court's reasoning. The only similarity between the searches conducted in *Frank*, *Camara*, and *Zurcher* is that none of them involved attempts to recover criminal evidence to be used against its possessor. Although this factual congruity is not insignificant, it is surely insufficient to compel the conclusion that administrative searches are constitutionally indistinguishable from searches of third parties for criminal evidence.[40] This insufficiency is dramatically illustrated by the majority's wholesale failure to examine the factors which had led the Court in *Camara* to require that officials first procure warrants before engaging in administrative searches. Such factors included the efficacy of alternative procedures and the degree of the intrusion accompanying such searches.[41] Even the most perfunctory application of these factors to *Zurcher* would indicate legitimate reasons for distinguishing between administrative and third party searches.

First, no alternative means exist enabling state officials to discover health and housing code violations without entering the premises where such infractions are allegedly being committed.[42] Unlike administrative searches, however, in searching third parties, certain viable options do exist. By far the easiest is an informal request; a more pragmatic method may be the subpoena *duces tecum*.[43] Second, searches for criminal evidence, by their very nature, entail a much greater potential privacy intrusion than inspections of residences designed to discover faulty plumbing, structural defects, or rodent infestations.[44]

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39. 98 S. Ct. at 1976-78. As Justice White wrote: "[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." 98 S. Ct. at 1978.

40. This, in essence, was the Court's conclusion. *See id.*

41. *See* 387 U.S. 523 at 530-39.

42. *See* Camara v. Municipal Court, 387 U.S. 523 (1967): "There is unanimous agreement among those most familiar with this field that the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections . . ." *Id.* at 535. *See also* Frank v. Maryland, 359 U.S. 360, 372 (1959).

43. *See* note 109 *infra*. A subpoena duces tecum is one which commands a witness to bring to court (or a grand jury hearing) some document or paper which he has in his possession, and which is relevant to the controversy at issue. BLACKS LAW DICTIONARY 1595 (4th ed. 1951).

44. Ironically, the Court in *Camara* (per Justice White, who also wrote the decision in the instant case) suggested this distinction: "A routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for fruits and instrumentalities of a crime" 387 U.S. 523, 530.

A more subtle irony evidenced by this quote is found in the Court's use of "fruits and instrumentalities," a phrase typical of the "mere evidence" period, *see* note 56 *infra*, when the

Not only, therefore, is the "invasion" more severe in searches of third parties, but the "need" for such an intrusion is often less demonstrable. When one considers that the *Camara* Court itself explicitly recognized the differences between searches for civil infractions and those for criminal evidence,[45] the majority's reliance upon *Frank* and *Camara* is all but casuistic.

Policy Considerations

The *Zurcher* Court's decision was grounded upon more than an interpretation of prior case law. The majority also devoted a section of their opinion to policy considerations, asking whether the district court's subpoena requirement would "substantially further privacy interests without seriously undermining law enforcement efforts."[46] The propriety of conducting such an inquiry cannot be doubted, for there is ample precedent establishing that, under the Fourth Amendment, "there is no ready test for determining reasonableness" other than by "balancing the need to search against the invasion which the search entails."[47] Furthermore, the constitutionality of third party searches is virtually an issue of first impression.[48] There are simply no relevant cases to turn to for guidance, the majority's mistaken view to the contrary notwithstanding.

The Court commenced its balancing analysis by articulating two reasons why the government's fundamental interest in law enforcement would be adversely affected by the district court's "subpoena-first" rule.[49] First, search warrants are generally employed at the beginning of criminal investigations when the identity of the perpetrator is unknown, and the ostensibly inculpable "third party" may in fact be involved in the crime. Even if he is not, his relationship with the actual perpetrator may be such that, were he subpoenaed, he would so inform the perpetrator or destroy the evidence

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search carried out against The Stanford Daily would probably have been forbidden on evidentiary grounds alone. *Id.* Actually, the mere evidence rule had been abandoned when the *Camara* decision was handed down, *see* Warden v. Hayden, 387 U.S. 294 (1957), but it was only one week earlier. It is therefore more than likely that the two decisions were written concurrently. For a criticism of the Court's reliance on pre-*Warden* case law, *see* note 56 *infra* and Justice Steven's dissenting opinion in the instant case, 98 S. Ct. at 1976.

The Court's inconsistent interpretation of the *Zurcher* district court's holding, *see* note 23 *supra*, is no more apparent than in its analysis of *Frank* and *Camara*. The majority commences their discussion by misstating the holding and ends it by stating it correctly. See 98 S. Ct. at 1976.

45. *See* note 44 *supra*.

46. 98 S. Ct. at 1979.

47. Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967). *See also* Go-Bart Co. v. United States, 282 U.S. 344 (1931): "There is no formula for the determination of [Fourth Amendment] reasonableness. Each case is to be decided on its own facts and circumstances." 282 U.S. at 357.

48. The only cases even remotely concerned with this issue were the older state court decisions upon which the district court mistakenly relied. *See* note 13 *supra*. Of course neither case concerned the search of a newsroom.

