

Search and Seizure of a Third-Party Newspaper: *Zurcher, Chief of Police of Palo Alto v. Stanford Daily*¹—On April 9, 1971, nine officers of the Palo Alto Police Department were assaulted while attempting to disperse a demonstration at the Stanford University Hospital.² Two days later, the Stanford Daily, the Stanford University student newspaper, published articles and photographs of the protest.³ Although the Daily did not publish photographs of the actual assault, the published pictures and text suggested that a Daily photographer had been in the area of the assault.⁴ The following day, the Santa Clara County Deputy District Attorney obtained a warrant to search the Stanford Daily offices for negatives and photographs relevant to identifying the assailants. The search warrant issued despite the failure of the warrant application to allege that any Daily staff member had participated in the crime.⁵ A fifteen minute search of the Daily's photographic laboratories, filing cabinets, desks and wastebaskets, revealed only the photographs that had been published on April 11, and no materials were seized as a result of the search.⁶ Although the police denied that they exceeded the bounds of the warrant, the Daily claimed the officers had an opportunity to scan or read confidential notes and correspondence.⁷

The Stanford Daily filed suit in the United States District Court for the Northern District of California against the issuing magistrate, the Santa Clara chief of police, the District Attorney, and one of the Deputy District Attorneys, as well as the officers who conducted the search.⁸ The plaintiff's claim, brought under Section 1983,⁹ alleged that the search violated the Daily's first, fourth, and fourteenth amendment rights.¹⁰ Upon the Daily's motion for

¹ 436 U.S. 547 (1978).

² *Id.* at 550-51. Apparently, while stationed at the east end of the building—away from their fellow officers, bystanders and reporters—the officers were charged by demonstrators armed with sticks and clubs. All the officers were injured and the hospital area was severely damaged by the violence. The police were able to identify only two of the assailants prior to the search. *Id.*

³ *Id.* at 551. The college press has the full panoply of first amendment rights. *Joyner v. Whiting*, 477 F.2d 456, 460-61 (4th Cir. 1973) (official university newspaper); *Bazaar v. Fortune*, 476 F.2d 570, 574-75 (5th Cir. 1973) (campus literary magazine); *Scoville v. Board of Ed. of Joliet Tp.* H.S. Dist. 204, 425 F.2d 10, 13 (7th Cir. 1970) (underground high school newspaper); *Dickey v. Alabama St. Bd. of Ed.*, 273 F. Supp. 613, 618 (N.D. Ala. 1967) (state college newspaper); *cf.* *Healy v. James*, 408 U.S. 169, 180 (1972) (establishment of S.D.S. chapter); *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 506 (1969) (black-armband protest).

⁴ 436 U.S. 551.

⁵ *Id.*

⁶ *Id.* at 551-52.

⁷ *Id.*

⁸ 353 F. Supp. 124, 125-26 (N.D. Cal. 1972).

⁹ Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976). Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

¹⁰ 353 F. Supp. at 124-25.

summary judgment, the district court granted declaratory relief,¹¹ holding that the fourth and fourteenth amendments forbid the issuance of a warrant to search the property of one not suspected of criminal involvement absent probable cause to believe that the objects sought might be destroyed or removed from the jurisdiction.¹² In the district court's opinion, a subpoena *duces tecum* was the proper vehicle for discovering the objects, except when probable cause exists to believe that, if given advance warning, the object's possessor would frustrate their discovery.¹³ Additionally, the district court held that when the innocent third-party is a newspaper, first amendment protections render unannounced searches impermissible except upon a clear showing that important materials likely would be destroyed or removed from the jurisdiction despite a restraining order.¹⁴ The respondents appealed to the United States Court of Appeals for the Ninth Circuit which *per curiam* adopted the district court's opinion.¹⁵ The Supreme Court granted *certiorari*.¹⁶

In a five to three decision,¹⁷ the Supreme Court reversed and HELD: the fourth amendment does not forbid the issuance of a warrant to search for and seize evidence of a crime simply because the owner or possessor of the place to be searched is not then implicated in the crime. Moreover, when administered with particular exactitude, the warrant requirements of the fourth amendment adequately safeguard first amendment values.¹⁸ Essentially, this

¹¹ *Id.* at 136.

¹² *Id.* at 127, 132-33. For an analysis of the district court's opinion, see 86 HARV. L. REV. 1317 (1973).

¹³ *Id.* at 132-33.

¹⁴ *Id.* at 135. There is reason to speculate whether a subpoena would have been practicable under the circumstances of this case. On the one hand, the Santa Clara County Grand Jury—the body before which a subpoena *duces tecum* is returnable—met two hours after the warrant was executed. *Id.* at 127. This suggests that a subpoena would have been as convenient and timely as a warrant. On the other hand, in policy statements published prior to the incident, the Daily had stated that it was under "no obligation to help in the prosecution of students for crime related to political activity" and that "negatives which [could] be used to convict protestors [would] be destroyed." Brief for Petitioners Zurcher at 9, *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), reprinted in 9 LAW REPRINTS (Criminal Law No. 24) at 123; see also 436 U.S. at 568-69 n.1 (Powell, J., concurring). Although these statements support an inference of non-cooperation and though the officer requesting the warrant said that the Daily's policy factored heavily in his choice of action, the statements were not submitted to the magistrate in the warrant affidavit. Brief for Petitioner Zurcher at 9; 353 F. Supp. at 135 n.16.

¹⁵ 550 F.2d 464 (9th Cir. 1977).

¹⁶ 434 U.S. 816 (1977).

¹⁷ 436 U.S. at 548. Justice White delivered the opinion of the Court. He was joined by Justices Blackmun, Powell, Rehnquist, and Chief Justice Burger. Justice Powell also filed a concurring opinion. Justice Stewart dissented; he was joined by Justice Marshall. Justice Stevens filed a separate dissenting opinion. Justice Brennan took no part in the consideration or decision of the case.

¹⁸ 436 U.S. at 560, 565. The Supreme Court decision represented a swift reversal of both the district court and appellate court opinions. An unarticulated reason for the disagreement between the courts may have been their divergent view of first amendment philosophy. For example, in *Application of Caldwell*, 311 F. Supp. 358 (N.D. Cal. 1970), *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), *rev'd sub*

holding was grounded upon three considerations. First, the Supreme Court noted that nothing in the fourth amendment, nor in the history of its construction, prohibits or limits the issuance of warrants to search non-suspect property.¹⁹ Second, in the Court's opinion, the critical element in assessing the reasonableness of a search is not the owner's culpability, but the existence of probable cause to believe that the specific items sought are located on property to be searched.²⁰ Third, the Court explained that prior cases requiring consideration of first amendment values in fourth amendment procedure demand only a careful application of the requirements of probable cause, specificity, and overall reasonableness before a valid warrant may issue.²¹

Concurring with the *Zurcher* majority, Justice Powell re-emphasized the lack of constitutional authority for exempting the press from the reach of the fourth amendment.²² Justice Powell's opinion asserted that the fourth amendment itself strikes a balance between the government and the press, allowing the Court little power or authority to rule otherwise.²³ Justices Stewart and Marshall were of the dissenting opinion that search warrants directed against the press endanger its first amendment freedoms. The dissenters argued that a search chills the confidential news sources upon which the

nom., *Branzburg v. Hayes*, 408 U.S. 665 (1972), both the United States Court for the Northern District of California and the Court of Appeals for the Ninth Circuit held that journalists have a qualified first amendment privilege to refuse to disclose confidential information gathered in the normal course of business, unless the state can show a compelling and overriding interest in the testimony. 311 F. Supp. at 360; 434 F.2d at 1089; 408 U.S. at 677-79. Even after the Supreme Court enunciated a contrary interpretation in *Branzburg*, both the United States Court for the Northern District of California and the Court of Appeals for the Ninth Circuit continued to recognize at least conditional first amendment protection of news sources. *Stanford Daily v. Zurcher* 353 F. Supp. 124, 132 (N.D. Cal. 1972), *aff'd per curiam*, 550 F.2d 464 (9th Cir. 1977), *rev'd.*, 436 U.S. at 553; *Farr v. Pitchess*, 522 F.2d 464, 467-68 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *cf.* *Lewis v. United States*, 501 F.2d 418, 422-23 (9th Cir. 1974), *cert. denied*, 420 U.S. 913-14 (1975). Also compare *KQED, Inc. v. Houchins*, 546 F.2d 284, 286 (9th Cir. 1976) (press has greater constitutional right of access to prisons and prisoners than does the general public) with *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (press has no greater constitutional right of access to prison information).

¹⁹ 436 U.S. at 554. See text at notes 42-49 *infra*. The fourth amendment reads: 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.

²⁰ 436 U.S. at 556. See text at notes 43-52 *infra*.

²¹ *Id.* at 565. See text at notes 104-111 *infra*. In pertinent part, the first amendment reads: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I. Nor may state action abridge these liberties, for the fourteenth amendment makes the first amendment binding upon the states. *Whitney v. California*, 274 U.S. 357, 362 and 373 (Brandeis, J., concurring) (1927).

²² 436 U.S. at 570 (Powell, J., concurring).

²³ *Id.* at 569.

press and public rely for important information.²⁴ In addition, the dissenting Justices believed that the *ex parte* warrant procedure precludes an opportunity for the adversary hearing which is generally required prior to any potential invasion of first amendment rights.²⁵ In a separate opinion, Justice Stevens dissented upon fourth amendment principles, stating that although a person's culpability may justify an invasion of his or her privacy, in the absence of culpability there must be a demonstrated need for an unannounced search by force.²⁶ To protect future privacy interests of innocent citizens, Justice Stevens advocated the establishment of a higher standard of probable cause to govern search and seizure of third-party property.²⁷

Search and seizure of the property of an innocent third-party newspaper presents an unusual convergence of fourth and first amendment priorities. Thus, the *Zurcher* decision has the potential to alter the application of both the fourth and first amendments. In strictly fourth amendment cases, *Zurcher* represents the first clear enunciation by the Supreme Court that the search and seizure of third-party property is reasonable upon adherence to traditional fourth amendment procedure, and therefore heralds heightened intrusions into the privacy of innocent third-parties. As to the first amendment, *Zurcher* breaks new ground by holding that the free press clause offers newspapers no protection from search and seizure beyond that provided by the fourth amendment. In this regard, *Zurcher* endangers the free flow of news and information encouraged by the first amendment.

This casenote will review the procedure established in *Zurcher* for the search and seizure of the property of an innocent third-party newspaper. First, it will consider the propriety of third-party searches in the light of the fourth amendment's requirement of reasonableness. Second, fourth amendment procedure will be re-examined when the search touches upon first amendment interests. Last, the casenote will question whether search or seizure of the press impairs first amendment rights and whether a workable standard can be established to balance competing interests. It will be submitted that the fourth amendment's requirement of reasonableness and the constitutional proscription against overbroad state infringement of first amendment liberties, prohibit the search and seizure of an innocent third-party newspaper when some less drastic means of investigation is available.

I. THIRD-PARTY SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT

A. Pre-*Zurcher* Authority

It is within government power to seize property from private citizens during the course of a criminal investigation. The constitutional exercise of this power is subject to the limitations present in the fourth amendment.²⁸ The

²⁴ *Id.* at 571-72 (Stewart, J., dissenting).

²⁵ *Id.* at 575-76.

²⁶ *Id.* at 581, 583 (Stevens, J., dissenting).

²⁷ *Id.* at 582-83. See text at notes 98-99 *infra*.

²⁸ See note 19 *supra*.

fourth amendment provides that a warrant may issue upon the order of a neutral magistrate,²⁹ following an affirmation³⁰ and a finding of probable cause to believe that evidence will be found on the premises to be searched.³¹ To be valid, a warrant must specifically describe both the premises to be searched and the property to be seized.³² In addition to these warrant requirements, the fourth amendment states that the scope and manner of the search must be reasonable.³³ Typically, property possessed by the criminal himself is the object of search and seizure. There are instances, however, when inculpable individuals possess evidence relevant to a criminal investigation. The fourth amendment is silent as to the propriety of the search and seizure of these "third-parties."

The *Zurcher* holding is the Court's first clear enunciation of a fourth amendment standard for third-party search and seizure.³⁴ Prior to 1967, innocent third-parties rarely were subject to search, since at that time the Supreme Court interpreted the fourth amendment as confining a search warrant's authority to the seizure of contraband, stolen goods, and instrumentalities of crime.³⁵ Third-party searches were unheard of because it was rare that an innocent party would possess property of a character which was subject to seizure. In 1967, the Court in *Warden v. Hayden*³⁶ overruled earlier

²⁹ See e.g., *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

³⁰ See e.g., *Nathanson v. United States*, 290 U.S. 41, 46-47 (1933); accord, *Aguilar v. Texas*, 378 U.S. 108, 112, 114-16 (1964).

³¹ See text and notes at notes 45-46, 69-70 *infra*.

³² See e.g., *Steele v. United States* No. 1, 267 U.S. 498, 501, 503 (1925).

³³ See text and notes at notes 71-75 *infra*. Even those searches permitted without a warrant are subject to the fourth amendment notions of reasonableness, probable cause and judicial evaluation. *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968). See also cases cited at note 86 *infra*.

