

STATE OF VERMONT
ORLEANS COUNTY, SS

STATE OF VERMONT

v.

VERMONT SUPERIOR COURT
ORLEANS UNIT, CRIMINAL DIVISION
DOCKET NO. 816-12-11 Oscr

CHRISTOPHER BRAITHWAITE

**Memorandum of Law
In Support of
Motion to Dismiss Under V.R.Cr.P. 48(b)(2)**

Introduction

The state argues that GMP's generalized right to exclude anybody and everybody, including the press, from its property is dispositive of the issue raised in Chris Braithwaite's Motion to Dismiss. We submit that (1) GMP's property right to exclude (i.e., give notice against trespass) is not absolute, (2) the press has a recognized interest and right to cover this newsworthy event and the governmental action involved, (3) both of these interests are based on fundamental constitutional rights, and (4) when they come into conflict, as they do here, the competing interests and burdens must be balanced.

Most, especially, once GMP called the government onto its property to take action against the trespassers, the constitutional right (and obligation) of the press to cover this transaction of government is triggered.

Under these circumstances, the property owner's right to exclude is subject to reasonable restraint serving the public good. On the very specific facts of this case, given the minimal burden on private property rights and given the compelling interest of the press, the right of the press to cover this newsworthy event should prevail.

Facts

1. Chris Braithwaite is a member of the working press. He is an owner and employee of The Chronicle which has published a weekly newspaper for decades, regularly covering important and newsworthy stories regarding the actions of government in the Orleans and northern Essex County areas.
2. Even if it should be found that Mr. Braithwaite was trespassing, he was there solely to cover a protest under way and the government's response to it.
3. He did not aid, abet, encourage, or incite the protesters; nor did he in any other way participate as a "protester."
4. His presence as an additional person on GMP property did not increase any damages caused by any trespass of the protesters, nor did it add to any damage that may have been caused to the property owner's interests by the protesters.
5. David Coriell is an employee of Green Mountain Power involved in community outreach for this project. He was at the site of the protest when Braithwaite was there. He knew Braithwaite's status as a reporter and publisher covering this issue. He knew Braithwaite was present as he listened to a lengthy conversation between Coriell and Dr. Ron Holland, one of the protesters who was ultimately arrested. He could have but didn't offer to make any special accommodations to Braithwaite to allow him to cover the events. Instead the police told Braithwaite that they were told to arrest everybody who wouldn't leave without exception.
6. Braithwaite told police he would leave the property immediately after the protesters were arrested, and voluntarily withdrew to a point away from the scene of the protest, but of necessity still on GMP property, from which he could observe and photograph the arrests.

7. He was then arrested along with those protesters who didn't leave.
8. He could not have observed or photographed the acts of civil disobedience or the government's response without being on GMP's property. The closest point on neighboring property was not within eyesight of the protest.
9. Green Mountain Power has no ongoing desire to keep Braithwaite off the construction site or away from any future act of civil disobedience at the site. A week after his arrest, on December 12, Braithwaite was invited to the site by Green Mountain Power to observe another protest and was driven to the site where a protest had taken place within the hour – and where, in fact, Braithwaite had been arrested on December 5.
10. Green Mountain Power has extended a standing invitation to Chris Braithwaite to visit the site in the future.
11. The property in question is not of a particularly private nature, such as a residence or curtilage; it is remote and open land on which all inhabitants of Vermont enjoyed a constitutional right to hunt and fowl under Chapter II Section 66, at least until GMP commenced construction on this project.

Argument

I. Property Rights and the Right to Exclude are not Absolute.

It has been long and well established law in Vermont that property rights are not absolute but are “subject, on general principles, to such reasonable restraint as the public good may require.” *Lawrence v. Rutland R.R.*, 80 Vt. 370, 383 (Vt. 1907)

It is the general right to acquire and possess property, and, by necessary implication, the general right to contract concerning it, that the Constitution protects. But that protection does not make those rights absolute in every particular. If it does, what becomes of the police power, which inheres in every free government ... and a condition on which all property is held ...”

Id. at 383.