49. 98 S. Ct. at 1979.

himself.[50] Second, the Court suggested that the party summoned by subpoena may assert his privilege against self-incrimination.[51] Since prosecutors would rarely be able to sustain the burden of overcoming such an assertion, particularly in the early stages of an investigation, the opportunity to obtain valuable evidence may be foreclosed. Even if they could sustain the burden, the time spent in litigation alone would substantially impede their progress. These reasons persuaded the majority that even as against third parties, subpoenas could not be effectively employed as a substitute procedure for search warrants.[52]

The Court then very briefly discussed the possibility that the district court's rule would act to protect a third party's interest in privacy.[53] It concluded that because search warrants are more difficult to obtain than subpoenas, it is unlikely that a clear-thinking prosecutor will choose the former without substantial grounds to believe the warrant is "necessary to secure and to avoid the destruction of evidence."[54]

The problem with the Court's analysis, however, is that the overwhelming majority of search warrants are used in an attempt to procure fruits, instrumentalities of a crime or contraband,[55] the very kind of evidence which would give rise to the inference that the party in possession is sufficiently

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50. *Id.*

51. *Id.* at n.8.

52. *Id.* In response to this argument it should be noted that it seems somewhat anomolous to hold a search and seizure constitutionally permissible under the Fourth Amendment because it may otherwise lead to a valid invocation of one's Fifth Amendment privilege against self-incrimination. Although the Court has held that a subpoena may violate the Fifth Amendment in circumstances where, had a search and seizure occurred, it would not have infringed upon Fourth or Fifth Amendment rights, *see, e.g.*, Andresen v. Maryland, 427 U.S. 463 (1976), this holding is surely different from the argument above. For a criticism of *Andresen, see* Justice Brennan's dissent in that case. *Id.* at 486 (Brennan, J., dissenting). *See also* DePaul Note, *supra* note 17, at 848. In the context of its Fifth Amendment argument, the Court also urged that the state's interest in the enforcement of criminal laws and the recovery of evidence remains exactly the same, whether or not such evidence is in the possession of a criminal or a third party. While that is true, it begs the question of whether this interest collides with a third party's countervailing interest in privacy. *See* notes 92-95 and accompanying text *infra*. *See also* Justice Steven's dissenting remarks on this subject, 98 S. Ct. at 1989-90.

53. 98 S. Ct. at 1980.

54. *Id.*

55. *See* L. TIFFANY, D. MCINTYRE, JR., D. ROTENBERG, DETECTION OF CRIME 99-104 (1967) [hereinafter cited as DETECTION OF CRIME]. In fact, the vast majority of searches are those incident to arrest. *Id.* at 105. Despite the Court's expressed preference for search warrants, they are "rarely used" by police, and then generally only to aid in prosecutions against vice. *Id.* at 100-01. For an argument that this preference for search warrants is, historically, misplaced, *see* TAYLOR note 12, *supra* at 44-46. Mr. Taylor suggests that the Framers (and the Court, at least until the 1920's) were afraid of the abuses associated with searches by warrant, *see* notes 17-18 *supra*; and not with warrantless searches. According to Mr. Taylor, until this century, the Court had never heard a case involving warrantless searches. . . .

culpable to be denied third party status.[56] In fact, both petitioners[57] and dissenting Justice Stevens[58] agreed that the mere possession of fruits, instrumentalities or contraband would alone satisfy the district court's "impracticality" standard.[59] Since, therefore, only evidence in the form of documents, photographs and the like could even raise the possibility that a sub-

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56. Dissenting Justice Stevens argues that the unique question presented by the *Zurcher* controversy is attributable to the Warden v. Hayden, 387 U.S. 294 (1967), decision wherein the Court abandoned an evidentiary distinction that pre-dated even the Constitution. 98 S. Ct. at 1987.

In the famous English decision of Entick v. Carrington, 19 How. St. Tr. 1029 (1765), Lord Camden outlawed not only the general warrant but also searches for a suspect's private papers to aid in his conviction. The "mere evidence" rule apparently grew out of this decision. *See generally* T. COOLEY, CONSTITUTIONAL LIMITATIONS 431-32 (7th ed. 1903); N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1911); R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS (1955). Until *Warden* there was a "distinction between evidentiary materials . . . which may not be seized . . . [and] those objects which may validly be seized including . . . instrumentalities . . . fruits . . . and property, the possession of which is a crime [*i.e.* contraband]." Harris v. United States, 331 U.S. 145, 154 (1947). Papers could be seized if they fit into one of the enumerated categories—for example, stolen or forged checks. Langdon v. People, 133 Ill. 382 (1890). Justice Stevens suggests that because the search in the instant case was directed toward photographs (*i.e.* "mere evidence") it could not have withstood a test of constitutionality prior to *Warden*. 98 S. Ct. at 1987-88. Moreover, *Warden* effectively created a constitutional void. Since mere evidence was exempt from seizure when the Fourth Amendment was drafted, the meaning of that Amendment's warrant requirements (particularly probable cause) is undetermined with respect to this post-*Warden* category of evidence. *Id.*

It is quite plausible to suggest that the Fourth Amendment was purposely written in general terms to allow for such contingencies as the mere evidence rule (or its abandonment). On numerous occasions the Court has explained that the ultimate standard under the Fourth Amendment is "reasonableness," and that such a word admits of great flexibility. *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523, 539 (1967).