³⁴ 436 U.S. at 550, 554-55. While there was no authority prohibiting third-party search or seizures, at the time of the district court opinion, it appears that neither was there any federal or state case approving such actions. Presently, such approval has come from the Sixth Circuit. In *United States v. Manufacturer's Nat'l Bank of Detroit*, 536 F.2d 699 (6th Cir. 1976), *cert. denied sub nom.* 429 U.S. 1039 (1977), the Sixth Circuit upheld the search of a third-party's safe deposit box and the seizure of its contents, stating:

Appellants argue that as "... innocent and uninvolved third parties, [they] were deprived of their Fourth and Fifth Amendment rights due to failure of the government to utilize a subpoena *duces tecum* or demonstrate its impracticality before applying for a warrant to search. . . ." Once it is established that probable cause exists to believe a federal crime has been committed a warrant may issue for the search of any property which the magistrate has probable cause to believe may [conceal] evidence of the crime. . . . We are not persuaded that the contrary rule adopted by the district court in *Stanford Daily v. Zurcher* . . . is required by either the Fourth or Fifth Amendment or the Federal Rules of Criminal Procedure.

536 F.2d at 702-03. Cf. Fed. R. Crim. P. 41(b): "A warrant may be issued under this rule to search for and seize and (1) property that constitutes evidence of the commission of a criminal offense . . ."

³⁵ See e.g., *Harris v. United States*, 331 U.S. 145, 154 (1947); *Gouled v. United States*, 244 U.S. 298, 308 (1921); *Boyd v. United States*, 116 U.S. 616, 623 (1886).

³⁶ 387 U.S. 294 (1967).

case law so as to permit seizure of all property of evidential value. A result of the *Hayden* holding was to subject persons fortuitously connected with crime to a search for property in their possession which might reasonably lead to the apprehension of criminals. *Hayden* itself, however, did not involve a third-party seizure.³⁷ Specifically, *Hayden* validated the seizure of an armed robbery suspect's clothing during a warrantless search of an apartment, while the police were in hot pursuit of the felon.³⁸ Therefore, it is open to question whether the Court intended the *Hayden* decision to expand the reach of ordinary search and seizure laws to embrace the search of citizens so remotely connected with the crime. In this regard, the *Hayden* Court remarked that current standards of fourth amendment procedure should be re-evaluated in the light of the decision's breadth.³⁹

B. *The Zurcher Standard for Third-Party Search and Seizure*

In *Zurcher*, the Court squarely faced the third-party search issue created in *Hayden*, but declined to re-evaluate fourth amendment standards. The initial contention which the *Zurcher* Court considered was the claim that a warrant should not issue to search third-party property, despite demonstrated probable cause, unless it was also shown that a subpoena *duces tecum* would be an impracticable alternative. This was the standard adopted by the district court.⁴⁰ The Supreme Court, however, rejected the proposed standard on the basis that it would require, prior to any search, that the state establish probable cause to believe that the property owner was implicated in the crime.⁴¹ Such a requirement, the Court stated, runs counter to well-established construction and application of the fourth amendment.⁴²

In its analysis of the district court's holding, the Supreme Court highlighted the property focus of fourth amendment search procedure. In this regard, the Court emphasized that warrants to search and seize are directed at property, not persons.⁴³ Normally, an invasion of privacy becomes

³⁷ *Id.* at 303-04.

³⁸ *Id.* at 298-99.

³⁹ *Id.* at 307. See 436 U.S. at 577-78, 582 n.11 (Stevens, J. dissenting).

⁴⁰ See text and notes at notes 12-14 *supra*. On the basis of dicta from two appellate level state decisions, the district court concluded that even warranted third-party searches are unreasonable under the fourth amendment. Neither of these decisions, however, is proper authority for that proposition. One of these cases, *Owens v. Way*, 141 Ga. 796, 82 S.E. 132 (1914), invalidated the power of an officer to seize property of a third person under the authority of a warrant to arrest the accused. *Id.* at 798, 82 S.E. at 133. The second of these cases, *Commodity Manufacturing Co., Inc., v. Moore*, 198 N.Y.S.45 (Sup. Ct. 1923), was based upon the property rationale of the "mere evidence" rule, which is no longer followed. *Id.* at 47; see cases cited at notes 35, 36 *supra*. The Supreme Court was highly critical of the district court's use of authority. 436 U.S. at 554 & n.5.

⁴¹ 436 U.S. at 554.

⁴² *Id.* See text and notes at notes 29-33 *supra*.

⁴³ 436 U.S. at 555. Cf. *Rakes v. Illinois*, 439 U.S. 128, (White, J., dissenting) (1978) (passenger with no property interest in auto searched or goods seized has no standing to challenge legality of search).

justifiable and a warrant may issue at a point when the state's reason to believe that incriminating evidence will be found on the premises becomes sufficiently great.⁴⁴ The Court noted that in criminal investigations, probable cause to search—the standard under which a warrant may issue—is an inquiry directed solely towards ascertaining the presence of the objects sought on the property to be searched.⁴⁵ Indeed, as the Court pointed out, when a search is directed against a particular premise, the owner or occupant need not be identified by the warrant.⁴⁶ In this regard, the Court cited⁴⁷ the use of probable cause established by *Camara v. Municipal Court of the City and County of San Francisco*,⁴⁸ which held that warrants to conduct routine administrative inspections of private dwellings to enforce municipal codes may issue on an area-wide basis without specific knowledge of the condition of a particular premise and without regard to the owner's or occupant's culpability or innocence.⁴⁹ In addition to the above considerations, the Court explained that to require suspicion of the owner as an element of probable cause to search and seize evidence, would unduly impose the requirement of a valid arrest upon a warranted search.⁵⁰ Never before has the right to search, and the validity of a seizure, been contingent upon the right to arrest.⁵¹ From

⁴⁴ 436 U.S. at 554; *Fischer v. United States*, 425 U.S. 391, 400 (1976).

⁴⁵ 436 U.S. at 554-56.

⁴⁶ *Id.* at 555. A valid warrant is required to describe with particularity the place to be searched and the persons or things to be seized. U.S. CONST. amend. IV. See *Andresen v. Maryland*, 427 U.S. 463, 480 (1976). But courts have uniformly held that the fourth amendment does not require a warrant to describe the person from whom the things will be seized. *E.g.*, *United States v. Kahn*, 415 U.S. 143, 155 n.15 (1974) (dictum); *United States v. Fiorella*, 468 F.2d 688, 691 (2d Cir. 1972); *Wangrow v. United States*, 399 F.2d 106, 115 (8th Cir.), *cert. denied*, 393 U.S. 933 (1968); *Dixon v. United States*, 211 F.2d 547, 549 (5th Cir. 1954).

⁴⁷ 436 U.S. at 554-56.

⁴⁸ 387 U.S. 523, 534 (1967), *overruling* *Frank v. Maryland*, 359 U.S. 360 (1959).

⁴⁹ 387 U.S. at 537-38. *Accord*, *Marshall, Sec. of Labor v. Barlow, Inc.*, 436 U.S. 307, 320-21 (1978) (OSHA need show only that a specific business has been chosen for inspection on the basis of a general administrative plan derived from neutral sources); See *v. City of Seattle*, 387 U.S. 541, 542 (1967) (*Camara* extended to administrative search of commercial premises).

⁵⁰ 436 U.S. at 554. Presence of probable cause to arrest will not always support the issuance of a search warrant; similarly, the presence of probable cause to search will not necessarily justify an arrest. Each calls for a demonstration of somewhat different facts. In the case of arrest, the conclusion concerns the guilt of the arrestee, whereas in the case of search warrants, the conclusions concern the connection of the items sought with the crime and their present location. Compare *Giordenello v. United States*, 357 U.S. 480, 485 (1958) (arrest) with *Camara v. Municipal Court*, 387 U.S. 523, 534-35 (1967) (search). See generally LaFave, *Search and Seizure: "The Course of True Law . . . Has not . . . Run Smooth,"* U. ILL. L.F. 255, 260-61 (1966); Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 687 (1961).

⁵¹ 436 U.S. 554, 556-8, *citing* *Carroll v. United States*, 267 U.S. 132 (1925). In *Carroll*, the Court said that where a car was stopped with the belief that it was transporting illegal liquor, the validity of the ensuing search and seizure was not dependent on the right to arrest the occupant, but upon the presence of a reason to believe that the car contained contraband. *Id.* at 158-59.

these principles of fourth amendment procedure, the Court concluded that probable cause to search turns not upon the culpability of the property owner but the location of the evidence.⁵²

After establishing that a valid warrant may issue to search any property which is reasonably believed to conceal objects or evidence of a crime, the Court addressed and explicitly rejected⁵³ the district court's ruling that the state must show that a subpoena *duces tecum* is an impracticable alternative before a warrant may issue to seize the property of an innocent third-party. To support its impracticability test,⁵⁴ the district court relied principally upon *Bacon v. United States*,⁵⁵ which held that a warrant to arrest a material witness may not issue unless there is probable cause to believe that it is impracticable to secure his presence by subpoena.⁵⁶ The district court maintained that third-party search and seizure is analogous to the arrest of a material witness, because in both situations the source of information is an innocent party.⁵⁷ Moreover, the district court reasoned that if an impracticability test is required in instances of third-party arrests, it should also be applied in cases of third-party search, because courts have defended individuals from unlawful seizures as vigorously as they have guarded individuals against unlawful arrest.⁵⁸ The district court attempted to bolster the logic of its analogy to *Bacon* by arguing the need to protect third-parties. First, the district court stated that the intrusion caused by a third-party search is unreasonable because, in most situations, a less drastic means exists to obtain evidence in the possession of a non-suspect.⁵⁹ Second, it stated that historically search warrants were directed solely against suspects.⁶⁰ Finally, the district court proposed that third-parties need added procedural protection, since they lack standing to invoke the exclusionary rule—the chief deterrent to unlawful seizures.⁶¹

⁵² 436 U.S. at 556.

⁵³ *Id.* at 558, 560.

⁵⁴ 353 F. Supp. at 128-30, 132.

⁵⁵ 449 F.2d 933 (9th Cir. 1971).

⁵⁶ *Id.* at 943. The *Bacon* holding rested on the statutory provisions of Fed. R. Crim. P. 46(b) (bail for witness) and 18 U.S.C. § 3149 (1976) (release of material witness).

⁵⁷ 353 F. Supp. at 129, 132.

⁵⁸ *Id.* at 130, 132.

⁵⁹ 353 F. Supp. at 130-31.

⁶⁰ 353 F. Supp. at 131. *But cf.* *Go-Bart Importing Co. v. United States*, 292 U.S. 344, 356-57 (1931) (fourth amendment "protects all, those suspected or known to be offenders as well as the innocent . . .").

⁶¹ 353 F. Supp. at 131-32. The exclusionary rule is a judicially created remedy to safeguard fourth amendment privacy rights through the deterrence of future unlawful police conduct. *United States v. Calandra*, 414 U.S. 338, 347-48 (1974). In most cases, it renders evidence seized in violation of defendant's constitutional rights inadmissible in a criminal prosecution. *E.g.*, *Weeks v. United States* 232 U.S. 383, 398 (1914); *Mapp v. Ohio*, 367 U.S. 643, 657-58 (1960). This rule may not be vicariously asserted, but can be successfully urged only by those whose rights were violated by the search itself. *Brown v. United States*, 411 U.S. 223, 229-30 (1973); *Alderman v. United States*, 394 U.S. 165, 171-72 (1969). Recently, the Court has raised serious doubts about the exclusionary rule's efficacy, *see United States v. Janis*, 428 U.S. 453-54 (1976); *Stone v. Powell*, 428 U.S. 465, 492 n.32, 493 n.34 (1976), and the rule itself may be abandoned. *See Stone v. Powell*, 428 U.S. at 499-502 (Burger, C.J., concurring).

The Supreme Court primarily criticized the district court's holding as an attempt to strike a balance between privacy and public need when that balance already is ensured by the fourth amendment itself.⁶² The Court summarily rejected the notion that search and seizure of third-party property requires more careful fourth amendment consideration because of the unavailability of the exclusionary rule.⁶³ Seldom would the state be so convinced of a party's lack of standing to suppress evidence, reasoned the Court, that it would act without regard for the party's fourth amendment rights.⁶⁴ The Court further admonished that seemingly innocent third-parties may not be blameless, but in fact, may be related, sympathetic, or vulnerable to the criminal.⁶⁵ In any event, the Court reasoned, the law enforcement interest in seizing evidence remains constant whether the owner is implicated or not, whereas the delay and warning inherent in the use of a subpoena would more frequently result in the loss of evidence.⁶⁶ Given these policy considerations, the Court concluded that a rule restraining the use of search warrants against third-parties would likely sacrifice an effective law enforcement tool for an uncertain gain of privacy.⁶⁷

In summary, as a result of *Zurcher*, the property of a third-party is subject to search and seizure as in any other instance where officials seek evidence relevant to a criminal investigation. *Zurcher* authorizes a search of any property, regardless of the status of its owner, when a warrant specifically describing the premises to be searched and objects to be seized, is issued by a neutral magistrate, after presentment of an affirmation as well as a finding of probable cause.

C. Analysis of the *Zurcher* Standard

The *Zurcher* standard—the Supreme Court's first direct pronouncement of the guidelines for third-party searches and seizures—is premised upon the belief that traditional fourth amendment standards can provide adequate protection to innocent parties from the intrusion of a search. Four factors contributed heavily to the Court's unwillingness to adopt new procedures. First, a probable cause inquiry is not concerned with the property owner's guilt or

⁶² 436 U.S. at 554 n.5, 559.

