Closed to the Media: The Defendant's Right of Privacy in the Preliminary Examination

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By JOSEPH A. WYNNE*

I Introduction

In 1982 the California Legislature amended section 868 of the California Penal Code. Now, if one accused of a crime wants to close his preliminary hearing to the public (and the press), he must show that an open hearing would endanger his right to a fair trial.¹ The San Francisco Chronicle headlined the change as “A Compromise for Free Press, Fair Trials.”² Indeed, the newly amended law was a compromise. It was wrought from six bills introduced over a four month period.³ The new law

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1. Section 868 of the Penal Code is amended to read:

   The examination shall be open and public. However, upon the request of the defendant and a finding by the magistrate that exclusion of the public is necessary in order to protect the defendant's right to a fair and impartial trial, the magistrate shall exclude from the examination every person except the clerk, court reporter and bailiff, the prosecutor and his or her counsel, the Attorney General, the district attorney of the county, the investigating officer, the officer having custody of a prisoner witness while the prisoner is testifying, the defendant and his or her counsel, the officer having the defendant in custody and a person chosen by the prosecuting witness who is not himself or herself a witness but who is present to provide the prosecuting witness moral support, provided that the person so chosen shall not discuss prior to or during the preliminary examination the testimony of the prosecuting witness with any person, other than the prosecuting witness, who is a witness in the examination. Nothing in this section shall affect the right to exclude witnesses as provided in Section 867 of the Penal Code.

   This section shall become operative on March 1, 1982.


3. The six bills are:

   A.B. 149, introduced on December 12, 1980 and withdrawn by its author on June 8, 1981. This bill was initially intended to repeal section 868. On May 12, 1981 it was amended and sought to amend 868 to the effect that either the defense or the prosecution could move to close a preliminary examination on
sought to balance the right of the public (and the press) to courtroom access against the defendant's right to a fair trial; more startlingly, it compromised what had been an unarticulated but nevertheless untrammeled right: that of an accused person to protect his privacy from scrutiny by the public in the courtroom until probable cause for a public trial had been established.

This note argues for the defendant's categorical right to close his preliminary examination on the ground that he has a right to privacy until probable cause for a public trial has been established. Forcing one accused of a felony to defend himself in a public forum before the government has established that there is cause to believe he has committed a crime, deprives him of the right of privacy expressly granted in the California Constitution.5

To support this argument, the note will first examine generally, the press's right to cover courtroom proceedings. Sec-
ondly, it will discuss the importance of the preliminary examination as the forum where probable cause for prosecution is judicially verified. The standard of probable cause as the requisite for all police and prosecutorial intrusions on the individual's privacy will be surveyed. Then the distinction between the government's right to collect information about an individual's possibly criminal activities and its right to publicize that information will be drawn by looking at cases where arrest and grand jury records have been sealed or expunged on privacy grounds even where the information in those records may have been truthful.

Finally the note will compare the effect of the old law which allowed a defendant to preserve his privacy from forced, premature, public scrutiny with the new law which has eliminated concern for the individual's privacy from having any place in the decision to close the preliminary examination.

II

Rights of the Press in the Courtroom

It is well established that the press may report events that transpire in an open courtroom.6 In Nebraska Press Association v. Stuart,7 the United States Supreme Court reiterated the rule that a very strong presumption exists against prior restraint on speech and publication. There, the petitioner sought to overturn a trial judge's order barring published or broadcast accounts of a murder defendant's confession or admissions, except for those made directly by the defendant to members of the press. In granting the petition, the Supreme Court stopped short of categorically ruling out prior restraint but found the presumption against such a restraint a great burden to overcome.8 California courts have shown at least as much antipathy for prior restraint on the press.9

The U.S. Supreme Court has also held that the press may publish records which are open to the public. In Cox Broadcasting Corp. v. Cohn,10 a suit for invasion of privacy was brought by members of a deceased rape victim's family. The suit was filed after members of the press published the name

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8. 427 U.S. at 558.
and address of the victim even though state law forbade such publication. The information had been obtained from court records which had been mistakenly opened to the press. The Supreme Court held that where the press has legitimate access to such information, it may publish it regardless of the privacy rights asserted by those who are the subject of such court records.\footnote{11}

\textit{Nebraska Press} and \textit{Cox} make it clear that once the press and the public receive sensitive or questionable information from the open courtroom, there is scant remedy afforded those who consider themselves injured if such information is publicized. The criminal defendant has no recourse once his reputation is damaged by information publicized from a preliminary examination. Neither restraining orders nor damages will be granted against the press if such information is lawfully obtained and disseminated.