Justice Stevens also criticizes the Court for not comprehending the novelty of the question presented by the instant case. "Today, for the first time, the Court has an opportunity to consider the kind of showing that is necessary to justify the vastly expanded 'degree of intrusion' upon privacy that is authorized by the opinion in *Warden v. Hayden*." 98 S. Ct. at 1978. He concludes that in searches for mere evidence, unless there is "probable cause to believe that the custodian is a criminal," or "if notice were given, he would conceal or destroy the object of the search," the search would be an unreasonable invasion of a third party's right to privacy and, therefore, a violation of the Fourth Amendment. *Id.* at 1990-91.

57. The Court even acknowledged this "concession" by petitioners. 98 S. Ct. at 1979.

58. 98 S. Ct. at 1989-90. Although Justices Stewart and Marshall dissented solely on First Amendment grounds, they also admitted that the possession of certain items (*e.g.* contraband) would be sufficient to justify even a newsroom search.

59. This would effectively place law enforcement officials in the same situation they were in before the district court's decision, since, except where a search was for mere evidence (which is rare, *see* DETECTION OF CRIME, *supra* note 55, at 101) there could be no subpoena requirement. A careful reading of respondents' briefs indicates that law enforcement officials' primary fear was that the district court's ruling would alter the present warrant procedure in all cases. "Additional information would be required for *every search warrant application*." Brief for Petitioners Bergna and Brown at 17 (emphasis in original). This fear would obviously be unjustified if the district court's subpoena rule applied only to searches for mere evidence be-

poena would be required,[60] it is difficult to subscribe to the majority's conclusion that law enforcement efforts would be seriously frustrated by the lower court's holding, even if the privilege against self-incrimination was consistently asserted. Moreover, it is not enough to say that an individual's interest in privacy is secure in the hands of a clear-thinking prosecutor.[61] For even though the Court is correct in believing that a search warrant is more difficult to obtain than a subpoena, the difficulty is not so great as to deter even a "rational" prosecutor from attempting to procure the former.[62]

At any rate, because the majority failed to comprehend the limited number of cases in which the district court's rule would be operative, they have left unanswered the question of whether a third party's interest in privacy is sufficient to overcome the government's interest in effective law enforcement when a search is directed toward documentary evidence.[63] Accordingly, their analysis is both incomplete and unpersuasive.

Third Party Newsroom Searches: First Amendment Considerations

Despite their finding that a prohibition against third party searches in general could not be countenanced under the Fourth Amendment, the majority then considered whether the First Amendment nevertheless forbids searches of third party newsrooms.[64] The Court began by noting the potential "chilling effects" upon the functioning of the media which respondents and their supporting *amici* asserted would result from allowing newsroom

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cause the issuance of a warrant *always* requires prosecutors to specifically designate the evidence for which they are searching. *See* FED.R. CRIM. P. 41. Only searches for mere evidence would require "additional information."

60. Of course, if there was any doubt as to how the district court's decision would be interpreted by magistrates, the Court could always have modified the lower court's decision by explaining that it applied only to mere evidence.

61. In the past, the Court has been unwilling to find a defendant's Fifth Amendment rights adequately protected during custodial interrogations by police officers or prosecuting attorneys unless "Miranda warnings" have been given. Miranda v. Arizona, 384 U.S. 436 (1966). The Court's holding in *Miranda* was premised on the fact that law enforcement officials (including prosecutors, who are often present during interrogations) had uniformly employed techniques of persuasion as well as deception in an attempt to elicit confessions. *Id.* at 455. Considering the ominous implications of this observation, it is somewhat surprising that the *Zurcher* majority would have so much confidence in the conduct of a prosecuting attorney when an individual's right to privacy is at stake.

62. Despite the fact that search warrants (unlike subpoenas) require a showing of probable cause and can be issued only by a magistrate, they are nonetheless often issued perfunctorily. *See* Y. KAMISAR, W. LAFAVE, J. ISRAEL, MODERN CRIMINAL PROCEDURE 289 (1974). *See also* W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY, 17-52 (Remington ed. 1965); DETECTION OF CRIME, *supra* note 55, at 121-55; LaFave & Remington, *Controlling the Police: the Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 991-95 (1965); LaFave, *Improving Police Performance Through the Exclusionary Rule—Part 1: Current Police and Local Court Practice*, 30 MO. L. REV. 391, 411-15 (1965).

63. The question is considered in the Alternative section of this Note.

64. 98 S. Ct. at 1980.

searches.[65] First, timely publication may be impeded by physical disruptions. In addition, confidential sources could dry up from fear of exposure and possible prosecution. Similarly, reporters may be deterred from preserving their notes and recollections. Further, the dissemination of news may be chilled by fears that "internal editorial deliberations" will be disclosed. Finally, self-censorship may be initiated in order to conceal from police the possession of potentially desirable information.[66]

While conceding that "the struggle from which the Fourth Amendment emerged 'is largely a history of conflict between the Crown and the press,'"[67] the Court rejected these arguments *in toto*, citing both the lack of data to support them[68] and its recent rejection of similar arguments in *Branzburg v. Hayes*.[69] In *Branzburg*, the Court had held that the First Amendment does not provide a testimonial privilege relieving a newspaper reporter of his obligation as a citizen to respond to a grand jury subpoena and answer questions relevant to a criminal investigation.[70] The *Branzburg* decision, however, is distinguishable from *Zurcher* on several grounds.