⁶³ *Id.* at 562 n.9. In doing so, the Court relied upon the earlier decision of *Alderman v. United States*, 394 U.S. 165 (1969), which declined to extend the exclusionary rule to defendants whose own fourth amendment rights had not been infringed. The *Alderman* holding was premised upon the conclusion that any increased deterrent effect on illegal seizures due to such an extension would not justify the concurrent reduction of law enforcement efficiency. *Id.* at 174-75. In any event, the *Zurcher* Court reasoned that it would be placing the cart before the horse to prohibit reasonable searches because of a perception that the existing exclusionary rules are incapable of deterring illegal searches. 436 U.S. at 562 n.9.

⁶⁴ *Id.*

⁶⁵ *Id.* at 561.

⁶⁶ *Id.* at 560-61. Besides the motion to quash, a third-party recipient of a subpoena has the fifth amendment's privilege against self-incrimination available as a defense. *Id.* at 561 n.8.

⁶⁷ *Id.* at 560-61.

innocence. Second, there is a lack of precedent for requiring a demonstration, in each case, that the use of a subpoena in lieu of a search would endanger the recovery of evidence. Third, it is difficult for courts successfully to distinguish innocent, cooperative third-parties from unidentified suspects. Finally, in the Court's opinion, a rule requiring the use of a subpoena unless proven impracticable would achieve, at best, an uncertain gain in privacy, while the cost to criminal investigation would be high.

The conclusions of the *Zurcher* Court are too facile and complacent. While precedent may favor the Court's holding, the decision ignores the basic principles underlying the fourth amendment—the principles of privacy and reasonableness. Indeed, by limiting its analysis to the property-oriented inquiry of probable cause, the Court avoided the more compelling question whether the search and seizure of a third-party is reasonable under the fourth amendment.

It is well settled that the core purpose of the fourth amendment is protection of individual privacy through the prohibition of unreasonable governmental interferences.⁶⁸ The two primary criteria for defining a permissible governmental interference with individual privacy are the separate concepts of reasonableness and probable cause. Probable cause is a before-the-fact determination of cause to issue a search warrant. Traditionally, a finding of probable cause to search requires two conclusions. First, there must be a proper showing that a crime has been committed and that a nexus exists between that crime and the objects or evidence sought.⁶⁹ Second, it must be demonstrated that the objects sought are within the place or on the premises to be searched.⁷⁰ In contrast, reasonableness is usually an after-the-fact

⁶⁸ *South Dakota v. Opperman*, 428 U.S. 364, 377 (1976) (Powell, J., concurring); *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 304 (1967); *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949); *Carroll v. United States*, 267 U.S. 132, 147 (1925). The fourth amendment, however, does not establish a general constitutional right of privacy. As virtually every governmental action interferes with personal privacy to some extent, the question becomes whether that interference is forbidden by some command of the constitution. While the fourth amendment protects the individual from only unreasonable governmental searches or seizures, the first, third, and fifth amendments protect personal privacy from other forms of governmental intrusion. *Katz v. United States*, 389 U.S. 347, 350-51 & n.4-5 (1967) (fourth amendment expectation of privacy); *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) ("penumbral" right of marital privacy). The shield of the fourth amendment adheres to the person, not to a particular place, and whenever an individual may harbor a reasonable expectation of privacy he is entitled to be free from unreasonable governmental intrusion. 389 U.S. at 351-52.

⁶⁹ *Warden v. Hayden*, 387 U.S. 294, 307 (1967); *Carroll v. United States*, 267 U.S. 132, 162 (1925); see also Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 687 (1961).

⁷⁰ *Camara v. Municipal Court*, 387 U.S. at 535 ("[a] search for [stolen or contraband] goods, even with warrant, is 'reasonable' only when there is 'probable cause' to believe that they will be uncovered in a particular dwelling."). See also, *Carroll v. United States*, 267 U.S. at 158-59 (the right of search and seizure "[is] dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law"); *Dumbra v. United States*, 268 U.S. 435, 441 (1925); *Amsterdam, Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 358 (1974).

evaluation of the scope of the intrusion and the manner of the seizure.⁷¹ There is no ready method for determining reasonableness other than by balancing the need to search, considering all facts and circumstances, against the degree of the invasion of privacy caused by the search.⁷² Of the two, reasonableness is the broader standard.⁷³ Indeed, the Court itself has described probable cause as simply the measure of the reasonableness of a particular warrant to search.⁷⁴ Therefore, an intrusion may be held unreasonable and, thus, impermissible under the fourth amendment, despite an earlier showing of sufficient probable cause to issue a search warrant.⁷⁵

⁷¹ The following cases illustrate some considerations which factor into a finding of reasonableness. (1) quantity of items seized, *e.g.*, *Kremen v. United States*, 353 U.S. 346, 347-48 (1957) (*per curiam*) (contents of cabin); (2) nature of items seized, *e.g.*, *Roden v. Kentucky*, 413 U.S. 496, 501 (1973) (film); *Coolidge v. New Hampshire*, 403 U.S. 443, 471 (1971) (contraband, stolen, or dangerous goods); *Schmerber v. California*, 384 U.S. 757, 769-70 (1966) (blood); (3) presence of warrant, *Katz v. United States*, 389 U.S. 347, 357 (1967) (warrantless search *per se* unreasonable); (4) transgression of warrant authority, *e.g.*, *Stanley v. Georgia*, 394 U.S. 557, 570-71 (1969) (Stewart, J., concurring) (seizure of obscene film under color of warrant to seize bookmaking material); (5) manner of seizure, *e.g.*, *Schmerber v. California*, 384 U.S. at 771-72 (taking of blood in hospital environment by accepted medical practices); (6) unnecessary forceful conduct, *e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 645 (1961) (forcible entry, battery); *cf.* *Terry v. Ohio*, 392 U.S. 1, 29-30 (1968) (frisk); (7) police subterfuge, *e.g.*, *Bumper v. North Carolina*, 391 U.S. 543, 549-50 (1968) (false warrant); (8) existence of cause, *e.g.*, *Terry v. Ohio*, 392 U.S. at 21 (specific, articulable facts); *Cupp v. Murphy*, 412 U.S. 291, 293 (1973) (probable cause to arrest); (9) place of search, *e.g.*, *United States v. Brignoni-Ponce*, 378 U.S. 873 (1975) (U.S. border); *United States v. Edwards*, 415 U.S. 800, 803-04 (1974) (in police custody); *Chimel v. California*, 395 U.S. 752, 767-68 (1967) (home); *Carroll v. United States*, 267 U.S. 132, 1153 (1925) (automobile); (10) purpose of search or seizure, *e.g.*, *Marshall v. Barlow's, Inc.* 436 U.S. 307, 320 (1978) (administrative); *South Dakota v. Opperman*, 428 U.S. 364, 375-76 (1976) (inventory); *Cupp v. Murphy*, 412 U.S. at 295-6 (1973) (prevent destruction of evidence); *Terry v. Ohio*, 392 U.S. at 30 (prevent crime).

⁷² *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967). In *Camara*, area-wide building code enforcement inspections were held reasonable in light of (1) their long history of judicial and public approval, (2) the high degree of public interest in effective code inspections, and (3) the relatively limited invasion of citizen's privacy. 387 U.S. at 537; *accord*, *South Dakota v. Opperman*, 428 U.S. 364, 372-73, 375 (1976).

⁷³ In the past, the relationship between the standards of reasonableness and probable cause was debated. *Compare* *Trupiano v. United States*, 334 U.S. 699, 705 (1948) (must adhere to warrant clause whenever reasonably practicable) *with* *United States v. Rabinowitz*, 339 U.S. 56, 65-66 (1950) (satisfaction of the warrant) requirement is not the *sine qua non* of the reasonableness of a search). Presently, however, reasonableness is accepted as the overriding test. *United States v. Edwards*, 415 U.S. 800, 807 (1974) (test is "not whether it was reasonable to procure a search warrant, but whether the search itself was reasonable . . ."); *Cady, Warden v. Dombrowski*, 413 U.S. 433, 439 (1973). *But see* *South Dakota v. Opperman*, 428 U.S. 364, 381 (1976) (Powell, J., concurring).

⁷⁴ *Camara v. Municipal Court*, 387 U.S. at 534.

⁷⁵ 436 U.S. at 559-60. The Court in *Zurcher* stated that reasonableness is the fundamental limitation on searches.

[A ruling that the warrant clause is adequate to protect third parties] is not to question that "reasonableness" is the overriding test of compliance with the Fourth Amendment or to assert that searches, however or whenever

The *Zurcher* Court did not fully evaluate the reasonableness of subjecting innocent third-parties to search and seizure, ending its inquiry, as it did, upon finding satisfactory compliance with basic warrant requirements. In the ordinary search situation encountered under the fourth amendment—the situation where property possessed by the suspect is the target of the search—satisfactory compliance with probable cause and the other warrant requirements usually satisfies the reasonableness requirement as well. This is because when the property owner is a suspect in the criminal investigation, it is reasonable to presume that out of self-interest that person may interfere with the state's recovery of the evidence.

The same presumption of a criminal motive to impede law enforcement is not equally valid, however, where the property owner is an innocent third-party. Recall that prior to *Warden v. Hayden*,⁷⁶ case law protected third-parties from searches by confining the character of seizable goods to contraband, stolen property, and instrumentalities of crime.⁷⁷ The seizure of these incriminating objects invariably was reasonable, since their possession alone created cause to believe either that the possessor was involved in the crime or that he would destroy or dispose of the goods, if given notice of the intended seizure.⁷⁸ This presumption is sufficiently reasonable to justify a forcible intrusion into individual privacy. The *Hayden* Court's extension of search warrant authority to embrace the seizure of all evidence, however, lacked the justification of the prior rule. Mere possession of evidence relevant to a criminal investigation does not support a presumption that, if given notice, the possessor will conceal or destroy the object of the intended search. Usually, it is in this regard—the mere possession of relevant evidence—that third-party property gains the attention of law enforcement authorities. Admittedly, the task of distinguishing third-parties from criminal suspects can be difficult and uncertain at times. Warrants are issued, typically, at early stages of the investigation. Further investigation may develop facts which cast suspicion upon

executed, may never be unreasonable if supported by a warrant issued on probable cause and properly identifying the place to be searched and the property to be seized.

Id. Cf. Terry v. Ohio, 392 U.S. 1, 18 (1968) ("... a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity or scope.").

⁷⁶ See text at notes 35-39 *supra*.

⁷⁷ See text and notes at note 35 *supra*. The rationale behind this rule was that to justify seizure, the government must have a property claim in the seized goods superior to that of the possessor. *Gould v. United States*, 225 U.S. 298, 309 (1921). Abandonment of the property rationale of *Gould* occurred as courts began to perceive that the state had an important interest in criminal investigation and prosecution regardless of the presence or absence of a proprietary interest. *Id.* at 306. See, e.g., *Schmerber v. California*, 384 U.S. 757, 767-68 (1966). Moreover, the "mere evidence" distinction had little rationality because, depending upon the circumstances, the very same papers and effects may be mere evidence in one case and an instrumentality in another. See generally, Comment, *Limitations on Seizure of "Evidentiary" Objects: A Rule in Search of a Reason*, 20 U. CHI. L. REV. 319, 320-22 (1953).

⁷⁸ See 436 U.S. at 581 (Stevens, J., dissenting).

prior seemingly innocent parties. Nevertheless, there are many circumstances in which a party's innocence is undoubted. The files of doctors, lawyers, merchants, customers, or journalists may contain information relevant to a criminal investigation.⁷⁹ These innocent third-parties lack the criminal motive to impede the investigation. Therefore, without some demonstration of a motive for withholding the evidence, a search and seizure of a third-party's property is an unreasonable invasion of privacy.⁸⁰

Moreover, the traditional rationale for search and seizure contrasts sharply with the facts of *Zurcher*. Traditionally, a warrant is issued in situations demanding prompt action.⁸¹ The *ex parte* nature of the warrant procedure is to avoid giving warning of the search to those in control of the place to be searched.⁸² This is because of the obvious danger that a criminal will destroy or hide evidence or fruits of his crime.⁸³ In contrast, neither the Daily nor any of its staff was suspected of participating in the assault and the warrant application showed only probable cause to believe that the evidence sought would be found in the Daily's office. The evidence was not contraband but photographs made in the normal course of business. There was no urgent or emergency need to search; nor was there a showing before the magistrate that the Daily would likely not honor a subpoena or that it would attempt to destroy the photographs sought.⁸⁴ Under these circumstances search and seizure seems to be an excessively intrusive means of criminal investigation.

A third-party search situation, like *Zurcher*, is so different from those ordinarily encountered under the fourth amendment that something more than mere compliance with the warrant requirements should be shown before a warrant may issue. The *Hayden* Court, in overruling prior law which protected innocent third-parties, recognized the potential need to re-evaluate the roles of probable cause and reasonableness in the third-party search situation.⁸⁵ As noted above, the *Zurcher* Court chose not to undertake this re-evaluation. Perhaps, the basic reason for this decision was the lack of precedent supporting a change in fourth amendment procedure. To draw such a conclusion, however, the Court would have to overlook its use of the reasonableness clause in past decisions. Frequently, when faced with a new factual situation of search and seizure the Court has employed the reasonableness test to determine whether the government action was a permissible privacy intrusion.⁸⁶ So

⁷⁹ Moreover, such unnecessary seizures border upon a deprivation of property without due process notice or opportunity for hearing. 436 U.S. at 581-82 & n.9 (Stevens, J., dissenting).

⁸⁰ See generally, 436 U.S. at 579 (Stevens, J., dissenting).

⁸¹ *Fuentes v. Shevin*, 407 U.S. 67, 93 n.30 (1972).

⁸² *Id. Accord*, American Law Institute, A Model Code of Pre-Arrest Procedure, Section 220.1(6), Note at 38 (1972).

