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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1484

JAMES ZURCHER, et al., *Petitioners,*

v.

THE STANFORD DAILY, et al., *Respondents.*

No. 76-1600

LOUIS P. BERGNA, et al., *Petitioners,*

v.

THE STANFORD DAILY, et al., *Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE, THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION AND THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

This brief is filed with this Court pursuant to the authority of Rule 42, paragraph 2, of the Rules of the Supreme Court.[1/]

[1/] Written consent of the parties has been obtained and with the cover letter is enclosed as part of the package containing this brief.

The National District Attorneys Association is a non-profit, non-political, tax-exempt corporation, composed of approximately 6,000 members, representing all fifty states. The purposes of the National District Attorneys Association are, *inter alia,* to improve and to facilitate the administration of justice in the United States and to promote the study of law in legal institutions.

The California District Attorneys Association is a non-profit, public service corporation, composed of the State's 58 elected District Attorneys, two elected City Attorneys principally engaged in the prosecution of criminal cases, and more than 1,200 deputy prosecutors.

The purposes of the California District Attorneys Association are, *inter alia,* to endeavor to improve the administration of criminal justice, to foster and maintain the highest ethical and professional standards of all persons engaged in the prosecution of offenses under California laws, to apply the knowledge and experience of its members in the field of criminal law to the promotion of the public good, and to promote the common welfare of the criminal justice system in areas of mutual concern such as appellate review, training, communication, public education and the equal administration of law.

The organizations seek to make known the views of prosecutors in the United States, in California, and to bring before this Court their positions on matters affecting the discharge of the duties of prosecutors in their everyday work.

The decision of the Court of Appeals, Ninth Circuit, in *Stanford Daily v. Zurcher,* 550 F.2d 464 (1977), adopting the opinion of the District Court in the same case, reported in

353 F.Supp. 124 (N.D. Cal. 1972), engrafts upon the laws governing searches and seizures wholly new requirements which portend the demise of the search warrant as an effective instrument in the enforcement of criminal law. Moreover, the decision imposes personal pecuniary liability upon prosecuting attorneys who become involved, directly or indirectly, in the issuance of search warrants, notwithstanding the facts of their good faith and their compliance with existing requirements for search warrants. The imposition of such liability will prevent prudent prosecutors from becoming involved in the issuance of any search warrants in the future.

Crime in the United States has grown to such proportions that it is only through vigorous prosecution that our society can function. If a prosecutor cannot obtain evidence or must look over his shoulder in each case in which he is involved in order to protect himself and his family from the possibilities and uncertainties of paying legal fees, the effectiveness of the criminal justice system may not only be reduced but it is quite possible in many instances that prosecution may not even begin.

The case at bar raises the foregoing issue and is therefore of utmost concern to the prosecutors of the United States. Amici curiae believe the decision of the Court of Appeals contains egregious errors of law, and further believes this brief will assist this Court in reaching the correct and just decision on the questions presented.

QUESTIONS PRESENTED

The basic question is whether the traditional rules governing issuance of search warrants are inadequate to protect the right of privacy, and must be augmented by new rules. A companion issue is whether newspaper offices and other places should be given a privileged status under the Fourth Amendment, effectively making them sanctuaries impervious to search warrants. The other question is whether policemen, prosecuting attorneys, and a judge should be held financially liable for their involvement with a search warrant which was issued according to traditional rules and executed lawfully.

ARGUMENT

I

THE GENERAL RULE ADOPTED BY THE COURT OF APPEALS, RESTRICTING THE USE OF A SEARCH WARRANT FOR THE PROPERTY OF ANY PERSON WHO IS NOT A KNOWN SUSPECT, HAS NO FOUNDATION IN LAW AND SHOULD BE REJECTED AS A MATTER OF POLICY.

The new rule adopted by the Court of Appeals was expressed by the District Court in the following terms:

> "[L]aw enforcement agencies cannot obtain a warrant to conduct a third-party search unless the magistrate has probable cause to believe that a subpoena duces tecum is impractical. Any evidence that a subpoena is impractical must be presented in a sworn affidavit if the magistrate is to rely on it."
>
> "[T]he mere failure to respond to a subpoena duces tecum should not, without more, be grounds for issuing a search warrant. The normal remedy is a contempt proceeding . . . Thus, even if the subpoena has been disregarded, it is questionable if a magistrate should still issue a warrant."
>
> "[A] subpoena can be impractical if the destruction of evidence is threatened . . . A court certainly possesses the power to issue a restraining order where it is presented with evidence that the materials are about to be taken from the jurisdiction or their destruction is imminent . . . Only if it appears that the materials will be destroyed or removed from

> the jurisdiction despite the restraining order, or that there simply is not time to obtain a suitable order, should a magistrate find probable cause to believe that a subpoena is impractical." *Stanford Daily v. Zurcher,* 353 F.Supp. 124, 132-133 (1972).

The foregoing rule is of constitutional magnitude: ". . . unless the magistrate has before him a sworn affidavit establishing proper cause to believe that the materials in question will be destroyed, or that a subpoena duces tecum is otherwise 'impractical,' a search of a third party for materials in his possession is unreasonable per se, and therefore violative of the Fourth Amendment." (353 F.Supp. at p. 127.)

The premise for the rule is an assertion that third parties--those not suspected of a crime--are entitled to greater protection under the Fourth Amendment than those suspected of a crime. (353 F.Supp. at p. 127.)

The enormous impact of this rule upon the states and law enforcement cannot be understated.

The search warrant has been a most important means of obtaining evidence in criminal cases.[2/] To resort now to other means of obtaining evidence will inevitably delay and frustrate criminal investigations and prosecutions to the point that the administration of justice will be unjustifiably burdened. In order to respond to the problems created by such a rule, states will be forced to make massive and complex

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2/ The importance of search warrants to law enforcement is indicated by the fact that in a single local jurisdiction, San Diego County, California, 1168 search warrants were issued by state magistrates in a single year, October 1, 1976, to October 1, 1977.

changes in their criminal laws. Statutes of limitation will have to be extended, and grand juries multiplied so that subpoenas duces tecum could be more readily available. These and other changes will disrupt the fair and efficient administration of criminal justice by the states. The ultimate cost to society cannot be predicted easily.

Such a rule would adversely affect past investigations as well as those arising in the future. Countless pending cases would be damaged or destroyed because they depend upon evidence secured by search warrants which do not comply with this rule. If the rule were given retroactive effect, it would reap a harvest of chaos in the field of criminal justice which could plague the courts for years, demoralize law enforcement, and substantially diminish public respect for our legal system.

Since the states have the primary responsibility for administering criminal laws, due respect for that responsibility requires a careful consideration of the impact upon the states of this rule and weighs against its hasty imposition.

