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Full Court Press: The Imperial Judiciary vs. The Paranoid Press

FRANCIS I. DALE*
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*The authors explore the current debate between the judiciary and the press over the fate of the first amendment. This is accomplished through a discussion of three recent Supreme Court decisions involving diverse constitutional issues: *Zurcher v. Stanford Daily* (concerning newsroom searches); *Herbert v. Lando* (concerning editorial privilege); and *Gannett v. DePasquale* (concerning courtroom closures). The authors analyze the cases, examine the press reactions and come to conclusions on the validity of both the holdings of the court and the reactions of the press. Their discussion goes beyond typical legal analysis to the broader issue of press/judiciary interaction which is perceived as overly antagonistic, largely unnecessary and counterproductive.*

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Limits have been put on . . . press freedom this past year. . . . These court decisions are a threat to the entire first amendment. . . . If we have an imperial judiciary . . . , one that is bending the first amendment at every turn, that will be just as disruptive and devious as was the Imperial Presidency.

Allen Neuharth, Chairman ANPA¹

Today . . . there is a distinctly identified and dangerous threat (from the judiciary) to the free press of America.

Walter Cronkite, Anchorman,
CBS Evening News²

Indeed, one of the reasons that journalists are so worried, even perhaps slightly paranoid, about the loss of their freedoms is that these rights have never been very secure, here or abroad.

Henry Grunwald, Essayist³

There appears to have developed a paranoia among certain members of our profession against the courts. . . .

J. Mart Clinton, Publisher
San Mateo Times⁴

The strident denunciations of the Burger Court as an enemy of press freedom reflect a gross lack of proportion.

Professor Benno C. Schmidt, Jr.
Columbia Law School⁵

The courts are nibbling away not only at freedom of the press but at the rights of the people. This is not only a battle for the press, a battle we shall certainly continue through all legal means, but a struggle for the people's right to know.

Tom Simmons, Executive Editor
Dallas News⁶

Press reaction to many Supreme Court decisions amount to overscream.—there are some in the press who seem to think that because they are rightly given enormous freedom they must be given absolute freedom.

Judge Harold Leventhal D.C. Cir.⁷

I. INTRODUCTION

While conflict between the press and courts is not new, recent decisions by the United States Supreme Court have aroused unusually acrimonious reactions from the Fourth Estate.⁸ Members

1. Keynote Address by Allen Neuharth, American Newspaper Publishers Ass'n., 93rd Annual Convention of the American Newspaper Publishers Association (Apr. 23, 1979) [hereinafter Keynote Address].

2. Address by Walter Cronkite to the San Diego Chamber of Commerce, Feb. 6, 1976, reprinted in Prosecutor's Brief, Mar.-Apr. 1979, at 22.

3. Grunwald, *The Press, the Courts and the Country*, TIME, July 16, 1979, at 74.

4. Clinton, *Status of the Media and the Courts*, CAL. PUBLISHER, June, 1979, at 4.

5. Schmidt, *Burger Court: Staunch Friend of Press Freedom*, Chicago Sun Times, July 17, 1979, at 36.

6. EDITOR AND PUBLISHER, May 5, 1979, at 24.

7. *The Press and the Courts: Freedom and Constraints*, addressed by Judge Leventhal to the Associated Press Managing Editors Association, Tulsa, Oklahoma, (Oct. 1979) reprinted in EDITOR AND PUBLISHER, Oct. 20, 1979, at 40.

8. The term the "Fourth Estate" originally attached to the field of journalism in Medieval Europe, although exact dates in the evolution of the terminology cannot be traced precisely. There were three generally accepted "estates", those being the nobility, the clergy, and the merchants or commoners. Estates of the realm were considered to be parts of the body politic, each wielding distinct political powers, each considered to have a role in the determination of public policy. The public press was originally "outside" of the estates, but gradually their role as

of the judiciary, as well as others in the legal fraternity, are responding in kind. Charges and countercharges, of which those quoted above are only a small part, have escalated both in frequency and vehemence. The press and the judiciary seem headed on a collision course, firing salvos over each other's bow all along the way. Allen Neuharth, Chairman of the American Newspaper Publishers Association, delivered a scathing attack on the Supreme Court at the Association's 1979 annual convention, where he inferred that there is a deliberate campaign to curb the press by emasculating the first amendment. In this respect, he suggests the Court has moved "above the law."⁹ Standing beneath a huge banner displaying the words of the first amendment in "old English" type, embellished with colorful calligraphy, Neuharth sounded a clarion call to do battle to rescue and free the first amendment. He also urged the press to go beyond (or above) the courtrooms and get "the people—ordinary citizens—on our side." Quoting Supreme Court Justice John Marshall, Neuharth hurled the battle cry, "The people made the Constitution and the people can unmake it."¹⁰

Of course, not all editors and publishers, and very few of the judiciary, agree with the Chairman's assessment of the situation. Several publishers strongly disagree with the assertion that recent court decisions are ominous. One of them even blames the press for the confrontation:

The impression is widespread that we are witnessing a judicial attack upon essential privileges and immunities conferred upon the press by the First Amendment. . . .

The truth is precisely the reverse: We are witnessing a brand-new bid by an aggressive and highly politicized press for privileges and immunities which it has never previously had, which it neither needs or deserves and which it would be dangerous to confer upon it.¹¹

The chairman of the Freedom of Information Committee of Sigma Delta Chi, the Society of Professional Journalists, calls the screaming and dire predictions over some Court decisions "non-

being "observers, reporters, and commentators on the rest of society" caused their elevation to the status meriting designation as the "Fourth Estate." V *ENCYCLOPAEDIA BRITANNICA, MICROPAEDIA*, 116 (15th ed. 1977); I *WEBSTER'S THIRD NEW INT. DICTIONARY* 899 (1966).

9. See note 1 *supra*.

10. See Keynote Address, note 1 *supra*.

11. Shaw, *Journalists Fear Impact of Court Rulings*, Los Angeles Times, Jan. 1, 1979, at 28, col. 1 (quoting W. Rusher, Publisher, NATIONAL REVIEW).

sense.”¹² A distinguished columnist for the *Wall Street Journal* describes the tendency of journalists to cry wolf at every unfavorable court ruling or government action as “a knee action reflex that anything we find inconvenient or annoying is somehow a violation of the first amendment.”¹³

Justice Lewis F. Powell finds no “hostility toward [the press]” amongst his brethren on the Court.¹⁴ Justice William J. Brennan, Jr. has expressed concern “that in the heat of the controversy [over recent decisions] the press may be misapprehending the fundamental issues at stake . . .” and that in some cases “the vehemence of the press’ reaction has been out of proportion to the injury suffered.”¹⁵

What’s behind all this hyperbole? What are the issues giving rise to the conflict? Is the press justified in its fears?

The press in this country has always had a relationship with the courts, usually as an observer or watchdog, often as a litigant, and occasionally getting caught up in the judicial process as a potential witness or a source for evidence. In whichever role the press finds itself, it always cites the first amendment as a shield to justify its position. When the issue is the right of the press to publish what it wishes, that shield of protection is practically absolute, and in relation to the right of free expression, all the familiar, heady rhetoric about freedom of the press is appropriate. But when the press tries to extend the shield first amendment of its protection from *what it publishes* to *how it functions*, the courts have refused to grant absolute protection. Press claims for functional protection include, for example, a constitutional right of access to newsworthy information, a constitutional right not to divulge confidential source material, and a constitutional immunity from inquiry into the editorial process. As against such claims, the courts balance competing constitutional claims under the fourth and/or the sixth amendments.¹⁶

12. Aiken, *Journalists Should Thrive on Struggle*, *The Cincinnati Enquirer*, May 13, 1979, § D, at 1.

13. Shaw, *Journalists Fear Impact of Court Rulings*, *Los Angeles Times*, Jan. 1, 1979, at 28, col. 1 (quoting Vermont Royster).

14. Statement to American Bar Association meeting (Aug. 1979), *reprinted in* EDITOR AND PUBLISHER, Aug. 18, 1979, at 4.

15. *Press and the Court: Is the Strain Necessary?*, Address by Justice Brennan at the dedication of the S.I. Newhouse Center for Law and Justice, Rutgers University, Oct. 17, 1979; *see generally*, EDITOR AND PUBLISHER, Oct. 27, 1979, at 10.

16. Justices Brennan and Stewart explain the scope of first amendment press rights by referring to:

[T]wo distinct models of the role of the press in our society that claim protection of the First Amendment.

.....

Under one model—which I call the ‘speech’ model—the press requires and

Over the years, minor adjustments to or expansions of the shield that protects the functioning of the press have taken place to accommodate the complexities of modern society, including the advent of the broadcast media. Certain types of issues persist, however, and repeatedly surface for judicial determination in a variety of situations. First among these are the free press/fair trial issues involving the conflicting or competing rights of the press and an accused under the first and sixth amendments.¹⁷ The free press/fair trial conflict almost always arises in the context of a criminal prosecution in some celebrated murder case.¹⁸

The multifaceted issues surrounding the torts of libel and invasion of privacy and their related procedural and evidentiary questions, are a second area which repeatedly confronts the courts. In such cases, courts must weigh the individual's right not to be maligned and to enjoy his privacy against the right of the press to report on public affairs.

is accorded the absolute protection of the First Amendment. In the other model—I call it the 'structural' model—the press' interests may conflict with other societal interests and adjustment of the conflict on occasion favors the competing claim.

EDITOR AND PUBLISHER, Oct. 27, 1979, at 10. See also note 103 *supra*. Thus, for example, under the "speech" model, the press has an almost absolute right to publish information in its possession. All the myriad tasks necessary for it to gather and disseminate the news, however, may, or may not, enjoy constitutional protections. There are many ways to "gather" and "disseminate" news and not every method used by the press will always outweigh competing societal or personal interests (*e.g.*, the right to a fair trial).

17. In the authors' view, constitutional rights do not so much directly *conflict*, as they *compete* for protection from governmental encroachment. The private interests and objectives of individuals, *e.g.*, news reporters and criminal suspects, may conflict, one demanding the right to cover a story and the other demanding a fair trial free of bias-producing publicity, but their constitutional rights are not in conflict. Constitutional rights define what government can or cannot do; they do not invoke rules of conduct between private persons. Only a government can violate a constitutional command. See Linde, *Fair Trials and Press Freedom—Two Rights Against the State*, 13 WILLAMETTE L.J. 211 (1977).

18. See, *e.g.*, the prosecution of Bruno Hauptmann, of Billy Sol Estes, of Dr. Sam Sheppard, of Lee Harvey Oswald, and Jack Ruby. Perhaps no other criminal case in the history of criminal law in America received wider publicity, pre-trial and trial, than that of a young Massachusetts orphan named Lizzie Borden, in 1892. Charges of prejudicial press publicity were rampant. So notorious was the case that it inspired a bit of immortal doggerel:

Lizzie Borden took an ax
And gave her father 40 whacks
And when she saw what she had done
She gave her mother 41.

Nevertheless, Lizzie Borden was acquitted.

A third group of issues frequently needing attention from the courts addresses those problems relating to the press' claimed right to gather news and information without interference, and to keep its information confidential including its files and the notes and sources of its reporters. Cases dealing with such issues involve competing claims under the first, fourth, and sixth amendments.

For the most part, cases involving each of these types of issues are decided according to precedent and become lineal descendants of familiar and long-standing decisions in the field. Occasionally, however, a decision is handed down which departs from the familiar legal genealogy, or at least is perceived by the press to have so departed. When this happens, the press attacks the courts.

Within the past five years, the pace of litigation involving these and other press-related issues has quickened sharply and, as the quotations appearing on the title page demonstrate, some of the decisions have surprised and greatly troubled some numbers of the press. The press has reason for concern, for many of the press cases before the courts not only expose the press to damages liability, but force the courts to define, more specifically than ever before, the exact legal boundaries of a variety of press activities. Pending cases, or those already decided by the United States Supreme Court, deal with such matters as whether a state can require the press to publish specified types of election-related material;¹⁹ whether the press now has any privilege, beyond that of the public generally, to access to government information;²⁰ whether police may stage unannounced raids on newspaper offices seeking evidence even though the newspaper is not suspected of any wrongdoing;²¹ whether states may impose prior restraint on newspapers prohibiting the publication of the names of juveniles charged with violent crimes;²² whether a newspaper

19. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (holding a Florida statute granting political candidates a right to reply to criticism by a newspaper violates the first amendment's guarantee of a free press). See text accompanying note 132 *infra*, for a discussion of the case.

20. See generally *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (holding neither the first nor the fourteenth amendment provides a right of access to government information, and that the news media has no constitutional right of access to a county jail, over and above that of other persons, to interview inmates and make recordings, films and photographs). *Pell v. Procunier*, 417 U.S. 817 (1974); *Saxbe v. Washington Post*, 417 U.S. 843 (1974).

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

22. *Smith v. Daily Mail Pub. Co.*, 99 S. Ct. 2667 (1979). (holding a statute making it a crime for a newspaper to publish without written approval of juvenile court, the name of a juvenile offender violated the first and fourteenth amendments).

reporter can keep his news sources confidential without risking jail;²³ whether libel case reporters can be questioned about their thoughts as they prepared their allegedly offending article or broadcast;²⁴ whether the press can be excluded from pre-trial hearings;²⁵ and whether a defendant convicted in a criminal case automatically becomes a "public figure" and is thereby obliged to prove actual malice before recovering in libel for press comments on his conviction.²⁶

In addition, the Court let stand two important lower court decisions: 1) A case that allowed prosecutors to look at records of newsgatherers' telephone toll calls in an effort to learn the names of their sources²⁷ and 2) a case wherein a newsman was sent to jail for refusing to turn over to the court his notes, recordings, pictures, and documents gathered during his investigation of a crime.²⁸ For the first time in recent history, a Federal judge has forbidden publication of an article.²⁹

State court decisions too, "are coming down like hailstones on a tin roof."³⁰ All across the country, trial courts, at the rate of "eight or ten new cases every month, are demanding to see re-

23. *Branzburg v. Hayes*, 408 U.S. 165 (1972) (holding that requiring newsmen to testify before a grand jury does not violate the first amendment, and that a reporter's promise to conceal the criminal conduct of his sources does not give rise to any constitutional testimonial privilege).

24. *Herbert v. Lando*, 441 U.S. 153 (1979).

25. *Gannett Co. v. DePasquale*, 99 S. Ct. 2898 (1979).

26. *Wolston v. Reader's Digest Ass'n., Inc.*, 99 S. Ct. 2702 (1979), (holding that plaintiff, the nephew of admitted Russian spies, who was cited for contempt for his failure to respond to a subpoena during a 1957-58 grand jury investigation of espionage was not a "public figure" for the purposes of a defamation suit and therefore not required to, by the first amendment, meet the "actual malice" standard). *Accord*, *Hutchinson v. Proxmire*, 99 S. Ct. 2675 (1979), wherein a research scientist engaged in a federally funded research project was held not to be a "public figure" for the purposes of a defamation suit resulting from Senator Proxmire's "Golden Fleece Award."

27. *Reporters Comm. v. American Tel. & Tel.*, 593 F.2d 1030 (D.C. Cir. 1978), *cert. denied*, 99 S. Ct. 1431 (1979).

28. *The New York Times Co. v. Jascavich*, 4 Med. L. Rptr. 1001 (1978); *see also Kansas v. Sandstrom*, 4 Med. L. Rptr. 1333 (1978).

29. *United States v. The Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979), in which Federal District Judge Robert Warren, distinguishing *New York Times v. United States*, 403 U.S. 713 (1971) (the Pentagon Papers case), enjoined the publication of an article containing technical information concerning the construction of the hydrogen bomb. *See generally, A Most Insidious Case*, *THE QUILL*, (June 1979).

30. *Shaw, Journalists Fear Impact of Court Rulings*, *Los Angeles Times*, Jan. 1, 1979, at 28, col. 1.

porters' confidential notes and to know the identities of their confidential sources."³¹

It's getting expensive for publishers to fend off the pressure. *The New York Times* was fined \$285,000 on contempt charges arising from repoter Myron Farber's refusal to give the court his notes on a story he wrote about a doctor standing trial for murder.³² The *Twin Falls Times-News* was ordered to pay a \$1.9 million libel judgment because the newspaper refused to disclose the identity of persons who led its reporters to public records that ultimately enabled them to expose an insurance fraud.³³

A detailed examination of the legal issues raised in three of such cases is warranted before discussing the ramifications of the decisions on the press and determining whether the Supreme Court is, as alleged by the press, reducing the scope of the first amendment. The cases are *Zurcher v. Stanford Daily*,³⁴ concerning newsroom searches; *Herbert v. Lando*,³⁵ concerning editorial privilege; and *Gannett Co. v. DePasquale*,³⁶ concerning closed courtrooms. These three cases were chosen for two primary reasons. First, in all three cases, the press raised legal claims of first impression before the Supreme Court. Although the Supreme Court previously had ruled on claims of press access, *Gannett* is the first case decided by the Court wherein a claim under the first amendment of press access to criminal pretrial proceedings is weighed against a defendant's sixth amendment right to a fair trial.

Secondly, these decisions have generated more press criticism and alarm than perhaps any other cases decided by the "Burger Court". The response has compelled various members of the Court to defend these decisions and protest the reactions of the news media. Accordingly, these cases can serve effectively to illustrate what many observers perceive to be a new and dangerous period of antagonism between the press and the court.

II. NEWSROOM SEARCHES AND THE PRIVACY RIGHTS OF NON-SUSPECT THIRD PARTIES

In *Zurcher v. Stanford Daily*, a narrow majority of the Supreme Court held that neither the first amendment nor the fourth

31. *Id.*

32. *New York Times v. Jascaveich*, 4 Med. L. Rptr. 101 (1978).

33. *Sierra Life Ins. Co. v. Magic Valley Newspapers*, 4 Med. L. Rptr. 1689 (D. Idaho 1978).

34. 436 U.S. 547 (1978).

35. 441 U.S. 153 (1979).

36. 99 S. Ct. 2899 (1979).

amendment, as made applicable to the states by the fourteenth amendment, prohibits the issuance of a warrant to search a newsroom for evidence relevant to a criminal investigation, even though no one connected with the newspaper is suspected of criminal conduct. The reaction of the press to this decision was immediate and heated. Anthony Day, Chairman of the Freedom of Information Committee on the American Society of Newspaper Editors, called the decision "a serious threat to the freedom of the press."³⁷ Jack Landau, speaking for The Reporters Committee for Freedom of the Press, called the *Zurcher* holding a "constitutional outrage to the editorial privacy rights of the press to protect confidential . . . information from inspection and seizure by the government."³⁸ The *Los Angeles Times* criticized the "narrow, crabbed [and] suspicious view of the first amendment"³⁹ taken by the Supreme Court. The *Miami Herald* accused the Court of "an appalling display of muddleheadedness"⁴⁰ and the *Chicago Tribune* predicted this decision "will, in short, protect the Watergates of the future."⁴¹ Finally, the *Chicago Sun Times* interpreted the case to be "a landmark decision in press law—in the sense that a bomb crater on a strip-mine scar can be a landmark."⁴²

A. Case Background

Before assessing, as real or imagined, the threat to press freedom that the newsmedia feel has been created by this case, a review of the facts in *Zurcher* is instructive. On Friday, April 9, 1971, demonstrators barricaded themselves in the administrative

37. *Testimony for U.S. Senate Judiciary Committee, Subcommittee on the Constitution*, 96th Cong., 1st Sess. (1978).

38. *Reporters Committee for Freedom of the Press*, 2 THE NEWS & THE LAW, July, 1978, at 4 (quoting Jack Landau).

39. EDITOR & PUBLISHER, June 10, 1978, at 16.

40. *Id.*

41. *Id.*

42. Perhaps the most humorous, if not fanciful, editorial reaction to the *Zurcher* decision came from the *Clearwater (Fla.) Sun*:

This week's court decision may give rise to a new breed of craftsman. He'll be the man who can design or build hidden wall panels or secret trap doors where evidence, no matter how innocent, can be hidden.

Another branch of knowledge that may flourish is cryptology. A reporter talking to a Mafia informer will be well advised to couch his notes in as mysterious a script as he can conjure up. As he sits writing his expose, he may find himself looking up into the stern eyes of a deputy sheriff who has just marched through the door, waving a search warrant issued by a friendly neighborhood magistrate.

offices of the Stanford University Hospital to protest the firing of a black hospital employee and the denial of tenure to a Chicano doctor. As members of the Palo Alto Police Department moved in to evict the demonstrators, a riot ensued, resulting in extensive damage to the administrative offices and injuries to nine police officers. The police were able to identify only a few of the demonstrators. On April 11, 1971, a special edition of the *Daily*, Stanford University's student newspaper, was published devoted to the demonstration. That edition published a photograph of the riot which identified the photographer as a member of the *Daily* staff and as having been present at the demonstration. On that basis, it was presumed he could have photographed the assault on the police officers. The following day, the Santa Clara County District Attorney's Office obtained a warrant to search the *Daily's* offices for negatives, films, and pictures of the demonstration and riot.⁴³ The affidavit in support of the application for the warrant made no allegation that any members of the *Daily* staff were involved in the unlawful acts at the hospital. The unannounced police search of the *Daily's* newsroom only produced photographs which had already been published in the April 11 special edition.