⁸³ *Fuentes v. Shevin*, 407 U.S. at 93 n.30; American Law Institute, Section 220.1(6), Note at 38.

⁸⁴ *But cf.* The Daily's non-cooperation policy statement at note 14 *supra*.

⁸⁵ See note 39 *supra*.

⁸⁶ See text and notes at notes 89-94 *infra*. The area of fourth amendment law where the Court has acted principally under the authority of the reasonableness clause has been the law of warrantless search and seizure. Subject to a handful of well de-

that the fourth amendment may adapt to these new situations, the reasonableness standard is purposely vague and flexible,⁸⁷ demanding only that the justification for the search and seizure match the degree of the intrusion.⁸⁸

For example, in *Terry v. Ohio*,⁸⁹ the Court held that a police officer may stop and frisk a person for the limited purpose of discovering concealed weapons, provided that the officer is able to point to specific articulable facts which reasonably warrant the intrusion.⁹⁰ Applying the reasonableness test in *Terry*, the Court reasoned that as the intrusion was somewhat less than ordinary, it was reasonable for the officer to search and seize upon a standard somewhat short of traditional probable cause.⁹¹ Similarly, in *Schmerber v. California*,⁹² the Court upheld the reasonableness of a blood extraction, for the purpose of determining the defendant's level of intoxication, upon a clear showing that such evidence would be found.⁹³ Again, as the intrusion was

lineated exceptions, warrantless search and seizure is per se unreasonable. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971). Where exceptions have been created, it is the rule that the scope of a warrantless search must be strictly circumscribed by the exigency which justifies its initiation. *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (stop and frisk search reasonable). *Accord*, *Cupp v. Murphy*, 412 U.S. 291, 295 & n.2 (1973) (samples from under murder suspect's fingernails is a sufficiently limited intrusion); *Chimel v. State of California*, 395 U.S. 752, 762-64 (1969) (absent a warrant, search of defendant's home incident to his arrest is unreasonable).

For an enumeration of permissible warrantless search situations see the introductory discussion in Lewis, *Justice Stewart and Fourth Amendment Probable Cause: "Swing Voter" or a Participant in a "New Majority"?*, 22 LOYOLA L. REV. 713, 717-18 (1976), and cases cited therein. Characteristically, such an exigency turns upon the reasonable belief that the evidence will be lost or destroyed. *Chimel v. California*, 395 U.S. 752 (1969). "When an arrest is made, it is reasonable for the officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." *Id.* at 762-63. *Accord*, *Cupp v. Murphy*, 412 U.S. 291, 295-6 (1973) (sufficient danger that evidence under murder suspect's fingernails would be destroyed); *United States v. Chadwick* 433 U.S. 1, 14-15 (1977) (warrantless search of luggage seized incident to arrest is unreasonable if there is no danger that persons will be harmed or evidence destroyed). *Cf.* *Carroll v. United States*, 267 U.S. 132, 153 (1925) (warrantless search of automobile reasonable because the vehicle may be moved out of the jurisdiction before a warrant is issued).

⁸⁷ See *Berger v. State of New York*, 388 U.S. 41, 75 (1967) (Black, J., dissenting).

⁸⁸ *Id.* at 69 (Stewart, J., concurring). *Cf.* *Terry v. Ohio*, 392 U.S. 1, 26 (1968) ("any . . . search [must] be strictly circumscribed by the exigencies which justify its initiation.").

⁸⁹ 392 U.S. 1 (1968).

⁹⁰ *Id.* at 21, 27, 30-31.

⁹¹ *Id.* at 24-27. Limited searches upon less than traditional probable cause have also been approved in the administrative search area. *Marshall, Sec. of Labor v. Barlow's, Inc.*, 436 U.S. 307, 320-21 (1978) (OSHA); *Camara v. Municipal Court*, 387 U.S. 523, 537-39 (1967) (building code—private property); *See v. City of Seattle*, 387 U.S. 541, 545-46 (1967) (building code—commercial property).

⁹² 384 U.S. 757 (1966).

⁹³ *Id.* at 768-71, *Schmerber*, validated the taking of a blood sample from the petitioner without a warrant upon the basis of (1) the existence of probable cause for arrest for drunken driving, (2) the time constraints created by the competing needs to

greater than the intrusion of an ordinary search and seizure, the *Schmerber* Court, applying the reasonableness test, demanded greater justification than traditional probable cause.⁹⁴ The standard of reasonableness used in the line of authority represented by *Terry* and *Schmerber* is applicable to the third-party search situation.⁹⁵ As in other new situations faced by the Court, the standard of probable cause needs to be modified before third-party search and seizure may be reasonable.

If the reasonableness test is applied to third-party search and seizure, then before a warrant may issue, the state must show that the justification for the search of third-party property is commensurate with the intrusion. Because third-parties may claim no greater privacy rights than suspects, the intrusion of a third-party search or seizure is of the same magnitude as the intrusion of a suspect search or seizure.⁹⁶ The proper focus of the reasonableness question, then is the state's justification for the intrusion of privacy. Yet as noted above, the justification for searching third-party property merely upon probable cause is far less than that supporting a search of suspect property.⁹⁷ In summary, unless the state can supplement its demonstration of probable cause to believe that the objects sought are located upon third-party property with a demonstration or presumption of a motive to impede the criminal investigation, search and seizure of third-party property is an unreasonable state intrusion.

hospitalize the petitioner and to investigate the scene of the accident, and (3) the presence of a *clear indication* that, in fact, evidence of intoxication would be found. *Id.* (emphasis added).

⁹⁴ *Id.*

⁹⁵ On the basis of *Terry*, *Camara*, and *Schmerber*, several commentators have suggested that the Court apply a sliding scale to judge the reasonableness of a search. See, McKenna, *The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment*, 53 IND. L. J. 55, 70-76 (1977-78); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 390-93 (1974).

⁹⁶ However, a recent commentator has argued that some items have a greater privacy value than others, and therefore, that the level of protection from search and seizure should be based upon the content of the seizure. See McKenna, *Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment*, 53 IND. L. J. 55, 70-76 (1978); cf. *Roaden v. Kentucky*, 413 U.S. 496, 501 (1973) ("A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material"). But cf. *Warden v. Hayden*, 387 U.S. 294, 301-02 (1967) ("Privacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit, or contraband"). An argument follows naturally from McKenna's content-based analysis that some third-party property is more private and more protected against seizure. The best example is private papers which are little more than an extension of the owner's person, the search for which invariably partakes of the character of a general search, and which are also often within the bounds of first and fifth amendment protection. 53 IND. L. J. at 68-69. Reputation is another third-party privacy interest endangered by the *Zurcher* holding, since damage to one's reputation may follow as a consequence of the search of one's home for criminal evidence. See Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 701 (1961).

⁹⁷ See text at notes 75-80 *supra*.

A similar standard for fourth amendment procedure was proposed by Justice Stevens in his dissent to the *Zurcher* opinion. Justice Stevens advocated a rule which would modify the probable cause inquiry to protect innocent third-parties. Justice Stevens proposed that a search warrant should issue only when there is cause to fear that, if notice were given, the possessor would conceal or destroy the objects of the search.⁹⁸ Probable cause to believe that the possessor is culpable or that he holds illegal goods would, in Justice Stevens' opinion, justify search and seizure.⁹⁹ Presumably, a demonstrated impracticability of less drastic means, such as a subpoena *duces tecum*, would justify search and seizure as well. Justice Stevens' proposal is eminently logical, for in any criminal investigation, if there is reason to believe the objects of the search can be obtained by means other than seizure, then search and seizure is an unreasonable government action.

The plurality of the Court, however, did not agree with Justice Stevens, ruling as it did that no exceptions or modifications in fourth amendment procedure were necessary to protect third-party privacy. The implication of *Zurcher* is that any person, who the police believe possesses any evidence relevant to a criminal investigation, is subject without recourse to forceful search and seizure. *Zurcher* casts the shadow of unannounced search and seizure upon the lives of countless law-abiding citizens.¹⁰⁰

II. CONVERGENCE OF THE FOURTH AMENDMENT AND THE FIRST AMENDMENT IN *ZURCHER*

A. *The Zurcher Approach to First Amendment Restrictions upon Search and Seizure*

The *Zurcher* decision represents not only an unwarranted invasion of the privacy interests of innocent third-parties, but, more significantly, it represents an overbroad grant of state power to search despite the presence of important first amendment rights. *Zurcher* is the first case in which the Court specifically dealt with the issue of search and seizure of the press. After ruling that third-party property may be searched or seized if the state closely adheres to traditional fourth amendment procedure, the Supreme Court next considered whether the first amendment requires added protections beyond those provided by the fourth amendment, in instances where the party subject to search has identifiable first amendment rights. Favoring a rule that a newspaper may be searched only after a subpoena is proven ineffective, the *Stanford Daily* asserted that a search and seizure of newspaper property, under a search warrant, seriously threatens the ability of the press to gather, analyze, and circulate news.¹⁰¹ The *Daily's* position was that, unlike the subpoena

⁹⁸ 436 U.S. at 582-83 (Stevens, J., dissenting).

⁹⁹ *Id.*

¹⁰⁰ See text and notes at note 79 *supra*. As noted in a later section of this case-note, the warrant issued against the *Daily* without any regard for whatever journalistic privileges or immunities that might have applied to the evidence. This suggests that in the future the Court may approve warrants to search and seize evidence held by professionals with recognized testimonial privileges—such as doctors, lawyers, and clergy.

¹⁰¹ 436 U.S. at 563-64. In argument the *Daily* submitted that:

First, searches will be physically disruptive to such an extent that timely

process, the *ex parte* nature of a warrant does not afford an opportunity to protect first amendment values before seizure.¹⁰² This is because the warrant procedure does not provide an adversary with notice or an opportunity to be heard upon the propriety of the impending search or seizure. Thus, a decision to search can be appealed only *post hoc*. The damage, however, is irreparable. Specifically, the Daily expressed fears that such minimal protection of the media from searches and seizures would lead to reporting and editorial self-censorship, as well as a chilling of confidential news sources.¹⁰³

The *Zurcher* Court declined to invoke a rule which would require prior demonstration of subpoena impracticability as part of the search warrant process. The Court remarked that neither the fourth amendment, nor the case law regarding its procedure when first amendment interests are present, support such a rule.¹⁰⁴ In its analysis of whether the first amendment requires modification of search procedure, the Court drew support¹⁰⁵ from two prior restraint decisions, *Stanford v. Texas*¹⁰⁶ and *Marcus v. Search Warrant*.¹⁰⁷ Both cases invalidated, as a prior restraint of expression, an indiscriminate seizure of a large quantity of putatively illegal publications.¹⁰⁸ In each case, many of the materials seized were later judicially determined to be protected by the first amendment.¹⁰⁹ Accordingly, these decisions held that a magistrate may issue a warrant only after carefully determining whether the materials to be seized fall within the protection of the first amendment, and whether their

publication will be impeded. Second, confidential sources of information will dry up, and the press will also lose opportunities to cover various events because of fears of the participants that press files will be readily available to the authorities. Third, reporters will be deterred from recording and preserving their recollections for future use if such information is subject to seizure. Fourth, the processing of news and its dissemination will be chilled by the prospects that searches will disclose internal editorial deliberations. Fifth, the press will resort to self-censorship to conceal its possession of information of potential interest to the police.

Id.

¹⁰² *Id.* at 566.

¹⁰³ *Id.* at 563-64.

¹⁰⁴ *Id.* at 565. The fourth amendment itself, said the Court, was a response to the struggles between the Crown and press. Aware of this struggle and desirous of curbing the general search, the Framers of the constitution nevertheless did not forbid warrants against the press and did not require special procedures for their issuance.

Id.

¹⁰⁵ *Id.* at 564-65.

¹⁰⁶ 379 U.S. 476 (1965).

¹⁰⁷ 367 U.S. 717 (1961).

¹⁰⁸ *Stanford v. Texas* held invalid a warrant which authorized the seizure from a private home of some 2,000 books, records and other material concerning the Communist Party. 379 U.S. at 477, 486. In *Marcus v. Search Warrant* the Court invalidated the seizure from a distributor of all copies of a large quantity of allegedly obscene publications, of which only a small fraction actually were judged obscene. 367 U.S. at 731-33.

¹⁰⁹ *Stanford*, 379 U.S. at 479-80; *Marcus*, 367 U.S. at 724 (one hundred-eighty of two hundred-eighty publications were later found to be protected by the first amendment).

seizure would place a prior restraint upon protected expression.¹¹⁰ Noting that neither case modified fourth amendment procedure in regard to the seizure of first amendment materials apart from demanding careful judicial attention, the *Zurcher* Court concluded that courts need do no more than apply the warrant requirements with particular exactitude when first amendment interests may be endangered.¹¹¹

In assuming its position that the strict administration of the warrant requirements sufficiently protects press rights, the *Zurcher* Court expressed confidence in the ability of magistrates to oversee fourth amendment procedures. The Court was particularly confident that magistrates could anticipate the type, scope, and intrusiveness of searches which actually would interfere with press operations.¹¹² In support of this premise, the Court noted that, despite the absence of a special rule, the power to search third-party newspapers has never been abused.¹¹³

Turning to the *Daily's* contention that media search and seizure procedure must be altered to prevent a chilling of confidential news sources, the Court cited the landmark decision of *Branzburg v. Hayes*¹¹⁴ for the contrary proposition.¹¹⁵ The Court noted that *Branzburg* rejected a similar claim for a journalistic privilege to withhold, from a grand jury subpoena, information acquired in confidence.¹¹⁶ The Court remarked that any added possible disclosure of confidential informants by media searches, beyond the disclosure possible through grand jury subpoenas, is de minimus for constitutional purposes.¹¹⁷ Through this argument the Court flatly rejected any claim that dis-

¹¹⁰ The *Stanford* Court ruled that the fourth amendment's requirement that the warrant particularly describe the things to be seized must be observed with the "most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain." 379 U.S. at 485. The *Marcus* Court ruled that the first amendment demanded, for the protection of the non-obscene material, that there be a step in the procedure before seizure designed to focus searchingly on the question of obscenity. 367 U.S. at 732. *Accord*, *Roaden v. Kentucky*, 413 U.S. 496, 506 (1973) (seizure of film without prior judicial determination of obscenity); *Heller v. New York*, 413 U.S. 483, 490-91 (1973) (seizure of film before judicial determination of obscenity legitimate if film is presented for evidence and not destroyed); *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636, 637 (1968) (seizure of film on police officer's conclusion of obscenity); *A Quantity of Books v. Kansas*, 378 U.S. 205, 210 (1964) (seizure of all copies of certain books without prior judicial determination of obscenity).