In \textit{Richmond Newspapers, Inc. v. Virginia}, the Supreme Court spoke of the "unbroken, uncontradicted history, as valid today as in centuries past, [which binds the court] to conclude that a presumption of openness inheres in the very nature of the criminal trial under our system of justice."\footnote{12} Except where there is proven danger to fair trial rights, pretrial and trial sessions are open to the press and the public.\footnote{13} The courts may not impose prior restraints on the press in reporting court procedures unless they satisfy a very heavy burden of proof.\footnote{14}

In an action brought by a man whose distant criminal past had been revealed by a publisher, the California Supreme Court stated that "truthful reports of recent crimes and the names of suspects or offenders will be deemed protected by the First Amendment."\footnote{15} Obviously a defendant in an active case cannot assert a cause of action against the press for truthful reports of current criminal proceedings.\footnote{16}

Clearly, the press may publish information about the defendant which it has legally obtained. What is not clear is whether or not the government, at a preliminary examination, may expose to the public embarrassing information about a defend-

\begin{footnotes}
\item[12] 448 U.S. 555, 573 (1980).
\item[13] \textit{Id.} at 581 n.18.
\item[14] Nebraska Press Association v. Stuart, 427 U.S. at 570.
\item[16] 4 Cal. 3d at 536.
\end{footnotes}
ant, information that may indicate a defendant has committed a crime, before probable cause to put the defendant on public trial has been established.

III

The Preliminary Examination

A. Its Purpose

The preliminary examination is universally recognized as a screening mechanism. Its aim is "to weed out groundless and unsupported charges of grave offenses and to relieve the accused of the degradation and expense of a criminal trial." Whatever use the preliminary hearing may be to the defendant in preparing a defense for his trial, whatever ancillary benefits the state may derive from the preliminary hearing, its primary function is to filter out those charges which are not adequately founded. An adequate foundation requires a showing of sufficient cause to believe the accused has committed a particular offense.

B. "Sufficient Cause"

The term "sufficient cause" means reasonable or probable cause, and it is defined as "such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused." The defendant's guilt or innocence is not the issue at the preliminary examination, and evidence to support an indictment or an information need not be sufficient to support a conviction.

17. The California Penal Code uses the term "examination" (See, e.g., CAL. PENAL CODE § 872) whereas courts use the terms preliminary examination and preliminary hearing interchangeably. See, e.g., Hawkins v. Superior Court, 22 Cal. 3d 584 (1978).
20. See infra text accompanying notes 30 and 36.
21. For example, testimony of a defense witness at a preliminary examination may be admissible under an exception to the hearsay rules as a prior inconsistent statement of the present witness. See California v. Green, 399 U.S. 149 (1970).
25. Id.
C. The Importance of the Hearing

Before a defendant can be bound over for trial in the superior court, a magistrate\(^27\) must examine the prosecution's evidence to determine if there is probable cause to believe the defendant committed the offense charged.\(^28\)

The importance of the preliminary examination in determining whether to try a defendant has been recognized by the United States Supreme Court. In *Coleman v. Alabama*, the Court held such an examination to be a "critical stage"\(^29\) of the criminal proceeding. In reversing the defendants' convictions because they did not have counsel at the preliminary hearing, the Court detailed the essential benefits accruing to a defendant who has counsel at the preliminary hearing. These include opportunities

1. to expose through direct and cross examination the weaknesses in the state's case that may lead the magistrate to refuse to bind over the accused for trial;
2. to skillfully interrogate witnesses in a manner that might provide a tool for impeachment of the state's witnesses during a trial; and
3. to more effectively discover the case the state has against the accused and to prepare a proper defense.\(^30\)

While the California Penal Code requires a preliminary examination only of charges made by information\(^31\) and not those made by indictment, the California Supreme Court has extended the defendant's right to have charges made against him by indictment examined by a magistrate. The California statute itself provides that criminal filings in the superior court may follow one of two procedures. Either the prosecution must go to the grand jury and seek an indictment or they must file a complaint in municipal court, present evidence at a preliminary examination and, on that basis, file an information. However, the California Supreme Court in *Hawkins v. Supe-

\(^27\) CAL. PENAL CODE § 807 defines a magistrate as "an officer having power to issue a warrant for the arrest of a person charged with a public offense." See also CAL. PENAL CODE § 808 which says that all judges of the state are magistrates.

\(^28\) CAL. CONSTIT. art. 6, § 10 assigns "original jurisdiction in all cases except those given by statute to other trial courts" to the Superior Courts. Prosecution of a felony can be initiated either by grand jury indictment or by an information filed with the Superior Court by the prosecutor.