The *Daily* and various members of its staff subsequently filed a civil lawsuit in the United States District Court for the Northern District of California alleging deprivation under color of state law of their constitutional rights under the first, fourth, and fourteenth amendments. The issue facing the court was whether third parties who are not suspected of criminal involvement are entitled to the same, if not greater protection under the fourth amendment than criminal suspects. The district court granted the request for declaratory relief, holding that, although there was probable cause to believe evidence relevant to the commission of a felony would be found on the *Daily's* premises, the fourth and fourteenth amendments do not tolerate warrants to search for evidence in the possession of innocent persons, without a showing of probable cause to believe that a *subpoena duces tecum* is impractical.⁴⁴ Noting that the first amendment "modifies" the fourth amendment to the extent that extra protections may be required when first amendment interests are involved,⁴⁵ and that a search

43. The warrant issued on a finding of just, probable and reasonable cause for believing that: Negatives and photographs and films, evidence material and relevant to the identification of the perpetrators of felonies, to wit, Battery on a Peace Officer, and Assault with a Deadly Weapon will be located [on the premises of the Daily].

436 U.S. at 551.

44. See *Zurcher v. Stanford Daily*, 353 F. Supp. 124, 129-132 (N.D. Cal. 1972), *aff'd per curiam*, 550 F.2d 464 (9th Cir. 1977), *rev'd*, 436 U.S. 547 (1978).

45. *Id.* at 134.

of a newspaper is a serious infringement of press freedoms, the trial court held that "less drastic means" must be employed when available. Therefore, "third-party searches of a newspaper office are impermissible in all but a very few situations . . . [i.e.] where there is a *clear showing* that 1) important materials will be destroyed or removed from the jurisdiction; and 2) a restraining order would be futile."⁴⁶ The court thus concluded that a *subpoena duces tecum* was less drastic and less intrusive on an individual's expectation of privacy than a search warrant since the individual would present the requested documents or have the opportunity to challenge the sufficiency of the *subpoena duces tecum* through a motion to quash before production of the materials. They also found that non-suspects were deserving of greater privacy rights.

The Ninth Circuit Court of Appeals affirmed and adopted the opinion of the trial court. The Supreme Court granted certiorari and, in a five to three decision, reversed. Justice White, author of the majority opinion,⁴⁷ characterized the district court's holding, that a warrant may not issue without a showing that a subpoena is impractical, as a "sweeping revision of the fourth amendment."⁴⁸ He argued that warrants are not directed at persons, but rather authorize the search of places and seizure of things. Thus, "[t]he 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 thing to be searched for and seized is located on the property to which entry is sought."⁴⁹ The fourth amendment requires only probable cause to believe that the instrumentality, fruit, or evidence of a crime is located on the premises to be searched. "The fourth amendment has itself struck the balance between privacy and public need . . .,"⁵⁰ and courts may not "[f]orbid the states from issuing warrants . . . simply because the owner or possessor of the place to be searched is not then reasonably suspected of criminal involve-

46. *Id.* at 135.

47. Chief Justice Burger and Associate Justices Blackmun, Powell, and Rehnquist joined in Justice White's opinion, with Justice Powell also submitting a concurring opinion. Justice Stewart filed a dissenting opinion, in which Justice Marshall joined, and Justice Stevens filed a dissent. Justice Brennan did not participate in the decision.

48. 436 U.S. at 554.

49. *Id.* at 556.

50. *Id.* at 559.

ment.”⁵¹

In response to the claim that such searches may interfere with constitutionally protected newsgathering and publication, Justice White stated that the Court was not “convinced, . . . that confidential sources will disappear and that the press will suppress news because of fears of warranted searches.”⁵² White also maintained that magistrates giving due consideration to the first amendment values at stake and properly applying the fourth amendment’s requirements of specificity and reasonableness, magistrates will guard against searches which “interfere with timely publication,” or involve “rummag[ing] at large in newspaper files.” Furthermore, “[i]f abuse occurs, there will be time enough to deal with it.”⁵³

B. Zurcher's Impact on the Press

This decision by the Supreme Court raises very serious practical problems for the press. If law enforcement agencies frequently employ surprise newsroom searches as a means of obtaining evidence in their criminal investigations, it is difficult to believe that magistrates will not, at least on occasion, authorize searches which interfere with timely publication, lead to the indiscriminate exposure of materials not specified in the warrant, or compromise the confidentiality of valuable and vulnerable news sources relationships. A critical point not adequately addressed by the Court is that while magistrates will issue search warrants only when proper in *form*, they have no control over whether the search itself is properly *conducted* and *limited* to the materials sought. Files and notes and even personal correspondence of reporters will necessarily be exposed to the undiscerning eyes of the police. Among those materials may be the names of confidential sources of stories unrelated to the case under police investigation. The only remedy thus provided for such is after the fact. As Chief Justice Burger suggested in his dissent in *Bivens v. Six Unknown Named Agents*, there are limited controls over certain procedures and there are cases in which harassment cannot be prevented.⁵⁴

Both the long and short term effects of such intrusions should invoke the application of first amendment protections. One of these protections is that even though a governmental purpose

51. *Id.* at 560.

52. *Id.* at 566.

53. *Id.*

54. *Bivens v. Six Unknown Named Federal Agents*, 403 U.S. at 388 (1971) (Burger, C.J., dissenting).

such as law enforcement be legitimate and substantial, that purpose cannot be pursued by means which broadly infringe upon first amendment liberties when it can be more narrowly achieved. Wherever possible, less drastic means must be employed.⁵⁵ This was the critical element in the District Court opinion. Obviously, where there is no reason to believe that a newspaper would wish to conceal or destroy evidence in its possession, service of a *subpoena duces tecum* would be less intrusive than surprise searches as a means of obtaining the evidence.

A second protection which is denied newspapers subjected to surprise searches is the opportunity to appear in court and contest the search and seizure on first amendment and other grounds. The Supreme Court has held on numerous occasions that governmental action which threatens irreparable injury to first amendment interests must be preceded by notice and an opportunity for an adversary hearing. A policeman's *ex parte* application to a magistrate for issuance of a search warrant clearly is not an adversary hearing.

In *Heller v. New York*,⁵⁶ *A Quantity of Books v. Kansas*,⁵⁷ and

55. See *Buckley v. Valeo*, 424 U.S. 1 (1976). *Buckley* challenged provisions of the Federal Election Campaign Act of 1971, the Court held, *inter alia*, that the first amendment invalidates the Act's expenditure limits since they place restrictions on the ability to engage in political expression. In discussing the Act's restrictions on contributions, *in re* the right of association, a right closely allied to freedom of speech, the court said interference with protected rights must be closely drawn. *Id.* at 25; *Carroll v. Princess Anne*, 393 U.S. 175 (1968). The Court set aside as unconstitutional an *ex parte* restraining order stopping a rally. "An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the [constitutional objective]. . . . [T]he State may not employ 'means that broadly stifle . . . liberties when the end can be more narrowly achieved.'" *Id.* at 183-84. *United States v. Robel*, 389 U.S. 258 (1967). "[W]hen legitimate legislative concerns are expressed which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goals by means which have a 'less drastic' impact. . . ." *Id.* at 268. *Shelton v. Tucker*, 364 U.S. 479 (1960). Holding unconstitutional a state statute requiring teachers to report every organization they have belonged to as violative of the right of free association. "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means. . . ." *Id.* at 488 (footnotes omitted).

56. 413 U.S. 483, 492 (1973).

57. 378 U.S. 205 (1964) A state procedure for issuing a warrant of seizure prior to a hearing on the issue of obscenity was held unconstitutional under the first amendment.

Marcus v. Search Warrant,⁵⁸ the Court held that under the first amendment, prior to the seizure of a large quantity of books, an adversary hearing must be held wherein testimony, affidavits, and other evidence may be considered in order to assure that protected speech would not be needlessly suppressed in the seizure of obscene and unprotected publications. "The history of liberty has largely been the history of the observance of procedural safeguards."⁵⁹ If the first amendment requires an adversary hearing prior to the intended seizure of pornographic literature, such a procedural safeguard should certainly be required before the seizure of newsmen's files.⁶⁰

In Justice White's opinion, *Zurcher* is distinguished from these cases. He posits, for example, that *A Quantity of Books* involved a seizure "not merely for use as evidence but entirely removing arguably protected materials from circulation."⁶¹ Justice White states that "surely a warrant to search newspaper premises for criminal evidence such as . . . news photographs taken in a public place carries no realistic threat of prior restraint or of any direct restraint whatsoever on . . . publication . . . or . . . communication of ideas."⁶²

Justice White puts great faith in the fact that magistrates asked to issue warrants to search newsrooms will "take cognizance of the independent values protected by the first amendment" and "apply the warrant requirements [of probable cause, specificity and overall reasonableness] with particular exactitude."⁶³ One

58. 367 U.S. 717 (1961). A search warrant issued authorizing the police to seize all "obscene" material. At trial, months later, much of what was seized was found not to be obscene. The court held that the procedures used lacked safeguards to prevent erosion of the first amendment. The abuses here show the danger to the first amendment inherent in such searches, *i.e.*, disruption and suppression of legitimate publications.

59. *McNabb v. United States*, 318 U.S. 332, 347 (1943).

60. The fact that even a temporary disruption of newsroom operations or removal of documentary materials may prevent the timely publication of newsworthy information makes a prior adversary hearing all the more appropriate. In *Carroll*, the Court invalidated an injunction issued *ex parte* against a political rally, and observed that "the reasons for insisting upon an opportunity for hearing and notice . . . are even more compelling than in cases involving allegedly obscene books. The present case involves a rally and 'political' speech in which the element of timeliness may be important." 393 U.S. at 182.

61. 436 U.S. at 566. This remark is interesting in light of *A Quantity of Books v. Kansas*. There, the question before the court concerned the procedure used to seize the books, not the determination of them as obscene. The issue wasn't whether some of the books seized were obscene, but whether the procedure used resulted in the suppression of a permissible publication. 378 U.S. at 210. Obviously in *Zurcher* the real question is whether newsroom searches may result in the suppression of permissible publication.

62. 436 U.S. at 562.

63. *Id.* at 565.

must question, however, whether this is a fair trade-off for the absence of a subpoena-first policy. Such a policy surely poses less of a threat of interference with constitutionally protected press activities and would not impair fair and effective law enforcement, at least where there is no reason to believe that the newspaper either is involved in criminal activity or might remove or destroy the evidence. Without a prior adversary hearing, a magistrate who has no knowledge of the specific nature of the materials in a newspaper's files or of the particular first amendment interests threatened by a search, may authorize a search which results in rummaging through newsrooms⁶⁴ and wholesale disclosure of materials not relevant to the crime under investigation. In short, there is no opportunity, prior to the intrusive search, to "[strike] a proper balance between freedom of the press and the obligation of all citizens to give relevant [evidence] with respect to criminal conduct."⁶⁵ Once a newsroom is invaded, a publication deadline missed, or confidential source materials seized or exposed which are not described in the warrant, the proper balance cannot be retrieved.

C. *Zucher's Misconstruction of the Fourth Amendment*

Another respect in which the *Zucher* decision may be said to

64. See generally Note, *Search and Seizure of the Media: A Statutory, Fourth Amendment and First Analysis*, 28 STAN. L. REV. 957 (1976).

65. *Branzburg v. Hayes*, 408 U.S. 665, 710 (1972) (Powell, J., concurring) (holding the first amendment doesn't afford a reporter a constitutional testimonial privilege with regard to confidential source material). In *Branzburg*, the four Justices who joined in the majority opinion held that properly subpoenaed newsmen are required to testify before grand juries, and do not have a right to a prior hearing wherein the relevance or necessity for the testimony may first be tested. Nevertheless, several state and lower federal courts have followed Justice Powell's separate concurring opinion in refusing to apply the "*per se Branzburg* rule" in newsmen privilege cases, particularly cases not involving grand jury testimony. These courts put the burden on the state, or the private litigant seeking evidence contained in a newsmen's confidential source materials, to show an immediate and compelling need for said evidence against which the relevant first amendment values may be weighed. See *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974), *cert. dismissed*, 417 U.S. 938 (1974); *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Burse v. United States*, 466 F.2d 1059 (9th Cir. 1972); *Democratic Nat'l Committee v. McCord*, 356 F. Supp. 1394 (D.D.C. 1973); *United States v. Gersten*, 5 Med. L. Rptr. 1334 (M.D. Fla. 1979); *CBS v. Superior Court*, 4 Med. L. Rptr. 1568 (Cir. Ct. Fla. 1978); *In re Grand Jury Subpoena*, 5 Med. L. Rptr. 1153 (Tex. 1979); *Zelenka v. Wisconsin*, 83 Wis. 2d 601, 266 N.W.2d 279 (1978).

be flawed is in its misconstruction of the reasonable search concept of the fourth amendment, *i.e.*, the protection of “persons, houses, papers, and effects, against unreasonable searches and seizures.”⁶⁶ The path to such a misconstruction was opened by the Court’s previous holding in the case of *Warden, Maryland Penitentiary v. Hayden*.⁶⁷ Prior to the *Warden* case, and as early as the 18th Century in England, mere evidence—and, in particular, a persons’ private papers—could never be the lawful object of a search warrant. The chief historical precedent for this rule was the 1765 English case in which Lord Camden, while upholding a jury verdict which had nullified a warrant seeking personal papers, attacked general warrants (*i.e.*, “writs of assistance”) used by English authorities to search at random for incriminating evidence.⁶⁸ Beyond that, he explicitly and unequivocally denied to magistrates the power to order the seizure of private papers:

Papers are the owner’s goods and chattels, they are his dearest property, and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written laws that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for us without such authority to pronounce a practice legal, which would be subversive of all the comforts of society.⁶⁹

66. U.S. CONST. amend. IV. Justice White largely confined his analysis to the warrant clause, *i.e.*, “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. *Id.*”

67. 387 U.S. 294 (1967) (holding the distinction prohibiting seizure of items of only evidentiary value and allowing seizure of instrumentalities, fruits, or contraband is no longer accepted as being required by the fourth amendment, thus abolishing the “mere evidence” rule).

68. In *Entick v. Carrington and Three Other King’s Messengers*, 19 How. St. Tr. 1029 (1765), a warrant was issued for the arrest of the person and seizure of the papers of John Entick, “the author, or one concerned in writing of several weekly very seditious papers, entitled the *Monitor*, or *British Freeholder*. . . .” Following his arrest and the seizure of his papers, Entick sued the officer executing the warrant and the jury returned with a verdict of £300. On appeal the court acknowledged the Secretary of State’s power to *arrest* and *search*, but the verdict was upheld on the narrow ground that the messengers serving the warrant had failed to take a constable along and did not return Entick and his papers to the judicial Secretary who had signed the warrant. The court, however, went on to discuss the government’s authority to search without making an arrest. The court characterized this as the most interesting point in the case:

[F]or if such warrants were to be held valid, the secret cabinets and bureaux of every subject in this Kingdom will be thrown open to search and inspection of a messenger, whenever the Secretary of State shall think fit to charge, or even to suspect a person to be the author, or printer, or publisher of a seditious libel.

Id.

69. *Id.* at 1066.

In 1886, the Supreme Court observed that the *Entick* case "is considered as one of the landmarks of English liberty."⁷⁰ The Court has also stated that the propositions expressed in Lord Camden's opinion "were in the minds of those who framed the fourth amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures."⁷¹ Although *Entick*, and the Supreme Court's approval of it in *Boyd v. United States*, involved the issue of compelled self-incrimination by an accused, they also were decided on the basis of individuals' legitimate expectations of privacy, and their teachings are therefore equally, if not more, applicable to the fourth amendment protection of innocent third parties from unreasonable searches and seizures.

In 1921, the Supreme Court unanimously ruled that the Constitution prohibits the use of a warrant "solely for the purpose of making a search to secure evidence to be used in a criminal or penal proceeding."⁷² Rather, warrants "may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken."⁷³

Thus, the power to search and seize depended upon the government's valid claim of a superior possessory interest in the property; the mere need to gather evidence to use in apprehending and convicting criminals was insufficient. This concept of fourth amendment law subsequently came to be known as the "mere evidence" rule:

This Court has frequently recognized the distinction between merely evidentiary materials on the one hand which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime, such as stolen property, weapons by which escape of the person arrested might be effected, and property of which the possession of which is a crime.⁷⁴

70. *Boyd v. United States*, 116 U.S. 616, 626 (1886).

71. *Id.* at 626-27.

72. *Gouled v. United States*, 255 U.S. 298, 309 (1921).

73. *Id.*

74. *Harris v. United States*, 331 U.S. 145, 157 (1947). From time to time courts circumvented the "mere evidence" rule through rather tortured interpretations of

In *Warden v. Hayden*, however, the Court upheld a search and seizure of items which clearly did not constitute contraband or the fruits or instrumentalities of crime. The case is a classical example of the maxim that "bad cases make bad law." Hayden had committed an armed robbery. Identified by his distinctive clothing, he was trailed from the scene of the robbery and observed entering his residence. The police entered the residence and arrested Hayden without a warrant. This was permissible under case law which allowed warrantless arrests based upon probable cause and limited searches incident thereto under "exigent circumstances."⁷⁵ Once inside, however, the police not only searched the house and seized the instrumentality (a weapon) and the fruit of the crime (money), but also seized from a washing machine the identifying clothing that Hayden had been wearing. This clothing, which constituted "mere evidence", was received into evidence at Hayden's prosecution. The Supreme Court declined to overturn Hayden's conviction on the grounds that this evidence was illegally seized and thereby refused to apply the "mere evidence" rule which had been unanimously upheld in 1921.

The Court in *Warden*, however, clearly was not contemplating the authorization of the kind of surprise searches, aimed at non-suspect third parties, of which *Zurcher* approves. The custodian of the seized clothing—Hayden—was properly suspected of criminal involvement. The Court ruled that the "exigent circumstances" which justified entry and search of the house while in "hot pursuit" without a warrant also justified the seizure of the clothing at the time of the suspect's arrest. Since the officers knew the suspect was armed and were looking for weapons when they discovered the clothing, the seizure of the clothing was thus justified.

Another element of the Court's rationale in *Warden* was that the clothing was not testimonial in nature and therefore did not compel Hayden to become a witness against himself, which is

the exception permitting the seizure and introduction into evidence of instrumentalities of crime. For instance, the Seventh Circuit Court of Appeals once upheld the seizure of a defendant's shoes and their introduction into evidence to match a heel print by arguing that the shoes were instrumentalities of crime since they "would facilitate a robber's get-away and would not attract as much attention as a robber fleeing barefooted from the scene of the hold-up." *United States v. Guido*, 251 F.2d 1, 3-4 (7th Cir. 1958).

75. See generally *Vale v. Louisiana*, 399 U.S. 30 (1970); *Ker v. California*, 374 U.S. 23 (1963); *Chapman v. United States*, 365 U.S. 610 (1961); *McDonald v. United States*, 335 U.S. 451 (1948); *Harris v. United States*, 331 U.S. 145 (1947).

proscribed by the fifth amendment.⁷⁶ It is difficult to see, however, how the seizure of documentary materials in *Zurcher* is any more permissible simply because the *Stanford Daily* was not a suspect, and no threat of compelled self-incrimination was therefore present. This follows because the intrusiveness of a search into private files and letters is obviously increased when directed against third persons not suspected of criminal involvement.

By rescinding in *Zurcher*, the protections accorded innocent persons under the "mere evidence" rule, which prior to *Warden v. Hayden* was "acknowledged as essential to enforce the fourth amendment's prohibition against general searches, the Court . . . needlessly destroys, root and branch, a basic part of liberty's heritage."⁷⁷ It creates enormous new potential for governmental intrusions into the privacy of all citizens. As Justice Stevens observed in his dissent to *Zurcher*:

Just as the witnesses who participate in an investigation or a trial far outnumber the defendants, the person or persons who possess evidence that may help to identify an offender, or explain an aspect of a criminal transaction, far outnumber those who have custody of weapons or plunder. Countless law abiding citizens—doctors, lawyers, merchants, customers, bystanders—may have documents in their possession that relate to an ongoing investigation. The consequences of subjecting this large category of persons to unannounced police searches are extremely serious.⁷⁸

"Nonetheless, Justice White finds that, by and large, adequate protection is found in the "'warrant clause' which speaks of search warrants issued on 'probable cause' and 'particularly describing the place to be searched, and the persons or things to be seized.'"⁷⁹ Yet, to hold that probable cause to search always overcomes one's privacy rights regardless of the type of evidence sought, the crime under investigation, or the individual's culpability or predisposition to conceal evidence, ignores the fact that there is also a "reasonableness" clause in the fourth amendment.