¹¹¹ 436 U.S. at 565.

¹¹² *Id.* at 566.

¹¹³ *Id.* It appears that subsequent to the search of the *Stanford Daily*, there have been at least six reported search and seizures of newspaper and radio media offices. In each case the target of the search was a comparatively small business with limited resources, there was no allegation of criminal complicity, and the warrant sought evidence collected while gathering news. Brief for Amici Curiae at 11-12 & n.6-7, *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), reprinted in 9 LAW REPRINTS (Criminal Law No. 24) at 581-82. See generally Note, *Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis*, 28 STAN. L. REV. 957 & n.3 (1976).

¹¹⁴ 408 U.S. 665 (1972).

¹¹⁵ 436 U.S. at 566.

¹¹⁶ *Id.*, citing 408 U.S. at 690-91.

¹¹⁷ 436 U.S. at 566.

closure of confidential sources through media search and seizure chilled constitutional rights.

Finally, the Court rejected the Daily's claim that the press should have an opportunity for notice and hearing before it is compelled to release material. Although courts cannot validly restrain the exercise of free expression without notice or adversary hearing,¹¹⁸ the Court distinguished the situation in *Zurcher*. In the Court's view, a warrant to search for criminal evidence carries no realistic threat of putting a restraint upon the publication of ideas, and thus the traditional need for a prior hearing is absent.¹¹⁹ In summary, the Court rejected all contentions that the first amendment imposes, or should impose, any protections for media third-parties over and above those provided by the fourth amendment. As a result, under the authority of *Zurcher*, to search media premises, the state is required only to comply with the traditional requirements of probable cause, specificity, and reasonableness, and to ensure their proper judicial administration.

*B. Analysis of the Zurcher Interpretation of the
First Amendment's Impact upon Search and Seizure*

A closer look at the precedent used by the Court in deciding *Zurcher* indicates that its reliance on prior restraint case law and *Branzburg* was fundamentally misplaced. Indeed, the very precedent used by the Court tends to support the position of the Stanford Daily. The more critical issue, however, is the effect of the Court's conclusion, based on this precedent, that the first amendment provides no protection to the media beyond that provided by the fourth amendment. This critical issue will be explored more fully in an endeavor to establish a first amendment basis for protecting media third-parties from search and seizure—a basis ignored by the *Zurcher* Court.

The Supreme Court's analogy to prior restraint cases—*Stanford v. Texas* and *Marcus v. Search warrant*—was inappropriate because prior restraint was neither a factual nor a legal issue in *Zurcher*. Prior restraint is simply legal shorthand for the first amendment's special guarantee against orders prohibiting the publication or communication of particular information or commentary.¹²⁰ Prior restraint was not a factual issue in this case, because all of the photographs relating to the incident had been published the day before the search.¹²¹ Indeed, the Court itself acknowledged that warrants like the one issued in *Zurcher*, to seize newsphotographs taken in a public place, hardly restrain the actual publication of a newspaper or its communication of ideas.¹²² Nor was prior restraint a legal issue in *Zurcher*. The pivotal inquiry

¹¹⁸ See, e.g., *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 180 (1968) (*ex parte* injunction against public rally of white supremacist group is prior restraint of speech and invalid for want of notice and hearing).

¹¹⁹ 436 U.S. at 567. In effect, the Court exempted the *ex parte* warrant process from the usual first amendment requirement of notice and hearing.

¹²⁰ *Nebraska Press Ass'n v. Stuart*, Judge, 427 U.S. 539, 556-59 (1976).

¹²¹ 436 U.S. at 551. See note 6 *supra*.

¹²² *Id.* at 564-65.

in cases involving prior restraint is whether the matter to be restrained is protected by the first amendment.¹²³ But as the Daily's claim rested upon the nature of the activities which were disrupted by the intrusion, it was irrelevant whether the physical evidence which was the object of the search was protected by the first amendment. The legal issue of *Zurcher* was whether the search of the Stanford Daily's offices unconstitutionally hindered the ability of the paper to gather, analyze and disseminate news, not whether the Daily was restrained from publishing particular news items.¹²⁴ In short, *Stanford v. Texas* and *Marcus v. Search Warrant* have no authority in this case, because those cases dealt with the seizure of materials protected by the first amendment, whereas *Zurcher* dealt with an intrusive search of the free press.

Branzburg is equally ineffective as authority for the proposition that media search and seizure does not impermissibly chill the collection of confidential news information. Neither the facts nor the rationale, which led the Court in *Branzburg* to reject the claim that grand jury subpoenas chill confidential sources, are persuasive in *Zurcher*. *Branzburg* sought to determine whether journalists were required to appear under subpoena before a grand jury and divulge information received in confidence.¹²⁵ Note that the subpoena process allows the recipient of a subpoena to appeal to a court for an order quashing the demand.¹²⁶ Also note that grand jury testimony is subject to fifth amendment protection, is spoken in the hearing of a judge, and is considered non-public until its use in litigation. Similar protections are unavailable to the subject of a search under current fourth amendment procedure. Recall that the *Zurcher* Court excepted the warrant process from the first amendment's requirement of prior notice and hearing.¹²⁷ *Branzburg* is inapplicable as authority because the focused, orderly, judicially controlled disclosure of confidential matters through a subpoena or grand jury inquiry contrasts sharply with the indiscriminate search of the Stanford Daily. Indeed, the *Branzburg* Court emphasized that the presence of judicial control over the subpoena process tempered its holding.¹²⁸

¹²³ See e.g., cases cited in note 110 *supra*.

¹²⁴ 436 U.S. at 563. See note 101 *supra*.

¹²⁵ 408 U.S. at 667.

¹²⁶ *Id.* at 710; 436 U.S. at 561-62 n.8.

¹²⁷ See text at notes 118-119 *supra*.

¹²⁸ 408 U.S. at 707-08. In fact, the availability of judicial review was what convinced Justice Powell to join the plurality in that case:

If a newsman believes that the grand jury investigation is not being conducted in good faith . . . [or] . . . if the newsman is called upon to give information bearing only a remote . . . relationship to the subject . . . , or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the Court on a motion to quash and an appropriate protective order may be entered In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.

Id. at 710 (Powell, J., concurring).

Further, because search and seizure threatens a much wider exposure of confidential materials and can be appealed only post hoc, the damage is irreparable and the chill generated by the fear of warranted searches is likely to be far greater than that created by a subpoena.¹²⁹ Although the *Branzburg* Court stated that it was not attempting to require the press to publish its sources of information or indiscriminately disclose them on request, an unannounced search of press offices will often produce this result.¹³⁰ Even in instances where the object sought is particularly described in the warrant, to locate the evidence in an unfamiliar pressroom layout, the officers conducting the search must view a great deal of material unconnected with the alleged crime. And although these disclosures may never reach the courts or the public, often the information was placed in confidence precisely to prevent its exposure to the police. On the basis of these factual distinctions alone, it may be argued that *Branzburg* compelled a decision directly opposite to that reached by the *Zurcher* Court. Indeed, the Daily was advocating only the procedural safeguard of a prior judicial hearing upon which the *Branzburg* decision was premised.¹³¹

Similarly, the policy arguments persuasive in *Branzburg* lose force when applied to *Zurcher*. First, the *Branzburg* Court presumed that only the confidences of criminals or informers with information about crime would be endangered by a grand jury's subpoena.¹³² This presumption supported rejection of a constitutionally mandated reporter's privilege, because the Court deemed the desire of criminals to avoid prosecution as undeserving of constitutional protection and those genuinely committed to providing information would not need constitutional protection.¹³³ Yet, because no magistrate, nor any warrant, can effectively prevent police officers from inadvertently viewing unrelated material during the course of a search, any and every type of confidential record, not merely those of undeserving criminals, is threatened by a search. Second, the *Branzburg* Court disdained the theory, which underlay the claim for a reporter's privilege, "that it is better to write about crime than to do something about it."¹³⁴ Had the Daily claimed that the evidence sought was privileged from disclosure, and thus completely beyond the state's reach, the *Branzburg* case may have controlled this issue. The Daily, however, claimed only that a subpoena would have been equally effective in producing that evidence.¹³⁵ Hence, *Zurcher* did not involve the principle that "the public . . . has a right to every man's evidence," which the Court found so authoritative in *Branzburg*.¹³⁶

¹²⁹ See text at notes 152-163 *infra*. But cf. 436 U.S. at 566 (the increased chill from the use of search warrants, as well as subpoenas, is "incremental" and "does not make a constitutional difference").

¹³⁰ 408 U.S. at 682.

¹³¹ 436 U.S. at 575-76 (Stewart, J., dissenting).

¹³² 408 U.S. at 691.

¹³³ *Id.* at 691, 695.

¹³⁴ *Id.* at 692.

¹³⁵ 436 U.S. at 574 (Stewart, J., dissenting).

¹³⁶ 408 U.S. at 688, 690.

In summary, neither the prior restraint cases, *Stanford* and *Marcus*, nor the *Branzburg* decision control the resolution of the issue whether unannounced media searches unconstitutionally hinder the ability of the press to gather, analyze, and publish news and opinion from all types of willing sources. In general, the *Zurcher* Court's choice of precedent lacks the power of compelling authority and, indeed, a closer examination of that precedent reveals support for the Daily's contentions.

The more disturbing implication of the Court's conclusion, on the basis of prior restraint decisions and *Branzburg*, however, is the implication that the first amendment offers no substantive or procedural protection against criminal investigation beyond that offered by the fourth amendment. The *Zurcher* Court suggests that the fourth amendment alone, if carefully administered, can protect newspapers from unreasonable searches. While it may be more difficult to show that the *Zurcher* Court's approval of searches of innocent third-parties' premises will abridge specific fourth amendment rights, it will be argued that the opinion's approval of media search and seizure significantly endangers first amendment free press rights. To this end, it will be submitted that to prevent an inhibition of the exchange of ideas and the exercise of expression, the newsprocessing activities¹³⁷ of the press should be protected from the disruption and chill of a search.

III. FIRST AMENDMENT BASIS FOR PROTECTING MEDIA FROM INTRUSIVE THIRD-PARTY SEARCHES & SEIZURES

A. Rationale for First Amendment Protection of Media Newsprocessing

What is most endangered by a third-party media search and seizure is the free flow of sensitive, controversial ideas and opinion.¹³⁸ Not only do all

¹³⁷ The term "newsprocessing" is a phrase used herein to describe the gathering, analyzing, editing, printing, and distributing of news and opinion. This term is used because a search and seizure may disrupt not only a paper's newsgathering ability but also directly or indirectly may interfere with all of the functions upon which the public depends for accurate and complete information.

¹³⁸ Promotion of a marketplace of ideas is the pre-eminent purpose of the first amendment. *E.g.*, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 248 (1974) ("marketplace of ideas"); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("free discussion of governmental affairs"); *Roth v. United States*, 354 U.S. 476, 485 (1957) ("unfettered interchange of ideas"). A free exchange of information is essential for enlightened self-government, individual self-fulfillment, and the peaceful venting of discontent. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

History, however, documents the tendency of governments to suppress the expression of those who most fervently dispute its policies. *United States v. United States District Court*, 407 U.S. 294, 314 (1972). For example, the period of 1969-1971 witnessed a dramatic rise in the use of subpoenas against the press. The cause was quite clearly the government's prosecution of the vituperative radical movements. Note, *The Newsman's Privilege After Branzburg: The Case for a Federal Shield Law*, 24 U.C.L.A. L. REV. 160, 162-64 (1976); Ervin, *In Pursuit of a Press Privilege*, 11 HARV. J. LEGIS. 233, 243-45 (1974); Comment, *The Newsman's Privilege: Protection of Confidential Sources of Information against Government Subpoenas*, 15 ST. LOUIS U.L.J. 181, 182-85 (1970). There is no reason for presuming that a similar phenomena cannot occur if media search and seizures are condoned.

citizens have a constitutional right to speak out in print,¹³⁹ the public has a constitutional right to hear their message.¹⁴⁰ Without an unfettered press, the public's right to know would be an empty concept.¹⁴¹ The press, as a major branch of the news media, is a significant, if not indispensable, element in the network of information. The press is, in effect, the public's informational agent and an important means by which the public receives information and ideas essential to its self-government and self-fulfillment.¹⁴² Stifling the

¹³⁹ *Dennis v. United States*, 341 U.S. 494, 584 (1951) (Douglas, J., dissenting) (full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions); *accord*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Stromberg v. California*, 283 U.S. 359, 369 (1931). In *Talley v. California*, 362 U.S. 60 (1960) the Court recognized the right of citizens to speak out while remaining anonymous, when forced identification might bring reprisal and deter peaceful discussions of public matters of importance. *Id.* at 64-65. The chill of anonymous sources not only robs the public of potentially important information but may be a violation of freedom of speech as well. *Cf. New York Times Co. v. Sullivan*, 376 U.S. at 266.