\(^29\) 399 U.S. 1, 10 (1970).

\(^30\) Id. at 9.

\(^31\) CAL. PENAL CODE § 738 (West 1970).
rior Court\textsuperscript{32} considered the preliminary hearing to be so important that a defendant now has the right to have a preliminary examination even after a grand jury has returned an indictment.

Criticizing the lack of equal protection afforded the indicted defendant compared to the defendant prosecuted by information, the California court held in \textit{Hawkins} that an indicted defendant has the right to have his indictment examined by a neutral and detached magistrate in an adversarial hearing just as a defendant charged by information does.\textsuperscript{33} The court noted that

the defendant accused by information "immediately becomes entitled to an impressive array of procedural rights, including a preliminary hearing before a neutral and legally knowledgeable magistrate, representation by retained or appointed counsel, the confrontation and cross examination of hostile witnesses, and the opportunity to personally appear and to affirmatively present exculpatory evidence.\textsuperscript{34}

It is important to note that \textit{Hawkins} was decided in 1978 when a defendant still had the right to close his preliminary examination upon request.\textsuperscript{35} While it might be argued today that by demanding a preliminary hearing after being indicted, a defendant is trading the closed grand jury room for the due process benefits available in an open courtroom, that was clearly not the intent of the California Supreme Court. \textit{Hawkins} gave the defendant the right to challenge the grand jury's determination of probable cause.\textsuperscript{36} \textit{Hawkins} sought to give the indicted defendant the same rights as the defendant charged by information. It did not purport to narrow the defendant's rights and protections, but rather to expand them.

Thus under California law, the preliminary hearing is not only acknowledged to be a critical stage of the proceedings in cases prosecuted by information, but it is proclaimed by the state Supreme Court as a right to which all potential felony defendants are entitled. Today, no one in California may be prosecuted without the opportunity to have a full adversarial screening before his case is brought to superior court.

\textsuperscript{32} 22 Cal. 3d 584 (1978).
\textsuperscript{33} Id.
\textsuperscript{34} Id. at 587 (quoting Johnson v. Superior Court, 15 Cal. 3d 248, 256 (1975)).
\textsuperscript{35} CAL. PENAL CODE § 868 was not amended until 1982.
\textsuperscript{36} 22 Cal. 3d at 593-594.
IV
Provable Cause: The Standard For Screening
Governmental Intrusions On The
Individual

Felonies comprise the most serious class of crimes in California, and the preliminary examination is the last screening procedure before a felony charge is filed in the superior court. However, the filing of any criminal charge, be it a felony or a misdemeanor, is accompanied by other screening stages which are imposed to protect individuals against unreasonable intrusions by the government into their lives. At each of these stages, the burden is on the government to justify further intrusion by showing that it has probable cause to proceed with the case.

California courts have recognized that “the definition of probable cause . . . has been consistently applied with equal force to the issuance of warrants, to arrests without warrants, to commitment [for trial] by a magistrate, and to indictment by a grand jury.”

A. A Lesser Standard for a Lesser Intrusion: Stop and Frisk

In Terry v. Ohio, the United States Supreme Court defined a special category of fourth amendment intrusions. These are so substantially less intrusive than arrest that the general rule requiring probable cause to make an intrusion on fourth amendment rights reasonable could, in narrow circumstances, be subordinated to a balancing test: individual privacy right weighed against the state interests in crime detection and police safety. The Court recognized that these “stop and frisk” actions were a serious intrusion on a person and must be tested by the fourth amendment's general proscription against unreasonable searches and seizures. But the balancing test allowed by the court was seen as sufficient to make such police actions reasonable under the fourth amendment.

38. See infra text accompanying notes 51-56.
40. 392 U.S. 1 (1968).
41. Id.
42. Id. at 17.
The California Supreme Court, in *In re Tony C.*, applied the *Terry* rule to California law. There, the court said, "[i]t is settled that circumstances short of probable cause to make an arrest may justify the police officer stopping and briefly detaining a person for questioning or other limited investigation." The standard permitting this investigative stop or brief detention requires that circumstances known or apparent to the officer include specific and articulable facts causing him to suspect that some activity relating to crime has taken place or is happening, or is about to happen, and that the person he intends to stop or detain is involved in such activity. Not only must the officer subjectively entertain such a suspicion; it must be objectively reasonable for him to do so.