Limitations on the rights of property owners have been recognized in a wide variety of contexts from zoning, historic preservation, logging, landlord tenant law (including rent control) and on and on.

A property owner's right to exclude is just one in the bundle of property rights that flow from ownership of real property. Like other aspects of property rights it is not absolute. One of the best and most profound examples of such a limitation on the right to exclude is the The Civil Rights Act of 1964 and the public accommodations provisions contained therein. 42 USCS § 2000a Simply put, once you open your private property for commercial business serving the public, the law prohibits discriminatory exclusion based on race. While highly controversial at the time this law was adopted (at least in some places), it is now widely recognized that the public good more than justifies, even requires, such a restriction on the right to exclude.

Thus, a private property owner's right to exclude can be limited when necessary to serve the public good.

II. Nowhere is the right of the Press to gather news more compelling than when it is covering the transactions of government

The state asserts that the press has no greater interest (or right) to be on GMP's property than the individual protesters. It cites *Branzburg v. Hayes*, 408 U.S. 665, 682-683 (1972) for the proposition that, under the First Amendment, the press enjoys "no special immunity from the application of general laws" nor any "special privilege to invade the rights and liberties of others." (quoting, *Associated Press v. N.L.R.B.*, 301 U.S. 103, 132-133

(1937). The facts of these cases are wholly unrelated to the evaluation of specific circumstances in which the press is covering specific governmental activity.¹ The broad language quoted is rendered mere dicta when applied to the circumstances of this case.

The State must acknowledge that, under certain circumstances, the First Amendment of the United States Constitution and Chapter I, Articles 6 and 13 of the Vermont Constitution do guaranty that special protections be recognized and special standards be applied to the extent that they are necessary to protect and promote a “vigorous and uninhibited press.” *Ryan v. Herald Ass'n*, 152 Vt. 275, 278 (Vt. 1989).

The law regarding prior restraint as it has evolved recognizes and is based largely on “the concept of the press as a Fourth Estate, coequal in our democratic republic in constitutional respect, even though not incorporated formally into our governmental system as a structuralized entity.” *Herbert v. Lando*, 568 F.2d 974, 989-993 (2d Cir. N.Y. 1977)

Similarly, the press enjoys special recognition and protection in the area of libel and defamation.

[T]he balance struck in *Gertz* between First Amendment interests and the state's interest in compensating defamed individuals depended on the weight assigned these "competing concerns." The Court emphasized the weight of the former in light of "the need for a vigorous and uninhibited press." *Id.* at 342. In contrast, where the defendant is a private individual whose defamatory statements were made in private letters to private parties, as in *Lent v. Huntoon*, 143 Vt. at 543, 470 A.2d at 1166, the First Amendment interest in protecting the defendant's speech is arguably less pressing, and the resulting accommodation might be different.

Ryan v. Herald Ass'n, 152 Vt. 275, 278 (Vt. 1989)

Nowhere is the freedom of the press more important than when it is covering the

¹ *AP v. NLRB* involves a Roosevelt era statute regulating union organizing in the work place including the press rooms at the Associated Press. *Branzburg* involves the general question of whether and under what circumstances, the press can be subpoenaed to testify before a grand jury.

“transactions of government” or the “actions of a governmental officer.” It is in this realm that the press is viewed as The Fourth Estate, absolutely essential to the functioning of a meaningful democracy – as critically important as the ballot box itself. Only by assuring that the rights of the press are robust and vigorously protected in a myriad of contexts when governmental actions are taking place -- only then -- can the promise of Chapter 1, Article 6 be assured -- that “all power being ... derived from the people,... all officers of government are ... at all times, in a legal way, accountable to them.” To that end the Vermont Constitution, Chapter I, Article 13, expressly protects writing and publishing “concerning the transactions of government” by the press and provides, “therefore the freedom of the press ought not to be restrained.”

The state cannot seriously challenge that the public interest and certain constitutional interests embodied in the First Amendment and Articles 6 and 13 are well served by having the press present at the time of this protest and on site when the government responded to GMP’s request to have the protesters arrested and removed from the property. Nor can the state casually dismiss the notion that the press’s presence on the scene was necessary, if the press were to have a meaningful ability to cover this particular transaction of government and how it was carried out.