Until *Warden v. Hayden*, the seizure of mere evidence, even

76. The items of clothing involved in this case are not 'testimonial' or 'commemorative' in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the fifth amendment. . . . This case does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.

387 U.S. 294, 302-03 (1967) (citing *Schmerber v. California*, 384 U.S. 757 (1966)).

77. *Warden v. Hayden*, 387 U.S. 294, 312 (1967) (Fortas, J.; Warren, C.J., concurring).

78. 436 U.S. at 579.

79. *Id.* at 554.

from criminal suspects, was held to be patently unreasonable and therefore invalid under the fourth amendment. Now, following the *Zurcher* decision, the reasonableness clause of the fourth amendment no longer forbids a search of the person or premises of even innocent parties, so long as there is probable cause to believe they possess evidence of criminal activity. In short, the requirement of reasonableness has now been effectively ousted as an independent element of fourth amendment protection.⁸⁰

Justice White also found the fact that "only a very few instances in the entire United States since 1791 involved the issuance of warrants for searching newspaper premises . . . hardly suggest[ed] abuse"⁸¹ and he reminded magistrates that "[w]here 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.'"⁸²

80. The fourth amendment guarantees that:

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.

U.S. CONST. amend IV. The *Zurcher* Court cited various cases for the proposition that criminal culpability is not a necessary consideration in assessing the existence of probable cause. 436 U.S. at 554, 558-59. There is no precedent, however, for the proposition that the suspected guilt or innocence of the person whose property is to be seized is not relevant to an analysis of the reasonableness of the search. One reason for this lack of precedent, of course, is that under the "exclusionary rule," the only person with standing to have illegally seized evidence suppressed is the defendant, who cannot vicariously assert the fourth amendment rights of a innocent third party whose premises were searched. See *Rakas v. Illinois*, 439 U.S. 128 (1978) and *Alderman v. United States*, 394 U.S. 165 (1969); but see *Kaplan v. Superior Court*, 6 Cal. 3d 150, 491 P.2d 1, 98 Cal. Rptr. at 649 (1971).

The Court in *Zurcher* circumvented the fourth amendment's independent requirement of reasonableness by stating a) that, "in applying the 'probable cause' standard 'by which a particular decision to search is tested against the constitutional mandate of reasonableness,' it is necessary 'to focus upon the governmental interest which allegedly justifies [the] official intrusion,'" and b) a search warrant is reasonable in criminal investigations wherever there is "'probable cause to believe [the evidence sought] will be uncovered in a particular dwelling.'" 436 U.S. at 554-55 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 534-35 (1967)). As stated by one observer,

This reasoning is tautological because it merely establishes that probable cause must be based on reasonableness and that reasonableness is dependent on probable cause. If the reasonableness clause is to retain any vitality in the context of third party searches, the requirements must be broadened beyond the scope of probable cause.

Third Party Searches in the Face of Zurcher v. Stamford Daily: Toward a Set of Reasonableness Requirements, 11 CONN. L. REV. 660 (1979).

81. 436 U.S. at 566.

82. *Id.* at 564. Of course, since the Supreme Court in *Boyd* unanimously overturned a search for mere evidence in the possession of a nonsuspect, and *Warden* is therefore the only precedent for the *Zurcher* holding, it should surprise no one that abuse was not prevalent prior to *Zurcher*. One commentator, however, re-

It is not paranoid, however, to question the adequacy of these protections. Without a requirement that police and prosecutors ask or subpoena first, and search later, there is no opportunity for an adversary hearing prior to the seizure. As a consequence, the almost 30,000 judges, magistrates, and other federal, state, and local judicial officers authorized to issue warrants must determine the reasonableness of a search in *ex parte* hearings where they only hear the arguments of the police and prosecutor. They have no way of hearing or determining the countervailing factors which may cause a particular search to impact on news-gathering or dissemination. Even when the police know the evidence sought will not be destroyed, and they could obtain the evidence by request or subpoena, they are still under the *Zurcher* holding, entitled to obtain a warrant and conduct an unannounced search.

This explicit grant of such open-ended authority to magistrates of this county, without providing definite guidelines to aid them in their analysis of the reasonableness of particular requests to search, clearly presents an opportunity for abuse.⁸³ As Thomas Jefferson wrote, "In questions of power, let no more be said of confidence in man, but bind him down from mischief by the chains of the constitution."

ported that fourteen searches against innocent third parties were conducted within one month after the *Zurcher* decision. See *Report of Hearings Before Senate Subcommittee on the Constitution on Citizens Privacy Protection Act*, 95th Cong., 1st Sess. 64 (1978) (testimony of Sam Dash). On October 10, 1979, police in Oregon obtained a search warrant and seized over 1,000 pages of documents from an attorney's file. The attorney subsequently claimed the files were confidential under the lawyer-client privilege as the attorney's "work product" and District Court Judge Phillip T. Abraham, Multnomah County, Oregon, ordered the return of the documents seized. WASHINGTON POST, Oct. 18, 1979, at 6. See also *O'Connor v. Johnson*, No. 49232 (Minn. Sup. Ct. 1979), wherein the Minnesota Supreme Court ruled that a surprise search of an attorney's files, when that attorney is not suspected of criminal activity, is unreasonable and unconstitutional under both the fourth amendment to the United States Constitution and article 1, section 10, of the Minnesota State Constitution.

83. Another concern relating to the absence of meaningful guidelines as to what may determine the reasonableness of third party searches is the fact that many officials empowered to issue warrants are not lawyers. The House Committee on Government Operations has noted that the Court's implications that "magistrates . . . have at least a working knowledge of Constitutional law" are incorrect. By one estimate of the National Center for State Courts, 8,800 of the 14,900 judges and comparable officials in states are not attorneys and "a number of states appear not to require that warrant issuers be lawyers." HOUSE COMM. ON GOV'T OPERATIONS, SEARCH WARRANTS AND THE EFFECTS OF THE STANFORD DAILY DECISION, H.R. REP. NO. 1521, 95TH CONG. 2D SESS. 4 (1978).

D. *The Practical Impact of the Zurcher Decision*

The threat of surprise searches impairs the operations of the press in several respects: One, physical disruption of the newsroom may impede timely publication. Second, if others perceive the press as an agent of law enforcement and as a source of information for prosecutors' offices, "confidential sources of information will dry up, and the press will lose opportunities to cover various events because of fears of the participants that press files will be readily available to the authorities."⁸⁴ Finally, police may seize materials which more than twenty-six states, by statute, have deemed privileged from testimonial disclosure. As stated by Justice White, "Fifth Amendment and State shield-law objections that might be asserted in opposition to compliance with a subpoena are largely irrelevant to determining the legality of a search warrant under the Fourth Amendment."⁸⁵ Without a doubt, *Zurcher* makes it possible for malicious judges or policemen, through newsroom searches, to plug leaks regarding their misdoings, or to harass a newspaper that has been investigating or criticizing them or their friends.⁸⁶

84. 436 U.S. at 563-64

85. 436 U.S. at 567. Shield laws are legislative enactments of testimonial privileges which exempt newsmen, under specified circumstances, from having to testify in civil or criminal litigation as to the identity of a confidential source or with respect to confidential information obtained from that source.

86. In testifying on so-called "Zurcher legislation" before a Congressional Committee, Robert Lewis, representing the Society of Professional Journalists, Sigma Delta Chi, spoke on such opportunities for abuse:

One of the Booth papers in Michigan assigned a reporter last year to follow a probate judge during business hours for two separate one-week periods. It was learned the judge spent an average of one and a half hours a day attending to judicial duties. As part of the inquiry, off-the-record interviews were obtained from a number of lawyers, all of them critical of the judge's work habits.

After stories on the investigation appeared, the state court administrator stepped in and the judge now is a fully contributing member of that community's judiciary. Had the Stanford decision been available to him, he could have seized the reporter's notes and retaliated against members of the bar who were critical of his work habits. In this instance, innocent persons could have been hurt.

In another Michigan city, at this moment the county prosecutor is under investigation by a federal organized crime strike force for alleged illegal ties to organized crime figures. The local paper has carried several stories about the probe presumably coming from sources close to the investigation. With Stanford, the prosecutor could obtain a search warrant of the newspaper to find, and try to plug the leaks.

In an Arkansas community, reporters obtained statements of criminal misconduct by policemen, made to them by other police officers. The paper, not to mention cooperating policemen, would have been uneasy if the then-police chief could have gotten a warrant to look at those notes and memos.

REPRINT OF HEARINGS BEFORE SENATE SUBCOMMITTEE ON THE CONSTITUTION ON CITIZENS PRIVACY PROTECTION ACT, 95th CONG., 1st SESS. 79 (1978).

The Court's failure to impose guidelines or otherwise limit the scope of its holding is particularly puzzling in view of the alternatives available. Short of imposing a subpoena-first requirement in all cases, in recognition of the unique first amendment problems posed by newsroom searches, the Court could have at least required an adversary hearing prior to the seizure of materials in the control of persons engaged in gathering, editing, or disseminating news for print or broadcast media. Failing that, and in recognition of the legitimate privacy interests of all persons, not just members of the news media, the Court could have overruled *Warden*, or it could have expressly restricted the holding in *Warden* to its facts (*i.e.*, a search incident to a lawful arrest) and thereby retained the "mere evidence" rule as applied to third party searches. Another alternative, regardless of whether the "mere evidence" rule were retained, would have been to disapprove all third party searches except where: a) the third party himself comes under reasonable suspicion of criminal involvement;⁸⁷ or, b) the third party is shown to have a strong motive to destroy or remove the evidence; or, c) there is probable cause to believe that seizure of the materials sought would aid in preventing an imminent, serious crime.⁸⁸

Under these alternative procedures, adequate protection would be given to legitimate privacy interests and claims of confidentiality which might otherwise be irretrievably impaired once a warrant is executed. Thus, the legitimate law enforcement interests served by a surprise search and seizure would not be forsaken.

For the reasons discussed above, the reaction of the press—while undoubtedly vehement and caustic—was founded upon a correct premise. *Zurcher v. Stanford Daily* is bad law in that it permits magistrates to ignore the vital concept of reasonableness which was enacted in the fourth amendment to safeguard every person's individual right of privacy. All third party searches are

87. This burden could be met by a showing that the evidence is contraband, or the fruits or instrumentalities of crime.

88. See generally Comment, *Third Party Searches in the Face of Zurcher v. Stanford Daily: Toward a Set of Reasonableness Requirements*. 11 CONN. L. REV. 660 (1979). It must be recalled that probable cause does not require positive proof; generally speaking, courts merely require reasonable grounds for an experienced police officer to believe in the fact at issue. See generally, *People v. Superior Court of San Bernardino*, 9 Cal. App. 3d 203, 209, 88 Cal. Rptr. 21, 24 (1970); *Saunders v. Mun. Court of Vallejo Judicial Dist.*, 240 Cal. App. 2d 563, 565, 569, 49 Cal. Rptr. 763, 764, 767 (1966).

now, *ipso facto*, permissible so long as the minimal requirements of the warrant clause are met. Yet, as illustrated by the words of Justice Frankfurter, this narrow reading of the fourth amendment disregards the cherished concepts of privacy held by the Founding Fathers:

It makes all the difference in the world whether one recognizes the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution, or one thinks of it merely as a requirement for a piece of paper.⁸⁹

It has been a constant and cherished feature of our heritage that for the law abiding citizen, his home is his castle.⁹⁰ Yet the Supreme Court now has thrown open to official search the homes and offices of all Americans when procedures could have been adopted which would assure citizens of their legitimate privacy, yet preserve the effective and necessary tools which have always been available to law enforcement agencies.

III. EDITORIAL PRIVILEGE IN LIBEL LITIGATION: *HERBERT V. LANDO*

A. Case Background

In *Herbert v. Lando*,⁹¹ a case involving public figure libel, the Supreme Court addressed first amendment limitations on plaintiff's discovery of editorial processes in particular, the thoughts, conclusions, and theories of the defendants in collecting, editing, and disseminating the alleged libel, in an effort to show "actual malice" on the defendant's part. The libel plaintiff, Anthony Herbert, received a great deal of news coverage in 1969-1970 while serving in Viet Nam when he accused his superior officers of concealing reports of war crimes committed by United States' soldiers. On February 4, 1973, CBS broadcast a "60 Minutes" program which, according to Herbert, portrayed him as a liar who had made the war-crimes charges as a means of explaining his dismissal from command. Herbert sued CBS, two of its employees (editor Barry Lando and correspondent Mike Wallace) and the *Atlantic Monthly* magazine, which had published an article written by Lando on the Herbert affair.

Herbert conceded in Federal Court that he was a "public figure"

89. *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

90. The poorest man in his cottage may bid defiance to all the forces 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 forces dare not cross the threshold of the ruined tenements. William Pitt, c. 1750.

91. 441 U.S. 153 (1979).

and therefore, under first and fourteenth amendment holdings, was precluded from recovering damages absent proof that defendants had broadcast and published the allegedly libelous statements with "actual malice", that is, with knowledge of reckless disregard of their falsity.⁹²

As the Supreme Court has ruled in cases subsequent to *Curtis v. Butts*,

Under this rule, absent knowing falsehood, liability requires proof of reckless disregard for truth, that is, that the defendant in fact entertained serious doubts as to the truth of his publication. Such subjective awareness of probable falsity may be found if there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.⁹³

In August, 1974, Herbert commenced deposing defendant Lando as to the role he played in the preparation and publication of the alleged libelous program. During the following year, Lando answered questions about what he knew or had seen; whom he interviewed; the details of his discussions with interviewees; and the nature and extent of his communications with news sources. Exhibits supplied to Herbert included transcripts of interviews, reporters' notes, film out-takes, and preliminary drafts of the "60 Minutes" telecast script. The transcript of Lando's depositions consisted of 2903 pages and twenty-four exhibits. Lando refused, however, to answer several questions posed by Herbert's attorneys. These questions were summarized by the Second Circuit Court of Appeals as follows:

1. Lando's conclusions during his research and investigation regarding people or leads to be pursued, or not to be pursued, in connection with the "60 Minutes" segment and the *Atlantic Monthly* article;
2. Lando's conclusions about facts imparted by interviewees and his state of mind with respect to the veracity of persons interviewed;
3. The basis for conclusions where Lando testified that he did reach a conclusion concerning the veracity of persons, information or events;
4. Conversations between Lando and Wallace about matter to be included or excluded from the broadcast publication; and,
5. Lando's intentions as manifested by his decision to include or exclude certain materials.⁹⁴

92. See *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (extending the actual malice standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), to "public figures").

93. 441 U.S. at 156-57 (citations omitted).

94. 568 F.2d 974, 983 (2d Cir. 1977). Specific examples of questions which Lando refused to answer include:

—whether Lando had 'considered making a comment' in the telecast about 'the army of Pentagon representatives going to military installations to speak against Col. Herbert . . .'

.....

Upon Lando's refusal to answer these questions, Colonel Herbert sought an order in the New York Federal District Court to compel discovery⁹⁵ under Rule 37(a)(2) of the Federal Rules of Civil Procedure.⁹⁶ Herbert argued that because Lando's mental conclusions and state of mind in the course of preparing the "60 Minutes" telecast were of critical importance in establishing whether he knew the telecast was false or was in reckless disregard of its falsity, the questions were relevant and proper.

The defendants opposed Herbert's motion arguing that, in the first place, the discovery already completed, including twenty six deposition days for one witness, was more than adequate to inform Herbert of the facts and circumstances surrounding the publication in question. Further discovery, defendants argued, would merely constitute harassment and "abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure"⁹⁷ which were intended to secure the just, speedy, and inexpensive resolution of civil lawsuits. Beyond that, Lando and CBS argued that the exercise of editorial judgment is constitutionally protected and extensive discovery thereof, is consequently prohibited. They also asserted that without some assurance that their pre-publication editorial discussions and conclusions will remain confidential, editors and journalists will refrain from candidly expressing their self-criticisms and frank evaluations of news stories for fear such discussions may give rise to a finding of actual malice and substantial libel damage awards; in a sense, a form of prior restraint because of its "chilling" effect. This self-censorship and restriction on the editorial process can only impede the accurate, yet "uninhibited, robust, and wide open" debate which the first amendment was designed to promote.⁹⁸

The trial court refused to uphold the asserted constitutional privilege of "editorial judgment" and ordered the discovery to proceed.⁹⁹ Defendants obtained certification of this question of a

—what 'the basis' was for including in the broadcast one soldier's statement, but not another soldier's statement, as to the manner in which Col. Herbert treated the Vietnamese . . . ;

—whether Lando had 'propose[d] to include in the program' certain favorable comments about Herbert.

Brief of Respondents at 12, *Herbert v. Lando*, 441 U.S. 153 (1979).

95. 73 F.R.D. 387 (S.D.N.Y. 1977).

96. FED. R. Civ. P. 37(a)(2), "If a deponent fails to answer a question propounded or submitted under Rules 30 or 31 [authorizing written or oral dispositions] . . . , the discovering party may move for an order compelling an answer. . . ."

97. Brief of Respondents at 20, *Herbert v. Lando*, 441 U.S. 153 (1979).

98. See *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

99. *Herbert v. Lando*, 73 F.R.D. 387 (1977).

constitutional editorial privilege for interlocutory appeal under 28 U.S.C. Section 129 2(b) and the case went to the Second Circuit Court of Appeals. There, a three-judge panel reversed the district court.¹⁰⁰ Two judges, writing separate opinions, concluded that the first amendment does protect the "editorial process" which is a necessary antecedent to the constitutionally protected dissemination of news.¹⁰¹

Concerning the so-called "chilling effect" which intrusive discovery of this editorial process was alleged to produce, and its constitutional significance, Judge Kaufman wrote:

Herbert wishes to probe further and inquire into Lando's thoughts, opinions and conclusions. The answers he seeks strike to the heart of the vital human component of the editorial process. Faced with the possibility of such an inquisition, reporters and journalists would be reluctant to express their doubts. Indeed, they would be chilled in the very process of thought. . . . [T]he tendency would be to follow the safe course of avoiding contention and controversy—the anti-thesis of the values fostered by the First Amendment.¹⁰²

Circuit Judge Oakes, in a concurring opinion, focused on what he observed to be "the Supreme Court's evolving recognition of the special status of the press in our governmental system,"¹⁰³ and the structural protections of press operations accorded by the free press clause of the first amendment.¹⁰⁴ Noting that "[t]he

100. 568 F.2d 974 (2d Cir. 1977).

101. Chief Judge Kaufman described the editorial process as follows:

The media is not a conduit which receives information and, senselessly, spews it forth. The active exercise of human judgment must transform the raw data of reportage into a finished product.

. . . .
The journalist must constantly probe and investigate; he must formulate his views and, at every step, question his conclusions, tentative or otherwise. This is the process in which Barry Lando was engaged and his efforts suggest the nature and scope of the reporter's task in shaping and refining a mass of facts into a finished product.

Id. at 984.

102. *Id.*

103. *Id.* at 986 (footnote omitted).

104. Perhaps the most eminent spokesman for this interpretation of the "free press" clause has been Justice Potter Stewart in his speech, "Or of the Press," delivered at Yale Law School in 1975. Justice Stewart pointed out:

It is tempting to suggest that freedom of the press means only that newspaper publishers are guaranteed freedom of expression. They *are* guaranteed that freedom, to be sure, but so are we all, because of the Free Speech Clause. If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy. . . . It is also a mistake to suppose that the only purpose of the constitutional guarantee of a free press is to insure that a newspaper will serve as a neutral forum for debate, and 'marketplace for ideas,' a kind of Hyde Park corner for the

doctrine of prior restraint, prohibiting government from censoring publications in advance, is one of the highest constitutional magnitude."¹⁰⁵ Judge Oakes pointed out that "[u]nhibited discovery into the motivations of the editor in a libel action poses precisely the danger sought to be avoided by the landmark cases which have established the prior restraint doctrine as hornbook constitutional law."¹⁰⁶ This danger "is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the first amendment."¹⁰⁷ The judge then observed that the special protection sought by defendants Lando and CBS—protection from the undue chilling of first amendment freedoms caused by the litigation process—is no different, from the standpoint of constitutional analysis, than the constitutional standard for liability established in *New York Times v. Sullivan*.¹⁰⁸

Herbert, by petition for writ of certiorari, appealed the decision of the Second Circuit Court of Appeals and in a six to three decision, the Supreme Court reversed. Justice White, with whom Chief Justice Burger and Justices Blackman, Powell, Rehnquist, and Stevens joined, acknowledged that the *New York Times* and *Butts* decisions requiring "actual malice" as the standard of liability in public official or public figure cases provided a degree of first amendment defense against self-censorship by the press posed by the spectre in litigation of absolute liability and presumed damages under pre-*New York Times* libel law. Nevertheless:

These cases [did not] suggest any First Amendment restriction on the sources from which the plaintiff could obtain the necessary evidence to prove the critical elements of his cause of action. On the contrary, *New York Times* and its progeny made it essential to proving liability that plaintiffs focus on the conduct and state of mind of the defendant. . . .