B. Probable Cause, Otherwise the Standard

The California application of the *Terry* rule is so limited that even detaining a person stopped on a traffic violation, for longer than it takes to write the citation while the officer runs a warrant check has been disapproved. The California Supreme Court recognized that just as a search, reasonable at its inception, may violate the fourth amendment by virtue of its intolerable scope and intensity, an investigative detention may transgress constitutional bounds when extended beyond circumstances which make its initiation permissible. Therefore, said the court, such a detention is forbidden, absent a showing of probable cause.

Probable cause, reasonable cause to believe a particular individual has committed a particular offense, is needed before the police can detain an individual beyond the brief interruption allowed in *Terry*, before the police can transport a suspected individual for identification or for questioning, and before police can make a warrantless arrest. A magistrate must make a determination that there is probable cause before issu-
ing an arrest warrant, a search warrant or an extradition warrant. A municipal court or justice court judge can be required to make a determination of probable cause in a misdemeanor case if the defendant is in custody at the arraignment.

In Dunaway v. New York, the United States Supreme Court recognized that "[t]he long prevailing standards of probable cause embodied 'the best compromise that has been found for accommodating the often opposing interests' in 'safeguarding citizens from rash and unreasonable interferences with privacy' and 'in seeking to give fair leeway for enforcing the law in the community's protection.'" Probable cause represents, through an accumulation of precedent, the minimum standard needed to justify government intrusion on the individual.

V
Privacy and Governmental Intrusion

A. The Fourth Amendment

The United States Supreme Court has described the basic purpose of the fourth amendment as safeguarding the privacy and security of the individual against arbitrary invasion by government officials. In Katz v. United States, the Supreme Court expanded the protection offered by the fourth amendment to areas where one might reasonably expect privacy. By overruling its earlier view that the fourth amendment protected one against trespass by the government, the Court expanded the concept of the fourth amendment as protecting the security of one's privacy against arbitrary intrusions by the government.

56. 442 U.S. at 208 (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).
57. 442 U.S. at 208.
58. The fourth amendment to the United States Constitution 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.
60. 389 U.S. 347 (1967).
61. Id. at 353.
62. Katz announced the trespass doctrine of Olmstead was no longer controlling.
government.\textsuperscript{63} Katz expressly left protection of the more general right of privacy to the states\textsuperscript{64} but as the Court stated in Stanley \textit{v. Georgia},\textsuperscript{65} a case involving the seizure of pornography in a private home, the right to be free from unwarranted governmental intrusions on one's privacy is fundamental.\textsuperscript{66}

\textbf{B. Privacy and the California Constitution}

While the United States Constitution does not explicitly mention any right to privacy,\textsuperscript{67} the California Constitution does. Article I, section 1 reads:

\begin{quote}
All people are by nature free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty: acquiring, possessing, and protecting property; and pursuing and obtaining safety, happiness, and privacy.\textsuperscript{68}
\end{quote}

Though privacy was expressly added to this section only in 1972,\textsuperscript{69} courts in California have long recognized an individual's right to privacy.

Recognition has been given of a right of privacy, independent of the common rights of property, contract, reputation and physical integrity, generally described as "the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity. In short it is the right to be let alone."\textsuperscript{70}

The express grant of a right to privacy in the California Constitution protects more than those areas protected by the fourth amendment. In \textit{White \textit{v. Davis}},\textsuperscript{71} the California Supreme Court held that the constitutional amendment granting an express right to privacy created an enforceable privacy right for all Californians. That this right is more encompassing than the privacy protection from the fourth amendment is made clear by the court's approval of the argument that privacy is a fundamental right guaranteed by several United States decisions.

\textsuperscript{63. Id.}
\textsuperscript{64. 389 U.S. at 350-351.}
\textsuperscript{65. 394 U.S. 557 (1969).}
\textsuperscript{66. Id. at 564.}
\textsuperscript{67. See supra note 64.}
\textsuperscript{68. CAL. CONST. art. I.}
\textsuperscript{69. White \textit{v. Davis}, 13 Cal. 3d 757 (1975).}
\textsuperscript{71. 13 Cal. 3d 757 (1975).}
States Constitutional amendments.\textsuperscript{72}

The California court in \textit{White} cited with approval the argument appearing in the state election brochure supporting voter approval of a constitutional right to privacy.\textsuperscript{73} In his opinion for the court, Justice Tobriner noted the brochure "represents, in essence, the only 'legislative history' of the constitutional amendment."\textsuperscript{74} The arguments in the brochure emphasize that there are not "effective restraints on the information activities of government and business. This amendment . . . creates a legal and enforceable right of privacy for every Californian."\textsuperscript{75}

At issue in \textit{White v. Davis} was a police practice whereby officers posed as students to attend university classes for the purpose of "intelligence gathering".\textsuperscript{76} Besides first amendment obstacles to such police behavior, the court found these activities an invasion of the express constitutional right to privacy. The brochure argument, approved by the court, concluded "[t]he right of privacy is an important American heritage and essential to fundamental rights guaranteed by the First, Third, Fourth, Fifth and Ninth Amendments to the U.S. Constitution. This right should be abridged only when there is a compelling public need . . . ."\textsuperscript{77}

As has been shown, in the criminal law area, probable cause to believe one has committed a crime has been recognized as the compelling public need warranting abridgement of the individual's privacy by the government. At each stage of the criminal prosecution procedure, probable cause must be established to justify further abridgment of the accused's right to be left alone.