The proposition that the working press should be treated no differently than the general public should not prevail where important governmental action is underway and a balancing of competing interests is required. To the extent that the dicta cited in *Branzburg* is deemed controlling under a First Amendment analysis, the broader and more specific language of the Vermont Constitution should be considered. The Vermont Supreme Court has expressly “reserved judgment as to whether this language would give greater protection in some

matters of public concern...” *Shields v. Gerhart*, 163 Vt. 219, 226-227 (Vt. 1995) We respectfully submit that this language expressly recognizes and protects the special status of the press as the Fourth Estate, whose ability to cover the activity of government vigorously, vibrantly, and immediately, is necessary if the constitutional promise of a working and accountable democracy is to be fully realized.²

III. Balancing of Interests

The Vermont legislature has engaged in the balancing of private interests against the public’s right and need to know in its approach to public records. In the statement of policy prefatory to Vermont’s Public Records Act, the legislature asserts, “All people, have a right to privacy in their personal and economic pursuits, which ought to be protected unless specific information is needed *to review the action of a governmental officer.*” 1 V.S.A. § 315.

Just such a balancing of competing interests is appropriate in the present situation.

In evaluating the interest of the property owner, it is hard to find that GMP’s property rights are impacted adversely in any way whatsoever by allowing the press to be present to cover the government’s response to the protesters’ act of civil disobedience. Nor does this involve a particularly private area of the property, such as inside a residence or the curtilage of a homestead.³ Nor is there any evidence that the press contributed additionally to any

² At times it may be difficult to distinguish between the general citizenry and the working press. In this case, however, there can be little doubt that Chris Braithwaite is a long standing member of the working press. Making this argument and noting this distinction is in no way intended to diminish the important constitutional rights of the general citizenry under the First Amendment and Articles 6 and 13. However, in all of these constitutional provisions, The Press receives separate and explicit recognition in addition to the general citizenry. This constitutes an affirmation of the Press’s special, institutional value as an implicit Fourth Branch of government reporting on and covering the workings of government.

damage that might have been caused by any trespass or that the presence of the press impaired the ability of the government to effectuate the warnings, give notices, and make arrests of the protestors.

The press, on the other hand, has a compelling interest to be present at the site to cover the acts of civil disobedience by the protestors and the government's response to GMP's request that the protestors be arrested and removed from this remote parcel of land. The manner in which the protestors engaged in their acts of civil disobedience and the manner in which law enforcement effectuated their arrest and removal is critically important and newsworthy. It was just such "demeanor" reporting of the Greensboro sit ins that was central to the success of these protests. The press coverage of the non violent and dignified nature of the protests and the violent and ugly response by the government and private citizens led to the national outrage that fueled the passage of the Civil Rights Act of 1964. The protests and the government response could only be meaningfully covered by being present during this event. Moreover, the underlying issues involved are highly newsworthy and have been playing out over the course of many years. The Chronicle has been covering this story in detail and has published scores of articles on the issues involved in the construction of large scale commercial wind farms on the ridgelines of the Northeast Kingdom.

On the very specific facts of this case, balancing the interests of the private property owner against those of the press warrants the conclusion that the right of the press to cover this event should prevail over any interest the property owner might have in excluding the

³ Moreover, any expectation of privacy by GMP was clearly extinguished when it invited the government on to its property to make arrests of the protestors. Inviting the government to arrest and remove, under these specific circumstances, should be seen as an implicit waiver of any right to exclude the press and impair its constitutional charge to monitor and report on the actions of government.

press from its property at the time of this event. This is especially so, after the property owner had called on the government to arrest and remove the protestors.

WHEREFORE, at this initial stage of these proceedings, this matter should be dismissed under V.R.Cr.P. 48(b)(2).

DATED at Newport, Vermont this 24th day of January, 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'P. White', with a long horizontal flourish extending to the right.

Philip H. White

cc: Orleans County State's Attorney