Thus, when the Court adopted the exclusionary rule, *Weeks v. United States,* 232 U.S. 383, 58 L.Ed. 652, 34 S.Ct. 341 (1914), it waited almost fifty years before imposing the same rule upon the states, *Mapp v. Ohio,* 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684 (1961). During the interim, the Court gave careful consideration to the judgment and experience of the states, *Wolf v. Colorado,* 338 U.S. 25, 93 L.Ed. 1782, 69 S.Ct. 1359 (1949), and gave the states an opportunity "to determine which rules best serves them," *Irvine v. California,* 347 U.S. 128, 134-137, 98 L.Ed. 561, 74 S.Ct. 381 (1954). Moreover,

imposition of the exclusionary rule upon the states was foreshadowed by *Wolf v. Colorado, supra*; *Irvine v. California, supra*; *Rea v. United States,* 350 U.S. 214, 100 L.Ed. 233, 76 S.Ct. 292 (1956); and *Elkins v. United States,* 364 U.S. 206, 4 L.Ed.2d 1669, 80 S.Ct. 1437 (1960).

Justification for the proposed rule begins with the assertion that third parties, those persons not suspected of a crime, are entitled to greater protection under the Fourth Amendment than those suspected of a crime. The assertion is stated as a self-evident truth, for no statute, decision, or constitutional provision is cited as direct authority for the proposition. An examination of pertinent authorities reveals that they contradict, rather than support, the assertion.

The Constitution of the United States does not support the distinction asserted by the Court of Appeals. The Fourth Amendment protects the right of the "people" to be secure against unreasonable searches and seizures. The Fourteenth Amendment protects every "person" against deprivation of due process by a state. It is, of course, through that provision of the Fourteenth Amendment that the Fourth Amendment is enforceable against the states. *Mapp v. Ohio, supra,* 367 U.S. at p. 655. Neither Amendment suggests that persons regarded by police as suspects should receive less protection, and that those regarded as non-suspects should receive more protection. All persons, suspect and non-suspect alike, are protected equally against unreasonable searches, and, conversely, are subject equally to reasonable searches. If support for a distinction between the protection afforded non-suspects and that afforded suspects is to be found, it must be found, if at all, outside the Constitution.

The opinions of this Court do not offer support for the distinction. As early as *Weeks v. United States, supra,* this Court said the protection of the Fourth Amendment "reaches all alike, whether accused of crime or not" (232 U.S. at p. 392). In *Go-Bart Importing Co. v. United States,* 282 U.S. 344, 75 L.Ed. 374, 51 S.Ct. 153 (1931), this Court stated the Fourth Amendment "protects all, those suspected or known to be offenders as well as the innocent" (282 U.S. at p. 357).

In *United States v. Kahn,* 415 U.S. 143, 39 L.Ed.2d 225, 94 S.Ct. 977 (1974), the Court clearly indicated that the legality of a seizure pursuant to a search warrant depends in part upon the character of the property seized, and not upon whether its possessor was identified in the warrant as a suspect. The Court cited, and quoted from, *United States v. Fiorella,* 468 F.2d at p. 691: "The Fourth Amendment requires a warrant to describe only 'the place to be searched, and the persons or things to be seized,' not the persons from whom things will be seized" (415 U.S. at p. 155, n. 15).

It is evident that the decisions of this Court constitute an unbroken chain of authority against the proposition that some persons are entitled to greater protection under the Fourth Amendment than are others.

None of the applicable statutes support the distinction between suspects and non-suspects. In federal cases the issuance of search warrants is governed by Federal Rules of Criminal Procedure, Rule 41, 18 U.S.C. Nothing in that rule prohibits or limits search warrants for evidence in the possession of non-suspects. The California statutes governing the issuance of search warrants, Penal Code Sections 1523-1529, make no distinction between suspects and non-suspects.

Moreover, federal and California laws permit all persons to move for return of property which was seized illegally. Federal Rule 41(e) permits a "person aggrieved by an unlawful search and seizure" to so move. Such a motion is distinct from the motion to suppress evidence which is available to criminal defendants under Rules 12 and 41(f). Similarly, California permits a "defendant" to move for suppression of evidence or return of property under Penal Code Sections 1538.5 and 1539, and permits a "person" to move for return of property under Penal Code Sections 1539 and 1540. Both federal and California laws clearly provide non-suspects with a remedy for unlawful seizures, and clearly contemplate that evidence may be seized from persons who were not implicated in any crime. Nothing in those statutes remotely suggests that a search warrant for a non-suspect's property is invalid absent a showing that a subpoena is impractical.

Clearly, the rule adopted by the Court of Appeals is unprecedented. It imports wholly new and unexpected requirements into the Fourth Amendment. Such a drastic change in the law governing search warrants would be tolerable if it were supported by compelling reasons. However, such reasons do not appear.

In support of the rule, it is said that privacy is of such great value that only necessary intrusions should occur. Amici curiae do not disagree. However, it is further stated that search warrants are unnecessary in most situations involving non-suspects since a less drastic means, a subpoena duces tecum, exists to achieve the same end (353 F.Supp. at p. 131). That proposition is unsound.

The Fourth Amendment is designed to prevent unreasonable searches and, at the same time, to provide a means for obtaining evidence with certainty, speed and security. A subpoena, however, is frequently not available during the evidence-gathering phase of an investigation, offers little certainty that the evidence will ever be obtained and virtually no security against the destruction of evidence. Additionally, the subpoena process is generally too slow to meet investigative needs.

It is also stated, in support of the new rule, that as a historical matter the notion of search warrants has involved only those persons suspected of crime (353 F.Supp. at p. 131). The only cited decision in support of the statement is *Henry v. United States,* 361 U.S. 98, 4 L.Ed.2d 134, 80 S.Ct. 168 (1959), which briefly refers to the history of general warrants and writs of assistance, but does not assert or purport to demonstrate that search warrants have involved only those suspected of a crime. Other decisions of this Court, on the contrary, suggest that--as a historical matter--search warrants have involved all property which is contraband, fruits or instrumentalities of crime, and evidence of crime, regardless of the culpability of the person who owned or controlled the premises searched. *Steele v. United States,* 267 U.S. 498, 69 L.Ed. 757, 45 S.Ct. 414 (1925); *United States v. Jeffers,* 342 U.S. 48, 96 L.Ed. 59, 72 S.Ct. 93 (1951).

The Court of Appeals stated one reason for the rule is a desire to provide third persons with meaningful protection against unlawful searches (353 F.Supp. at pp. 131-132). That statement glosses over the distinction between searches with a warrant and without a warrant. The people are protected against unlawful searches with a warrant by both the

constitutional interposition of an impartial magistrate, and, to a lesser extent, by the existence of the exclusionary rule. The exclusionary rule may be the only protection against unlawful warrantless searches, but that circumstance is irrelevant to the question now before this Court.