C. Probable Cause and Individual Privacy

1. Expungement of Arrest Records

The importance of probable cause as the standard for permitting intrusions on privacy can be shown where courts have gone so far as to order the expungement of arrest records of defendants arrested without probable cause.\textsuperscript{78} In \textit{Sullivan v.}
The District of Columbia Circuit Court of Appeals, citing its "broad and flexible and equitable powers," expunged the arrest records of antiwar demonstrators when the court found the government had failed to meet its burden of establishing probable cause for arrest. The court found such arrests to be in violation of the defendant's fourth amendment rights. Agreeing with the defendant's contention that nothing else would be an adequate remedy, the court ordered outright expungement of the arrest records.

In Colorado, the state supreme court granted a plaintiff's motion to have her arrest record expunged on the ground that the record violated her right of privacy. The plaintiff had been arrested on a vagrancy charge and was subsequently acquitted. In noting the lack of a legislative prescription for treatment of the records of an acquitted person as well as the court's and the legislature's expressed concern for the individual's right of privacy, the Colorado court was alarmed, as was the California court in White v. Davis, by the increasing ability of the government and industry to collect and disseminate information about the individual.

2. Expungement of Grand Jury Records

The Colorado Court of Appeals relied on this concern expressed by the Colorado Supreme Court when it ordered the expungement of a plaintiff's name from two indictments. In both indictments the plaintiff was repeatedly referred to as an

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80. 478 F.2d 971; see also Dean v. Gladner, 451 F. Supp. 1313 (S.D. Texas 1978); Washington Mobilization Committee v. Cullinane, 400 F. Supp. 186 (D.C. Cir. 1975); Urban v. Breier, 401 F. Supp. 706 (E.D. Wis. 1975); but cf. Loder v. Municipal Court, 17 Cal. 3d 859 (1976) where the California Supreme Court refused to expunge an arrest record. Charges against the defendant had been dismissed for failure to prosecute. Citing the limited but compelling uses of such records by authorities, the court held that the defendant's privacy rights under article 1, section 1 of the California Constitution did not prohibit their retention. The court did not discuss the defendant's rights to privacy under the fourth amendment and article 1, section 13; the defendants appear not to have argued that they were arrested without probable cause.
82. Id. at 160.
83. 13 Cal. 3d 757 (1975).
84. 503 P.2d at 158-159.
"unindicted co-conspirator." The charges in the indictments were disposed of when the indicted individuals pleaded to lesser charges and the indictments were dismissed. The court held that the harm to the plaintiff's privacy outweighed the public interest in retaining the records of his being named an unindicted co-conspirator.

3. Privacy as a Bar to Arrest Record Dissemination

The District of Columbia Circuit of the U.S. Court of Appeals has expressed concern for the individual's rights to privacy and due process where arrest record dissemination is concerned. In *Utz v. Cullinane*, the court granted declaratory relief to four petitioners seeking to prevent the District of Columbia police from forwarding their arrest records to an FBI file. The court noted the petitioners did not seek expungement nor challenge the existence of probable cause for their arrests. Neither did the petitioners assert that police maintenance of such records violated their due process rights. Although the court recognized the value of the arrest records for law enforcement purposes, it nevertheless questioned the constitutional validity of disseminating such records, especially where no conviction had resulted. The court expressed doubt about the constitutionality of a federal statute which funneled preconviction and post-exoneration records from the D.C. police to the FBI but stopped short of declaring the statute unconstitutional. Yet the court forthrightly asserted that:

\[\text{due process obligates the government to accord an individual the opportunity to disprove potentially damaging allegations before it disseminates information that might be used to his detriment. The proper forum for definitely adjudicating an individual's guilt or innocence is a trial that conforms to constitutional strictures; if the government aborts that procedure or if the individual is otherwise vindicated at trial, the Constitution requires that he be treated as though he engaged in no criminal activity. For the government to disseminate an arrest record pertaining to the allegedly criminal episode, when it knows that employers may infer that the individual was guilty}\]