First, the Court in *Branzburg* explicitly limited its analysis solely to a determination of a reporter's right to withhold information from a grand jury.[71] Writing for the majority, Justice White copiously documented the

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65. *Id.* at 1980-81.

66. *Id.*

67. *Id.* at 1981 *quoting* Stanford v. Texas, 379 U.S. 476, 482 (1965).

68. Despite the Court's rejection of these arguments, there is substantial support for them. *See* Comment, *Search Warrants and Journalists' Confidential Information*, 25 AM. U. L. REV. 938 (1966); Comment, *The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 CALIF. L. REV. 1198 (1970); Comment, *Search Warrants and Journalists' Confidential Information*, 4 J.L. REF. 85 (1970); Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U. L. REV. 18 (1969); Comment, *Newsman's Privilege Two Years After Bransburg v. Hayes: The First Amendment in Jeopardy*, 49 TUL. L. REV. 417 (1975); Comment, *The Newsman's Privilege after Branzburg: The Case for a Federal Shield Law*, 24 U.C.L.A. L. REV. 160 (1976). *See also* Affidavits of Walter Cronkite, Gordon Meanning, Douglas Kneeland, *et al.*, Petitioners Brief for Certiorari, Joint Appendix at 57-147, Zurcher v. The Standard Daily, 98 S.Ct. 1970 (1978) [hereinafter cited as Joint Appendix].

In response to the second and fourth possible "chilling effect" it is interesting to consider that if reporters did not preserve their notes and recollections and/or self-censorship were initiated, the Court's decision could be self-defeating: there would be no news stories from which police could determine the existence of evidence and/or that evidence would be destroyed after the stories were printed.

69. *See* Branzburg v. Hayes, 408 U.S. 665 (1972).

70. For an interesting analysis of *Branzburg* and its impact, *see* Goodale, *Branzburg v. Hayes and The Developing Qualified Privilege for Newsmen*, 26 HAST. L.J. 709 (1975).

71. 408 U.S. 665 at 682. Athough Justice White did mention that the holding would also apply to criminal trials, *id.* at 690-91, this was obiter dictum. Note, too, Justice Powell's observation on "the limited nature of the Court's holding." *Id.* at 409 (Powell, J., concurring). At least one lower court justice has suggested that *Branzburg* is "controlled" by Powell's opinion. See *United States v. Liddy*, 478 F.2d 586 (D.C. Cir. 1972) (Leventhal, J., concurring). The holding may be further limited by the fact that all three reporter-plaintiffs had actually witnessed the crime (as opposed to simply having knowledge or evidence of it, as was the claim made against The Stanford Daily) and refused even to appear in front of the grand jury.

grand jury's invaluable role in law enforcement and that institution's "historic" and "essential" reliance on the subpoena process.[72] *Zurcher*, however, presents no issue even remotely affecting the grand jury's function. And far from demanding an exemption from subpoenas, as had been requested by the plaintiffs in *Branzburg*, The Stanford Daily was imploring the Court to require them.[73]

Second, the privilege from disclosure urged by the petitioner in *Branzburg* conflicted with the well-established rule that "the public has a right to every man's evidence."[74] *Zurcher*, on the other hand, involved only a choice of means for obtaining information; no "privilege" to withhold was asserted.

Third, and most important, *Branzburg* did not involve the possibility of physical disruption of newsrooms or the potential exposure of internal editorial deliberations.[75] The *Zurcher* Court minimized these concerns by explaining that the proper administration of the preconditions for a warrant would prevent needless rummaging through files.[76] But this argument is

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72. *See* Branzburg v. Hayes, 408 U.S. 665 at 686-90, 701 (1972).

73. Prior case law has in fact established a clear difference between subpoenas and search warrants, particularly in regard to their instrusiveness and the degree of judicial supervision which each requires. "A subpoena is served in the same manner as other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of a court." United States v. Doe (Schwartz), 457 F.2d 895, 898 (2d Cir. 1972) (Friendly, C.J.), *quoted in* United States v. Dionisio, 410 U.S. 1, 10 (1972). *See also* People v. Warburton, 7 Cal. App. 3d 825, 86 Cal. Rptr. 894 (1970):

> The flaw in defendant's thesis here is that it uncritically equates servicing a subpoena duces tecum with entering an office and forcibly seizing papers found there. When police unjustifiably enter an office and seize papers, privacy is irrevocably destroyed. But the issuance and service of a subpoena do not, by themselves, invade the private papers of anyone.

Id. at 824.