It is also untenable to conclude from our cases that, although proof of the necessary state of mind could be in the form of objective circumstances from which the ultimate fact [i.e., actual malice] could be inferred, plaintiffs may not inquire directly from the defendants whether they knew or had reason to suspect that their damaging publication was in error.¹⁰⁹

Justice White noted that standards of liability which call into

community. A related theory sees the press as a neutral conduit of information between the people and their elected leaders. These theories, in my view, again give insufficient weight to the institutional autonomy of the press that it was the purpose of the Constitution to guarantee. . . .

Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633-34 (1975) Cf. note 16 *supra*.

105. 568 F.2d at 989.

106. *Id.* at 990.

107. *Id.*

108. 376 U.S. 254 (1964).

109. 441 U.S. at 160.

question the publisher's intent, and thereby involve state-of-mind evidence, were common in libel actions before *New York Times* and *Butts*. Prior to enactment of the first amendment, proof of malice permitted the recovery of punitive or enhanced damages for libel. Qualified common law privileges also existed which protected publishers from liability absent proof of malice. Thus, concluded Justice White, creation of an absolute privilege against compelling testimony relevant to the editorial process "is not required, authorized or presaged by [the Court's] prior cases," and would substantially enhance the burden of proving actual malice, contrary to the expectations of *New York Times*, *Butts*, and similar cases."¹¹⁰

With respect to whether the court should nevertheless modify "established constitutional doctrine" by creating such a privilege, Justice White held that to erect such an "impenetrable barrier" would constitute "a substantial interference with the ability of a defamation plaintiff to establish the necessary ingredients of malice," particularly when libel plaintiffs must "prove knowing or reckless falsehood with 'convincing clarity.'"¹¹¹

In response to the argument that the process of editorial decision-making would be intolerably chilled by requiring disclosure of editorial conversations and conclusions, Justice White answered that "if the claimed inhibition flows from the fear of damages liability for publishing knowing or reckless falsehoods, those effects are precisely what *New York Times* and other cases have held to be consistent with the first amendment."¹¹²

110. *Id.* at 169.

111. *Id.* at 170 (citing *New York Times v. Sullivan*, 376 U.S. 254, 285, 286 (1964)).

112. *Id.* at 171. This answer, of course, begs the question whether the current realities of protracted, expensive, and intrusive discovery in libel litigation might not justify modification of "established doctrine." It certainly would not be the first time the Court substantially modified constitutional law in this area. In *New York Times v. Sullivan*, the Court's creation of the "actual malice" standard was clearly not based on pre-existing, explicit constitutional doctrine. In *New York Times*, the Court addressed a rule of liability under Alabama's defamation law, whereby statements injurious to reputation and factually untrue in any respect entitled the public official plaintiff to general as well as punitive damages, even though no injury be alleged or proved. The Court found the chilling effect to political speech caused by such legal presumptions, when viewed in light of the general policies underlying the first amendment, required creation of a new privilege for the "citizen critic of government." 376 U.S. at 282. In stating that "libel can claim no talismanic immunity from constitutional limitations[;] [i]t must be measured by standards that satisfy the First Amendment." *Id.* at 269. Justice Brennan suddenly, but quite correctly, transformed libel into an area of constitutional law. In

In a similar vein, Justice White argued that

[a]s we have said, our cases necessarily contemplate examination of the editorial process to prove the necessary awareness of probable falsehood, and if indirect proof of this element does not stifle truthful publication and is consistent with the First Amendment, as respondents seem to concede, we do not understand how direct inquiry with respect to the ultimate issue would be substantially more suspect. Perhaps such examination will lead to liability that would not have been found without it, but this does not suggest that the determinations in these instances will be inaccurate and will lead to the suppression of protected information.¹¹³

Justice White appears to be saying: a) state-of-mind evidence is permissible under existing law¹¹⁴ and aids the judicial inquiry for truth; b) if such evidence results in liability for damages caused by knowing or reckless falsehood, such false speech is unprotected in any event; and, c) if state-of-mind evidence increases the number of libel judgments for such culpable publications, this will not chill the editorial process, for there will be "even more reason to resort to prepublication precautions, such as a frank interchange of fact and opinion."¹¹⁵

What this dispute between the press and the court may boil

dicta in several earlier cases, the Supreme Court had readily accepted the proposition that libel laws were unaffected by the first amendment. *See* *Roth v. United States*, 354 U.S. 476, 482-83 (1957); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942); *Near v. Minnesota*, 283 U.S. 697, 707-08 (1931). In *Beauharnis v. Illinois*, 343 U.S. 250, 254-56, 262-63 (1952) the Court, noting that libel law was not subject to first amendment limitations, upheld a criminal group libel statute which allowed a defense of truth only "when published for good motives and for justifiable ends."

The Court in *New York Times* also analogized the "privilege for criticism of official conduct . . . to the protection accorded a public official when *he* is sued for libel by a private citizen." 376 U.S. at 282. Yet, in approving that privilege in *Barr v. Mateo*, 360 U.S. 564 (1959), the Court acknowledged that the law of privilege as a defense by officers of the government in suits for defamation and kindred torts "has, in large part, been of judicial making, although the Constitution itself gives an absolute privilege to members of both Houses of Congress in respect to any speech . . . done in session." 360 U.S. at 569. "The privilege [as applied in *Spalding v. Vilas*, 161 U.S. 483 (1895), to executive officers of cabinet rank] is but our expression of a policy designed to aid in the effective functioning of government." 360 U.S. 572-73.

Thus, in substantially altering Constitutional law insofar as it governs liability for defamatory speech critical of public officials, the Court in *New York Times* undoubtedly was influenced less by constitutional precedent than by mounting civil rights activism directed at the suppression by local governments on basic human liberties. Given a sufficient showing of inhibition of protected speech caused by protracted and undue discovery of the editorial process, there is no jurisprudential reason why the Court could not have departed from its prior decisions.

113. 441 U.S. at 172.

114. As stated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 n.6 (1974), actual malice turns on a journalist's "subjective awareness of probable falsity."

115. 441 U.S. at 174. In his dissent, Justice Brennan challenges the validity of this "curious observation": "Because such 'prepublication precautions' will often prove to be extraordinarily damaging evidence in libel actions, I cannot so blithely assume such 'precautions' will be instituted, or that such 'frank interchange' as now exists is not impaired by its potential exposure in such actions." 441 U.S. at 195-96.

down to is a basic fear on the part of journalists, which the court does not share, that "editorial exchanges . . . are so subject to distortion and . . . misunderstanding,"¹¹⁶ that they will in fact give rise to erroneous libel verdicts.

The basis for this fear is a belief that the general public often misperceives the institutional demands on journalists and editors which frequently makes complete investigation and verification impossible. Editing is by no means an easy or objective task. Editors are constantly faced with press deadlines, as they struggle daily to publish thousands and even hundreds of thousands of words on events of the day. Much of the "hot news" which is published concerns regional, national, or international affairs. Given the limitations on the size of a newspaper's staff, dissemination of such news necessarily involves republication of the investigations and observations of others¹¹⁷ which, often cannot possibly be independently verified although republication of a libel is deemed culpable even if it is published with identifying attributions.¹¹⁸

Many stories are based on information supplied by anonymous sources. An editor, not having directly participated in the investigation, must therefore trust his reporters' judgment as to the credibility of those sources. At the same time, an editor is aware that, should the subject of the story sue for libel, that reporter may not, and except in extreme cases, should not identify those

116. *Id.* at 174.

117. [A] vast amount of what is published in the daily and periodical press purports to be descriptive of what somebody *said* rather than what anybody *did*. Indeed, perhaps the largest share of news concerning the doings of government appears in the form of accounts of reports, speeches, press conferences and the like. The question of the 'truth' of such an indirect newspaper report presents rather confidential problems.

Time, Inc. v. Pape, 401 U.S. 279, 285-86 (1971).

118. See A. HANSON, *LIBEL AND RELATED TORTS*, 65-70 (1969); W. PROSSER, *LAW OF TORTS*, § 108 (4th ed. 1971). Various courts, however, now recognize a qualified privilege—that so-called privilege of neutral reportage—for the accurate and disinterested reporting of newsworthy charges, "regardless of the reporter's private views regarding their validity." *Edwards v. National Audubon Soc., Inc.*, 556 F.2d 113, 120 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977).

See also *Dixson v. Newsweek, Inc.*, 562 F.2d 626, 631 (10th Cir. 1977); *Whitaker v. Denver Post, Inc.*, 4 Med. L. Rptr. 1351 (D. Wyo, 1978); *Harrison v. Washington Post Co.*, 391 A.2d 781 (D.C. Ct. App. 1978); *Krauss v. Champaign News Gazette*, 59 Ill. App. 3d 745, 375 N.E.2d 1362 (1978); *Rand v. New York Times Co.*, 4 Med. L. Rptr. 1556 (Sup. Ct. N.Y. Co. 1978); *Orr v. Lynch*, 60 App. Div. 2d 949, 401 N.Y.S.2d 897 (3d Dept. 1978); *Campo Lindo for Dogs, Inc. v. New York Post Corp.*, 65 App. Div. 2d 650, 409 N.Y.S.2d 453 (3d Dept. 1978); *contra Dickey v. CBS*, 583 F.2d 1221 (3d Cir. 1978).

sources in defense at trial.¹¹⁹ Finally, information uncovered through investigations into corporate, political, or other forms of covert fraud and corruption often cannot be completely verified. In sum, editors must rely to a large extent upon their judgment, based on experience. For the vast majority of the time their judgment is proven to be correct. Yet, whether correct or not, the decision to publish may, on occasion, lead to libel suits claiming millions of dollars in damages. Knowing this to be an inherent hazard in an editor's life, the press reasonably fears inquiry into the subjective conclusions and mental impressions arrived at in the editorial process. The judgment to publish may be founded on "solid belief, arrived at through experience but difficult, if not impossible, to sustain in a specific case."¹²⁰

If *Herbert* is relied upon to allow virtually unlimited inquiry into the subjective components of the editorial process, the judiciary could invite plaintiffs' attorneys and juries to second-guess a media-defendant as to why a story was written in a certain manner. Although this aspect of the problem was not raised to any significant degree before the Supreme Court by the attorneys for Lando and CBS, Justice Potter Stewart's dissenting opinion pinpoints the reasons why such second-guessing may lead to erroneous libel judgments.¹²¹ In essence, Justice Stewart argues that detailed inquiry into the way in which a story was written may ultimately incorporate common law "malice" into the constitutional concept of "actual malice law:"

I have come greatly to regret the use in that opinion [*New York Times v. Sullivan*] of the phrase "actual malice." For the fact of the matter is that "malice" as used in the *New York Times* opinion simply does not mean malice as that word is commonly understood. In common understanding, malice means ill will or hostility, and the most relevant question in deter-

119. "Pledges of confidentiality to news sources must be honored at all costs, and therefore should not be given lightly. Unless there is clear and pressing need to maintain confidentiality, sources of information should be identified." AMERICAN SOCIETY OF NEWSPAPER EDITORS, STATEMENT OF PRINCIPLES, art. VI, ¶ III.

120. *Zurcher v. Stanford Daily*, 436 U.S. at 563,

It may frequently be the case that journalists entertain some conscious doubts as to the truth of their stories. Piecing together an incident under deadline pressure from a variety of second-hand sources often calls for rapid subjective judgments by journalists. Most likely, this is done with varying degrees of confidence in the truth of the piece as of the time of the publication. It would seem necessary, therefore, to incorporate the circumstances of publication in determining whether the doubts entertained were serious enough to constitute 'reckless' journalistic behavior in a particular case. The *St. Amant* standard [i.e., publication with a high awareness of . . . probable falsity], if literally applied, would otherwise appear to be easier to meet than the Supreme Court intended.

Comment, *Herbert v. Lando: Reporter's Privilege from Revealing the Editorial Process in a Defamation Suit*, 78 COLUM. L. REV. 449 (1978).

121. See *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). Malice is commonly understood to mean ill will or dislike.

mining whether a person's action was motivated by actual malice is to ask "why." As part of the constitutional standard enunciated in the *New York Times* case, however, "actual malice" has nothing to do with hostility or ill will, and the question "why" is totally irrelevant. . . .

The gravamen of . . . a [public official or public figure libel] lawsuit . . . concerns that which was in fact published. What was *not* published has nothing to do with the case. And liability ultimately depends upon the publisher's state of knowledge of the falsity of what he published, not at all upon his motivation in publishing it—not at all, in other words, upon actual malice as those words are ordinarily understood.¹²²

Accordingly, Justice Stewart would have ruled Colonel Herbert's discovery questions concerning the editorial process to be irrelevant and therefore not discoverable under the Federal Rules of Civil Procedure.

B. Herbert's Impact on the Media

As happened after the *Zurcher v. Stanford Daily* decision, the press reacted to the *Herbert* decision with an immediate firestorm of complaints. On April 18, 1979, Allen H. Neuharth, Chairman and President of the American Newspaper Publishers Association, stated:

The decision by the United States Supreme Court today in the *Herbert* case is one more step by the current court to weaken, erode, and diminish freedom of the press and by extension of all First Amendment freedoms. The American people—not just the press—were the real losers today. Last spring the Supreme Court ruled that police can rummage through newsrooms. Today it has ruled that lawyers can rummage through reporters' and editors' minds.

Neuharth also is credited with saying that the "state of mind of the majority of the members of the Burger Court needs examination."¹²³

Anthony Day, editorial page editor of the *Los Angeles Times*, has said he fears "public officials will use this decision to try to harass newspapers with expensive lawsuits . . . I think it will cause trouble."¹²⁴ An April 29, 1979, editorial in the *Des Moines Register* stated that "thinking and give-and-take are part of the creative process. Concern that the process one day might be picked apart and may determine the outcome of litigation cannot help but be inhibiting. If the high court believes otherwise, why did the justices consult and exchange ideas in strict confidence."¹²⁵

122. 441 U.S. at 199-200.

123. EDITOR AND PUBLISHER, Apr. 28, 1979, at 12.

124. EDITOR AND PUBLISHER, May 5, 1979, at 24.

125. Editorial, *Des Moines Register*, April 29, 1979.

Ralph Otwell, editor of the *Chicago Sun Times*, said he was “appalled and flabbergasted and frustrated by the decision.” He argued that the decision would pose a real problem for smaller newspapers that do not have “lawyers on call around the clock—the decision . . . could have a serious effect on the way they do their jobs.”¹²⁶ Finally, Robert Phelps, managing editor of the *Boston Globe*, called the decision “another indication of the Supreme Court’s continuing erosion of the press’s ability to report freely, . . . an indication of the Court’s view that the press is too free.”¹²⁷

Other representatives of the press, however, do not share the view that *Herbert* makes new and dangerous inroads into press freedom:

As a newsperson I feel that any intrusion by the Supreme Court on the First Amendment is to be deplored. But as an American citizen I can’t throw my hands in the air and think this is going to lead to brainwashing on the part of attorneys in libel cases. I don’t know if I can agree with the cartoonists who say the decision has sawed off our heads and scooped out our brains. There isn’t a publisher in the country who needs to worry if he goes to press with fairness, and accuracy and truthfulness.¹²⁸

Sylvan Fox, assistant managing editor of *Long Island Newsday*, said “the effect of the decision is relatively minor in the sense that I doubt very much that it will affect us and the kind of work we have been doing.”¹²⁹

If one reflects on the prior decisions governing public official/public figure libel litigation and the manner in which the “editorial privilege” claim was raised to the Supreme Court, the *Herbert* decision should neither come as a surprise nor, in itself, pose a substantial threat to newsmen engaged in the editorial process. As the many state and federal cases cited by Justice White illustrate,¹³⁰ evidence falling within the asserted editorial privilege has routinely been subject to discovery and admitted at trial.¹³¹ Moreover, in addition to the Justices who joined in Mr. White’s majority opinion, concurring Justice Powell, as well as dissenting Justices Brennan and Marshall, did not dispute the relevance to a libel plaintiff’s case of both the defendant’s state of

126. EDITOR AND PUBLISHER, May 5, 1979, at 24.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Herbert v. Lando*, 441 U.S. at 160 n.6, 165 n.15.

131. See e.g., *Goldwater v. Ginzburg*, 414 F.2d 324, 343 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970); *Indianapolis Newspapers, Inc. v. Fields*, 254 Ind. 219, 250-51, 259 N.E.2d 651, 664, *cert. denied*, 400 U.S. 930 (1970) (evidence of ill will). Dean Prosser equates the Sullivan standard with the “scienter” standard used in deceit actions: “The state of the speaker’s mind, notwithstanding its elusiveness as a matter of psychology and its difficulty of proof, must be looked to. . . .” W. PROSSER, *LAW OF TORTS*, § 107, at 700-01; § 118, at 821 (4th ed. 1971).

mind and any admissions by one editor to another of a story's doubtful veracity.

Furthermore, while the lack of legal authority establishing the asserted privilege puts respondents in a difficult position, the holdings in the principal cases cited by respondents as support for creation of such an editorial privilege were clearly stretched beyond their interpretive limits. In *Miami Herald Publishing Co. v. Tornillo*,¹³² the Supreme Court unanimously held unconstitutional a Florida statute creating a "right of reply" to press criticism of candidates for nomination or election.¹³³ In *Columbia Broadcasting System v. Democratic National Committee*,¹³⁴ the Court held that neither the Federal Communications Act nor the first amendment required broadcasters to accept paid political advertisements.¹³⁵

These decisions reflect the strong constitutional policy in support of editorial freedom to select and "process" information for publication.¹³⁶ But, as Justice White correctly observed, in and of themselves, cases stating "that neither a State nor Federal Government may dictate what must or must not be printed neither expressly nor impliedly suggest that the editorial process is immune from any inquiry whatsoever."¹³⁷

Another difficulty in the *Herbert* case was respondent's inabil-

132. 418 U.S. 241 (1974).

133. The Court concluded:

Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forego publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle of conduit for news, comment, and advertising. The choice of materials to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.

Id. at 258.

134. 412 U.S. 94 (1973).

135. "It would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by respondents. *Id.* at 120.

136. "No 'government agency—local, state, or federal—can tell a newspaper in advance what it can print and what it cannot." *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 255-56 (1974).

137. 441 U.S. at 1168. Justice White further pointed out that the decisions in *Tornillo* and *Gertz* were announced on the same day and, although the *Gertz* opinion contains an overview of the role of the first amendment in libel litigation,

ity, either in written submissions to the Court or in oral argument, to adequately define the limits of the claimed privilege. The Court, during oral argument and in Justice White's opinion, raised serious concerns as to the scope of this privilege and found it to be indefinite in two respects. First, it is unclear whether the privilege would apply to non-media defendants.¹³⁸ Second, the Court was confused as to which type of mental impressions would fall within the privilege.

[A]lthough we are told that respondent Lando was willing to testify as to what he "knew" and what he had "learned" from his interviews, as opposed to what he "believed", it is not at all clear why the suggested editorial privilege would not cover knowledge as well as belief about the veracity of published reports.¹³⁹

In oral argument, counsel for respondents asserted, under questioning from Justices Powell and Stevens, that the privilege included all thoughts and opinions regarding unpublished materials

"there was no hint that a companion case had narrowed the evidence available to a defamation plaintiff." *Id.*

138. See 4 U.S. SUPREME COURT, ORAL ARGUMENTS, 42-44 (Oct. Term 1978). This raises the recurrent controversy whether the press is an unofficial fourth branch of the government entitled to structural protections under the first amendment in addition to the speech protections given all persons. As discussed in note 103 *supra*, Justice Stewart subscribes to the theory that the free press clause of the first amendment gives the press special structural protection, something above and different from the protection given to individuals. See generally Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975).

Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals: Freedom of speech, freedom of worship, the right to counsel, the privilege against compulsory self-incrimination, to name a few. In contrast, the Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection.