Another reason for the new rule according to the Court of Appeals consists essentially of an analogy between arrests and searches: since a material witness cannot be arrested to secure his presence unless a subpoena is impractical, it follows *ipso facto* that a non-suspect cannot be searched unless a subpoena duces tecum is impractical (353 F.Supp. at p. 132). The analogy is erroneous. It fails to consider and balance the various interests involved in searches and seizures.

Our interest in personal liberty forbids the arrest of an innocent person who, without more, happens to be a material witness to a crime. We recoil from the prospect of such an arrest because it is commonly understood that witnesses will attend judicial proceedings without the necessity of a forcible deprivation of personal liberty. However, when it is probable that a material witness will not attend a proceeding despite a subpoena, our interest in effective law enforcement outweighs our interest in personal liberty, and permits his arrest. That rule springs from practical necessity, and is in accord with common sense and the Constitution.

However, notwithstanding the fact that an arrest infringes a particularly cherished value, personal liberty, the apprehension of criminals is so important that the validity of an arrest of a suspect is not made dependent upon a showing that other means were impractical.

The provision for search warrants represents a constitutional compromise between the right of an individual citizen to be left alone and the right of society to defend itself against the menace of crime. Search warrants are permitted because it is generally understood that other means of obtaining evidence lack the speed, security, and certainty which are necessary to a successful investigation and prosecution of crime. Although search warrants infringe important values, the acquisition of evidence of crime is so important that the validity of a search warrant has never been made dependent upon a showing that other means were impractical. To impose a requirement of such a showing now would be to reverse the balance which has traditionally been struck between the interests involved. No argument has been advanced which requires that the scales be tipped against the interest in law enforcement, and that search warrants be made more vulnerable to invalidation than they already are. The rule announced by the Court of Appeals should be rejected because it is unworkable and because it shifts the balance of constitutional interests too far against the general welfare of the nation.

A. The proposed rule is unnecessary for the protection of the right of privacy. Adequate protections against, and remedies for, unlawful invasions of privacy already exist.

The rule requiring the use of a subpoena duces tecum in lieu of a search warrant is based, in part, on the view that absent such a rule a third party would have no meaningful protection against or remedy for an unlawful search pursuant to a warrant. This view arises from a belief that the exclusionary rule is the chief remedy and protection against unlawful

searches, and that third parties receive no protection from the exclusionary rule (353 F.Supp. at pp. 131-132). In adopting this view the Court of Appeals ignored several important considerations.

Unlike a warrantless search, a search pursuant to a warrant cannot occur until an impartial magistrate has judged the cause to be sufficient and has authorized the search, carefully circumscribing its scope. A search warrant can be issued only by a neutral magistrate, not by a policeman or a prosecutor. *Coolidge v. New Hampshire,* 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971). This constitutional interposition of a magistrate between the police and the citizen constitutes the chief protection against unlawful searches pursuant to a warrant. Moreover, this protection shields all citizens, the accused and non-accused alike. See *Go-Bart Importing Co. v. United States, supra,* 282 U.S. at p. 357.

The exclusionary rule, requiring suppression of illegally obtained evidence, theoretically provides some additional protection for all citizens by deterring unlawful searches. *Stone v. Powell,* 428 U.S. 465, 486, 49 L.Ed.2d 1067, 96 S.Ct. 3037 (1976). Its efficacy as a deterrent is a matter of grave doubt. *United States v. Janis,* 428 U.S. 433, 446-453, 49 L.Ed.2d 1046, 96 S.Ct. 3021 (1976). However, assuming that it is effective, various factors tend to distribute its benefits among the non-accused as well as the accused.

California, for instance, has a so-called vicarious exclusionary rule: a defendant has standing to seek suppression of any illegally seized evidence which is offered against him, regardless of the fact he has no possessory interest in the

premises searched and the property seized. *Kaplan v. Superior Court,* 6 Cal.3d 150, 491 P.2d 1 (1971). That rule protects equally the privacy right of the non-accused and the accused. In other jurisdictions, where a stricter standing rule prevails, the exclusionary rule often protects the privacy rights of the non-accused by giving the accused standing to seek suppression based on his possessory interest in the evidence seized, notwithstanding the fact he had no possessory interest in the premises searched. *Simmons v. United States,* 390 U.S. 377, 19 L.Ed.2d 1247, 88 S.Ct. 967 (1968). Thus, it cannot be said fairly that the exclusionary rule offers no meaningful protection to the non-accused.

Aside from the protections which exist prior to a search, the law provides remedies for all citizens in equal measure after an illegal search and seizure has been made. A major remedy for all persons, accused or not, is the provision for a motion to return the property which was seized. California Penal Code Sections 1539 and 1540; Federal Rules of Criminal Procedure, Rule 41(e). Another remedy consists of an action for damages for violation of civil rights. *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 29 L.Ed.2d 619, 91 S.Ct. 1999 (1971). Such remedies may be imperfect, but it cannot be contended that they are less available to the non-accused than to the accused.

The Court of Appeals has adopted a rule which would apply in every jurisdiction, state and federal. In so doing, the Court ignored the fact that privacy protections vary considerably from one jurisdiction to another. For example, California laws provide special protections for the financial privacy of all persons, suspects or not. *Burrows v. Superior Court,* 13 Cal.3d 238, 529 P.2d 590 (1974); California Government Code Section

7460, *et seq.* The same protections are not provided by federal law. *United States v. Miller,* 425 U.S. 435, 48 L.Ed.2d 71, 96 S.Ct. 1619 (1976). Thus, in failing to review the differences in protections afforded by state and federal laws, the Court of Appeals failed to consider whether its rule was appropriate for the states. The Court apparently assumes a rule which may be appropriate for federal cases must be appropriate also for state cases.

In many future cases the proposed rule will effectively expand the exclusionary rule, by providing a new basis for invalidating a search warrant. The Court of Appeals evidently believes such an expansion is necessary to protect the privacy of third persons. That belief is directly contrary to the views expressed by this Court in refusing to expand the exclusionary rule. *Alderman v. United States,* 394 U.S. 165, 171-176, 22 L.Ed.2d 176, 89 S.Ct. 961 (1969). The rule espoused by the Court of Appeals is, in fact, neither necessary nor desirable.

B. The proposed rule is impractical. It creates an unreasonable risk evidence will be destroyed. A subpoena duces tecum is impractical as a substitute for a search warrant because the process frequently cannot meet legitimate needs of law enforcement.

The requirement of a subpoena, instead of a search warrant, is based upon an assumption that law enforcement officers can easily distinguish between suspects and non-suspects during the evidence-gathering stage of an investigation. That assumption ignores reality. In fact, in many cases when the police learn of the commission of a crime, they have little or

no idea of the culprits' identities. The process of obtaining evidence, including physical evidence, has as one of its purposes the identification of suspects.

If law enforcement agents are prohibited from using a search warrant, and are required to use a subpoena, to obtain evidence from any person who has not yet been identified as a suspect, then there is a real possibility that the person subpoenaed may be a principal or an accomplice in the crime. Thus, such a requirement creates an unreasonable risk of destruction of evidence.