74. Branzburg v. Hayes, 408 U.S. 665 at 688, *quoting* United States v. Bryan, 339 U.S. 323, 331 (1950); *see also* 8 J. WIGMORE, EVIDENCE § 2192 (McNaughton rev. ed. 1961). In United States v. Calandra, 414 U.S. 338, 345 (1974), the Court stated:

> The duty to testify has long been recognized as a basic obligation that every citizen owes his Government. *Blackmer v. United States*, 284 U.S. 421, 438, 52 S. Ct. 252, 255, 76 L. Ed. 375 (1932); *United States v. Bryan*, 339 U.S. 323, 331,70 S. Ct. 724, 730, 94 L. Ed. 884 (1950) . . . The duty to testify may on occasion be burdensome and even embarrassing. It may cause injury to a witness' social and economic status. Yet the duty to testify has been regarded as "so necessary to the administration of justice" that the witness' personal interest in privacy must yield to the public's overriding interest in full disclosure. *Blair v. United States*, 250 U.S. [273] at 281. . . .

For an amusing illustration of the rule, see 4 THE WORKS OF JEREMY BENTHAM 320-21 (Edinburg ed. 1843).

75. The former "chilling effect" is obviously not possible in any case involving the service of a subpoena. The latter, although possible (*i.e.*, a reporter might be subpoenaed to testify as to a conversation about editorial deliberations), is unlikely.

76. 98 S. Ct. at 1982.

entirely specious, for there is simply no conceivable way to search for a few documents in a room filled with many, without doing precisely that.[77] Moreover, unlike searches for weapons or narcotics, newsroom searches for photographs or writings actually require police to read and examine every document until they have found either the ones specified in the warrant or satisfied themselves that the evidence is not there.[78] In contrast, a subpoena *duces tecum* is far less intrusive, as it involves neither an entry nor a search or seizure.[79]

The Court also rejected arguments that seizures of presumptively protected materials always require a prior adversary judicial hearing to examine the state's entitlement to such material and to assess potential invasions of First Amendment freedoms.[80] The Court construed a series of former cases[81] to require such a hearing only when the seizures involved a "prior restraint"[82] upon free expression. Because The Stanford Daily was not "restrained" from printing any news story or photograph, such cases were found to be inapplicable.[83] This finding is not, however, entirely correct, for although each of the cases cited involved a prior restraint, none of them suggested that in the absence of such an intrusion no prior hearing was mandated. In fact, each emphasized the duty of the Court to consider, in deciding the constitutionality of a given search, such factors as the locus of

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77. *Id.* at 1985 n.7 (Stewart, J., dissenting). *See also* Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment at 10, The Stanford Daily v. Zurcher, 353 F. Supp. 124 (N.D. Cal. 1972), *quoting* affidavit of CBS News Director Gordon Manning:

> To allow this kind of free-wheeling search is to invite more searches, since a working newsroom contains an abundance of information, much of which would be argued by investigators to be useful . . . Not only would these news gathering and reporting functions be inhibited in an exaggerated but a similar way to which the subpoena power inhibits, but also the very ability of the news organization to operate would be threatened. A search warrant presumes that material must be sifted before the needed material is located. I can imagine the working of a newsroom being brought to a complete halt while this voluminous and as yet unorganized information is "searched."

78. This is, unfortunately, a necessary, albeit ironic, consequence of the Fourth Amendment's specificity requirement.

79. *See* note 73 *supra*.

80. 98 S. Ct. at 1982.

81. Roaden v. Kentucky, 413 U.S. 496 (1973); Carroll v. Princess Anne, 393 U.S. 175 (1968); Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636 (1968); A Quantity of Books v. Kansas, 378 U.S. 205 (1964); Marcus v. Search Warrant, 367 U.S. 717 (1961).

82. Such "restraints" have traditionally been defined as "those barring information and ideas from reaching the public," Litwack, *The Doctrine of Prior Restraint*, 12 HAR. CIV. RTS. L. REV. 519, 519 (1977) *See also* Near v. Minnesota, 283 U.S. 697 (1931).

83. 98 S. Ct. at 1982. *But see* Justice Stewart's dissent: "The decisions of this Court establish that a prior adversary judicial hearing is generally required to assess in advance *any* threatened invasion of First Amendment liberty." 46 U.S.L.W. at 4553 (Stewart, J., dissenting) (emphasis added).

the search and the type of evidence sought.[84] The Court, however, never undertook this kind of detailed inquiry.

The majority's third party newsroom analysis suffers from the same mistakes which plagued their discussion of third party searches in general, namely, misapplied precedent and an inchoate examination of the issue. For had the Court followed the standard suggested by the "prior restraint" cases[85] and other decisions involving a convergence of First and Fourth Amendment rights,[86] it would have balanced the petitioners interest in effective law enforcement against the respondent's interests in privacy and freedom of the press. Although the Court did engage in a balancing analysis of sorts,[87] it was restricted to respondent's Fourth Amendment claim, and as noted above, it was markedly inadequate.[88] This analytical deficiency, together with the Court's injudicious reliance upon *Branzburg*, fatally flawed its opinion.[89]

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84. It has been noted that "[a] seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to a different kind of material." Roaden v. Kentucky, 413 U.S. 496, 501 (1973). *See also* note 81 *supra*.

85. *See* notes 81 & 84, *supra*.