Justice Stewart goes on to contend that only with the advent of "investigative reporting" and "advocacy journalism" has the press assumed the role intended by the framers of the Constitution: "The primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the government as an additional check of the three official branches." Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975). "The publishing business is, in short, the only organized private business that is given explicit constitutional protection." *Id.* at 633.

Justice Burger, on the other hand, believes the press is not entitled to constitutional rights unavailable to all persons through the free speech clause of the first amendment. In a concurring opinion in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), Chief Justice Burger asserts two fundamental bases for not accord special protection to the press. First, there is no evidence, or at least compelling evidence, that the framers intended to distinguish between the free speech rights of all persons and the press freedoms of the organized media. *Id.* at 798-99. Second, to involve courts legislatures, or administrative agencies in determining which entities fall within the "institutional press" is not only "reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the first amendment was intended to ban from this country," *Id.* at 801, but would invoke an impermissibly confining approach to the free press guarantee, pegging its protection to such factors as "content of expression, frequency or fervor of expression, or ownership of the technological means of dissemination." *Id.*

139. 441 U.S. at 170-71.

and all editorial communications and thought processes preceding publication. Opinions regarding specific published statements would not be privileged.¹⁴⁰ Nonetheless, the impression one gets from reviewing the transcript of oral argument before the Court is that several of the Justices were unconvinced that the privilege could be defined in a manner capable of being administered by a trial court.¹⁴¹

Finally, although respondents Lando and CBS were attempting to obtain a broad-sweeping testimonial privilege based on first amendment grounds, they may have been able to obtain at least "half a loaf" had they properly raised the issue of abuse of discovery in their interlocutory appeal.¹⁴² The problems of undue burden and expense posed by the abuse of liberal discovery procedures clearly concerned the entire Court. Justice Marshall dissenting, noted that the *New York Times* standard of liability cannot of itself "secure public exposure to the widest possible range of information and insights. . . ."¹⁴³

Insulating the press from ultimate liability [by according some margin of

140. For example, a plaintiff could ask, "Did you believe the statement attributed to X which was broadcast?" No answer would be required, however, to the question, "What did you think of the published statement attributed to X in light of the contradictory statement of X (or Y) which was not broadcast?" See *generally*, 4 U.S. SUPREME COURT ORAL ARGUMENTS 36-38, 54-56 (Oct. Term 1978).

141. Justice White also was concerned that "[i]f damaging admissions to colleagues are to be barred from evidence, would a reporter's admissions made to third parties not participating in the editorial process also be immune from inquiry?" 441 U.S. at 171. See 4 U.S. SUPREME COURT ORAL ARGUMENTS, 45-47, 59-61 (Oct. Term 1978).

142. The defendants failed to certify, for hearing on interlocutory appeal, the question of whether further discovery might be improper under Rule 26(c) of the Federal Rules of Civil Procedure: "Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . ." This, of course, may have been a deliberate decision, so as to force the Court to address the question of a constitutional privilege, rather than decide the case on the basis of more narrow, non-constitutional grounds. Nonetheless, it might be argued that, at least in "private figure" libel cases where the plaintiff need not meet the heavy burden of proving actual malice, the public interest in the confidentiality of the editorial process is sufficient to authorize restrictions on discovery of particular editorial discussions or mental conclusions. Cf., *Gaison v. Scott*, 59 F.R.D. 347 (D. Hawaii 1973); *Frankenhauser v. Rizzo*, 59 F.R.D. 339 (E.D. Pa. 1973); *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *adhered to*, 51 F.R.D. 187 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973); *Gillman v. United States*, 53 F.R.D. 316 (S.D.N.Y. 1971); *Banks v. Lockheed-Georgia Co.*, 53 F.R.D. 283 (N.D. Ga. 1971); *California v. United States*, 27 F.R.D. 261 (N.D. Cal. 1961).

143. 441 U.S. at 203-04.

error in publication] is unlikely to avert self-censorship so long as any plaintiff with a deep pocket and a facially sufficient complaint is afforded unconstrained discovery of the editorial process. If the substantive balance of interests struck in *Sullivan* is to remain viable, it must be reassessed in light of the procedural realities under which libel actions are conducted.¹⁴⁴

Justice Marshall also asserted that through “*in terrorem* discovery,” litigators have transformed the liberal discovery procedures under Rule 26 of the Federal Rules of Civil Procedure into “tactics of attrition, rather than submit to the intrusiveness and expense of protracted discovery, even editors confident of their ability to prevail at trial or on a motion for summary may find it prudent to ‘steer far wid[e] of the unlawful zone’ thereby keeping protected discussion from public cognizance.”¹⁴⁵

In his dissent, Justice Stewart, as mentioned above, found the fact that Herbert had “already discovered what Lando knew, saw, said and wrote during his investigation” to be more than sufficient; he also regarded few of the discovery questions at issue as “com[ing] within even the most liberal construction of Rule 26(b). . . .”¹⁴⁶ The majority opinion and that of Justice Powell also reflected the Court’s concern that, particularly when discovery may impinge on press freedoms, the rules of discovery “be construed to secure the just, *speedy* and *inexpensive* determination of every action.”¹⁴⁷ Yet the Court was not required to address the problem of undue discovery under the Federal Rules in any determinative way, for the issue “[w]hether, as a nonconstitutional matter . . . the trial judge properly applied the rules of discovery was not within the boundaries of the question certified under 28 U.S.C. Section 1292(b) and accordingly [was] not before [the Court].”¹⁴⁸

The press is clearly frustrated over the Court’s refusal to uphold an absolute editorial privilege and may feel the Court’s decision reflects insensitivity to the chilling effect on internal editorial communications posed by uncontrolled discovery. It is too early to say, however, that this decision imposes new restrictions on the freedom to publish. On the one hand, *dicta* in the majority opinion in *Herbert* urges that the standards of relevance be firmly applied to avoid “undue burden or expense.” Also, Justice Powell urges district judges to superintend pretrial discovery so that it may lead to a speedy resolution of the litigation and not unduly impair first amendment values. The Court also surely did not ex-

144. *Id.* at 204.

145. *Id.* at 205 (citing *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 53 (1971)).

146. 441 U.S. at 202.

147. *Id.* at 177.

148. *Id.*

pand the areas of inquiry previously available to libel plaintiffs. On the other hand, plaintiffs' attorneys may not have been fully aware that questions of the sort raised by Col. Herbert constitute permissible discovery. Moreover, in declining to create a constitutional privilege, and in not having to address, under the Federal Rules of Civil Procedure, the burdensome nature of the unanswered questions raised by Colonel Herbert, the Court's decision does uphold, in this particular case, an absolutely staggering amount of discovery. It is uncertain, therefore, whether the *Herbert* decision will have any impact upon the manner in which trial judges exercise their responsibility to impose reasonable control over discovery which otherwise would be limited only by the imagination of plaintiffs' attorneys.

With respect to undeserved libel verdicts, it also remains to be seen whether the fears of the press and of Justice Stewart are warranted. Objective criteria of knowing or reckless falsity which may form the basis for liability, but which, by and large, protect that necessary margin of error contemplated in *New York Times v. Sullivan*, of course remain available to public figure libel plaintiffs. Such indicia of actual malice include outright fabrication;¹⁴⁹ the persistent inaccuracy of a news source;¹⁵⁰ publication on the basis of communications with completely unverified, anonymous sources;¹⁵¹ publication of a highly defamatory account of an incident, after the journalist failed to communicate with any of the actual participants and the editor failed to discuss said account in any detail with the journalists;¹⁵² publication of defamatory opinions with no basis in either disclosed or assumed facts;¹⁵³ repeated use of provocative, defamatory headlines unsupported by facts;¹⁵⁴ failure to investigate inherently improbable accusations coupled with a strong bias or motive to defame;¹⁵⁵ publication,

149. See *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245 (1974); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

150. See generally *Washington Post Co. v. Keogh*, 365 F.2d 965 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967).

151. *Vandenburg v. Newsweek, Inc.*, 507 F.2d 1021 (5th Cir. 1975); *but see*, *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968); *New York Times v. Connor*, 365 F.2d 567, 576 (5th Cir. 1966); *Stevens v. Sun Publishing Co.*, 240 S.E.2d 812, 270 S.C. 65 (S.C. Sup. Ct.), *cert. denied*, 436 U.S. 945 (1978).

152. *Akins v. Altus Newspapers, Inc.*, 4 Med. L. Rptr. 1449 (Okla. Sup. Ct. 1977).

153. See generally *Hotchner v. Castillo-Puche*, 551 F.2d 910 (2nd Cir. 1977).

154. *Hodges v. Oklahoma Journal*, 4 Med. L. Rptr. 2492 (Okla. Ct. App. 1979).

155. *Weaver v. Pryor Jeffersonian*, 569 P.2d 967 (Okla. 1977).

without any independent verification, of highly defamatory statements when said statements did not constitute “hot news” and there was ample opportunity for verification;¹⁵⁶ repetition of a defamatory broadcast based solely on anonymous tips and without undertaking any independent verification after having received a denial of the charges from the public official plaintiff;¹⁵⁷ and the election to publish charges of corruption and speculation on the basis of the ambiguous comments of a biased source, notwithstanding negative verification from a “neutral professional source.”¹⁵⁸

Objective evidence in the foregoing cases of failures to verify and investigate—when considered wholly apart from any accompanying ill will—may reasonably be construed to constitute recklessness, *i.e.*, a needless and wanton indifference to consequences.

Only future case law will show whether libel verdicts will increase based on subjective evidence regarding a journalist’s intent. Notwithstanding the holding in *Herbert*, Justice White concedes that “[i]t may be that plaintiffs will rarely be successful in proving awareness of falsehood from the mouth of the defendant himself.”¹⁵⁹

Although such methods have been previously available to libel plaintiffs, newly educated plaintiffs’ attorneys may now increase their discovery of pre-publication communications and the basis for a defendant’s choice of content. Armed with this sort of discovery, it may be reasonable to suppose that a greater number of libel cases will reach the jury. Once there, it is anybody’s guess whether trivial or merely negligent editorial misjudgments such as a newsman’s hunch to adopt “one of a number of possible rational interpretations of a document,”¹⁶⁰ or plausible “misinterpretations of the gist of lengthy government documents,”¹⁶¹ will, when coupled with voluminous evidence of common law malice

156. *Widener v. Pacific Gas & Electric Corp.*, 75 Cal. App. 3d 415, 142 Cal. Rptr. 304 (1977), *cert. denied*, 436 U.S. 918 (1978).

157. *Holter v. WLCY*, 366 So. 2d 445 (Fla. Dist. Ct. App. 1978).

158. *Cape Publications, Inc. v. Adams*, 336 So. 2d 1197 (Fla. Dist. Ct. App. 1976), *cert. denied*, 434 U.S. 943 (1977).

159. 441 U.S. at 170.

160. *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971). *TIME* magazine quoted, from a report of the Civil Rights Commission, charges against Pape without indicating that the charges were those of an individual, not the findings of the commission. Pape sued *TIME* for libel, claiming that its failure to reveal that it was reporting mere allegation, showed actual malice. It was held that such failure amounted to the adoption of one of several rational interpretations of a document, and while it might reflect a misconception, it did not constitute actual malice.

161. *Id.* at 291.

(ill will), be deemed to be reckless or knowing falsehood.¹⁶²

Since the real impact of *Herbert* remains speculative, the press might do well to cease its widely publicized hue and cry over this decision. *Herbert* simply assures libel plaintiffs that they are not barred by *New York Times v. Sullivan* from inquiry into subjective intent in their efforts to prove actual malice. Ingenious counsel for plaintiffs may question extensively during discovery, consistent with Rule 26(b), but counsel for press defendants still have available to them at trial, the same arsenal of evidentiary objections they had prior to *Herbert*. The rules of evidence have not been changed and courts, if reminded by defense counsel, can find no basis in *Herbert* to liberalize existing standards of proof and admissibility. Absent an admission of actual malice by the defendant, having an objective basis for believing the accuracy of an offending publication, of course, remains the best defense to

162. *Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir. 1969), highlights the very thin line drawn by some judges between simple negligence, or negligence accompanied by ill will and recklessness.

The trial court, appellants also argue, erroneously permitted the jury to find actual malice from evidence of negligence and ill will. The record is to the contrary. The court below not only charged the jury but also emphasized in the charge that neither negligence nor failure to investigate, on the one hand, nor ill will, bias, spite, nor prejudice, on the other, standing alone, were sufficient to establish either a knowledge of the falsity of, or a reckless disregard of, the truth or falsity of the materials used. Moreover, the court properly instructed the jurors that they should consider all the evidence concerning appellants' acts and conduct . . . in deliberating upon whether the defendants published with actual malice. *There is no doubt that evidence of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of the defendant's recklessness or of his knowledge of falsity.*

See, e.g., Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). *Id.* at 342 (emphasis added). *See also Cochran v. Minneapolis Newspaper Inc.*, 372 N.E.2d, 1211, 1220 (Ind. App. 1978).

It is disturbing that juries, when presented with evidence of a defendant's republication ill will toward a plaintiff, erroneous publication by the defendant, and the plaintiff's resulting reputational injury, may infer actual malice from negligence and ill will. *New York Times* requires proof of specific intent to inflict harm through falsehood. *See Greenbelt Cooperative Pub. Ass'n, Inc. v. Bresler*, 398 U.S. 6 (1970); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 91 (1967); *Rosenblatt v. Baer*, 383 U.S. 75 (1965); *Henry v. Collins*, 380 U.S. 356 (1965); *Garrison v. Louisiana*, 379 U.S. 64 (1964).

As observed recently by the Wyoming Supreme Court, these cases "make it clear that bad or corrupt motives, spite, hostility, ill will, or deliberate intention to harm are not material with respect to the definition of actual malice set forth in *New York Times v. Sullivan*. . . ." *Adams v. Frontier Broadcasting Co.*, 555 P.2d 556, 563 (Wyo. 1976).

rebut inferences of actual malice raised by evidence of ill will. Even without an objective basis, a defendant will still be protected by the *New York Times v. Sullivan* standard which requires more than a mere showing of falsity and ill will.¹⁶³

By continuing its doomsday rhetoric, the press can only serve to embolden and educate the plaintiffs' bar, and perhaps prejudice prospective veniremen against news media which are increasingly perceived to be seeking preferential treatment.¹⁶⁴

IV. CLOSED COURTROOMS: *GANNETT CO. V. DEPASQUALE*¹⁶⁵

In this case, the Supreme Court considered for the first time whether allegedly prejudicial pre-trial publicity can, upon the defendant's request, prompt closure of a pre-trial suppression hearing to the press and public. The facts of the case center upon the July, 1976 disappearance of Wayne Clapp, who was last seen fishing with two companions on Lake Seneca. The two companions later were seen driving in Clapp's pickup truck, but without Clapp, whose bullet-ridden boat was subsequently discovered by the police.

Two Rochester newspapers, owned by Gannett Co., Inc., published stories on Clapp's disappearance which related the investigator's theory that he had been shot in his boat and dumped overboard. One of the stories, in the evening *Times-Union*, mentioned the names of Kyle Greathouse and David Ray Jones, stating that Greathouse had been identified as one of the two companions last seen with Clapp. The story also said that Jones, Greathouse, and Greathouse's wife were being sought by police in connection with the disappearance.

Michigan police apprehended Jones and Mr. and Mrs. Greathouse on July 21. On July 22, Gannett's two Rochester newspapers reported the details of the capture, including the suspects' attempts to escape from the Michigan police. The stories also repeated police theories that Greathouse and Jones had shot Clapp with his own gun, robbed him, and then thrown his body overboard.

On July 24, Gannett's morning *Democrat & Chronicle* reported

163. See *New York Times v. Sullivan*, 376 U.S. 254 (1964).

164. See Ledene, *Scoop and Dagger*, HARPER'S MAGAZINE, Jan. 1979, at 91; *Is the Press Living By a Double Standard?*, U.S. NEWS & WORLD REPORT, Oct. 10, 1977, at 29; *Does the Press Disclose All?*, THE WALL ST. J., Aug. 11, 1978, at 10, col. 3; Linde, *Advice to the Press*, THE CENTER MAGAZINE, May/June, 1978, at 2; Banks, *Memo to the Press: They Hate You Out There*, THE ATLANTIC MONTHLY, Apr. 1978, at 35; Will, *Crying Wolf*, NEWSWEEK, April 30, 1970, at 104.

165. 99 S. Ct. 2898 (1979).

that Greathouse had led police to the location where he had buried Clapp's .357 magnum, and that the suspects, along with the gun, were being returned to New York.

The following day, it was reported that Greathouse and Jones had been arraigned on second-degree murder charges and were being held in Seneca County. It also was reported that three eyewitnesses had testified that they had seen Clapp's boat veering sharply in the water following several gunshot-like noises.

On August 2, Greathouse and Jones were indicted, an occurrence reported by both the *Democrat & Chronicle* and the *Times-Union*, along with more details of Clapp's disappearance. On August 6, similar stories were again published.

Several weeks later, attorneys for Jones and Greathouse moved to suppress inculpatory statements made by their clients to police, asserting that the confessions had been involuntary. They also moved to suppress certain physical evidence, including the .357 magnum which, it was asserted, had been seized pursuant to the involuntary confessions.

On November 4, the suppression hearing (or so-called Huntley hearing)¹⁶⁶ was held before County Court Judge Daniel DePasquale. At this hearing, the defense attorneys moved to exclude the press and public on the ground that the court would be taking evidentiary matters into consideration that might or might not be brought forth subsequently at trial. A Gannett reporter, present in the courtroom at the time, offered no objection to this, nor did the prosecutor. Justice DePasquale, noting that the defendants had a constitutional right to an open proceeding if they so desired, granted the motion for closure.¹⁶⁷

The following day, the Gannett reporter, who had been removed from the hearing, wrote to Judge DePasquale, voicing his objec-

166. In *People v. Huntley*, 15 N.Y.2d 72, 204 N.E.2d 179 (1965) the New York Court of Appeals held that the separate inquiry into the voluntariness of a confession which is required under *Jackson v. Denno*, 378 U.S. 368 (1964), is to be conducted in a preliminary hearing.

167. Judge DePasquale stated:

[T]his Court is going to grant the motion since these matters are in the nature of a Huntley hearing and suppression of physical evidence, and it is not the trial of the matter. Certain evidentiary matters may come up in the testimony of people's witnesses that may be prejudicial to the defendant, and for those reasons the Court is going to grant both motions.

Petitioner's Brief for Certiorari, *Gannett Co. v. DePasquale*, 57 U.S.L.W. 4902 (1979).

tions to the closure of the Huntley hearing and requesting immediate access to the transcript. The judge responded by stating that the hearing was concluded and that no decision had been made regarding release of the transcript. Gannett Co. then moved that the court set aside its order of closure. At a hearing on that motion, Judge DePasquale acknowledged the existence of a first amendment right of access to criminal proceedings, but held that the reasonable probability of prejudice to the defendants outweighed any competing interests of the press and the public.

An original petition of mandamus and prohibition was subsequently filed by Gannett, alleging violation of the first, sixth, and fourteenth amendments. On December 17, 1976, the Appellate Division of the Supreme Court of the State of New York vacated Judge DePasquale's order, finding that it both violated the public's interest in open judicial proceedings and constituted an unlawful prior restraint in violation of the first and fourteenth amendments.¹⁶⁸

Judge DePasquale, through the New York Attorney General's Office, filed an appeal. The New York Court of Appeals upheld the original exclusion order, noting that although under state law "[c]riminal trials are presumptively open to the public, including the press," such a presumption must give way if there exists a threat to the defendants' right to obtain a fair trial.¹⁶⁹

In a five to four decision, the Supreme Court affirmed this decision. Justice Stewart, in the majority opinion,¹⁷⁰ characterized the issue as "whether members of the public have an independent constitutional right to insist upon access to a pretrial judicial proceeding, even though the accused, the prosecutor and the trial judge all have agreed to the closure of that proceeding in order to assure a fair trial."¹⁷¹

Justice Stewart first reviewed the "prejudicial" publicity with which Judge DePasquale had to contend and then proceeded to review previous cases which had characterized the public trial guarantee under the sixth amendment as one created for the benefit of the defendant. "The Constitution nowhere mentions any

168. *Gannett Co. v. DePasquale*, 55 App. Div. 2d 107, 381 N.Y.S.2d 719 (1976).

169. *Gannett Co. v. DePasquale*, 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977).

170. Joining Justice Stewart were Chief Justice Burger and Justices Powell, Rehnquist, and Stevens. Justices Burger, Powell, and Rehnquist also filed concurring opinions. Justice Blackmun, with whom Justices Brennan, White, and Marshall joined, concurred in that part of Stewart's opinion relating to mootness, but dissented from the remainder of the opinion.