¹⁴⁰ The right to receive information has been the basis of the holdings in *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974) (addressee has right to receive uncensored mail from prison inmates) and *Lamont, DBA Basic Pamphlets, v. Postmaster Gen.*, 381 U.S. 301, 307 (1965) (public has first amendment right to receive "communist political propaganda" arriving in mails from abroad). In *Lamont*, Justice Brennan stated that "[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." 381 U.S. at 308 (Brennan, J., concurring). *See, Houchins v. KQED, Inc.*, 438 U.S. 1, 32 (1978) (Stevens, J., dissenting); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976); *Kleindienst v. Mandel*, 408 U.S. 753, 762-65, 771 (1972); *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969).

¹⁴¹ *Cf. Grosjean v. American Press, Co., Inc.*, 297 U.S. 233, 250 (1936) (tax based on circulation invalid). While the Supreme Court has not openly declared a right to know, nevertheless, the concept is present in the rationale of many of its decisions. In *Thornhill v. Alabama*, 310 U.S. 88 (1940), the Court stated that the liberties of the first amendment must be broadly construed in order that they may "supply the public need for information and education with respect to the significant issues of the times." *Id.* at 101-02. *Accord*, *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 147 (1967); *Time, Inc. v. Hill*, 385 U.S. 374, 388-89 (1967); *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966). The "principal that debate on public issues should be uninhibited, robust, and wide-open" is so strong that the Court has indicated that speech may be protected even when libelous, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); and seditious, *Dennis v. United States*, 341 U.S. 494, 584 (1951) (Douglas, J., dissenting). Congressional recognition of the public's right to know is manifest in the Freedom of Information Act of 1967, 5 U.S.C. § 552, 81 Stat. 54, as amended by 90 Stat. 1247 (1976).

¹⁴² *Saxbe v. Washington Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting):

An informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities. For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government. By enabling the public to assert meaningful control over the

press will inhibit the flow of information to the public. For these reasons, press newsprocessing activities should be entitled to first amendment protection.¹⁴³

The issue of the precise extent of first amendment protection afforded to the press has generated considerable controversy among the Justices. There is a fundamental division in the Court as to whether the press, as an institution, should be entitled to greater first amendment rights than the general public.¹⁴⁴ Always cognizant and solicitous of the press' informational role,¹⁴⁵ a majority of the Supreme Court, nevertheless, has failed to fully protect all elements of the media's newsprocessing function. For instance, the Court has recognized and protected the press' right to disseminate opinion and information,¹⁴⁶ but despite strong and persistent dissents it has given only lip service

political process, the press performs a crucial function in effecting the societal purpose of the First Amendment.

Id. But see Chief Justice Burger's caustic criticism of the claim that the press is trustee of the public right to know. *New York Times Co. v. United States*, 403 U.S. 713, 749-50 (1971) (*per curiam*) (Burger, C.J., dissenting).

¹⁴³ Precedent for granting the press extra rights for the greater good of the people exists in the areas of libel and obscenity. It is solely for the public's interest in unrestrained debate, rather than the disseminator's interest, that media liability is judged by a higher libel standard. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). *Accord*, *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 42-43 (1971); *Greenbelt Coop. Pub. Ass'n, Inc. v. Bresler*, 398 U.S. 6, 11-12 (1970); *cf.* *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (invasion of privacy). Similarly, the definition of obscenity is worded not to protect authors but the public's right to consider diverse and unrestrained expression. *Memoirs v. Massachusetts*, 383 U.S. 413, 418-19 (1966); *Roth v. United States*, 354 U.S. 476, 484-88 (1957).

¹⁴⁴ Compare Chief Justice Burger's view in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 802 (1978) (Burger, C.J., concurring), quoting *Pennekamp v. Florida*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring) ("[T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it. '... the liberty of the press is no greater and no less ...' than the liberty of every citizen. ...") with Justice Stewart's view in *Stewart, "Of the Press,"* 26 *HASTINGS L.J.* 631, 634 (1975) ("The primary purpose of the constitutional guarantee of a free press was ... to create a fourth institution outside the Government as an additional check on the three official branches.").

The three most important cases in recent times addressing this issue—*Branzburg*, *Houchins*, and *Zurcher*—were decided by bare pluralities. *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (three majority, one concurring, three dissenting); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (four majority, one concurring, three dissenting); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (four majority, one concurring, four dissenting).

¹⁴⁵ *Houchins v. KQED, Inc.*, 438 U.S. 1, 8 (1978) (media acts as the "eyes and ears" of the public); *Estes v. Texas*, 381 U.S. 532, 539 (1965) (press is a "mighty catalyst in awakening public interest"). See note 142 *supra*.

¹⁴⁶ The government must sustain a heavy burden to justify any system of prior restraint of dissemination. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (*per curiam*) (publication); *Grosjean v. American Press Co., Inc.*, 297 U.S. 233, 244-45 (1936) (circulation); *Schneider v. State*, 308 U.S. 147, 162 (1939) (distribution). Editorial independence and discretion as to what to publish is presumptively protected from interference. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (right of reply statute invalid); *Columbia Broadcasting System, Inc. v. Pittsburgh*

to the liberty of the press to gather and analyze news.¹⁴⁷ The reason for this inconsistency is that, from the majority's viewpoint, the press has no special first amendment rights.¹⁴⁸ Accordingly, press dissemination is treated to the

Comm'n on Human Relations, 413 U.S. 376, 386-87, 391 (1973) (purely commercial advertising is not protected speech but is subject to reasonably drawn governmental regulation); *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 392 (1969) (radio station must provide equal time for response to criticized individuals or political opponents of candidate endorsed). Finally, the press has expanded libel protection. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1975) (expands application of *New York Times* standard to private persons seeking punitive damages); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (public figure must show newspaper published defamatory material with knowledge of its falsity or reckless disregard for the truth).

¹⁴⁷ Although Supreme Court decisions have given constitutional weight to the right of newsgathering, e.g., *Branzburg*, 408 U.S. at 681 ("without some protection for seeking out the news, freedom of the press could be eviscerated"); *Id.* at 709 (Powell, J., concurring) ("The Court does not hold that newsmen . . . are without constitutional rights . . . to . . . [gather] news or . . . [safeguard] their sources."); *accord*, *Houchins v. KQED, Inc.*, 438 U.S. 1, 10-11 (1978); *cf.* *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) ("the right to . . . publish does not carry with it the *unrestrained* right to gather information.") (emphasis added), no case has deemed the right of newsgathering significant enough to outweigh the state's competing interest.

Moreover, it is well established that the press has no special right of access to information even though that information may be of public interest. *E.g.*, *Houchins v. KQED, Inc.*, 438 U.S. at 9. The Court has been adamant that nothing in the first amendment compels the government to provide the media with information or access to it on demand. *Id.* at 15; *accord*, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609 (1978). Thus, the press has no greater access to prison inmates or information about prison conditions. *Houchins v. KQED, Inc.*, 438 U.S. at 16; *Pell v. Procunier*, 417 U.S. 817, 834-35 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974). And it has no special access to trial information. *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966); *Estes v. Texas*, 381 U.S. 532, 541-42 (1965). However, once the press has acquired information, the government may not prevent it from reporting what it has learned and what the public is entitled to know. *Nixon v. Warner Communications, Inc.*, 435 U.S. at 609 (press may publish and comment on White House tapes as made public at trial, but may not have physical access.); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829-42 (1978) (newspaper is immune from criminal sanctions for the accurate publishing of a confidential judicial proceeding); *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469, 491-92 (1975) (press may publish name of rape victim made public through trial pleadings); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (*per curiam*) (newspapers may publish so-called Pentagon Papers even though criminally obtained).

The right of newsgathering has great currency in dissenting opinions. *E.g.*, *Houchins v. KQED, Inc.*, 438 U.S. at 32 (Stevens, J., dissenting, joined by Brennan & Powell, JJ.); *Pell v. Procunier*, 417 U.S. 817, 835 (1974) (Powell, J. concurring in part, dissenting in part) and at 841 (Douglas, J., dissenting); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 863-64 (1974) (Powell, J., dissenting); *Branzburg v. Hayes*, 408 U.S. 664, 727-28 (1972) (Stewart, J., dissenting, joined by Brennan & Marshall, JJ.).

¹⁴⁸ In the majority's view, freedom of the press is a fundamental personal right of expression and the press clause "comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. City of Griffin*, 303 U.S. 444, 450, 452 (1938). Much of the reluctance to extend any greater constitutional protection to the media stems from the difficulty of defining the "press." *E.g.*, *Branzburg v. Hayes*, 408 U.S. 665, 704-05 & n.40 (1972). It would be patently unfair, if not unconstitutional, to discriminate on the basis of attributes such as circulation or the stature of

same high protection afforded the public's right of free expression. Freedom from prior restraint of publication is the primary guarantee of the first amendment's free press clause,¹⁴⁹ simply because publication is a form of expression. On the other hand, as news gathering and analysis is quintessentially a media function—there being no public right to gather information—press news gathering and news analysis merit a low degree of protection. The majority's exposure of press newsgathering activities to government disruption or control risks serious abridgement of the public right to know. Because of public dependence on the press, press activities instrumental in gathering and processing information and opinion should have first amendment protection from undue search and seizure.

The facts of *Zurcher* demonstrate that the search for and seizure of evidence of a crime, which the press may have inadvertently gathered during the normal course of its business, may abridge the public's right to know. Although the search of the *Stanford Daily* was held to conform with traditional fourth amendment requirements, it demonstrably chilled press activities which are an integral part of the news and information network. Specifically, the search physically disrupted the operation of the *Daily*, disclosed or threatened the wholesale disclosure of confidential material unrelated to the search, impaired the *Daily's* ability to gather information, chilled confidential relationships, created pressures for self-censorship, and impaired the credibility of the *Daily* as an independent news agency.¹⁵⁰

Each of these intrusions tends to reduce the availability of news and opinion to the public and therefore deserves closer examination.¹⁵¹ The presence of police officers rummaging through the papers and drawers of a newspaper office can easily impede the workings of the press. A likely result of the physical disruption of a newspaper search would be a reduction of the flow of timely information. Press operations are under severe deadlines, and a large scale search may bring the entire process to a halt.¹⁵² A search for particular

the publication. Cf. *Grosjean v. American Press Co., Inc.*, 297 U.S. 233, 239-40 (1936) (tax based on circulation invalid). It is beyond question that the courts may not inquire into the content of the paper except in cases of obscenity or libel. 408 U.S. at 705 n.40.

Opponents of press rights argue as well that any rule creating special constitutional rights for the news media would conflict with the equal privilege—equal protection concepts of the constitution. *State v. Buchanan*, 250 Or. 244, 248-49, 436 P.2d 729, 731 (1968); Cf. *Associated Press Co. v. United States*, 326 U.S. 1, 20 (1946) (the established press may not repress others from exercising their rights to publish).

¹⁴⁹ *Nebraska Press Association v. Stuart*, Judge, 427 U.S. 539, 556-59 (1976); *New York Times Co. v. United States*, 403 U.S. 713, 715-17 (1971) (*per curiam*) (Black, J., concurring); *Near v. Minnesota*, 283 U.S. 697, 713, 716-17 (1931).

¹⁵⁰ 353 F. Supp. at 136.

¹⁵¹ Admittedly, this claim is supported principally by the statements and testimony of journalists who are interested parties by affiliation. News journalists, however, are the only available, knowledgeable sources of evidence.

¹⁵² See Affidavit of Gordon Manning. (C.B.S. Director of News) in Brief for Respondent *Stanford Daily* at 18-19, *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), reprinted in 9 LAW REPRINTS (Criminal Law No. 24) at 240-41; see generally Note, *Search and Seizure of the Media: A Statutory Fourth Amendment and First Amendment Analysis*, 28 STAN. L. REV. 957, 989 (1976). The potential seriousness of this disruption is borne out

evidence, such as documents or films, in a busy, unfamiliar, and cluttered newsroom necessarily involves leafing through and scanning a mass of extraneous material.¹⁵³ Some of that material is likely to be relevant to other investigations¹⁵⁴ and some is likely to be confidential in nature.¹⁵⁵ Indeed, matters of the greatest delicacy often reach the public only because the press has agreed to suppress the identity of the informant.¹⁵⁶ Moreover, the inability to judicially test in advance the scope and propriety of a search heightens the potential for needless abridgements.¹⁵⁷ Disclosure of confidential material, whether actual or threatened, will impair the ability of the press to gather certain kinds of important information.¹⁵⁸ An impressive scientific study has

by the fact that a recent search of radio station KPFK-FM is alleged to have lasted eight and one-half hours. See note 113 *supra*, 9 LAW REPRINTS (Criminal Law No. 24) at 582 n.6.

¹⁵³ 436 U.S. at 551. According to the affidavit of *New York Times* reporter Douglas Kneeland, "the intrusion of a search is indiscriminate; its scope and propriety cannot be judicially tested in advance; and the mere possibility of its use renders vulnerable all confidential materials." Brief for Respondent *Stanford Daily* at 20-21, *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); reprinted in 9 LAW REPRINTS (Criminal Law No. 24) at 242-43.