86. In United States v. United States Dist. Court, 407 U.S. 297 (1972) the Court considered the constitutionality of a particular type of domestic security surveillance. In phrasing the issue, the majority said "as the Fourth Amendment is not absolute in its terms, our task is to examine and balance the basic values at stake in this case: the duty of Government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free expression." *Id.* at 314-15. The majority also observed that cases which "reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime . . . involve greater jeopardy to constitutionally protected speech." *Id.* at 313. Although the *United States* Court therefore believed that "balancing" represents a rigorous level of scrutiny, the more liberal members of the Court consistently assert that such a standard allows the judiciary to unjustifiably circumvent the clear commands of the Bill of Rights. *See* Schneckloth, Conservation Center Superintendent v. Bustamonte, 412 U.S. 218 (1973) ("the Framers of the Fourth Amendment struck the balance . . ."). *Id.* at 290 (Marshall, J., dissenting); Linkletter v. Walker, Warden, 381 U.S. 618 (1965) (Court viewed as following "a recent pattern of balancing away the Bill of Rights guarantees . . ."). *Id.* at 645 (Black, J., dissenting). *See also* note 90 *infra*. If one adopts the perspective of these dissenting Justices, the *Zurcher* majority may be criticized for failing to employ even a minimal level of scrutiny. From the point of view of the *United States* Court, the majority simply failed to use the proper level.

For examples of cases which employ the balancing technique where only Fourth Amendment interests are at stake, *see* Camara v. Municipal Court, 387 U.S. 523 (1967); Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (the determination of whether a warrant should be issued for an area search involves a balancing of the legitimate interests of law enforcement with protected Fourth Amendment rights) *Id.* at 284 (Powell, J., concurring).

87. *See* 98 S. Ct. at 1979.

88. *See* notes 49-63 and accompanying text *supra*.

89. The closest the Court came to articulating a First Amendment standard was to explain that "where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.' 98 S. Ct. at 1981, *quoting* Stanford v. Texas, 379 U.S. 476, 485 (1965). The Court apparently took this to mean that the Fourth Amendment's warrant requirements must be applied scrupulously, and thus concluded that since the warrant in the instant case technically adhered to the requirements set forth in that Amendment's second clause, the search was constitutional. But the first

AN ALTERNATIVE ANALYSIS

Although a balancing approach has been criticized by several members of the Court when employed in a First Amendment context,[90] it has been uniformly adhered to in cases involving either the Fourth Amendment alone or the First and Fourth Amendments conjointly.[91] Moreover, the somewhat speculative, yet consequential nature of the harms attending newsroom searches, makes this analysis singularly appropriate. For it allows consideration of both the likelihood and potential intensity of newsroom searches to be weighed against the possible damage to law enforcement efforts resulting from the prohibition of such intrusions.

The following observations seem to fairly characterize a balancing of these competing interests. First, the Supreme Court has consistently held that privacy is one of the foremost rights guaranteed by the Constitution.[92] Accordingly, they have held that the permissible scope of any search may not exceed that which is reasonably necessary to discover the desired evi-

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clause of the Fourth Amendment prohibits unreasonable searches and seizures of any kind, with or without a warrant, and case law has clearly held there is "no ready test for determining reasonableness," other than requiring a "balancing [of] the need to search against the invasion which the search entails." Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967). *See also* Go-Bart Co. v. United States, 282 U.S. 344 (1931): "There is no formula for the determination of [Fourth Amendment] reasonableness. Each case is to be decided on its own facts and circumstances." *Id.* at 357.

90. *See* Branzburg v. Hayes, 408 U.S. 665, 713 (1972), wherein dissenting Justice Douglas stated: "[In regard to the First Amendment] my belief is that all of the 'balancing' was done by those who wrote The Bill of Rights." *See also* Konisberg v. State Bar of Calif., 366 U.S. 36, 61 (1961); Barenblatt v. United States, 360 U.S. 109, 143 (1959); Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 879 (1960).

91. *See* notes 86 & 89 *supra*.

92. In his famous dissent in Olmstead v. United States, 277 U.S. 438 (1928), Justice Brandeis explained the primacy of this right:

> The makers of our Constitution . . . conferred, as against the government, the right to be let alone—the most comprehensive of all rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Id. at 478. Justice Bradley, in Boyd v. United States, 116 U.S. 616 (1886) described the right which the Fourth and Fifth Amendments protect in this way: "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . ." *Id.* at 630. In Wolf v. Colorado, 338 U.S. 25 (1949), which declared that the exclusionary rule is not mandated by the Fourteenth Amendment, Justice Frankfurter, speaking for a majority of the Court, said: "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society." *Id.* at 45.

In recent years, the Court has held that the right of privacy clearly extends to areas of personal autonomy. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraceptives for unmarried persons); Stanley v. Georgia, 394 U.S. 557 (1969) (private possession of obscene material); Griswold v. Connecticut, 381 U.S. 479 (1965) (marital privacy).

dence.[93] But under this standard, documentary searches, unlike those for weapons or plunder, would compel police to scrutinize all of one's papers, personal or otherwise, until they have found those specified in the warrant.[94] The uniquely intrusive character of documentary searches, therefore, indicates the potential for invasions of privacy which such searches may entail.