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86. Id. at 509.
87. Id.
88. 520 F.2d 467 (D.C. Cir. 1975).
89. Id. at 474-475.
90. Id. at 475.
91. Id. at 477.
rather than innocent of the crime, effectively permits the government to inflict punishment despite the fact that guilt was not constitutionally established.\textsuperscript{92}

The court then granted the summary relief in which the plaintiffs sought to assert their constitutional interests in privacy and due process.\textsuperscript{93}

In \textit{Doe v. Webster},\textsuperscript{94} the D.C. Circuit again expressed concern for the petitioner's right to privacy when a youthful ex-offender sought to have records of a federal conviction expunged.\textsuperscript{95} The court discussed two reasons given by the government for maintaining such records: the need to preserve an accurate record in order not to "rewrite history" and the need for a record for investigative and other law enforcement purposes.\textsuperscript{96} The court discounted the first reason,\textsuperscript{97} pointing to expungement of indictments and special grand jury reports that were defamatory, and of records of an assortment of enforcement, administrative and prosecutorial organizations for a variety of reasons, without loss to history and noted that "[T]he list could be extended almost indefinitely."\textsuperscript{98} Although the court gave weight to investigative and enforcement needs, it reiterated its concern for the right to privacy which it had expressed in \textit{Utz v. Cullinane}.\textsuperscript{99}

4. \textit{The California View}

The California Court of Appeal has held that dissemination by the state to public employers of records of an applicant's arrest not ending in conviction, violated the individual's right to privacy under article 1, section 1 of the California Constitution.\textsuperscript{100} Probable cause for arrest was not in contention but the court found no compelling interest served by disseminating these records. In \textit{Central Valley Chapter, Seventh Step Foundation v. Younger},\textsuperscript{101} the Court of Appeal discussed the 1972 constitutional amendment:

The adoption of the amendment was intended to strengthen

\textsuperscript{92.} \textit{Id.} at 480-481.
\textsuperscript{93.} \textit{Id.} at 491.
\textsuperscript{94.} 606 F.2d 1226 (D.C. Cir. 1979).
\textsuperscript{95.} \textit{Id.} at 1238.
\textsuperscript{96.} \textit{Id.} at 1241.
\textsuperscript{97.} \textit{Id.}
\textsuperscript{98.} \textit{Id.} at 1243.
\textsuperscript{99.} \textit{Id.} at 1238 n.49.
\textsuperscript{100.} 95 Cal. App. 3d 212 (1979).
\textsuperscript{101.} \textit{Id.}
the right of privacy. The elevation of the right to be free from invasions of privacy to constitutional stature was apparently intended to be an expansion of the privacy right. The election brochure argument states: "The right to privacy is much more than 'unnecessary wordage.' It is fundamental to any free society. Privacy is not now guaranteed by our State Constitution. This simple amendment will extend various court decisions on privacy to insure protection of our basic rights."102

The appellate court acknowledged that the right to privacy is not absolute.103 However, incursion into an individual's privacy must be justified by a compelling interest. The state argued that the administrative difficulty of separating arrests not ending in conviction from actual convictions when furnishing a record to an entitled organization gave the state that compelling interest. The court rejected this argument.104 While the state may have a compelling interest in maintaining such records,105 that alone is not enough to justify dissemination of that information to employers.

The court in Central Valley found that five different employees of the Oakland Civil Service Commission had misread the petitioner's records, interpreting arrests as convictions and had consequently denied the petitioner employment.106 The California court quoted Utz v. Cullinane in supporting its contention that "'employers cannot or will not distinguish between arrests resulting in conviction and arrests which do not.'"107

To an accused, the possibility of damage from the public's misapprehension of information made public in a preliminary hearing seems as great as the possibility of damage from misinterpreting arrest records.

The election brochure argument, cited with approval in White, implies that the express right to privacy under article 1, section 1 of the California Constitution is an attempt to consolidate the protection of the federal Bill of Rights108 into a substantive source of the right to privacy. The California Supreme Court has made it clear that governmental intrusion on this

102. Id. at 235 (quoting Porten v. USF, 64 Cal. App. 3d 825, 829 (1976)).
103. 95 Cal. App. 3d at 237 (citing Loder v. Municipal Court, 17 Cal. 3d 859 (1976)).
104. 95 Cal. App. 3d at 238.
105. Id. at 235.
106. Id. at 230-231.
107. Id. at 231.
108. See supra note 77.
right is tolerated only where there is a compelling state interest served by such an intrusion.\textsuperscript{109} Where probable cause for arrest is not disputed and the compelling state interest in keeping arrest records was established, the individual's right to privacy was subordinated to this state interest in keeping the records.\textsuperscript{110} Where probable cause for arrest is unchallenged, and there are no compelling state interests served by disseminating the arrest record and no conviction has resulted, the privacy right of the accused, under the California Constitution, bars dissemination.\textsuperscript{111}