¹⁵⁴ As the requirement of specificity is being relaxed by the Court, material not particularly mentioned in the warrant nonetheless may be seizable. *E.g.*, *Andresen v. Maryland*, 427 U.S. 463, 484 (1976). This exception, however, appears to be limited for the time being to the seizure of contraband, stolen goods or instrumentalities of crime in plain view even though those items are wholly unrelated to the offense which initiated the search. *Coolidge v. New Hampshire*, 403 U.S. 443, 471 (1971); *Harris v. United States*, 331 U.S. 145, 154-55 (1947); *Seymour v. United States*, 369 F.2d 824, 826-27 (10th Cir. 1966), *cert. denied*, 386 U.S. 987 (1967) (seizure of suspected stolen postal money orders during search for marihuana).

¹⁵⁵ The reliance of journalists upon confidential sources has been documented in several studies. Compare Guest and Stanzler, *The Constitutional Argument for Newsmen Concealing their Sources*, 64 N.W.U.L. REV. 18, 57-61 (1969) (Appendix) and Note, *The Protection of Confidences: A Qualified Privilege for Newsmen*, 1971 LAW AND SOC. ORD. 385, 406-15 (Appendix) with Blasi, *The Newsmen's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 245-53 (1971) (Tables I-V).

In regard to the present case, affidavits filed in support of the *Daily* asserted that confidential documents were present in the office during the search and that the officers were in a position to see these documents. 353 F. Supp. at 127.

¹⁵⁶ Although Blasi identifies the publication of information and opinions which "presumably would not be available for public consumption if the source had to be identified" as "the most significant use" of confidential news relationships, Blasi, *supra* note 155, at 245-46, he later concluded that "good reporters use confidential source relationships mainly for the assessment and verification . . . [of news stories] . . . rather than for the purpose of gaining access to highly sensitive information of a newsworthy character." *Id.* at 284. Nevertheless, confidential news relationships supply important and controversial new stories. *E.g.*, *Branzburg v. Hayes*, 408 U.S. 665, 667-70, 672-73, 675-76 (1972) (hashish laboratory; drug abuse; Black Panther Party aims and activities); *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394, 1395 (D.D.C. 1973) (Watergate burglary).

¹⁵⁷ See text and notes at notes 125-31 *supra*.

¹⁵⁸ 436 U.S. at 551. Because photographers and their cameras are frequent targets of violence, their ability to record events often depends upon the cooperation of those who may be photographed, which is more likely to be given if law enforcement authorities do not have access to unpublished materials. Brief for Respondent

ascertained that reporters regularly use confidential information for (1) not-for-attribution quotation, (2) verification of information from other sources, (3) an estimation of the importance of specific facts and stories, (4) assessment of the significance of recent developments and future probabilities, and (5) eliciting on-the-record information from other sources.¹⁵⁹ Confidential sources may be chilled by the increased threat of exposure¹⁶⁰ and journalists

Stanford Daily at 20, *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), reprinted in 9 LAW REPRINTS (Criminal Law No. 24) at 242 n.8.

¹⁵⁹ Blasi, *supra*, note 155, at 245-46.

¹⁶⁰ See generally Murasky, *The Journalist's Privilege: Branzburg and Its Aftermath*, 52 TEX. L. REV. 829, 856-62 (1974); Note, *The Protection of Confidences: A Qualified Privilege for Newsmen*, *supra* note 155, at 262-74; Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L. REV. 317, 329-34 (1970); Guest and Stanzler, *supra* note 155, at 43-49 (1969). But Cf. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

[W]e remain unclear how often and to what extent informers are actually deterred . . . when newsmen are forced to testify before a grand jury. The available data indicates that some newsmen rely a great deal on confidential sources and that some informants are particularly sensitive to the threat of exposure and may be silenced . . . , but the evidence fails to demonstrate that there would be a significant construction of the flow of news to the public. . . . are widely divergent and to a great extent speculative.

Id. at 693-94.

The issue is not whether disclosure will inhibit confidential sources but rather whether the extent of the inhibition is constitutionally impermissible. The *Branzburg* decision has been criticized as demanding an inordinately high standard of empirical proof of a deterrent effect. *Branzburg*, 408 U.S. at 733 (Stewart, J., dissenting); Murasky, *supra* note 155, at 854-56 (1974). Usually "on the basis of common sense and available information" the Court has inquired "whether there was a rational connection between . . . (the governmental action) and the (impairment of First Amendment activity) and whether the effect would occur with some regularity." 408 U.S. at 733-74 (Stewart, J., dissenting). In a series of cases where the state's justification stemmed solely from its police power, the Court required no evidence that the challenged act chilled constitutionally protected rights of speech, press or association. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) (teachers must disclose associational ties as condition of employment); *Talley v. California*, 362 U.S. 60, 64-65 (1960) (handbills must carry name and address of sponsors, distributors, and authors); *Smith v. California*, 361 U.S. 147, 153-54 (1959) (requirement that bookseller examine the contents of his shop); *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (burden on taxpayer to demonstrate non-advocacy of disloyalty). Other Supreme Court decisions cited "substantial, uncontroverted evidence" to establish an impermissible chilling effect. *Bates v. City of Little Rock*, 361 U.S. 516, 523-24 (1960) (disclosure of membership required for occupational license tax); *Gibson v. Florida Legislative Investigative Comm.*, 372 U.S. 539, 557 (1963) (disclosure of NAACP membership to legislative investigation of Communist activity); *NAACP v. Alabama*, 357 U.S. 449, 463 (1958) (disclosure of membership as foreign corporation). Admittedly, where the state's justification for the chill rests upon the proper exercise of a constitutional power, as in *Zurcher* and *Branzburg*, the burden of proof should be somewhat higher. However, the empirical data cited above on the subject generally and the "substantial, uncontroverted evidence" adduced in district court establish that search and seizure of the press significantly chills confidential news informants.

may be discouraged from probing sensitive areas of the news¹⁶¹ or from preserving accurate and complete records of their probes.¹⁶² Finally, the possibility of seizures of media information may reduce the credibility of the press in the eyes of the public, which may believe that newsreporters have been intimidated into omitting portions of the truth or that the press has become an unwilling source of government and law enforcement intelligence.¹⁶³ These arguments graphically demonstrate that searches and seizures of news-processing facilities have a negative impact upon the press. There is, therefore, a real need for the Court to recognize and protect under the first amendment this essential press function, so as to ensure the ready flow of news and commentary to the public.

First amendment protection may be extended to cover newsprocessing, even though it is not properly communication. Despite the Court's emphasis upon freedom from prior restraint of expression, an impermissible abridgement of the first amendment does not have to be aimed at communication. Court decisions have made it clear that it is impermissible for government action to indirectly constrict the flow of ideas or opinion.¹⁶⁴ Yet as dem-

¹⁶¹ New York Times national news editor Gene Roberts warned in his affidavit to the Court that "[i]f reporters and photographers believe that the information they gather will be available to government officials, they will not be eager to get the sensitive story, or to track down the individual who will supply the critical information. And I, as an editor, will consider carefully before publishing facts, or a photograph, which might imply that there is more than appears." Brief for Respondent Stanford Daily at 24, *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), reprinted in 9 LAW REPRINTS (Criminal Law No. 24) at 246. See generally Murasky, *supra* note 160, at 862-66; Note, *The Protection of Confidences: A Qualified Privilege for Newsmen*, *supra* note 155, at 390-91; Note, *Reporters and Their Sources: The Constitutional Right of a Confidential Relationship*, *supra* note 155, at 329, 332; Guest and Stanzler, *supra* note 155, at 44, 46.

¹⁶² 9 LAW REPRINTS (Criminal Law No. 24) at 246. In an affidavit, the national news editor of the New York Times stated that if confidential notes "are subject to police seizure, it is likely that reporters will stop bringing them back to their offices and using them as aids in preparing their stories. I am obviously concerned for the quality and character of journalism if reporters refrain from taking notes or taping interviews for fear that this raw stuff might be easily available to government officials through the device of a search warrant." *Id.*

¹⁶³ As stated by one veteran and highly respected newsman:

Perhaps the most shocking aspect of *The Stanford Daily* search was the fact that the police were utilizing the offices of the Daily to determine the availability of evidence. The extension of the news office from a news gathering function to an investigating agency of the authorities is terrifying. Professional news gathering facilities cannot be permitted to be used as evidence gathering agencies in either criminal or civil proceedings without losing all trace of the independence and integrity on which the journalistic profession is founded.

Affidavit of Walter Cronkite, *Id.* at 244-45.

¹⁶⁴ E.g., *Grayned v. City of Rockford*, 408 U.S. 104, 114-17 (1972) (antinoise ordinance held to be a reasonable regulation of the time, place and manner of public demonstration); *Cox v. Louisiana*, 379 U.S. 536 (1965) (statutes which authorize conviction for peaceful demonstration as breach of peace and obstructing public passage are invalid as applied); *Martin v. City of Struthers*, 319 U.S. 141, 145-47 (1943) (door

onstrated above, media search and seizure has an inhibiting effect upon the communication of news to the public. As media search and seizure so markedly threatens first amendment interests, to protect those interests, first amendment standards should be applied in addition to fourth amendment standards. Accordingly, the remainder of this casenote will present a standard which should be required by the first amendment in a media search situation, and propose an alternative standard for third-party media search procedure.

B. *Standard for Indirect Restrictions of First Amendment Freedoms*

The standard typically employed to review indirect government infringements of first amendment freedoms is stated succinctly in *United States v. O'Brien*:¹⁶⁵

... a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the government's interest is unrelated to the suppression of free expression; if the incidental restriction on alleged First Amendment rights is no greater than is essential to the furtherance of that interest.¹⁶⁶

When this four-part first amendment standard is applied to a case of media search and seizure, it reveals that the *Zurcher* standard is an overbroad grant of state power and that comparable ends may be achieved under a narrower standard. First, *O'Brien* requires that the action infringing first amendment rights be within the state's constitutional powers. Media searches would satisfy this first step, because, as governed by the fourth amendment, search and seizure is constitutional. Second, *O'Brien* requires that the infringing action further an important government interest. Prosecution of criminal activity is an important state interest, and *Branzburg* indicates that search and seizure to obtain evidence in a criminal investigation bears a reasonable relationship to that interest.¹⁶⁷ Third, the state interest must be unrelated to the suppres-

to door distribution of pamphlets forbidden by municipal ordinance to prevent nuisance and crime); *cf.* *Buckley v. Valeo*, 424 U.S. 1, 64-65 (1976) (any significant impairment of first amendment freedoms subject to exacting scrutiny).

If the Court can find that effective alternative sources or means of communication are readily available, however, then the inhibition of a particular source or means of communication by a neutral government action may not be unconstitutional. *Pell v. Procunier*, 417 U.S. 817, 823-28 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 846-48 (1974); *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 566-67 (1972).

¹⁶⁵ 391 U.S. 367 (1968).

¹⁶⁶ *Id.* at 377.

¹⁶⁷ 408 U.S. at 700-01. The interests implicated in *Branzburg* were the state's interests in "extirpating the traffic in illegal drugs, in forestalling assassination attempts on the President, and in preventing the community from being disrupted by violent disorders endangering both person and property." *Id.* at 701. Justice White writing for the *Branzburg* majority stated that the state interests advanced could pass muster under even the more exacting "compelling" or "paramount" standards. *Id.* at 700. *Cf.* *NAACP v. Button*, 371 U.S. 415, 438-39 (1963) (regulation of legal profession not a

sion of free expression. This aspect of *O'Brien* would be satisfied if the search was part of a good faith criminal investigation.¹⁶⁸ Although, it may seem unlikely that a state would intentionally use its power of search and seizure to suppress free expression, a loosely drawn procedure may encourage the abuse of search and seizure to harass vocal individuals and organizations. Finally, the fourth *O'Brien* step requires that the incidental restriction of first amendment rights be no greater than is essential to achieve the state's purpose. This is fundamentally a restatement of the "least drastic means" doctrine appearing in other first amendment cases.¹⁶⁹ Under the least drastic means doctrine, even legitimate government action may be invalid when the chosen means unnecessarily restricts constitutionally protected liberty.¹⁷⁰ In theory, the doctrine requires a searching examination of the challenged government method, but, in practice, the Court has overturned state regulations whenever it can be reasonably asserted that a less injurious alternative exists for achieving the same basic purpose.¹⁷¹ Traditionally, the Court has not demanded that the proposed alternative be as efficient in meeting state objectives as is the challenged procedure.¹⁷²

The fourth *O'Brien* step highlights the deficiency of the *Zurcher* standard as to first amendment rights in media searches and seizures. Recall that the *Zurcher* majority approved third-party media searches upon a strict adminis-

"compelling" state interest to compel disclosure of association's membership); *Thomas v. Collins*, 323 U.S. 516, 532 (1944) (registration of labor organizers not a "paramount" state interest to restrain exercise of free speech and free assembly).

Where government investigation intrudes on first amendment rights, the Court has required the state to show a substantial rather than reasonable, relationship between the information sought and the state interest compelling its disclosure. *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963) (disclosure of NAACP membership to state legislative). Nonetheless, *Branzburg* also indicates that a reasonable search and seizure meets either of these burdens. 408 U.S. at 700-01.

¹⁶⁸ Cf. 408 U.S. at 707 (grand jury investigation).

¹⁶⁹ E.g., *Shelton v. Tucker*, 364 U.S. 479 (1960).