Moreover, the distinction between suspects and non-suspects does not take into account the possibility that the person subpoenaed may be a friend, a relative, or a criminal associate of the perpetrator. Such a person, though not personally involved in the crime, may be highly motivated to destroy evidence linking the criminal to the crime. Such motivation is often difficult to discern and more difficult to prove.

The use of the concept of "known suspects" by the courts below creates considerable uncertainty about the propriety of using a search warrant in many cases. Police may view a person as a suspect simply because he had a motive or an opportunity to commit the crime, or because he has a record of similar offenses. The spectrum of suspicion may range from a mere hunch to probable cause. Nothing in the opinions below indicates the amount of suspicion which would be sufficient to permit the use of a search warrant, nor whether the basis of that suspicion should be set forth in the affidavit for the search warrant. The uncertainty of the rule will create great confusion in the courts and among law enforcement agencies, and will inevitably invite litigation.

The cases under review here demonstrate the danger of the subpoena requirement. For all that the police knew, the mob which criminally assaulted the officers could have included members of the staff of the *Stanford Daily*. The fact that none of the staff was a "known suspect" did not diminish the danger that members of the staff would destroy the evidence sought, either because of complicity in the offense or because of sympathy for the offenders.

A search warrant offers a high degree of security against destruction of evidence, whereas a subpoena does not. A search warrant gives the possessor of evidence little or no notice that a seizure is imminent, thus minimizing the danger of destruction.[3]/ A subpoena, of course, provides notice and gives ample opportunity for destruction of evidence. Use of subpoenas to obtain evidence from persons who may be criminals or accessories, sympathizers, or associates of criminals is likely to increase the common phenomenon of destruction or concealment of evidence. Moreover, the penalties for contempt and destruction of evidence may be quite lenient compared to the penalties for the crimes to which the evidence may relate.[4]/ Such lenient penalties are a weak deterrent to the destruction of evidence.

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[3]/ In *Ker v. California,* 374 U.S. 23, 10 L.Ed.2d 726, 83 S.Ct. 1623 (1963), this Court held that in the execution of a search warrant no notice need be given to occupants when a danger of destruction of evidence exists (374 U.S. at pp. 37-41). The Court of Appeals, however, would require that substantial notice be given through the subpoena process unless the applicant for a warrant has overwhelming proof that destruction of evidence is imminent and otherwise unpreventable.

[4]/ The maximum penalty in California for destruction of evidence or contempt is six months in jail and a $500 fine. California Penal Code Sections 19, 135, and 166. At the time of the incident at Stanford, the maximum penalty for battery upon a peace officer was ten years in prison and a $5000 fine. California Penal Code Sections 243 and 672.

The foregoing reasons, alone sufficient to demonstrate the impracticality of the subpoena requirement, do not exhaust the problems raised by the rule espoused by the Court of Appeals. Other reasons for rejecting the subpoena requirement include the unavailability of subpoenas, the slowness of the subpoena process, and the potential futility of the process.

California law permits no more than one grand jury in any single county to return indictments. California Penal Code Sections 904, 904.5-904.9. The regular grand jury is charged with many duties in addition to its indictment function. California Penal Code Sections 914.1, 919, 920, 922, 925, 925a, 927, 928, 933, and 933.5. Consequently, most criminal cases in California are prosecuted by complaint and information, not by indictment.[5/]

A complaint must not be filed until probable cause exists to accuse a particular person.[6/] Frequently a prosecutor does not know that probable cause exists to accuse a person until the investigation, including the gathering of physical evidence, is substantially completed. However, until a complaint has been filed neither the prosecutor nor anyone else has any power to

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5/ In 1974, for example, of the 53,441 felony cases prosecuted in Superior Courts, only 1,902 or 3.6% were prosecuted by indictment. *California Criminal Justice Profile,* Bureau of Criminal Statistics, California Department of Justice (1976).

6/ See California Government Code Section 26501, and California Business and Professions Code foll. Section 6076, rule 7-102. See also ABA Standards, Compilation, p. 91, §3.9(a). Unless a prosecutor knows or believes he has probable cause to accuse a person, it is evidently unethical for him to file a complaint against that person.

issue a subpoena compelling the production of evidence in court. California Penal Code Sections 1326-1328. Thus, during the pre-complaint, evidence-gathering phase of a criminal investigation, a judicial subpoena is simply not available for the production of evidence.

A grand jury subpoena is available during the evidence-gathering phase, but its availability is so limited that it is not an adequate substitute for a search warrant. Since a grand jury subpoena is invalid in the absence of a pending grand jury investigation, and a grand jury investigation can be initiated only by the grand jury itself, not the District Attorney or the police, law enforcement officers do not have a independent legal power to issue valid grand jury subpoenas. *In re Peart,* 5 Cal.App.2d 469, 43 P.2d 334 (1935). Thus, like a search warrant, the availability of a grand jury subpoena is limited by the discretion of an independent authority. More importantly, the volume of criminal cases is so immense that a single grand jury, devoting all its time to criminal matters, could deal with only a small fraction of them. Consequently, if a grand jury subpoena were required in lieu of a search warrant, law enforcement agents would be required as a practical matter to ignore many crimes.

The impracticality of using a grand jury subpoena is particularly acute in California when the evidence sought consists of financial records held by financial institutions. Such evidence is necessary in a prodigious number of cases, especially those involving insufficient funds checks, embezzlement, and other frauds. A grand jury may obtain such evidence by subpoena only when a majority of its members resolves to do so, a showing of probable cause is made to a superior court judge, and the judge personally signs

and issues the subpoena. California Government Code Section 7476(b). Given the time-consuming nature of that process, the great volume of criminal cases, and the laws limiting the number of grand juries, a grand jury subpoena is obviously not an adequate substitute for a search warrant.

Even if drastic changes were made in the laws governing subpoenas, making judicial subpoenas and grand jury subpoenas available both in fact and law during the evidence-gathering stage, a subpoena would still not be an adequate substitute for a search warrant.

Speed in obtaining evidence is frequently essential to a successful investigation and prosecution. When an item of evidence is obtained quickly, it can lead to the immediate discovery of other physical evidence and witnesses. Rapid investigation minimizes the hazards of fading memories, loss or destruction of physical evidence, and intimidation or corruption of witnesses.

The speed with which evidence may be obtained by a search warrant is well known. Laws permitting so-called "telephonic" search warrants tend to accelerate the process. See California Penal Code Sections 1526 and 1528. Moreover, since litigation of the validity of a search warrant follows rather than precedes the securing of evidence pursuant to a warrant, such litigation does not impede the investigation.