VI
Privacy and The Preliminary Hearing

A. Rights of the Press and the Public to Attend a Preliminary Hearing

In \textit{San Jose Mercury-News v. Municipal Court},\textsuperscript{112} the California Supreme Court, in upholding the constitutionality of the pre-amended section 868, dealt with the question of whether the press and the public have a right to attend a preliminary examination. The court found that neither the public nor the press has an unqualified right to attend a preliminary examination under either the U.S. or the California Constitution.\textsuperscript{113} The court first looked at the question of access to information under the first amendment noting that "'[t]he right to speak and publish does not carry with it the \textit{unrestrained} right to gather information.'"\textsuperscript{114} Further, the court could find no right of media access to places where the public presence is properly restricted. Among these places, said the court, are grand jury proceedings, executive sessions of official bodies, meetings of private organizations and the conferences of high courts themselves.\textsuperscript{115} The court noted that a majority of five U.S. Supreme Court Justices in \textit{Gannett Co. v. DePasquale} found no public or media right to attend suppression of evi-

\textsuperscript{109} Loder v. Municipal Court, 17 Cal. 3d 859 (1976).
\textsuperscript{110} That state interest is "promotion of more efficient law enforcement and criminal justice." 17 Cal. 3d at 864.
\textsuperscript{111} See supra note 100.
\textsuperscript{112} 30 Cal. 3d 498 (1982).
\textsuperscript{113} Id. at 506.
\textsuperscript{114} Id. at 502 (quoting Zemel v. Rusk, 381 U.S. 1, 17 (1965)).
\textsuperscript{115} Id. at 502 (citing Branzburg v. Hayes, 408 U.S. 66 (1972)).
\textsuperscript{116} 443 U.S. 368 (1979).
dence hearings. Three of these justices agreed that the preliminary hearing was traditionally subject to closure. Four justices dissenting in *Gannett* argued that the suppression hearing is critically important because it might provide the public its only opportunity to learn of police misconduct where evidence has been suppressed and a trial precluded. But the dissenters considered the preliminary hearing to be less critical to criminal justice proceedings than the suppression hearing and not closely equivalent to a trial, which is traditionally open. This is important to note because these dissenters agreed with Chief Justice Burger in *Nebraska v. Press Association v. Stuart* that pretrial proceedings are presumably open. The pretrial stage then, is that period after a preliminary hearing and before the opening of the trial. The California court noted that a total of seven justices agreed that the preliminary hearing was traditionally subject to closure. These same seven justices, said the California court, stressed the common law tradition of open trials in *Richmond Newspapers, Inc. v. Virginia*. Thus, the California Supreme Court declined to hold that a right of access to a preliminary hearing arose under the federal constitution.

The California court then turned to the state constitution. It noted that section 868 predated the public trial guarantee of the state constitution by some seven years. Since the constitutional convention which approved the public trial guarantee saw no inconsistency between an open trial and a closed hearing, the court found that the trial provision did not confer a right to attend the preliminary examination on the press and the public. Similarly, when the California liberty-of-speech clause was reincorporated at the 1879 constitutional convention, no inconsistency with section 868 was noted. The supreme court, in *San Jose Mercury-News*, declined to find one.

The court concluded that the statute, giving the defendant

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117. 30 Cal. 3d at 503.
118. Id. at 503-504.
119. Id.
120. Id. at 504-505.
121. Id.
122. Id. at 506.
123. Id. at 507.
124. Id. at 508.
125. Id.
control over access, was a proper means of protecting the defendant’s right to a criminal trial free of juror bias that might result from a public preliminary hearing. 126

B. The Old Law

Until amended in 1982, California Penal Code section 868 codified the right to a closed, private examination of felony charges if the defendant so requested. 127 Absent a magistrate’s determination of probable cause for a trial, the government could not force a defendant into a public forum. The probable cause standard for screening governmental intrusions is founded on a fundamental right to privacy as articulated by courts over the last few decades. The old section 868 was truer to this principle than its replacement.