¹⁷⁰ *Id.* "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in light of less drastic means for achieving the same basic purpose." *Id.* at 488. Cf. *Martin v. City of Struthers*, 319 U.S. 141, 146-47 (1943) (ordinance forbids door-to-door distribution of pamphlets to prevent nuisance and crime); *Schneider v. State*, 308 U.S. 147, 164 (1939) (handbill ordinance forbids distribution of all literature as means of preventing litter).

¹⁷¹ E.g., *United States v. Robel*, 389 U.S. 258 (1968). "It is not our function to examine the validity of congressional judgment [that one possible alternative would be inadequate]. Neither is it our function to determine whether [the rejected alternative] exhausts the possible alternatives to the statute under review. . . . [W]hen legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a "less drastic" impact on the continued vitality of First Amendment freedoms." *Id.* at 267-68. See, *Martin v. City of Struthers*, 319 U.S. 141, 147 (1943) (mischief to be corrected could be easily controlled by "traditional legal methods").

¹⁷² See, e.g., *Schneider v. State*, 308 U.S. 147, 164 (1939); *Shelton v. Tucker*, 364 U.S. 479, 493-94 (1960) (Frankfurter, J., dissenting); see generally Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464, 468-74 (1969).

tration of the warrant requirements. The *Zurcher* standard does not reflect the instances when search and seizure imposes a greater restriction upon first amendment rights than is essential to obtain evidence from an innocent third-party newspaper. Specifically, the *Zurcher* Court would allow search and seizure without any prior inquiry into whether the third-party media source would honor a request to produce evidence. In conclusion, because of its serious negative impact upon the free flow of news and information, media search and seizure is a permissible intrusion upon media operations only if search and seizure is the least drastic available means of criminal investigation.

IV. AN ALTERNATIVE TO THE *ZURCHER* STANDARD

As shown above, the Supreme Court's approbation of a loosely drawn procedure for third-party media search and seizure threatens a significant impairment of first amendment rights. Nonetheless, one must account for the legitimate government need to investigate and prosecute criminal activity. Moreover, as not all abridgements of the first amendment are impermissible,¹⁷³ the question becomes one of obtaining the proper balance of these competing interests. A majority of the *Zurcher* Court held that basic fourth amendment requirements alone, if carefully followed, sufficiently protect first amendment interests.¹⁷⁴ While this holding might be correct in a case of a seizure of first amendment material interests,¹⁷⁵ such a rule cannot protect first amendment rights when those rights adhere to the individual property, rather than to the property itself. This is simply because the fourth amendment is concerned with the character and status of the property to be seized, rather than with the rights of its owner.¹⁷⁶ In short, the deficiency of the *Zurcher* Court's scheme of applying a fourth amendment standard to the search of a third-party newspaper is that the standard of one amendment alone cannot fully protect the constitutional interests which lie outside the scope of that amendment. There is a similar deficiency with an entirely first amendment standard of review. That is, while the first amendment may govern *when* a reasonable search may infringe or not infringe first amendment freedom, it says nothing about *what* a reasonable search is nor *how* it should be conducted.

Because search and seizure of a third-party newspaper manifests the convergence of the two amendments, a natural resolution would accommodate both first and fourth amendment standards. As a matter of judicial review, the standards of each could be applied individually, but some manageable rule must be developed so that magistrates can determine, prior to the issuance of a warrant, whether the anticipated search and seizure will impinge

¹⁷³ *Elrod v. Burns*, 427 U.S. 347, 360 (1976) ("for the prohibition on encroachment of First Amendment protections is not an absolute"); *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972) ("It is clear that the First Amendment does not invalidate every incidental burdening of the press . . .").

¹⁷⁴ 436 U.S. at 565.

¹⁷⁵ See text and notes at notes 108-111 *supra*.

¹⁷⁶ 436 U.S. at 555. See text and notes at notes 43-49, 108-110 *supra*.

first amendment liberties. Therefore, the following standard is proposed. To properly balance individual privacy with law enforcement needs, the magistrate should follow the fourth amendment's standards of a reasonable search and seizure. However, before the magistrate may issue a warrant to search the premises of a third-party who possesses clear first amendment rights, the magistrate must have evidence that a less drastic means of criminal investigation is impracticable.

In this regard, there appear to be at least two less intrusive alternatives to search and seizure of a third-party newspaper. The first is use of a subpoena *duces tecum*, as endorsed by the *Zurcher* district court.¹⁷⁷ Primarily, a subpoena obviates the need to search about in media offices, since it allows the newspaper itself to locate and produce the document within a reasonable time. As a result, the physical disruption caused by the presence of police in the office could be avoided and the disclosure of confidential material could be closely circumscribed to the specific request. In addition, the newspaper would have the opportunity, on a timely motion to quash, to be heard on the relevance and materiality of the requested disclosures and to assert any testimonial privileges.¹⁷⁸ In contrast, an *ex parte*, unannounced, seizure presents no such opportunity and may include the inadvertent seizure of protected documents, later determined to be irrelevant to the investigation.¹⁷⁹

The second less intrusive method by which the state may obtain evidence in the possession of a third-party media source is the vehicle of informal contact and negotiation as suggested by the regulations of the United States Attorney General as to the issuance of media subpoenas.¹⁸⁰ These regulations are prefaced with a statement that the prosecutorial power of the federal government should not be used to impair the media's responsibility to broadly cover controversial public issues.¹⁸¹ To that end, the Attorney General's regulations require that, prior to subpoenaing a representative of the news media, the justice department must have made all reasonable attempts to obtain the information from non-media sources, and negotiations with the media must be fully exhausted.¹⁸² No justice department official may subpoena

¹⁷⁷ 353 F. Supp. at 132-33.

¹⁷⁸ In the case at hand, the search was wholly avoidable as, in fact, the items to be seized did not exist. 436 U.S. at 551-52. Compare *Branzburg v. Hayes*, 408 U.S. at 710 (Powell, J., concurring in 5 to 4 decision) with 436 U.S. at 561-62, n.8, 567.

¹⁷⁹ Cf. *Andresen v. Maryland*, 427 U.S. 463, 467 (1976) (sixty-two of ninety documents seized were later found irrelevant); *Marcus v. Search Warrant*, 367 U.S. 717, 724 (1961) (one hundred-eighty of two hundred-eighty publications seized were later judged non-obscene).

¹⁸⁰ Policy with regard to the issuance of subpoenas to, and the interrogation, indictment, or arrest of, members of the news media, 28 C.F.R. § 50.10 (1976).

¹⁸¹ *Id.* at § 50.10(a). In pertinent part § 50.10 reads:

(a) Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues"

¹⁸² *Id.* at § 50.10(b), (c), (e)(3). In pertinent part § 50.10 reads:

(b) All reasonable attempts should be made to obtain information

the news media without the express authorization of the Attorney General, and, even then, the subpoena's purpose should be limited to the verification of published information.¹⁸³ Finally, the regulations advise that a subpoena not be used to obtain non-essential or speculative information.¹⁸⁴ By means of these regulations, the justice department has voluntarily limited its use of media subpoenas to avoid needlessly infringing media newsprocessing rights. The justice department has no similar limitation of its authority to search and seize media property, since before *Zurcher* the propriety of media searches was not established. As a comparison of *Zurcher* and *Branzburg* has shown, however, a search is more damaging to first amendment liberties than a subpoena as a means of criminal investigation.¹⁸⁵ Thus, in light of *Zurcher*, the Attorney General's regulation of media subpoenas must be extended to comprise media search and seizure to remain consistent with its underlying policy. Finally, state and local justice departments should adopt the United States Attorney General's policy of informally contacting the press before authorizing the use of more drastic means.

An obvious limitation with either an informal contact policy or subpoena policy is that each alternative requires the cooperation and good faith of the property owner. Indeed, a primary objection of the Supreme Court in *Zurcher* to a subpoena first rule was that the notice and delay inherent in the subpoena process could result in the loss of the desired evidence.¹⁸⁶ If the less drastic means doctrine was incorporated into fourth amendment procedure, however, the state would be able to resort to search and seizure whenever it has good reason to suspect that the property owner would not honor a subpoena. Any difficulty in identifying a property owner as a cooperative third-party could be partially ameliorated by permitting magistrates certain presumptions, which may include the presumption that relatives or known associates of the suspect would be uncooperative. A presumption of non-cooperation also may be reasonable if the third-party media held instrumentalities of crime, contra-

from nonmedia sources before there is any consideration of subpoenaing a representative of the news media.

(c) Negotiations with the media shall be pursued in all cases in which a subpoena is contemplated

(e) [In requesting express authorization to serve a member of the news media with a subpoena]

(3) the government should have unsuccessfully attempted to obtain the information from alternative nonmedia sources.

¹⁸³ *Id.* at § 50.10(d), (e)(2), (4). In pertinent part § 50.10 reads:

(d) If negotiations fail, no Justice Department official shall request . . . a subpoena to any member of the news media without express authorization of the Attorney General.

(e) In requesting . . . authorization . . . , the following principles shall apply: . . . (2) . . . The subpoena should not be used to obtain peripheral, non-essential or speculative information. . . . (4) The use of subpoenas to members of the news media should, except under exigent circumstances, be limited to the verification of published information

¹⁸⁴ *Id.* at § 50.10(e)(2); see note 183 *supra*.

¹⁸⁵ See text at notes 125-31, 150-163 *supra*.

¹⁸⁶ 436 U.S. at 560-61.

band or stolen goods.¹⁸⁷ Furthermore, an urgent need for the evidence should be recognized as a factor supporting the issuance of a search warrant. Thus, for example, a warrant to seize property in the possession of a third-party newspaper may be justified if the evidence would directly establish guilt or innocence, if similar evidence were unavailable from non-media sources, and if non-cooperation either is firmly established or may be reasonably presumed.¹⁸⁸

Admittedly, adaptation of less drastic means principles to protect third-party privacy and first amendment rights from injury through search and seizure would create a multiple tier system of fourth amendment procedure. Magistrates would be required to follow different procedures to issue a warrant to search suspect property, third-party property, and media property. Therefore, in the warrant procedure, emphasis would fall on the identity and character of the property owner. In addition, in the case of third-party or media search and seizure, the demonstration of sufficient cause to search would be slightly increased. But these new problems are justifiable burdens to ensure the vitality of the flow of information and news to the public, as well as the reasonableness of an intrusion upon the privacy of a third-party.¹⁸⁹

¹⁸⁷ This is not to reinstate the pre-*Hayden* rationale that the state possesses a superior proprietary interest in these types of goods. Rather, possession of contraband, stolen goods or instrumentalities of crime creates a reasonable inference that the third party may be implicated in the crime and may attempt to frustrate law enforcement. See text at notes 75-80 *supra*.

¹⁸⁸ If the Santa Clara County District Attorney had followed the procedures suggested by this casenote, the search of the Stanford Daily may have been reasonable. The need to search the Daily could have been demonstrated by bringing before the magistrate: (1) the Daily's policy of non-cooperation with law enforcement investigations, see note 14 *supra*; (2) the absence of non-media alternative sources; (3) the reasonable belief that the evidence would be directly relevant to conviction or acquittal and (4) probable cause to search. See *generally* text and notes 2-4 *supra*.

¹⁸⁹ As of September, 1978, thirteen bills variously modifying or reversing the Supreme Court in *Zurcher* have been introduced in Congress. Some are aimed specifically at the protection of the media. H.R. 12952, 95th Cong., 2d Sess. (Drinan); H.R. 13169 95th Cong., 2d Sess. (Fish); S. 3258, 95th Cong., 2d Sess. (Sasser). Senator Sasser's bill would permit a warrant to issue only after an adversary hearing of probable cause to believe that notice would lead to the concealment, alteration or destruction of the evidence. Under the bill proposed by Congressman Heinz a warrant may issue only on probable cause to believe that a reporter or news organization had committed a crime. S. 3225, 95th Cong., 2d Sess. (Heinz). A subpoena *duces tecum* is required by Congressmen Bayh and Quayle's proposals when the party to be searched has a reasonable expectation of privacy. S. 3164, 95th Cong., 2d Sess. (Bayh); H.R. 13017, 95th Cong., 2d Sess. (Quayle). Other bills directed at the search of third-parties generally would not allow a warrant to issue unless the person was a suspect or a substantial likelihood that the evidence would be destroyed. S. 3222, 95th Cong., 2d Sess. (Dole); S. 3261, 95th Cong., 2d Sess. (Haskell); H.R. 13113, 95th Cong., 2d Sess. (Jacobs); H.R. 13227, 95th Cong., 2d Sess. (Edwards). See also, H.R. 13168, 95th Cong., 2d Sess. (Fish); H.R. 13319, 95th Cong., 2d Sess. (Railsback); H.R. 13710, 95th Cong., 2d Sess. (Gudger). See *generally* The News Media and the Law, October, 1978; [1978] 3 MEDIA L. RPTR. (No. 42).

CONCLUSION

Zurcher v. Stanford Daily represents a significant encroachment upon the basic rights of privacy and free press. Condoning third-party search and seizure upon a traditional standard of probable cause is a blind adherence to the words of the fourth amendment, which ignores the very principles for which they stand. The decision minimizes the justification necessary to search and seize, thereby needlessly endangering the privacy of innocent citizens at the behest of state law enforcement interests. Furthermore, the Court's unwillingness to meaningfully distinguish search and seizure of the press from other third-party search situations, fails to acknowledge the important role of the press in keeping the public abreast of news and opinion. Search and seizure of the press jeopardizes the free flow of information by obstructing the ability of the press to gather, publish, and circulate news. As regards both issues in *Zurcher v. Stanford Daily*, the Court has struck an unequal balance of the competing interests.

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