Second, searches of newsrooms include an additional and perhaps more serious detriment—the infringement of First Amendment press rights.[95] Such searches certainly involve potentially greater chilling effects than the petitioners in *Branzburg* had urged against subpoenas.[96] Considering the somewhat solicitous treatment which the majority in *Branzburg* gave to such contentions,[97] it is astonishing to observe the cavalier manner[98] in which the *Zurcher* Court dismissed more persuasive arguments.[99] For newsroom searches may cause not only a drying up of confidential sources,[100] but also

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93. *See* Y. KAMISAR, W. LAFAVE, J. ISRAEL, MODERN CRIMINAL PROCEDURE 264 (1974): "The police may look only where the items described in the warrant *might* be concealed." (emphasis supplied).

94. *See* note 78 *supra*.

95. *See* notes 65-66, and accompanying text *supra*. Note also the various "shield" laws enacted in 26 states to protect newsmen. *See, e.g.*, CAL. EVID. CODE § 1070 (West Supp. 1978); ILL. REV. STAT. ch. 51, §§ 111-19 (1977 & Supp. 1978); N.J. STAT. ANN. §§ 2A:84A-21, 29 (West Supp. 1978). For an analysis of many of these statutes, *see Hearings on H.R. 717 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 301 (1973).

96. *See* notes 73-79, and accompanying text *supra*. *See also* Note, *Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis*, 28 STAN. L. REV. 957, 989, 994 for an excellent argument that search warrants are far more dangerous to press rights and privacy freedoms than subpoenas.

97. *See* Branzburg v. Hayes, 408 U.S. 665, 690, 693, 707 (1972). The *Branzburg* Court clearly conceded that petitioners' claims were not insignificant. They believed, however, that certain factors outweighed these claims. *See* notes 63, 65 and accompanying text *supra*.

98. 98 S. Ct. at 1981-82.

99. *See* notes 70-77 *supra*.

100. *See* note 66 and accompanying text *supra*. For cases which recognize the media's reliance on confidential information, *see also* Farr v. Pitchess, 522 F.2d 464, 467-68 (9th Cir. 1975), *cert. denied* 427 U.S. 912 (1976); Carey v. Hume, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974), Baker v. F&F Inv. 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); Morgan v. State, 337 So. 2d 951 (Fla. Sup. Ct. 1976); Rosato v. Superior Court, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), *cert. denied*, 427 U.S. 912 (1976); affidavit of Gene Roberts, Joint Appendix, *supra* note 68 at 124-30, Affidavit of Douglas Kneeland, Joint Appendix, *supra* note 68, at 66-71. "If the government is permitted to search newspaper offices or even the homes of newsmen for unpublished photographs, notes, tape recordings or other materials, [that trust which prompts] sources to disclose information will be effectively destroyed." *Id.* at 68. The Roberts' affidavit stated:

> It will not matter that the newspaper of the individual newsman is an unwilling accomplice of the government. An accomplice he will be, his hardwon reputation for independence shattered. Doors will be closed. And the public will be deprived of much that it has the need and the right to know.

Id. at 128.

prolonged physical disruptions[101] as well as the exposure of internal editorial deliberations.[102]

Third, where by the nature of the evidence sought[103] or for some independent reason the police suspect that the possessor of property is criminally involved, the issuance of a subpoena is clearly an inefficacious way of procuring the desired property.[104] However, an unsuspected person in possession of documentary evidence could well be a bona fide third party who would honor a subpoena or even an informal request.[105]

Finally, when one considers the statistically insignificant role which search warrants play in criminal investigations,[106] the kind of evidence generally secured through warrants,[107] the paucity of media searches,[108] and the variety of methods available to the police for obtaining evidence,[109] the govern-

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101. *See* notes 66, 75-79 and accompanying text *supra*. According to the Los Angeles Times, in 1974 the L.A. police searched radio station KPFK-FM for more than eight hours in an unsuccessful attempt to obtain the original copy of a message from a terrorist group which claimed credit for committing two bombings. Los Angeles Times, Oct. 11, 1974, at 4 col. 1. *See also* affidavit of Frank Haven, Joint Appendix at 60-66, "the thorough disruption of day-to-day newspaper operations which would result from subjecting newspapers to the use of search warrant procedures is too obvious to require much elaboration." *Id.* at 63.

102. *See* notes 66, 75 and accompanying text *supra*.

103. *E.g.*, weapons and contraband.

104. *See* Fuentes v. Shevin, 407 U.S. 67 (1972) wherein it was noted: "The danger is all too obvious that a criminal will destroy or hide evidence or fruits of his crime if given any prior notice." *Id.* at 93-94 n. 30.

105. The Court's failure to examine the law enforcement interest in relation to the specific facts of the *Zurcher* case obscured a legitimate law enforcement argument. Since previous experience has shown that media personnel often risk contempt citations and incarceration rather than respond to a subpoena requiring testimony, would they not similarly destroy documentary evidence in their possession upon receipt of a subpoena *duces tecum*. *See* note 88 and accompanying text *supra*. *See also* Guest & Stanzler, note 68 *supra and* Murasky, *The Journalist's Privilege: Branzburg and Its Aftermath*, 52 TEX. L. REV. 829, 858 n.94 (1974). According to Ms. Murasky, one study indicates that in 96% of all cases noted, newsmen have chosen to accept contempt citations when grand juries insisted on their testimony.