171. 99 S. Ct. at 2901.

right of access to a criminal trial on the part of the public, its guarantee, like the others enumerated, is personal to the accused."¹⁷² Stewart specifically discussed two cases in support of this position. *In re Oliver*¹⁷³ was a case in which the Court held that conducting a criminal contempt hearing in secret, over the defendant's objection, violated the accused's right to public trial under the due process clause of the fourteenth amendment. *Estes v. Texas*,¹⁷⁴ held that a defendant was denied due process by the broadcast of his trial over radio and television.¹⁷⁵

Justice Stewart acknowledged the existence of "a strong societal interest in public trials,"¹⁷⁶ but found that "[r]ecognition of an independent public interest in the enforcement of sixth amendment guarantees is a far cry . . . from the creation of a constitutional right on the part of the public."¹⁷⁷ According to Stewart, the historical development of the public trial guarantee which had been detailed by Gannett and various press organizations in briefs *amici curiae*, "demonstrates no more than the existence of a common law rule of open civil and criminal proceedings."¹⁷⁸ Stewart asserted that the Court's "judicial duty" in this case was to determine whether the sixth amendment incorporated the common law rule of open proceedings; whether it explicitly rejected that rule; or whether the tradition of open proceedings was simply "left undisturbed" by the sixth amendment. While conceding that "the sixth amendment permits and even presumes open trials as a norm," Stewart found no constitutional require-

172. *Id.* at 2905.

173. 333 U.S. 257 (1948).

174. 381 U.S. 532 (1965).

175. In holding that the press did not have a constitutional right to be present with equipment to televise Billy Sol Estes' trial, the Court was concerned not so much with whether trials are to be open the public, but rather with eliminating the peculiar distractions of film, sound, and lighting equipment which denied to a defendant the "judicial serenity and calm to which he is entitled." 381 U.S. at 532. The Court stated:

[T]he circumstances and extraneous influences intruding upon the solemn decorum of court procedure in the televised trial are far more serious than in cases involving only newspaper coverage. *Id.* at 548. It is true that the public has the right to be informed as to what occurs in its courts, but reporters of all media including television, are always present if they wish to be. . . .

Id. at 541 (emphasis added).

176. 99 S. Ct. at 2907.

177. *Id.*

178. *Id.* at 2908.

ment that pre-trial proceedings “be opened to the public [when] the participants in the litigation agree that it should be closed to protect the defendants right to a fair trial.”¹⁷⁹ Beyond that, Stewart cited various authorities for the proposition that, whatever common law rule or policy favored open trials, it was not as rigorously applied to pre-trial proceedings.¹⁸⁰

For the foregoing reasons, Justice Stewart found no public right under the sixth and fourteenth amendment to attend criminal proceedings. The Court declined to examine the question of whether there is a public right to attend criminal trials under the first and fourteenth amendments, stating that such an examination would be too “abstract.” Justice Stewart reasoned that: “[E]ven assuming, *arguendo*, that the First and Fourteenth Amendments may guarantee such access in some situations, a question we do not decide, this putative right was given all appropriate deference by the state *nisi prius* court in the present case.”¹⁸¹

Several factors lead the majority to conclude that “appropriate deference” had been given to the putative first amendment right to attend criminal judicial proceedings. These included the fact that none of the spectators present in the courtroom objected at the time of the original ruling and that counsel for Gannett had subsequently been given an opportunity to be heard upon the motion to quash. Also persuasive in this regard were Judge DePasquale’s comments that he had weighed the first amendment right to attend the proceedings against the “reasonable probability of prejudice to the defendants,”¹⁸² with the conclusion that the “putative” right to attend must give way. Finally, it was reasoned that any denial of access was temporary and that, upon the release of the transcript of the Huntley hearing, “the press had the opportunity to inform the public of the details of the pretrial hearing accurately and completely.”¹⁸³

Although joining the majority opinion of Justice Stewart,¹⁸⁴ in

179. *Id.* “The history upon which the petitioner and amici rely totally fails to demonstrate that the Framers of the Sixth Amendment intended to create a constitutional right in strangers to attend a pretrial proceeding, when all that they actually did was to confer upon the accused an explicit right to demand a public trial.” *Id.*

180. *Id.* at 2909-11.

181. *Id.* at 2912.

182. *Id.*

183. *Id.*

184. Although he stated the question as relating to a “pretrial judicial proceeding,” Justice Stewart concluded, “For these reasons, we hold that members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials.” *Id.* at 2911.

his concurring opinion, Chief Justice Burger narrowly limited his concurrence to the closure of pre-trial proceedings: "For me, the essence of all this is that by definition 'pretrial proceedings' are exactly that."¹⁸⁵

Justice Powell, in his concurring opinion, recognized the existence of an "interest protected by the First and Fourteenth Amendments in being present at pretrial suppression hearings,"¹⁸⁶ but also noted that it was an interest which was to be weighed against a defendant's constitutional right to a fair trial.¹⁸⁷ Justice Powell said that in balancing these competing interests, the trial court must decide "whether a fair trial for the defendant is likely to be jeopardized by publicity, if members of the press and public are present and free to report prejudicial evidence that will not be presented to the jury."¹⁸⁸ Powell also encouraged trial judges to seek less restrictive alternative means to preserve the fairness of the trial and to assure that the exclusion of the press and the sealing of any transcript does not persist any longer than necessary. Justice Powell also argued that members of the press or public present at the time the motion for closure is made should be given an opportunity to be heard in opposition to the motion.¹⁸⁹ Powell limited this right to be heard to persons pres-

185. *Id.* at 2915.

186. *Id.*

187. *Id.* at 2916.

188. *Id.*

189. Since the *Gannett* decision was handed down, reporters for several newspaper groups have been issued a wallet-sized card to be read to the judge or passed to a court officer for relay to the judge when a motion for closure is raised. The card provided to its reporters by the *Los Angeles Herald Examiner* reads as follows:

Journalists are American's guardians of the people's First Amendment rights to a free unfettered press. Today more than ever, journalists must be able to move quickly and effectively to defend the public's right to know. The enclosed statement may be read into the court record when a reporter is confronted with attempts to close the courtroom doors on the public and the press. Or this card may be handed to the court clerk with a request that it be passed immediately to the judge. In that case, sign it and date it. Your honor, I am———, a reporter for the Los Angeles Herald Examiner, and I would like to object on behalf of my employer and the public to this proposed hearing. Our attorney is prepared to make a number of arguments against closings such as this one, and we respectfully ask the Court for a hearing on those issues. Because I cannot make the appropriate legal arguments myself, I also request that this proceeding be suspended briefly so that I can arrange for counsel to come to this courtroom and make those arguments to you. I believe our attorney can be here relatively quickly for the Court's convenience and he will be able to demonstrate that closure in

ent in the courtroom because of the substantial and intolerable delays which would otherwise result.¹⁹⁰ Finally, Powell found that Judge DePasquale properly balanced the competing constitutional rights involved and, "giving due deference to [his proximity] to the surrounding circumstances,"¹⁹¹ concluded that the exclusion order was not erroneous.

Justice Rehnquist's concurring opinion departed from the majority opinion in yet another way because he interpreted the Court's decision as holding that there was no sixth amendment right of access to judicial proceedings, and "if the parties agree on a close proceeding, *the trial court is not required by the sixth amendment to advance any reasons whatsoever for declining to open a pretrial hearing or trial to the public.*"¹⁹² He further stated that since the Court on numerous occasions had refused to recognize any first amendment right of access to information generated or controlled by government, none of the procedural protections advanced by Justice Powell (right to an adverse hearing, a finding of substantial reasons for closure) need be employed by trial courts.¹⁹³

The press reaction to *Gannett* was one of outrage. The lead editorial in the July 7, 1979 *Editor & Publisher* magazine stated:

Once again the Supreme Court of the United States has demonstrated its determination to establish the judiciary as a private club, meaning both an association and a weapon.

This decision is another club in the hands of the judiciary to be used against the press.

It is now within the power of the judiciary to be as much of a menace to . . . liberty as it wants to and when it wants to without restraint.¹⁹⁴

Allen H. Heuharth, speaking in his capacity as both *Gannett* president and president of the American Newspaper Publishers

this case will violate the First Amendment, and possibly state statutory and constitutional provisions as well. I cannot make the arguments myself, but our attorney can point out several issues for your consideration. If it pleases the Court, we request the opportunity to be heard through counsel. Finally, I request that this statement be made a part of the record of this proceeding. Thank you.

Reporter's signature

Date

190. 99 S. Ct. at 2916.

191. *Id.* at 2917.

192. *Id.* at 2918 (emphasis added).

193. [The lower courts] remain, in the best tradition of our federal system, free to determine for themselves the question whether to open or close the proceeding. Hopefully, they will decide the question by accommodating competing interests in a judicious manner. But so far as the Constitution is concerned, the question is for them, not us, to resolve. *Id.* at 2918-19. See generally Monaghan, *First Amendment Due Process*, 83 HARV. L. REV. 518 (1970). See also *Nebraska Press Ass'n. v. Stuart*, 433 U.S. 1327, 1329 (1976).

194. EDITOR AND PUBLISHER, July 7, 1979, at 9.

Association, called the *Gannett* decision another chilling demonstration that the majority of the Burger court is determined to unmake the Constitution. The Supreme Court added a touch of irony in holding this decision for release on the eve of the Fourth of July anniversary of our independence. This new assault on the first amendment is a sorry way to celebrate the people's guarantee of freedom. Only an aroused people can reverse this frightening court trend and prevent further erosion of the basic freedoms of the first amendment.¹⁹⁵

James J. Kilpatrick, a strong supporter of a strict constructionist approach to constitutional law, stated:

What [the *Gannett* decision] comes down to is this: In secret proceedings as tightly controlled as England's old Star Chamber, judges and prosecutors may now connive with defendants to wheel and deal behind closed doors. Subsequent transcripts, purporting to report pretrial proceedings, could be unrecognizably doctored. When the press is locked out, the people lose their eyes and their ears and their sense of a fishy smell as well. In the case at hand, the defendant's rights never were endangered for a moment. The public's rights went down the tube.¹⁹⁶

Don Dwight, publisher of the *Minneapolis Star* and *Minneapolis Tribune*, stated that *Gannett* "robbed" the public of its right to watch and measure its system of justice: "The Supreme Court has turned our criminal court system into a 'good'ol boys club' and the public is not in the club. . . . Robbery is robbery even when done by the United States Supreme Court."¹⁹⁷ One lawyer-publisher wrote the "Ode to the *Gannett* decision."

The Burger Court surpassed itself
and reached the heights of follies.
The Court they should have closed
was theirs instead of DePasquale's.¹⁹⁸

As can be seen from this small sampling of press reaction, the Court's decision in *Gannett* has evoked violent criticisms and caused considerable confusion regarding exactly what kinds of proceedings may be closed and what kind of showing, if any, is required to justify closure.¹⁹⁹

195. Allen H. Neuharth, *id.* at 9.

196. Kilpatrick, *Shadows of the Star Chamber*, Washington Star, July 26, 1979.

197. EDITOR AND PUBLISHER, Aug. 25, 1979, at 11.

198. See EDITOR AND PUBLISHER, Jan. 5, 1980, at 15 (quoting Ashton Phelps, publisher of the *New Orleans Times Picayune and Stats*).

199. If the public or press asserts a right to attend under the sixth amendment, the defendant apparently need make no showing of prejudice, since the Court finds no sixth amendment right or interest in persons other than the defendant. If

Jurists also appear to be confused. A study conducted by the Reporters Committee for Freedom of the Press, entitled *Secret Court Watch*, has concluded that after July 2, 1979, when the *Gannett* decision was announced, motions for either closure of judicial proceedings or prior restraints on publication have been made in numerous cases, many of which have been approved.²⁰⁰

Supreme Court Justices rarely comment regarding the meaning of particular decisions of the Court, but the myriad of reaction to *Gannett* has prompted four Justices to do just that. On August 9, Chief Justice Warren Burger told a reporter for Gannett News Service Washington that the decision "referred to pretrial proceedings only." He acknowledged that members of the judicial community may have misinterpreted the Court's holding, stating that "maybe judges are reading newspaper reports of what we said" implying that the misinterpretation may have resulted from inaccurate press accounts of the decision.²⁰¹

Less than a week after Burger's remarks, Associate Justice Powell told a group of delegates to an American Bar Association meeting that "we are totally dependent on the media to interpret what we do . . . instead of having any hostility toward you [the press], we depend upon you very much." He added, however, that sometimes "under the constraint of deadlines, we find that what is written appears to bear little relationship to what we did decide."²⁰²

Continuing this trend of illumination, Justice Blackmun stated that the decision *does* permit barring reporters from criminal trials.²⁰³

Finally, on September 8, at the dedication of the University of Arizona College of Law at Tucson, Justice Stevens defended the *Gannett* decision for the same reasons raised in Justice Brennan's speech at Rutgers, namely that *Gannett* did not involve the "core principles of First Amendment law, *i.e.*, the right to publish, but rather a right of press access which the Court repeatedly has

the public or press asserts a first amendment right to attend, a showing of the "reasonable probability" of prejudice evidently justifies closure. See Prettyman, *Building Walls with Gannett*, 4 DISTRICT LAWYER, Oct./Nov. 1979, at 37.

200. 93 closures have initially been enforced, upheld or appealed since the *Gannett* decision; 83 motions for closure have been denied or withdrawn. Of the 93 closures, 67 have been pretrial proceedings, while 23 were trial or conviction proceedings.

201. Weaver, *Burger's View on Right to Attend Trial*, The New York Times, Aug. 11, 1979.

202. Greenhouse, *Powell Says Court Has No Hostility Toward Press*, The New York Times, Aug. 14, 1979, at 13, col. 1.

203. Hill, *Blackmun Speaks Out on Gannett Decision*, EDITOR AND PUBLISHER, Oct. 13, 1979, at 13.

determined is not a right of Constitutional dimension."²⁰⁴ Justice Stevens declared:

The consistent results in cases involving the right of the press to publish, or to decide what not to publish, are significant because they must distinguish America from other nations around the world . . . that impose significant restraints upon what the news media may publish. There is no valid basis for questioning the present Supreme Court's faithful adherence to recognized First Amendment doctrine in the area in which its protection is of the greatest importance.

[T]he Court's repeated refusals to extend First Amendment protection to a right of access to newsworthy matter . . . cannot fairly be described as a withdrawal of protections previously available to the press. Quite the contrary, they are more fairly characterized as a refusal to develop or to recognize new rules of law.

I have heard the prophets of doom argue that the Watergate scandal would never have been exposed if *Gannett* and other cases had been decided a few years ago. That argument has not merit.²⁰⁵

From the standpoint of first amendment law, perhaps the most disheartening aspect of the *Gannett* decision for the press was the Court's refusal to address directly the question of the existence of a first amendment right of access to judicial proceedings. Although the Supreme Court has noted, in dicta, that "without some protection for seeking out the news, freedom of the press could be eviscerated,"²⁰⁶ the Court has again refused to recognize a right of access to government proceedings or to information within the government's control.²⁰⁷ Whether or not one regards the Court's failure to uphold a first amendment right of press ac-

204. EDITOR AND PUBLISHER, Sept. 15, 1979, at 9-10.

205. *Id.*

206. *Branzburg v. Hayes*, 408 U.S. at 681.

207. *See Houchins v. KQED*, 438 U.S. 1 (1978) (the press has no right of access to a county jail, over and above that of other persons, to interview inmates and photograph or record jail conditions for broadcast or publication); *Nixon v. Warner Communications Inc.*, 435 U.S. 589 (1978) (the press has no constitutional right to obtain from Judge Sirica's Federal District Court tapes of President Nixon's White House conversations to which the public also has not been given physical access); *Pell v. Procunier*, 417 U.S. 817 (1974) (a state regulation prohibiting face-to-face interviews between news media representatives and inmates is upheld for it merely restricts the press to the same degree of access accorded the public); *Saxbe v. Washington Post*, 417 U.S. 843 (1974) (a federal prison policy prohibiting face-to-face interviews between inmates and the news media upheld); *United States v. Gurney*, 558 F.2d 1202 (5th Cir. 1977) (although the press is entitled to report whatever occurs in open court, press has no constitutional right of access to bench conferences with counsel, exhibits identified but not received into evidence, defendant's grand jury testimony which was not read to the jury, etc.); *Garrett v. Estelle*, 556 F.2d 1274 (5th Cir. 1977); *Kearns-Tribune v. Utah Board of Corrections*, 2 Med. L. Rptr. 1353 (D. Utah 1977) (the press does not have a constitutional right to attend state executions).

cess as correct,²⁰⁸ Justice Stewart's narrow treatment of the sixth amendment issues raised, in *Gannett*, the nature and amount of pre-trial publicity involved, and society's fundamental interest in open proceedings, pose a grave danger that secret trials may become a common practice.

As Justices Blackmun, Brennan, White and Marshall point out at the beginning of Justice Blackmun's dissenting opinion, it is questionable whether any real impairment of the defendants' right to a fair trial was actually at stake in the case. Justice Blackmun criticized the majority for not facing up to the "placid, routine, and innocuous nature" of the news coverage of the case and its "comparative infrequency."²⁰⁹ He pointed out that there had been no significant media coverage of the case for almost three months prior to the Huntley hearing, and that the publicity "consisted almost entirely of straight forward reporting. . . . The stories contained no 'editorializing' and nothing that a fair-minded person would describe as sensational journalism." Justice Blackmun found no evidence, either from the nature and extent of the publicity or from the "casual comments" made at the hearing before Judge DePasquale, that there existed a real threat of impermissible prejudicial publicity.²¹⁰

B. Consequences of the Gannett Decision

This factual dispute has a significant bearing on whether the *Gannett* decision is sound as precedent for the closure of pre-trial proceedings. If the threat of prejudicial publicity did in fact seriously and imminently threaten the defendants' sixth amendment right to a fair trial, which could not otherwise be preserved, then there arguably is authority for Judge DePasquale's closure of the pre-trial proceedings.²¹¹ If, however, there was not a serious threat to trial by an impartial jury, factual contexts similar to

208. The practical problem raised by the legal distinction between prior restraints on publication and restraint on access to the news, and the reason why many members of the news media may regard that distinction as nothing more than a legal fiction, is that restraint on access produces, *ipso facto*, restraint on news dissemination: "It must be realized that the use of closed proceedings has the capacity to subvert the entire effect of [decisions barring the prior restraint of publication]." *New Jersey v. Allen*, 73 N.J. 132, 373 A.2d 377, 394 (1977).

209. 99 S. Ct. at 2919.

210. *Id.* at 2919-22. "The court obviously was not impressed with any brooding presence of possible prejudicial publicity. Its comment was only that 'evidentiary matters may come up . . . that may be prejudicial.' It is difficult to imagine anything less sensational in a murder context." *Id.* at 2920.

211. See *Branzburg v. Hayes*, 408 U.S. at 685 (1972); *Sheppard v. Maxwell*, 384 U.S. 358 (1966); *People v. Jelke*, 308 N.Y. 56, 123 N.E.2d 769 (1954); *Matter of United Press Ass'n v. Valente*, 308 N.Y. 71, 123 N.E.2d 777 (1954); and *Gannett Pacific v. Richardson*, 33 Med. L. Rptr. 2575 (Hawaii Sup. Ct. 1978).

Gannett cannot validly be presumed to authorize closure. Also, the Supreme Court's failure to require either a specified showing of prejudice or a hearing on press objections to closure would open a Pandora's box whereby any pre-trial suppression hearing could be closed upon the prosecutor's failure to oppose the defense motion for closure. Thus, upon the acquiescence of the prosecutor, defendants, in essence, would possess a right to compel private suppression hearings.²¹²

Although each case involving the due process requirement of trial before an impartial jury turns on its own facts, the Supreme Court has announced the general rule that a fair trial does not require

that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.²¹³

212. In *Singer v. United States*, 380 U.S. 24 (1965), the Court addressed the question whether Rule 23(a) of the Federal Rules of Criminal Procedure, which conditions a defendant's waiver of a jury trial upon "the approval of the court and the consent of the government," was invalid on the ground that the Constitution gives a defendant a right to insist on a non-jury trial regardless of whether the court and prosecution are willing to acquiesce. The Supreme Court found that although Article III, Section 2 of the Constitution ("[t]rial of all Crimes . . . shall be by jury.") is primarily for the protection of the accused, the accused is not thereby given an unlimited right to compel a non-jury trial. To condition waiver of a jury trial upon the consent of the court and prosecution therefore is not contrary to one's right to a fair trial or to due process. *Cf.*, *Faretta v. California*, 422 U.S. 806 (1975). In *Singer*, the Court observed:

The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right. For example, although a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial . . . although he can waive his right to be tried in the State and district where the crime was committed, he cannot in all cases compel transfer of the case to another district . . . and although he can waive his right to be confronted by the witnesses against him, it has never been seriously suggested that he can thereby compel the Government to try the case by stipulation.