By contrast, a subpoena involves a slow process. Unlike a search warrant, a subpoena cannot be issued until the identity of the possessor of evidence is learned. It cannot be served until his location is determined. If the person is not present within the local or state jurisdiction, special

proceedings must be undertaken. See California Penal Code Sections 1330 and 1334.3. Moreover, since a subpoena commands an appearance before a court or a grand jury, the time of production of evidence depends upon the convenience of the proper forum. Finally, litigation of a subpoena precedes production of the evidence. Such litigation may consume years,[7]/ irreparably damaging an investigation. The hazards attending the inherent delays in the subpoena procedure are too great to make a subpoena an adequate substitute for a search warrant.

In *United States v. Calandra,* 414 U.S. 338, 38 L.Ed.2d 561, 94 S.Ct. 613 (1974), this Court declined to permit grand jury witnesses to invoke the exclusionary rule as a bar to questioning. A major reason for the decision was that a contrary rule would create intolerable delays in grand jury investigations. That same reason requires rejection of the rule espoused by the Court of Appeals.

A final reason for rejecting the subpoena requirement is the potential futility of the process. Considering the enormous difficulty in overcoming a claim of privilege under the Fifth Amendment's self-incrimination clause (see *Maness v. Meyers,* 419 U.S. 449, 42 L.Ed.2d 574, 95 S.Ct. 584 (1975)), a person in possession of evidence can successfully resist a subpoena by asserting such a claim. That same person,

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[7]/ For example, enforcement of a summons to one Solomon Fisher was delayed by litigation for more than four years after its service. See *United States v. Fisher,* 352 F.Supp. 731 (1972); *United States v. Fisher,* 500 F.2d 683 (1974); *Fisher v. United States,* 425 U.S. 391, 48 L.Ed.2d 39, 96 S.Ct. 1569 (1976). Another lengthy delay is shown in *Couch v. United States,* 409 U.S. 322, 34 L.Ed.2d 548, 93 S.Ct. 611 (1973). In view of statutes of limitation and other factors, such delays can be fatal to a prosecution.

however, cannot successfully resist a search warrant. *Andresen v. Maryland,* 427 U.S. 463, 49 L.Ed.2d 627, 96 S.Ct. 2737 (1976). Thus, a search warrant provides greater certainty that the evidence will be obtained, and, at the same time, fully protects the Fourth and Fifth Amendment rights of the person or persons involved.

In summary, a subpoena is an unacceptable substitute for a search warrant because it entails an unreasonable risk of destruction of evidence, it is not sufficiently available when it is most needed, its inherent slowness unreasonably delays the investigative process, and legal barriers can render it an entirely futile device for obtaining evidence. In view of these factors, the language of *United States v. Janis, supra,* is particularly apropos:

> "There comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches. We find ourselves at that point in this case." (428 U.S. at p. 459.)

II

THE SPECIAL RULE LIMITING THE USE OF A SEARCH WARRANT FOR A NEWSPAPER OFFICE HAS NO LEGAL FOUNDATION AND SHOULD BE REJECTED.

In this case the Court of Appeals has adopted a rule which states a search warrant for a newspaper office shall be permitted only in those rare circumstances in which there is a clear showing that (1) important material will be destroyed or removed from the jurisdiction, and (2) a restraining order would be futile (353 F.Supp. at 135). The Court explained its new rule was based on three considerations:

- the indiscriminate nature of a search, pursuant to a warrant for particular objects, would render other "confidential" materials vulnerable to police examination;

- the ex parte issuance and execution of a search warrant would deprive the media and journalists of judicial control;

- there is a possibility that police searches would jeopardize a newspaper's credibility and create a risk of self-censorship (353 F.Supp. at pp. 134-135).

An examination of the foundation for the new rule reveals the reasoning to be neither compelling nor persuasive.

It is said that exposure of confidential materials poses a staggering threat to the gathering of news. As a matter of historical fact, that statement is false. For almost 200 years

"confidential" information and sources of newsmen have been subject to exposure. Nevertheless, the press has flourished. *Branzburg v. Hayes,* 408 U.S. 665, 698-699, 33 L.Ed.2d 626, 92 S.Ct. 2646 (1972). Additionally, it is somewhat naive to believe that an elected public prosecutor or an appointed United States Attorney would indiscriminately search the offices of a powerful media organization such as the Los Angeles Times. The political and public backlash could be career-crushing. Because of powerful, organized media support, no prosecutor would unnecessarily search a minor journalistic facility for the same reason. Therefore, the burden, if any, which possible exposure imposes on news gathering is uncertain and insufficient to override the public interest. *Branzburg v. Hayes, supra,* 408 U.S. at pp. 690-691, 706.

The issuance of search warrants is a judicial function, and judicial control is inherent in the process. Indeed, the judiciary has more control over search warrants than it does over grand jury subpoenas. A grand jury subpoena may be issued before probable cause has been found to believe any crime has been committed. The power to issue a subpoena before probable cause has been established is a necessary adjunct of the grand jury's traditional investigative power. *United States v. Dionisio,* 410 U.S. 1, 35 L.Ed.2d 67, 93 S.Ct. 764 (1973). By contrast, a magistrate's constitutional obligations prohibit him from issuing a search warrant until probable cause has been established under oath. Thus, the courts are in a much better position to restrain abuses through the search warrant process than through the subpoena process. After execution of a warrant the courts exercise control through a process of review.

Finally, the possibility that search warrants will jeopardize a newspaper's credibility and create a risk of self-censorship is said to justify the rule permitting subpoenas and forbidding search warrants. Ironically, similar arguments have been advanced against the use of subpoenas, but have been rejected. *Branzburg v. Hayes, supra,* 408 U.S. at p. 679. The public interest in successful criminal investigations demands that the police be permitted to use the most effective legal process for gathering physical evidence. That process is also the one most subject to judicial control--the search warrant.

As this Court made quite clear in *Stanford v. Texas,* 379 U.S. 476, 13 L.Ed.2d 431, 85 S.Ct. 506 (1965), history teaches us that the Fourth Amendment was in large measure a response to attacks upon the press by means of the general warrant. The Fourth Amendment was designed in part to guarantee the freedom of the press by requiring particularized warrants. It would indeed be a sad comment upon the Fourth Amendment to hold now that it is generally unable to keep that historic promise of protection.

The proposed rule is simply unnecessary for protection of freedom of the press. The press is sufficiently protected by the Fourth Amendment and the exclusionary rule. The sufficiency of those protections is amply demonstrated by the history of the press in this country. The power to search newspaper offices pursuant to a warrant has existed for a very long time. Concurrently, the press has fulfilled its societal function with a success unmatched in the world. Clearly, freedom of the press and the power of government to search have coexisted with relative peace. There is no valid reason to believe that at this point in our history survival of that freedom requires annihilation of that power.

A. The special rule regarding newspapers is more impractical than the general rule adopted by the Court of Appeals because it imposes an unreasonable burden of proof upon an applicant for a search warrant.