Despite this argument's strong prima facie appeal, there is a very pragmatic consideration militating against such actions on the part of the media. Should the practice of destroying evidence become sufficiently widespread to seriously burden law enforcement efforts, magistrates naturally would tend to accept prosecutorial claims regarding the impracticability of issuing subpoenas. Therefore, newsmen's contemptuous disregard of subpoenas would serve only to undermine their own best interests by increasing the chances that future evidence would be secured through searches.

Besides, if the Court has enough faith in magistrates to believe that they will handle the issuance of search warrants prudently, it is only logical to expect that, if the district court's rule were affirmed, magistrates would be equally as prudent in the issuance of subpoenas. *See* 98 S. Ct. at 1982.

106. *See* DETECTION OF CRIME, *supra* note 55, at 100-101, 105.

107. *Id.*

108. *See The Reporters Committee for Freedom of the Press*, 12 PRESS CENSORSHIP NEWSLETTER (1978) [hereinafter PCN] The PCN claims that only ten such searches have ever been carried out. *See also* Brief for the United States as Amicus Curiae note 109 *infra*.

109. *See* DETECTION OF CRIME, *supra* note 55, at 3-4; E. ELDEFONSO, A. COFFEY & J. SULLIVAN, POLICE AND THE CRIMINAL LAW 62 (1972); Amsterdam, *supra* note 12, at 358-60.

ment's interest in law enforcement would have suffered no substantial loss had the Court prohibited merely newsroom searches for documentary evidence.[110]

The foregoing analysis has indicated the kinds of harms and gains which may result from forbidding searches similar to the one carried out against The Stanford Daily. While the benefits of such searches to criminal investigations are virtually *de minimis*,[111] the detriments to First[112] and Fourth Amendment freedoms are quite substantial. The balance of interests should have tipped against permitting these potentially dangerous and, until recently,[113] unheard of intrusions.[114]

CONCLUSION

It is difficult to assess what consequences will follow from the Supreme Court's decision in *Zurcher*. The Court suggests that the scarcity of media searches provides a secure foundation for believing that the final adjudication of the *Zurcher* controversy in favor of the petitioners will be an unlikely

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See also Amicus Brief of National Association of Criminal Defense Lawyers which states "historically police and prosecutors have always either requested [documentary evidence] informally or had a grand jury or court issue a subpoena duces tecum . . ." and Brief for the United States as Amicus Curiae at 3 which argued: "[There is a] strong [federal] preference for subpoenas or informal requests where feasible . . . [Federal] law enforcement officials rarely, if ever, engage in the practice of searching newspaper offices. No case has been found in which any media facility has been searched under federal auspices."

110. In fact, in the Brief for the United States at 32, as Amicus Curiae it was said the "federal law enforcement efforts would not be seriously hampered by a decision of [the Supreme Court] approving the 'subpoena first' rule of the courts below in the limited context of searches of the press as a neutral third party believed to be in possession of evidence bearing upon a criminal investigation." Respondents had, of course, never contended anymore than this.

In response to the argument that such a prohibition would constitute a resurrection of the now discarded mere evidence rule, *see* Reply Brief for Petitioners Bergna and Brown, Zurcher v. The Stanford Daily, at 3 n.3, it should be observed that the instant case involves *only* documentary evidence. *See* also note 56 *supra*. Furthermore, the Court, on occasion, has revived the distinction between the two kinds of evidence. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971), wherein the Court explained that inadvertency is necessary to justify seizures under the "plain-view" rule, unless, perhaps, the desired items are "contraband [or] stolen [or] dangerous in themselves." *See also* Roaden v. Kentucky, 413 U.S. 496 (1973) at 502.

111. *See* note 110 and accompanying text *supra*.

112. Should the importance of First Amendment freedoms ever be questioned, one need only refer to the admonishing words of Chief Justice Hughes:

> [I]mperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

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

113. It was conceded by all parties that the Daily search was the country's first newsroom search.

114. In Boyd v. United States, 116 U.S. 616 (1886), Chief Justice Bradley said, "Illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight devia-

source of future First and Fourth Amendment abuses.[115] Yet the apparent absence of such searches before The Stanford Daily incident was probably attributable to a feeling on the part of law enforcement officials that searches of newspaper offices would receive judicial condemnation.[116] The Court's holding, however, effectively puts an end to any such doubts and it certainly opens the door to potentially serious invasions of privacy rights and press freedoms. One may find solace, though, in that the Court nevertheless recognized the largely empirical nature of the *Zurcher* controversy, and said if indeed "grave abuses" were to follow from its decision, "there will be time enough to deal with [them]."[117]

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tions from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional protections for the security of person and property should be liberally construed." *Id.* at 649.

115. 98 S. Ct. at 1982.

116. This is really the only explanation which is compatible with 1) law enforcement arguments about how important such searches are, and the tremendous burden which will attend their prohibition (*see* notes 49-52 and accompanying text *supra*) and 2) the absence of newsroom searches during the first 196 years of this nation's history (*see* note 113 *supra*.)

117. 98 S. Ct. at 1982.