380 U.S. at 34-35 (citations omitted).

213. *Irvin v. Doud*, 366 U.S. 717, 722-23 (1961). *See also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976). "[T]hese cases demonstrate that pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial."

Admittedly, pre-trial publication as to the judicial suppression of a defendant's confession may implant more damaging preconceived notions of an accused's guilt than would publicity as to the facts surrounding the crime. Nonetheless, it is purely speculative to surmise that, because evidentiary matters may come up in a suppression hearing that may be prejudicial, publicity of such a widespread and damaging nature will cause a result wherein an impartial jury cannot be impaneled. Under that "standard", secret pre-trial suppression hearings will become the rule rather than the exception.

Another difficulty with the Court's decision in *Gannett* is that it fails to require a trial judge even to consider whether alternative protective measures might be employed either at the suppression hearing or, if incriminating evidence is suppressed, at trial.²¹⁴ Of course, measures such as expanded voir dire at trial or change of venue, change of venue,²¹⁵ continuance of the trial,²¹⁶ or sequestration of the jurors are available to a judge only *after* the suppression hearing is concluded. Only then can the real impact, if any, of publicity concerning the pretrial proceedings be gauged. Possible alternatives at the pretrial hearing include temporary exclusion of the press while the content of the incriminating statements is discussed, or admission of the sealed confession into evidence and restrictions upon comment by the participants as to its contents.

These measures have only been prescribed by the Supreme Court as alternatives to "gag orders,"²¹⁷ which, as prior restraints on expression, violate what Justice Stevens has referred to as the

Murphy v. Florida, 421 U.S. 794, 799 (1975). "[E]xposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged [does not] alone presumptively deprive the defendant of due process." *But see*, Rideau v. Louisiana, 373 U.S. 723 (1965), wherein the Court reversed a murder conviction because, prior to trial, local broadcast media telecast three times the filmed confession of the defendant made at the jail subsequent to his arrest. The trial court, upon being advised that certain members of the jury panel had seen the televised confession, refused the defendant's request to strike three members from the jury panel, two of whom were deputies to the Sheriff who had obtained the defendant's confession before television cameras.

214. Before closure, "[a]ll other measures within the power of the court to insure a fair trial must be found to be unavailing or deficient." *New York Times v. Stankey*, 380 N.Y.S.2d 239, 243 (1976).

215. "[S]tate laws restricting venue must on occasion yield to the constitutional requirement that the state afford a fair trial." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 563 n.7 (1976) citing *Groppi v. Wisconsin*, 400 U.S. 505 (1971).

216. "[W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity." *Shepard v. Maxwell*, 384 U.S. 333, 363 (1966).

217. 99 S. Ct. 2898 (1979); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (per curiam) and *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539 (1976).

"core principle of the First Amendment." Nevertheless, their availability does not become irrelevant simply because there is no first amendment right of access to judicial proceedings.

That the Court's decision in *Gannett* is lax and overbroad is evident when certain considerations are taken into account. Judicial recognition that there exists a "strong societal interest in public trials,"²¹⁸ that open judicial proceedings are one of the most consistent and fundamental features of our democratic heritage,²¹⁹ that "[t]he operations of the courts . . . are matters of utmost public concern,"²²⁰ that "[c]ontemporaneous review [of criminal trials constitutes] an effective restraint on possible abuse of judicial power,"²²¹ and that open judicial proceedings protect the public's "right to know" and preserve "the respect and confidence of the community in applications of the criminal law,"²²² illustrate dramatically the laxity and overbreadth of the Court's decision which requires little or no showing of the need for closure and no judicial consideration of available alternatives.²²³

Unfortunately, the opinion itself leaves so much room for spec-

218. *Gannett Co. v. DePasquale*, 99 S. Ct. 2898, 2907; see also *United States v. Cianfrani*, 573 F.2d 835 (3d Cir. 1978); *United States v. Clark*, 475 F.2d 240 (2d Cir. 1973); *United States v. Kolki*, 172 F.2d 919, (3d Cir. 1949). (*en banc*); *United States v. Lopez*, 328 F. Supp. 1077 (E.D.N.Y. 1971); *Commercial Printing Company v. Lee*, 553 S.W.2d 270 (Ark. 1977); *Keene Publishing Company v. Keene Dist. Court*, 380 A.2d 261 (N.H. 1977); *People v. Marino*, 383 N.Y.S.2d 147 (Cty. Ct. 1976).

219. See *In re Oliver*, 333 U.S. 257, 267-70 (1948); Radin, *The Right to a Public Trial*, 6 TEMP L.Q. 381 (1932).

220. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978).

221. *In re Oliver*, 333 U.S. 257, 270 (1948).

222. *In re Winship*, 397 U.S. 358, 364 (1970). See also *Landmark Communications Inc. v. Virginia*, 435 U.S. 829 (1978); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-96 (1975); *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966); *In re Oliver*, 333 U.S. 257, 270-71 (1948).

223. The American Bar Association Standards relating to the Administration of Justice contain Standard 8-3.2 entitled "Pretrial proceedings; exclusion of public and sealing of records." It provides, in part, that "if at the pretrial proceeding testimony or evidence is adduced that is likely to threaten the fairness of a trial, the presiding officer shall advise those present of the danger and shall seek the voluntary cooperation of the news media in delaying dissemination of potentially prejudicial information by means of public communication until the impaneling of the jury or until an earlier time consistent with the fair administration of justice. The presiding officer may close a preliminary hearing, bail hearing, or any other pretrial proceeding, including a motion to suppress, and may seal the record only if:

(i) the dissemination of information from the pretrial proceeding and its record would create a clear and present danger to the fairness of the trial, and
(ii) the prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means."

ulation that it is little wonder the press and lower court judges are confused as to the applicability of the ruling in other factual situations. Justice Stewart, ordinarily a gifted communicator, almost mechanically, leads the reader through, around or over the first amendment and common law barriers to closure and then concludes with a narrow holding based on the sixth amendment only. He refuses to be diverted to consider any of the broader implications of the public access issue, because the trial court presumably dealt with those when it ordered the closure, although it's not clear from the record what, if any criteria the court used in making the order. In short, Stewart failed to provide sufficient elaboration which might have served to help lower court judges to understand the scope and factual context of the decision. The opinion was so restrained that only Justice Stevens was content to sign it without elaboration. The other three justices in the majority wrote separate opinions which were so diverse that trial judges could and have used the decision to justify widely differing rulings on closed-door criminal justice. While technically it was a five to four decision, it may be more accurate to record it as a two plus one plus one plus one to four decision.

Justice Stewart's opinion reflects an uncharacteristic coolness toward press rights, seemingly treating the press as a "stranger" in the courthouse. Indeed, he makes the comment that "our adversary system of criminal justice is premised upon the proposition that the public interest is fully protected by the participants in the litigation."²²⁴ Although this view may be accurate as related to the conduct of the trial itself, it is not universally valid because it does not deal with society's right to know, through observation (either direct or indirect) how that trial is being conducted. This freedom to observe is crucial to protecting the public interest. The *Gannett* opinion seems to hold otherwise, implying that the prosecutors and the courts alone are sufficient to protect the public interest, acting as watchdogs. This is a fine notion, but who will watch the watchdogs? Only Justice Blackmun, in his dissent, assails the majority's stand on this subject, asserting that "what transpires in the courtroom is public property."²²⁵

224. 99 S. Ct. at 2907.

225. *Id.* at 2922 (quoting *Craig v. Harney*, 331 U.S. 367, 374 (1974)). In *Gannett v. DePasquale*, only Justice Powell expressly found a first amendment right of the press and public in open judicial proceedings, and he found that right to be properly weighed by Judge DePasquale. Justice Stewart's opinion did not address the question because it held that whatever "putative" first amendment rights exists were given due deference by the trial court. Justice Rehnquist stated that no first amendment rights were involved. The four dissenting Justices declined to reach

The opinion was also somewhat deficient in that it failed to make any distinction between pre-trial proceedings and criminal trials. The press might well assert that the Court needs a copyreader to catch such omissions. It has been speculated that Justice Stewart wrote the opinion believing he was writing the minority opinion. Supposedly, it became the majority opinion only at the last minute when, as has been reported, Justice Powell switched sides.²²⁶ Apparently, Justice Powell was willing to agree to the closure of the pre-trial hearing if the question presented were defined as a sixth amendment case only. Perhaps that explains the simplicity and narrowness of the opinion, because often a minority opinion merely makes the opposing points and does not bother to elaborate as to all the implications that follow therefrom, as a sound majority opinion should. Thus, it may be that the opinion will be only a temporary "detour" and that the many unanswered questions as to when and in what circumstances a pre-trial hearing or a criminal trial may be closed will be answered in a later case.

the issue of first amendment access for they felt that: "[t]o the extent the Constitution protects a right of public access to [a judicial proceeding], the standards enunciated under the sixth amendment suffice to protect that right." *Id.* at 2940.

In *Richmond Newspapers, Inc.*, the press will have the opportunity to assert arguments not raised in *Gannett*, but which may give greater weight to the claim of a constitutional right of the public to attend trials. First, it may be argued that a right of public attendance at trials—while not explicitly found in the first and sixth amendment—reinforces both the informational policy underlying the freedom of the press, *see, e.g.*, *Landmark Communications Inc. v. Virginia*, 435 U.S. 829 (1978); *Oklahoma Pub. Co. v. District Court of Oklahoma County*, 430 U.S. 308 (1977); *Craig v. Harney*, 331 U.S. 367 (1947), and the protective policies of the public trial guarantee, *see, e.g.*, *Sheppard v. Maxwell*, 384 U.S. 333, 349, 350 (1966), *In re Oliver*, 333 U.S. 257, 291 (1948). Therefore, it can be argued that the interplay of these two amendments, and the achievement of their respective goals by public attendance at trials, gives rise to a peripheral or penumbral right of the public to attend trials. For examples of the Court's recognition of "penumbral" constitutional rights, *see, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *NAACP v. Alabama*, 357 U.S. 449 (1958); *Boyd v. United States*, 116 U.S. 616 (1886); *Embry v. Palmer*, 107 U.S. 3 (1882); *see also*, *Lamont v. Postmaster General*, 318 U.S. 301, 308 (1965) (Brennan, J., concurring).

In addition, it may be argued that while the right to attend criminal trials is not explicitly mentioned in the Bill of Rights, it is one "retained by the people" under the ninth amendment. Mr. Justice Story, who was alive in 1789 when Congress enacted the sixth and ninth amendments, once wrote: "In declaring, that the accused shall enjoy the right to a speedy and public trial [the sixth amendment] does but follow out the established course of the common law in all trials for crimes. The trial is always public." III J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 662 (3d ed. 1970).

226. Thomas, *TIME*, Nov. 5, 1979, at 64.

Fortunately, the Court will soon have an opportunity to limit or modify its decision in *Gannett*. The Court has agreed to consider *Richmond Newspapers v. Virginia*,²²⁷ a case involving a criminal trial in Hanover County, Virginia. In this case, a defendant facing murder charges requested that the public be excluded from his trial. The prosecutor did not object. The trial judge agreed to close the trial to the public and to the press because, he reasoned, "having people in the courtroom is distracting to the jury." He acted pursuant to a state law which permits the exclusion of any persons "whose presence would impair the conduct of a fair trial."²²⁸ Although the defendant was acquitted, the publisher of the Richmond newspaper contested the closure order.

While the outcome of any case before the Supreme Court is difficult to predict, it would appear probable that a solid majority of the Court will vote to overrule the closure order in this case. The dissenters in *Gannett*, Justices Blackmun, Brennan and White, most likely will again recognize a sixth amendment right of the public to attend criminal proceedings.²²⁹ Although Justice Powell concurred in the result of *Gannett*, he nonetheless found a first amendment right to attend judicial proceedings. This right may be abrogated only after a hearing, which Powell felt was adequate. Inasmuch as no meaningful hearing appears to have been convened in the *Richmond Newspapers* case, Powell will presumably vote to overturn the closure order. Moreover, in *Houchins v. KQED Inc.*, Justice Stevens (another member of the majority in *Gannett*) stated that "By express command of the sixth amendment the proceeding must be a 'public trial'. It is important not only that the trial itself be fair, but also that the community at large be confident in the integrity of the proceedings."²³⁰ It can

227. The opinion of the circuit court and the opinion of the Supreme Court of Virginia are not officially reported, but are set forth in the appendix to appellant's jurisdictional statement. Docket No. 79-243 at (1), (2) & (3). 48 U.S.L.W. 3178.

228. VA. CODE § 19.2-266 (1975).

229. Justice Blackmun's dissenting opinion in *Gannett* correctly points out that prosecutors may assent to motions for closure, not because of any real threat to the defendant's right to a fair trial, but in order to hide police or prosecutorial misconduct or ineptitude. 99 S. Ct. at 2930. A judge and prosecutor also may connive with defendants to close trial proceedings in order to hide their undue leniency or favoritism toward the defendant. More commonly, judges and prosecutors may be inclined to assent to closure so that, upon conviction of the defendant, undue publicity may not be a ground for reversible error. 99 S. Ct. at 2935-36.

230. 438 U.S. 1, 36-37 (1978). See, e.g., *United States ex rel. Lloyd v. Vincent*, 520 F.2d 1272 (2nd Cir.) (restrictions to preserve secret identity of undercover agent), cert. denied, 423 U.S. 937 (1975); *United States v. Bell*, 464 F.2d 667 (2nd Cir.) (exclusion of public during discussion of government's anti-hijacking procedures); *Geise v. United States*, 262 F.2d 151 (9th Cir. 1958) (closure to better enable prosecutrix and witnesses of tender age to testify in rape prosecution); *United States ex rel. Orlando v. Fay*, 350 F.2d 967 (2nd Cir. 1965) (exclusion of general public to

be seen, therefore, that Justice Stevens will likely vote to overturn the Virginia Supreme Court's holding in *Richmond Newspapers*.

Although he wrote the Court's majority opinion in *Gannett* which contained frequent references to lawful closure of a criminal trial, Justice Stewart did leave himself some leeway within which to overturn closure orders in subsequent decisions. A change in his stance could come about should he find that the trial court gave no meaningful consideration to the first amendment and to the social benefits conferred by open trials, or that no significant threat to a fair trial existed.

Chief Justice Burger, having focused his concurrence in *Gannett* on the fact that it involved only a pre-trial proceeding, is difficult to predict. Justice Rehnquist, who stated in *Gannett* that the litigants themselves may agree to closure without convening a hearing, or without even giving a reason for closure, will surely vote to affirm the decision of the Virginia Supreme Court.

It is therefore very possible that, in *Richmond Newspapers*, the Court will overturn the closure order by a vote of eight to one, although a seven to two vote is more likely. Judge Harold Leventhal of the United States Court of Appeals for the District of Columbia, speaking at the 1979 convention of the Associated Press Managing Editors Association, gave odds of seven to five that the Supreme Court, when it considers *Richmond*, will say that the first amendment gives the press a constitutional interest in these matters (*i.e.*, criminal trials) which must be given some weight. In our opinion, it is extremely doubtful, however, that the Supreme Court will go so far as to find a first amendment right of press access to a criminal trial.²³¹

maintain decorum); *People v. Hinton*, 31 N.Y. 2d 71, 286 N.E.2d 265, 334 N.Y.S.2d 885 (1972) (restriction to protect undercover agent), *cert. denied*, 410 U.S. 911 (1973); *People v. Hagan*, 24 N.Y.2d 395, 248 N.E.2d 588, 300 N.Y.S.2d 835 (1969) (closure to protect witnesses testifying against the murderers of Malcolm X), *cert. denied*, 396 U.S. 886 (1969).

231. In oral argument in *Gannett*, the attorney for *Gannett* argued that only by open trials can abuses and unfairness to a defendant be prevented. According to one observer:

This seemed to raise the ire of more than one justice. After intense questioning from Chief Justice Warren Burger and Associate Justices William Rehnquist and White, the bell weather note was rung by Justice Stevens, who put it this way: 'Does the press consider itself as a better guardian of a defendant's rights than the trial judge? Is the press a better judge of

In addition to overturning the Virginia Supreme Court decision on the ground that criminal trials must be open to the public, it is generally hoped that the Supreme Court in *Richmond Newspapers* will reassess its reasoning in *Gannett* regarding protection by trial participants of the public interest,²³² and will prescribe more definite standards for trial courts to use in ruling on motions for closure.

V. CONCLUSION

The three recent cases discussed in this article pose different sorts of problems for the news media as they go about their task of informing the public. The *Zurcher* decision is bad law which undermines the legitimate privacy interests of all Americans. Should the decision lead to newsroom searches as a frequent law enforcement practice, it also will impair—incrementally but substantially—the ability of the press to gather and disseminate valuable information from confidential news sources. The *Gannett* decision is bad law as well, reflecting a kind of “all or nothing” jurisprudence. The decision to close that particular suppression hearing clearly was not needed. If a pre-trial hearing may be closed solely on the basis of the kind of publicity that normally surrounds murder investigations, and on the premise that the press may report suppression of a confession, then innumerable criminal pre-trial proceedings will qualify for closure annually. Moreover, although the Court finds no first amendment or sixth amendment public right of access, the strong societal interest in public proceedings is surely entitled to more than the minimal attention given to it. In the Court’s majority opinion, the Court presumes open judicial proceedings to be the norm, yet leaves the press and the public with no means of enforcing that presumption in many instances.

While the *Herbert* decision does not remove the protections for journalists afforded by *New York Times v. Sullivan*, it may, nevertheless, subject the press to more expansive and subjective pre-trial discovery in plaintiff’s efforts to support allegations of actual malice. To avoid an increase in undeserved libel verdicts is founded on evidence of falsity coupled with common law malice, libel defense attorneys must be even more assiduous in assuring that trial courts’ jury instructions emphasize both the policy un-

fairness than a jurist? . . . His questions all but cried out with the judicial complaint that the press is overstepping its bounds.

EDITOR & PUBLISHER, Dec. 2, 1978, at 7; 4 U.S. SUPREME COURT ORAL ARGUMENTS 23, Oct. Term 1978.

232. 99 S. Ct. at 2908.

derlying the strict actual malice standards and the restrictions on its evidentiary components.

A vocal and growing segment of the news media is convinced that these three cases illustrate how the current Supreme Court has sought to narrow the constitutional protection of the press. The authors do not stand with this segment of the news media. In *Zurcher* and *Herbert*, the Supreme Court, rightly or wrongly, declined to forge new protections for the press which would exempt news media from legal obligations applicable to all citizens. In *Gannett*, the Court rejected, under the particular circumstances presented, a tradition of open justice which predates colonial times. The Court, however, did not narrow or overrule its previous interpretations of first amendment law relating to press access.

A more important question raised by these decisions is whether the news media have presented these cases in such a way as to limit the Court's flexibility to rule in its favor. The press also must ask itself whether its vehement and even caustic reaction to recent decisions will only serve to reduce its credibility in its future claims for judicial relief.

In at least two of the cases discussed herein, it can be argued that the press failed to raise the proper issues before the Supreme Court, but rather continued to beat the drum for broad constitutional protection of the right to *gather* news, as opposed to publishing it. In *Zurcher v. Stanford Daily*,²³³ the press did not force the Court to address the very shaky precedent of *Warden v. Hayden*.²³⁴ Nor did the press emphasize to the Court the protections contained in the "reasonableness clause" of the fourth amendment. Instead, the press focused only upon the first amendment. The Court was asked to invalidate surprise searches because a) they might impair confidential newsgathering—a function which the Court in *Branzburg v. Hayes*²³⁵ had already decided was not deserving of constitutional protection, and b) they may, in future cases, be conducted so disruptively as to delay protected publication.

In *Herbert*, too, the press may have chosen to fight its battle with the wrong weapons. Indeed, the defendants neglected to

233. 436 U.S. 547 (1978).

234. 387 U.S. 294 (1967).

235. 408 U.S. 165 (1972).

preserve for the Court's consideration the question of whether the voluminous depositions and production of documents already completed should bar further discovery as unduly burdensome. Instead, the press asked the Court to create an absolute editorial privilege, the bounds of which were not clear to anyone involved in the case.