The proposed rule regarding searches of newspaper offices is impractical and destructive of society's interest in effective law enforcement for essentially the same reasons stated above concerning search warrants of other premises. The subpoena procedure is too slow, too uncertain, too lacking in security, and insufficiently available. In addition, it is impractical to require investigators to make a "clear showing" that evidence "will be destroyed or removed" or that a restraining order "would be futile," as a condition precedent to issuance of a search warrant for a newspaper office.

In the initial evidence-gathering stage of an investigation, the investigators ordinarily do not know who is likely to destroy evidence or ignore a restraining order. To require investigators to make a clear showing that such conduct will or would occur in the future is to require them to exercise precognitive powers possessed by few, if any, mortals. If, as in the instant case, an expressed intent to destroy evidence does not clearly show that destruction will occur, then no circumstance will ever fulfill the requirement of a clear showing. As a practical matter, the rule puts newspaper offices, and myriad extensions of the same, absolutely beyond the reach of search warrants. The possibility of making a "clear showing" is a mere mirage which disappears when it is closely examined.

B. Adoption of such a rule will inevitably make innumerable places, besides newspaper offices, effectively immune from service of search warrants. That rule will jeopardize all our freedoms, and must be rejected.

The Fourth Amendment itself imposes no limits on the places which can be searched for evidence. If it is held that the First Amendment makes newspaper offices immune from searches, then other places must also be held immune from searches because they too implicate values protected by the Constitution; *e.g.*, a church, a union office, a political party office (First Amendment), a rifle association office (First and Second Amendments), an attorney's office (Sixth Amendment), a bail bond office (Eighth Amendment), a voter registration office (Fifteenth and Nineteenth Amendments). Conceivably, searches of any of those places could negatively affect constitutional values.

The ultimate ramifications of such a rule are unforeseeable. However, one consequence seems clear. Since all freedoms depend to some extent upon effective law enforcement (*Branzburg v. Hayes, supra,* 408 U.S. at p. 692), those same freedoms will be rendered less secure if law enforcement agencies are deprived of the most effective process for obtaining physical evidence. The Court may be aware of the murderous bombing of the Los Angeles Times newspaper offices by labor union members on October 1, 1910.[8]/ If in

[8]/ Accounts of the bombing, and the subsequent investigation and prosecution of the McNamara brothers, who were defended by Clarence Darrow among others, were reported in many issues of the Los Angeles Times newspaper, most notably those on October 1, 1910, and December 14, 1911. Crucial evidence in that case was obtained by a search of the union's headquarters. See W. W. Robinson, *Bombs and Bribery,* Los Angeles, California (1969).

such a case the freedom of association were held to bar any search of union offices for evidence of crime, law enforcement agencies could be rendered impotent to protect the freedom of the press. Any rule which places our freedoms in such jeopardy should be rejected as unwise.

A rule which effectively makes any place a sanctuary from searches is inconsistent with the historical development of the laws governing search and seizure. The decisions of this Court demonstrate that the nature of the place searched is not dispositive of the legality of a search. *Katz v. United States,* 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967). Thus, notwithstanding the constitutional values reflected in such places, this Court has approved the search of an attorney's office with a warrant (*Andresen v. Maryland,* 427 U.S. 463, 49 L.Ed.2d 627, 96 S.Ct. 2737 (1976)), indicated that a union office may be properly searched with a warrant (*Mancusi v. DeForte,* 392 U.S. 364, 20 L.Ed.2d 1154, 88 S.Ct. 2120 (1968)), and approved a warrantless nonconsensual search of a commercial firearms storeroom (*United States v. Biswell,* 406 U.S. 311, 32 L.Ed.2d 87, 92 S.Ct. 1593 (1972)).

If the prior decisions of this Court are to be accorded due respect, and if law enforcement agencies are to be able to continue effectively to protect our institutions, including the press, the proposed rule must be rejected and the traditional rules upheld.

III

THE COMMON LAW IMMUNITIES APPLICABLE TO PROSECUTORS AND POLICE OFFICERS SHOULD BE APPLIED TO 42 U.S.C. §1988.

The District Court below held that in equitable suits to remedy violations of Fourth Amendment rights of those not suspected of criminal activity an award of attorney's fees as costs was within the court's power and responsibility. *Stanford Daily v. Zurcher,* 366 F.Supp. 18, 24 (N.D. Cal. 1973). In reaching this conclusion the District Court found the defense of qualified immunity to an action for money damages that law enforcement acted in good faith and upon probable cause was not relevant to the award of attorney's fees in an equitable action concerning constitutional rights. 366 F.Supp. 25. The Court granted an award of "reasonable attorney's fees" later determining the amount to be $47,500. *Stanford Daily v. Zurcher,* 64 F.R.D. 680, 688 (1974).

The Ninth Circuit affirmed the award of attorney's fees in this matter. However, the Ninth Circuit's rationale for the award was not based on the common law or previous court decisons, but on 42 U.S.C. §1988 which had recently been amended (Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, October 19, 1976) to include the award of attorney's fees to the prevailing party in civil rights actions. *Stanford Daily v. Zurcher,* 550 F.2d 464, 466 (9th Cir. 1977). The Court rejected the argument that the qualified immunity available to public officials who act in good faith, in damage actions under Section 1983 also insulates them from liability from injunctive or declaratory relief actions (550 F.2d 465). The Ninth Circuit did not discuss whether the qualified immunity

should be applied to an award of attorney's fees under 42 U.S.C. §1988, nor the concept of a prosecutor's absolute immunity in this Court's recent decision in *Imbler v. Pachtman,* 424 U.S. 409, 47 L.Ed.2d 128, 96 S.Ct. 984 (1976).

It is the contention of amici that the awarding of attorney's fees in injunctive or declaratory relief actions emasculates the well reasoned and appropriate rules of absolute immunity for prosecutors set forth in *Imbler v. Pachtman, supra,* and qualified immunity set forth in *Pierson v. Ray,* 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213 (1967). The possibility of liability for an award of attorney's fees will undoubtedly have a chilling effect on the exercise of prosecutorial discretion, especially in cases such as the matter at bar in which it is held that a defense of good faith is not available and the prosecutor is not even allowed to show that he was following state law which had been sanctioned by the Legislature and the courts.

The Ninth Circuit accepted the rationale in *Rowley v. McMillan,* 502 F.2d 1326, 1332 (4th Cir. 1974), to support its conclusion that the immunity rule does not apply to injunctive and declaratory relief actions.

Assuming, *arguendo,* that the immunity rules do not apply in injunctive and declaratory relief actions because those actions are designed to prevent *future* illegal action by public officials, the rationale which supports the immunity rules makes them applicable to awards for attorney's fees in actions under 42 U.S.C. §1988. Injunctive and declaratory relief actions usually arise because of some prior action of public officials which is interpreted as an indication of future action which is considered to be a violation of some right by the aggrieved party. Therefore, the ability of the public

official to effectively, efficiently and fearlessly carry out his assigned duties is the basic consideration in any discussion of any type of civil rights action against such public officials.

It is clear that the major rationale behind the immunity rules is that a public official should be free to carry out his duties without the constant fear of damage suits and personal liability for acts done in the course of those duties.

In *Rowley v. McMillan, supra,* the case relied on by the Ninth Circuit in rejecting the immunity defense, the Court cites and discusses two United States Supreme Court cases which clearly hold that the rationale behind the immunity rules is to prevent the impact of the fear of personal liability on public officials. In *Barr v. Matteo,* 360 U.S. 564, 3 L.Ed.2d 1434, 79 S.Ct. 1335 (1959), the Court stated:

> "The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties--suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." 360 U.S. at p. 571.

This rationale was emphasized again in *Scheuer v. Rhodes,* 416 U.S. 232, 40 L.Ed.2d 90, 94 S.Ct. 1683 (1974):

> "The concept of the immunity of government officers from personal liability springs from the same root considerations that generated

> the doctrine of sovereign immunity. While the latter doctrine--that the 'King can do no wrong'--did not protect all government officers from personal liability, the common law soon recognized the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability. This official immunity apparently rested, in its genesis, on two mutually dependent rationales: (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." 416 U.S. at pp. 239-240 [footnotes omitted].

In *Imbler v. Pachtman, supra*, 424 U.S. 409, 47 L.Ed.2d 128, 96 S.Ct. 984, this Court held that a prosecutor has absolute immunity in an action under 42 U.S.C. §1983 for damages for his activities which were an "integral part of the judicial process." The rationale for applying the rule of absolute immunity in *Imbler* appears to be the eradication of the effect on the prosecution and the courts in carrying out their respective duties with the specter of financial damages hanging over the head of the prosecutor. In discussing the effect on the prosecution, the Court states:

> "A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his

> own potential liability in a suit for damages." 424 U.S. at pp. 424-425.

The effect on the courts in reviewing criminal convictions is discussed as follows:

> "Various post-trial procedures are available to determine whether an accused has received a fair trial. These procedures include the remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies. In all of these the attention of the reviewing judge or tribunal is focused primarily on whether there was a fair trial under law. This focus should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment." 424 U.S. at p. 427 [footnotes omitted].

It is submitted that an award of attorney's fees in an equitable action such as injunction and declaratory relief would raise the same fears in the prosecutor that an award for civil damages would raise. Whether the awarding of attorney's fees is considered an additional remedy necessary to effectuate the congressional underpinnings of a substantial program (*Stanford Daily v. Zurcher, supra,* 366 F.Supp. 18, 23), or a shifting of the financial burden in order to effectuate a strong congressional policy (*Id.* at p. 25), the public official will only see the possibility of such an award as a threat to his financial security and will act accordingly in carrying out his duties. Therefore, the rationale which this Court has followed in finding both absolute immunity for prosecutors in certain

situations (*Imbler v. Pachtman, supra*) and qualified immunity as to other public officials (*Pierson v. Ray, supra*) should be applied to the award of attorney's fees under 42 U.S.C. §1988 in injunctive or declaratory relief actions under the Civil Rights Act.

Because of a recent decision of the Court of Appeals, a question has arisen as to which of the immunities should be applied to the prosecution in the case at bar. Since an interpretation of that case might influence the ultimate disposition of the present case, *i.e.,* a return to the trial court for a hearing on the good faith of the prosecutor, it is discussed below.

In *Briggs v. Goodwin,* 22 Cr.L. 2001 (D.C. Circuit 9-21-77), the Court emphasized the limited scope of *Imbler v. Pachtman, supra,* and allowed only a qualified immunity to a prosecutor who allegedly lied when called as a witness in a motion to determine if any informants had been included in persons subpoenaed to testify before a federal grand jury.

The Court distinguished between the prosecutor's role as an advocate in which his activities were "intimately associated with the judicial phase of the criminal process" giving him absolute immunity and his function as an administrator or investigative officer in which he enjoys only qualified immunity requiring a showing of a reasonable good faith belief in his actions. The Court in *Briggs, supra,* provided limited guidance in distinguishing between investigative behavior and advocacy. However, other cases cited in *Briggs* assist in classifying the actions of the prosecutor in this case. In *Apton v. Wilson,* 506 F.2d 83, 94 (D.C. Cir. 1974), the Court states:

> "There is also room for extension of the 'judicial' immunity approach to the case of executive officials taking action on findings made following administrative adjudication and subjected to appropriate judicial scrutiny." [Footnote omitted.]

In the present case the prosecution chose a procedure which required a presentation of facts to an impartial magistrate who was required to make an independent finding of probable cause and to sanction the search warrant procedure. This certainly subjected the prosecutor's actions to "appropriate judicial scrutiny."

In *McCray v. State of Maryland,* 456 F.2d 1, 5 (4th Cir. 1972), the Court recognizes: "A closely associated defense is afforded all public officers who act in obedience to a judicial order or under the court's direction. . . ."

The action in the present case of conducting the search pursuant to the search warrant would clearly come under this defense.

It is therefore contended that the action of the prosecutor in assisting in obtaining the search warrant was an act of advocacy which was protected by the absolute immunity rule of *Imbler v. Pachtman, supra.*[9]/

Even assuming, *arguendo,* that the action of the prosecution was investigative, he would enjoy the qualified privilege which applies to the police officers who are also subject to the

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[9]/ It could also be argued under *McCray v. State of Maryland, supra,* that the police officer is protected by the absolute immunity derived from carrying out the orders of the magistrate.

order requiring payment of attorney's fees in this case. Both police and prosecutor under such qualified immunity have a right to present a defense that their actions were made in good faith and in conformance with state law. *Pierson v. Ray, supra,* 386 U.S. 547, 557, 18 L.Ed.2d 288, 296, 87 S.Ct. 1213 (1967).

As noted above the District Court found that this defense did not apply to the awarding of attorney's fees. *Stanford Daily v. Zurcher, supra,* 366 F.Supp. 18, 25. The Court of Appeals found that the defense did not apply to injunctive or declaratory relief actions and did not address the specific issue of whether it applied to the awarding of attorney's fees in such actions.

It is contended that disallowing a defense of a qualified immunity based on a good faith belief that the public officers are following the law in an award of attorney's fees in an injunctive or declaratory relief action is an unfair and unjust application of the equitable powers of the court and an improper interpretation of 42 U.S.C. §1988. In essence, it leaves the public officer with no defense even though he followed the letter of the law.