Although such criticism is easy when one has the benefit of hindsight, it can be observed that even in *Gannett*, the media's arguments were less than adequate. The dissenters in *Gannett* found a public right to attend judicial proceedings grounded in the sixth amendment, and Justice Powell, in a concurring opinion, found a first amendment interest in gathering and disseminating information from judicial proceedings. He emphasized that, although competing first amendment interests are sacrificed whenever a judicial proceeding is closed to preserve a fair trial, due deference to the judge's proximity to the situation compelled him to acquiesce in the balance struck. In light of this, one might conclude that the press should have focused its arguments more on the facts of the case itself, showing that the publicity in question was not inflammatory or widespread enough to raise even the "reasonable probability" that the defendants could not obtain a fair trial. Additional emphasis on the unsensational and almost routine nature of the publicity involved might have persuaded Justice Powell or other Justices in the majority that the public's interest in open trials (whether constitutionally based or not) was being sacrificed without a constitutional need for secrecy. Indeed, as a practical matter, Judge DePasquale accorded defendants Greathouse and Jones an absolute power to compel a private proceeding simply by waiver of their rights to a public trial.²³⁶

Although arguments regarding the insufficiency of the showing of prejudice were raised by the various news media organizations which filed briefs in *Gannett*, these arguments were made primarily in light of the Court's holding in *Nebraska Press Association v. Stuart*²³⁷ rather than in the context of a balancing situation. If one weighs the public's interest in open trials against the right to a fair trial, the balance clearly is on the side of open trials since the alleged threat to a fair trial is, at best, speculative and remote. Moreover, the press again urged the Court to recognize a constitutional right of the press to access, although such proceedings have long been conducted in secret to protect the witnesses from undue embarrassment, to protect trade secrets, or to preserve the

236. See 99 S. Ct. at 2924-25 (Blackmun, J., dissenting).

237. 433 U.S. 1327 (1975) (prior restraint).

confidentiality of undercover agents or state secrets.²³⁸

The foregoing evaluation, is, of course, merely reflective of the authors' opinions, as to which some lawyers and commentators can and will no doubt differ. But certain questions persist: Why are the press and the courts at odds? Are there latent issues behind this confrontation that neither side is aware of? Is the dispute, characterized by the hyperbolic title *The Imperial Judiciary v. The Paranoid Press*, perhaps the result of a gap in communications, which if narrowed could contribute to few confrontations in the future? We think so.

The press and the courts, as well as the public generally, are all party to the current confusion over the recent decisions and the direction of our courts vis-a-vis the press. The origin of this naive (or confusion) on the part of the press is clouded.

To begin with, litigation which cannot be settled always produces a winner and a loser, and in the last several years there has been an unparalleled increase in press-related law suits. From 1789 when the first amendment was adopted until 1919 when the Court decided *Schenck v. United States*²³⁹ and *Abrams v. United States*,²⁴⁰ espionage cases involving pamphleteers rather than the organized press, there were no first amendment press cases decided by the Supreme Court in our constitutional history. The first Supreme Court case involving the press as related to the first amendment was *Near v. Minnesota*,²⁴¹ which concerned a prior restraint on publication.

In recent years, however, the "constitutionalization" of libel law, the advent of broadcast media and their regulation by government, the end of the "commercial speech" exception under the first amendment, and various enactments of statutory rights of access (Freedom of Information Act, Government and Sunshine Act, etc.), have produced a dramatic increase in press-related litigation. This, in turn, has expanded the field of liability insurance to underwrite the cost of libel litigation, but first amendment litigation as well.

Furthermore, the "information explosion" in the Twentieth Century, making it almost impossible for the ordinary citizen to

238. See note 229 *supra*.

239. 249 U.S. 97 (1919).

240. 250 U.S. 616 (1919).

241. 283 U.S. 697 (1931).

inform himself of significant events in government, natural sciences, economics, and the like, raises new questions as to what kinds of information the press may obtain or publish. As stated by one commentator,

[Previous] methods of obtaining information may well be inadequate today. More accurate and complete information is needed to fulfill the growing requirements of the public for in-depth interpretation of complicated facts and statistics, as well as more reliable forecasts of future actions and changing conditions. Journalism is also changing. Serious efforts to cover minorities and dissident groups as well as to report on increasingly complex government and business activities make necessary 'access to information that was previously unimportant because it was non-existent.'²⁴²

Of course, aside from those factors which have given rise to increased press litigation, wherein the press is bound to suffer some setbacks, the current animosity of the press toward the judiciary stems more directly from the nature of the modern press and its self perception. As to the latter point, several commentators have observed a new arrogance, or a "salvationist ethic"²⁴³ on the part of the press, due to the recent success of investigative journalists in uncovering political corruption or other wrong doing. One editor has observed that "[an] occupational disease of journalism is self-righteousness and an occasional belief that the Constitution was created only for the First Amendment and that to paraphrase Charlie (General Motors) Wilson, 'What's good for the press is good for the country'."²⁴⁴

Such beliefs tend to produce the feelings within the press that it deserves a privileged place in society to which all other interests must be subordinated. Consequently, the press consistently seeks to consolidate functional privileges which it has enjoyed over the years and translate them into constitutional "free speech" rights, which are frequently asserted in inappropriate cases.

The press, in its capacity as a watchdog of the government and of the courts, operates in an adversary role. Its reporters are paid to dig, often where they are not wanted, to uncover information which others may not want known. Indeed, from the press' point view, the more information it can obtain will enhance the job done to serve the public's "right to know." Even on the assumption that all of the news media's myriad activities do serve to enable the press to inform the public, those activities are not

242. Watkins, *News Gathering and the First Amendment*, 53 JOURNALISM Q. 406 (1976) (quoting Comment, *Newsgathering: Second Class Right Among First Amendment Freedoms*, 53 TEXAS L. REV. 1440 (1975)).

243. Chesire, *The Imperial Press*, NAT'L REV., Aug. 17, 1979, at 1021.

244. Grunwald, *Don't Love the Press, But Understand It*, TIME, July 8, 1974, at 74-75.

necessarily constitutionally protected or of paramount importance. The concept of "the right to know" is devoid of helpful content without addressing the question of what the public should know. As stated by Professor Telford Taylor:

[T]here certainly is no authorized interpretation of the First Amendment . . . that guarantees the people the right to know everything at any time and every place, whether it be the fact that an enemy code has been broken or the identity of an adolescent victim of a rape. If the phrase ("the right to know") is simply intended to mean that it is a good thing for the public to be generally well informed, of course I heartily agree, but in the solution of the difficult question that we are talking about here (i.e., the public's right to know as it conflicts with a defendant's right to a fair trial), I do not find the phrase at all helpful.²⁴⁵

Given such motives and aggressive intent, it is obvious that the press can be relied upon to resist any possible interference with or limitations on its right to publish, as well as its right to gather news and information, even if it comes in the form of a judicial opinion. Perhaps this accounts for what appears to be the "knee-jerk" reactions of the press to so many of the unfavorable press-related decisions.

On the other hand, it can be asserted that other characteristics of the press account for its overreaction to and misapprehension of judicial decisions. It may be that these supposed distorted perceptions result "naturally", as a matter of course. Consider the following:

1. The press generally, excluding the specialists who cover the Supreme Court, does not make a distinction between the "holding" of the Court and the opinions of the Justices. Frequently the press is confused, and misinterprets the opinions and fails to separate the specific holding from elaboration.
2. The press generally does not appreciate the utility and necessity of the Court's confining itself to the narrow question presented. It seems that the press is unable to understand why the Court does not go beyond its holdings to anticipate potential disputes that might later arise and give specific guidelines to the lower courts on how to follow the ruling.
3. The press generally does not understand the function of *obiter dictum* in an opinion.
4. The press is, for the most part, composed of generalists who are impatient with legal niceties, technicalities, and legal jargon. The press tends to "see the forests" and resists the strictures that come from "looking at the trees".
5. The press is impatient with the form of Court opinions, which are written in dry and symbolic language with constant reference to legal precedents.

245. Taylor, *Press and Prejudice: The Impact of News on Justice*, 112 AM. PHIL. Soc'y 124 (1968).

6. The press fears the impact of Court decisions believing that the rulings are carved in stone and are only rarely modified, distinguished, or overturned.
7. The press tends to view things as in absolute terms, failing to appreciate that the cases that reach the appellate level of our judiciary systems are hard cases, requiring the courts to balance conflicting considerations and to play a role of conciliation, creating exceptions or new concepts to cover unusual circumstances.
8. The press usually tends to be cynical, to dramatize dissent, to concentrate on the confrontations within the judiciary, and to print the "bad news." This tendency is increased in first amendment cases which produce a five to four split in Supreme Court decisions more frequently than other cases.²⁴⁶
9. The press often forgets that judicial protection for some of its functions, such as newsgathering, the operations of the editorial process, the conditional privilege to report on official proceedings or other matters of public interest, is founded in the common law or legislative enactment. The press tends to assimilate instantly every structural or functional privilege gained, thereafter claiming it an immutable constitutional right. This leads to inappropriate legal confrontations and excessive rhetoric.

Assuming this fairly characterizes the nature and attitude of the press, there is little wonder that its reaction to anything that threatens what it perceives to be its absolute freedom may seem paranoid to the judiciary and to some commentators.

On the other hand, the nature and defensive reactions on the part of the courts to press criticism is an issue which is similarly clouded. Courts in our judicial system enjoy a significant level of independence. Therefore, when judges decide in response to the publicity attendant to their decisions or by the widespread confusion arising therefrom, to publicly explain the intended meaning of their opinions (as in *Gannett*), and to take the press to task for its news and editorial content on those opinions, the aura of dispassionateness and venerability that generally surrounds the judiciary tends to fade, and one looks for bias or distorted perceptions which might explain the media's impression that the courts are antagonistic toward the press. Perhaps, as some members of the press contend, judges, by reason of their training, experience, and position, naturally distrust the press. Consider the following:

1. Judges are jealous of their constitutional authority and resent press attempts to impose trial procedures which restrict judges' ability to control their own courtrooms. Judges are particularly sensitive to the claim that news media are better guardians of a defendant's constitutional rights than the court.
2. Judges feel that the press, at least in cases where it is a litigant, is biased and tends to manipulate its reporting on the courts to influence public opinion in its favor. For example, the press fully reports on almost all decided cases concerning press rights, many of which are rel-

246. See generally, Powell, *Myths and Misconceptions About the Supreme Court*, 61 AM. BAR ASS. J. 1347 (1975).

atively unimportant, but ignores many non-media cases which are of considerably more significance.

3. Judges complain that the press, and particularly commercial television, rarely can present effectively the complex matters that surround the court system. For example, judicial opinions, which require careful and considered analysis by legal scholars, are frequently subjected to instant analysis and reaction by the press. This tends to distort court news. Consequently, the public rarely gets the opportunity to read or hear sober discussions of both sides of media-related decisions. Naturally, this frustrates judges who, by tradition and pursuant to the Code of Judicial Conduct,²⁴⁷ are reluctant to comment publicly on the meaning or basis of a judicial decision or to respond to personal attacks.
4. Judges sometimes resent the press' absolutist perspective of the first amendment; the frequent knee-jerk, overwrought reactions of the press to any balancing of rights which result in restrictions on its activities reflects an arrogance and claim for preferential status that judges naturally resist.²⁴⁸
5. Judges recognize that, at least at the trial level, media defendants (in libel and privacy suits, for instance), or particularly members of the media who on short notice seek to intervene for purposes of contesting gag orders, motions for closure, *etc.*, are represented by corporate counsel who may not specialize in the first amendment field. As a result, judges who must make interlocutory rulings on motions for closure, *etc.*, without the benefit of adequate time for independent research, and often are not presented with a concise and well framed exposition of the applicable facts and law. This, in turn, may result in rulings which, even if ultimately correct under the circumstances, lend

247. ABA CANONS OF JUDICIAL CONDUCT, No. 3(A)(b).

248. Although narrowly restricted prior restraint, on publication are permissible only when the speech in question "will surely result in direct, immediate, and irreparable damage to our Nation or its people", *New York Times Co. v. United States*, 403 U.S. 713, 730 (1971) (Stewart, J., concurring), the courts have often upheld other forms of governmental regulation of speech by balancing competing interests. See *FCC v. Pacifica Foundation*, 438 U.S. 726, *reh. denied*, 439 U.S. 883 (1978), *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (commercial speech); *Jones v. North Carolina Prisoners' Labor Union Inc.*, 433 U.S. 119 (1977) (upholding restrictions on union activities by prisoners); *Hudgens v. NLRB*, 424 U.S. 507 (1976) (picketing and demonstration); *United States v. O'Brien*, 391 U.S. 367 (1968) (symbolic speech); *Buckley v. Valeo*, 424 U.S. 1 (1976) (upholding campaign finance disclosure requirement); *Pell v. Procunier*, 417 U.S. 817 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) (upholding restriction on press interviews with inmates); *Parker v. Levy*, 417 U.S. 733 (1974) (upholding the conviction of a soldier under the Code of Military Justice for urging blacklisted men not to go to Vietnam); *United States Civil Service Comm. v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (upholding the Hatch Act); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (regulation of expression by the broadcast media); *Adderly v. Florida*, 385 U.S. 39 (1960); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Uphaus v. Wyman*, 360 U.S. 72 (1959) (upholding a requirement that witnesses respond to legislative inquiries); *Adler v. Board of Education*, 342 U.S. 485 (1952) (upholding requirements of loyalty oaths); *Garner v. Board of Public Works*, 431 U.S. 716 (1951); and *Gerende v. Board of Supervisors*, 341 U.S. 56 (1951).

themselves to appeal based on an inadequate presentation of the applicable law or the lack of a sufficient underlying factual record.

6. Judges may lose respect or sympathy for the working press because reporters, not trained or experienced in the judicial process, often misinterpret or exaggerate what actually happens or is important.²⁴⁹
7. Judges also complain that the press is not truly interested in court problems and fails to help them inform the public about much-needed improvements and reforms.

Given the foregoing circumstances surrounding judges' perceptions and dealings with the press, it is not surprising that a degree of judicial antagonism toward the press has resulted, which only increases press mistrust and paranoia.

The apparent hostility of the press toward the courts, published in response to recent judicial decisions, creates perceptions which may undermine both the effectiveness of our judicial institutions and the public confidence which they require. Judges are concerned that the basis and impact of rulings are distorted in the press, which not only confuses the public as to the state of the law but encourages the belief that the courts, and the Supreme Court in particular, do not uphold the first amendment. It is safe to say that most jurists not only disagree with this contention, but feel it diverts attention from, or even generates public opposition to, the fiscal and other commitments needed to upgrade our judicial system.

The jeremiads of the press in response to recent decisions may generate as much public dissatisfaction with the press as with the judiciary. While the kind of rhetoric discussed herein may be an

249. Justice Brennan, in his Rutgers speech, pointed out that two newspapers actually erroneously characterized the opinion in the *Herbert* case as holding that truth would not longer be an absolute defense in libel suits. *New Orleans Times Picayune*, Apr. 20, 1979, at 18; *Birmingham News*, April 19, 1979, at 12.

One example of erroneous or misleading editorializing on decisions of the Supreme Court is found in *High Court vs. The Press: The Supreme Court, A Decade of Constitutional Revision*, *NEW YORK TIMES MAGAZINE*, Nov. 18, 1979, at 76. There, Sidney Zion, both a former legal reporter for the *Times* and former Assistant U.S. Attorney, described the Court's decision in *Paul v. Davis*, 424 U.S. 693 (1976), as holding that (a) private citizens have "no constitutional right to seek damages for any harm done to his reputation by police," and (b) "government officials may, in bad faith, defame the innocent." In fact, the Court held in a five to three decision that the plaintiff—who was defamed in a flyer circulated by police for the purpose of alerting local merchants to possible shoplifters operating during the Christmas season—had simply not stated a cause of action under 42 U.S.C. 1983. That statute creates a federal cause of action for any person whose constitutional "rights, privileges, or immunities" are deprived by another, acting under color of state law. Contrary to Mr. Zion's statements, the courts by no means ruled, or even implied, that the plaintiff had no effective remedies against the police or that government officials may defame innocent persons with impunity. As stated in Justice Rehnquist's majority opinion, "[plaintiff's] complaint would appear to state a classical claim for defamation actionable in the courts of virtually every State." *Paul v. Davis*, 424 U.S. 693, 697 (1976).

honest reaction to decisions which the press has "lost", also underscores the enormous autonomy, or, if you will, freedom from accountability of the press. Generalized protests that the news media deserves special protection from searches and seizures, that editors sued for the intentional tort of libel are immune from inquiry as to their intent, and that the first amendment accords access to any information or events which the press deems newsworthy, clearly irritate many people. Hostile questions such as "Who elected the press anyway?," and "Who is to watch the watchdog?," are often hurled at editors. The loss of public confidence in the press is something we must all seek to avoid.

A good deal more is at stake here than simply the sensibilities of the press. As the public loses confidence in the press, so will it cease to care greatly when the rights of the press—the legitimate rights—are transgressed. An arrogant, prideful press may have rights, but it will have few friends to speak of, and a friendless press is a press more enfeebled than is healthy for the Republic.²⁵⁰

Moreover, the concept that "the squeaky wheel gets the grease," or "*vigilantibus, non dormientibus, jura subvernient*,"²⁵¹ may not hold true if the injury claimed and protection sought by the press far exceeds the injury suffered. The press therefore must not only be careful not to strain its credibility with its readership, the economic lifeblood of the press, but with legislators and judges as well, who uphold or enact legal protection for the press. The press must seek to educate legislators, judges, and the public as to the real world of journalism, the role that the press must play in our society if it is to remain open, and society's need for legal protection of its functions.²⁵²

Some tension between the press and the courts is healthy as

250. Chesire, *The Imperial Press*, NAT'L. REV. Aug. 17, 1979, at 1021.

251. The laws assist the vigilant, not those who slumber on their rights.

252. The educational process has already begun. Two first amendment Congresses, sponsored by 12 national journalism organizations, were held to heighten public awareness of the free press guarantee, the promoters hoped to exert a favorable influence on the educators, attorneys, and business people who attended. The Congresses were sponsored by the American Newspaper Publishers Association, Associated Press Managing Editors Association, American Society of Newspaper Editors, National Association of Broadcasters, National Broadcast Editorial Association, National Conference of Editorial Writers, National Newspaper Association, Radio-Television News Directors Association, Reporters Committee for Freedom of the Press, Society of Professional Journalists/Sigma Delta Chi, the Associated Press and United Press International. EDITOR & PUBLISHER pleaded with journalists to treat these Congresses specially (journalists do not give much space or time to journalistic meetings), so that the impact on the public would be more than minimal. Editorial, EDITOR & PUBLISHER, Jan. 5, 1980, at 8.

well as necessary. A constructive dialogue between the press and judiciary is, however, needed. It can lead to an understanding that judges and journalists are persons of good faith acting in service to the same ideals of "enlightened opinion and right conduct"²⁵³ on the part of our citizenry. Such an understanding, however, requires a realization on the part of the press that its freedom from governmental abridgement under the first amendment does not exist for the benefit of the press alone, but for the benefit of all. Most serious journalists do not question the need to balance the rights of the free press against other rights in society, including the rights of defendants. Such journalists contest only the degree of balance, and that is the essence of today's controversy. Thus, it is not suggested that the press abandon its vigilance to protect press freedoms; the fight, however, perhaps needs to be waged more intelligently, and on selected issues, and without the bitterness and rancor which has characterized the controversy over *Zurcher*, *Herbert*, and *Gannett*. The strident and haughty laments, voiced by the news media in response to these decisions perceived to threaten the press, only produces a backlash of resentment and undercuts press response that might later be warranted.

The sensitivity of the Supreme Court to the peculiar self-righteousness of current press criticism is evident.²⁵⁴ Both Justice Brennan and Justice Stevens have lectured the press on its misconception of constitutional press freedoms. Justice Brennan, long a staunch friend of the cause of press freedom, has spoken of the news media's rush to "codgel" the Court after the *Herbert* decision, and how such hostile reaction ultimately may impair the credibility of the press:

If the press wishes to play a part in this (legal) process, it must carefully distinguish the basis of which its constitutional claim is based, and it must tailor its arguments and its rhetoric accordingly. This may involve a certain loss of innocence, a certain recognition that the press, like other institutions, must accommodate a variety of important social interests. But the sad complexity of our society makes this inevitable, and there is no alternative but shrill and impotent isolation.²⁵⁵

Perhaps now is the time for judges and journalists to recognize that they share certain common interests, if not a common fate. As New York's Irving R. Kaufman, Chief Judge of the Second Judicial Circuit, has written:

253. *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

254. See note 230 *supra*.

255. See note 14 *supra*.

Different as the press and the federal judiciary are, they share one distinctive characteristic: both sustain democracy, not because they are responsible to any branch of Government, but precisely because, except in the most extreme cases they are not accountable at all. Thus, they are able to check the irresponsibility of those in power. . . .²⁵⁶

256. See note 3 *supra*. Without a free press, there can be no society. Freedom of the press, however, is not an end in itself but the means toward the end of a free society . . . an independent judiciary puts the freedom of the press in its proper perspective. *Pennekamp v. Florida*, 328 U.S. 331, 354-355.