A prime example is set forth in the present case in which the police officers and the prosecutor followed California statutory law which authorized the issuance of a search warrant for the type of evidence sought to be seized therein and which had been held to be constitutional. *Collins v. Lean,* 68 Cal. 284, 9 Pac. 173 (1885); *People v. Thayer,* 63 Cal.2d 635, 408 P.2d 108, 47 Cal.Rptr. 780 (1965), cert. denied, 384 U.S. 908, 16 L.Ed.2d 361, 86 S.Ct. 1342 (1966).

There is no finding that the public officers acted in bad faith or with malicious intent. Apparently there was no hearing offered the public officers in that the District Court found the defense irrelevant. Therefore, to penalize them by an award of attorney's fees without consideration of their good faith is an abuse of the court's equitable power and should not be allowed.

The retroactive application of 42 U.S.C. §1988 to the present case is also not warranted. It appears that the Civil Rights Attorney's Fee Act of 1976 was a radical departure from the prevailing common law rule forbidding the awarding of attorney's fees. In a decision prior to the passage of that Act, this Court stated:

> ". . . But the Court has never interpreted §1988 to warrant the award of attorney's fees. And nothing in the legislative history of that statute suggests that such a radical departure from the long-established American rule forbidding the award of attorneys' fees was intended." *Runyon v. McCrary,* 427 U.S. 160, 185, 49 L.Ed.2d 415, 96 S.Ct. 2586 (1976).

If the awarding of attorney's fees in civil rights actions was considered "a radical departure from the long-established American rule forbidding the award of attorneys' fees" by this Court, it can be assumed that the prosecution and police involved herein harbored no fears of such an award when they sought out the magistrate in this action. To punish those officers by retroactive application of the statute would serve no deterrent purpose and would be an unreasonable application of the statute.

The awarding of attorney's fees in this case without consideration or application of the applicable immunity defense will open the door to the awarding of such fees in all cases. If the immunity defense is irrelevant regarding prosecutors and police officers, then it is irrelevant in regard to judges and legislators. No public official is immune from liability for an award of attorney's fees under the theory of the District Court and the Court of Appeals in its application of 42 U.S.C. §1988 in this case. Surely this was not the intent of the Legislature in amending Section 1988 or this Court in its application of the immunity rule.

Finally, the District Court opines that since California state law requires indemnification of public employees for any judgment rendered against them for their actions while performing their duties, the fear of the effects of such an award will not have the adverse effects which concerned this Court in *Pierson v. Ray, supra*; *Stanford Daily v. Zurcher, supra,* 366 F.Supp. 18, 25.

In California the public entity employing an employee is required to indemnify that employee for a judgment arising out of any claim or action against the employee for actions arising out of the federal Civil Rights Act, whether or not the public employer could be made a party to the suit. California Government Code Section 825;[10]/ *Williams v. Horvath,* 16 Cal.3d 834, 846, 548 P.2d 1125, 129 Cal.Rptr. 453 (1976).

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[10]/ "§825. Request for defense or defense by public entity; payment of judgment, compromise or settlement; agreement with employee; reservation of rights

If an employee or former employee of a public entity requests the public entity to defend him against any claim or action against him for an injury arising out of an act or omission occurring within the scope of his employment as an employee of the public entity and such

However, the public employer may refuse to pay a judgment until it is established that the employee's acts were in fact within the scope of employment. California Government Code Section 825; *Williams v. Horvath, supra,* at p. 843. The public employee is thus not relieved of a fear of liability. Not only may he be ultimately liable for attorney's fees, he may also have to finance a lawsuit to force the public employer to recognize his claim. The fear of personal financial loss will still permeate his actions in carrying out his duties.

Further, it does not appear that the issue of whether the California statute applies to an award of attorney's fees has been resolved in this state which could cause the employee further litigation.[11]/ Finally, it is not inconceivable that

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Footnote 10 continued

request is made in writing not less than 10 days before the day of trial, and the employee or former employee reasonably cooperates in good faith in the defense of the claim or action, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed.

If the public entity conducts the defense of an employee or former employee against any claim or action with his reasonable good faith cooperation, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed; but, where the public entity conducted such defense pursuant to an agreement with the employee or former employee reserving the rights of the public entity not to pay the judgment, compromise or settlement until it is established that the injury arose out of act or omission occurring within the scope of his employment as an employee of the public entity, the public entity is required to pay the judgment, compromise or settlement only if it established that the injury arose out of an act or omission occurring in the scope of his employment as an employee of the public entity.

Nothing is this section authorizes a public entity to pay such part of a claim or judgment as is for punitive or exemplary damages. (Amended by Stats. 1972, c. 1352, p. 2685, §1.)"

[11]/ Government Code Section 825 precludes indemnification for punitive or exemplary damages.

legislators will amend the indemnification law if it is determined that there is no defense to the award of attorney's fees in civil rights actions against public employees.

The indemnification of a public employee by his employer in California obviously extends to all damages awarded under 42 U.S.C. §1983. If such indemnification is a valid reason to disregard the immunity rules in an award of attorney's fees, it is also a valid reason to do away with such immunity rules in actions for damages. This Court has not so held in its consideration of past cases applying the immunity rules.

It should not do so in this case. Logic and political realities lead to the conclusion that payment of the award of such fees by any political entity will lead to adverse consequences to the public employee whose action caused the granting of the award. Local legislatures are quite concerned about the expenditure of public funds. This concern will be reflected in such areas as the budget of the department in which the offending employees are employed and the consideration of such employees' salaries and fringe benefits. Elected officials will have to face a contention during election time that his department wasted public funds. This can only affect the policy of his department in carrying out their duties to the detriment of the public.

It is submitted that the indemnification of employees is itself an irrelevant consideration when determining whether or not the immunity rule should apply to the award of attorney's fees.

For the reasons stated above, it is respectfully submitted that the Ninth Circuit erred in affirming the award of attorney's fees in this case.

CONCLUSION

The primary responsibility for enforcing and administering criminal law lies with states. Although the rule adopted by the Court of Appeals would have an adverse impact on federal law enforcement, the burden of the rule would weigh more heavily on the states.

The adopted rule flies in the face of the historical development of the Fourth Amendment and ignores the original intent of the amendment which was to balance the right of personal privacy against legitimate interests of society in the apprehension and conviction of criminals.

In Fourth Amendment cases, this Court has engaged traditionally in a process of balancing various competing interests. *United States v. Janis, supra,* 428 U.S. at pp. 447-454; *Stone v. Powell, supra,* 428 U.S. at pp. 487-489. That balancing process is noticeably absent from the opinions of the District Court and the Court of Appeals in the instant case. Indeed, those opinions focus solely upon the rights of the individual, and give no attention to the needs of the greater community.

For our system of justice to survive, the prosecutor must have the latitude to investigate and gather evidence in a timely fashion without the intimidating prospect of future assessments for legal fees arising from his official actions in carrying out the mandate of society. This concept has been recognized by the Court for centuries and for the reasons set forth should not now be cast aside.

Respectfully submitted on behalf of the National District Attorneys Association and the California District Attorneys Association,

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