Enacted in 1872, section 868 was based on the Field Code. 128 Some commentators have attributed this section to nothing more than Field’s known antipathy toward the press. 129 However, Field’s anticipation of the right to privacy has been suggested as at least as convincing a rationale for the content of this penal code section as it was written. 130 Notwithstanding legislative history, or the lack thereof, 131 it follows from the analysis of probable cause and privacy presented above that

126. Id. at 514.
127. Prior to the 1982 amendment, section 868 read:
   The magistrate must also, upon the request of the defendant, exclude from the examination every person except his clerk, court reporter and bailiff, the prosecutor and his counsel, the Attorney General, the district attorney of the county, the investigating officer, the officer having custody of a prisoner witness while the prisoner is testifying, the defendant and his counsel, and the officer having the defendant in custody; provided, however, that... a prosecuting witness may, in the discretion of the court, be entitled for moral support to the attendance of one person of his or her own choosing otherwise not a witness. The person so chosen shall not discuss prior to or during the preliminary hearing the testimony of the prosecuting witness with any person, other than the prosecuting witness, who is a witness in the examination. Nothing in this section shall affect the right to exclude witnesses as provided in Section 867 of the Penal Code.
128. The Field Code was written by David Dudley Field and was first implemented in the State of New York in 1849. See M. Green, Basic Civil Procedure 93-94 (1972).
the preliminary hearing should be closed to the public at the defendant's request.

The preliminary hearing is designed, where the charge against the defendant is not substantiated, to spare the accused the expense and degradation of a criminal trial. The California Supreme Court has recognized the importance to the accused of a closed proceeding:

Section 868 provided a substantial and often indispensable protection to the person who is unjustifiably accused of a criminal offense. The legislature has specifically conferred upon the accused the right to protect his name from being maligned at a preliminary examination.

The preliminary examination is not a trial although there are many similarities to a trial: "Witnesses may be cross-examined, credibility is crucial, and each side has an incentive to prevail." Discovery is allowed before a preliminary hearing, and a defendant may raise an affirmative defense or he may remain silent.

Under the old law, the preliminary examination had to be closed whenever the defendant so moved. Closure was not

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134. 30 Cal. 3d at 510.
137. 30 Cal. 3d at 512.
138. In People v. Elliot, 54 Cal. 2d 498 (1960), the California Supreme Court overturned the conviction of a defendant who had requested and was denied a closed hearing. "The right afforded to the defendant by Section 868 of the Penal Code to require that all unauthorized persons be excluded from the courtroom during the preliminary examination, is a substantial safeguard which cannot be disregarded by the magistrate. The section is mandatory." The court further held "the legislature has specifically conferred upon an accused the right to protect his name from being maligned at a preliminary examination."

In People v. Pompa-Ortiz, 27 Cal. 3d 519 (1980), the court reiterated its holding: "[i]t is settled that denial of a substantial right at the preliminary examination renders the ensuing commitment illegal and entitles a defendant to dismissal of the information on timely motion." Pompa-Ortiz differed from Elliot in that it was not the defendant but rather the victim in a rape case who requested a closed preliminary examination while she testified. The court held that the legislature had intended to grant defendants a public hearing except as provided under Section 868 and therefore the magistrate had erred in closing the examination on other than the defendant's request. However, the Elliot holding was restricted to the extent that where an error under Section 868 was not challenged in a timely manner, a showing of prejudice on account of the error was required for dismissal of charges. The only exception to the requirement of showing prejudice in untimely appeals is where an examination contains a jurisdictional error.

The court left intact the defendant's right to a pretrial challenge of irregularities in
within the magistrate's discretion; he could neither close the hearing without the defendant's consent nor open it against the defendant's will.

C. The New Law

It should be again emphasized that this note argues for a categorical right to close a preliminary examination on the grounds of the privacy of the accused. The United States Supreme Court, the California Supreme Court and the California Legislature have all acknowledged that due process rights to a fair trial may also require the closing of a preliminary examination. Due process rights to a fair trial may be weighed against the first amendment rights to public access in any pretrial proceeding, resulting in a case-by-case or ad hoc balancing. Now, in accord with the amended section 868, only the proven possibility of prejudice at trial justifies the closure of the preliminary examination to the press and public. But the quickness with which the preliminary hearing may occur after arrest can prevent a defendant from showing that prejudice. Although a defendant can move to suppress evidence before a preliminary hearing, he need not do so. He may choose to make such a motion at the pretrial stage after the preliminary hearing. Therefore, it is possible that evidence may be presented at a preliminary hearing that might later be suppressed. Yet the California Court of Appeal has ruled that the public's right of access to information regarding an ongoing criminal procedure does not include the right to pretrial disclosure of inadmissible evidence.

Lawmakers and commentators have advocated the use of the preliminary examination without any showing of prejudice. Denial of the right to a closed preliminary examination remains grounds for defeating a commitment for trial in superior court.

139. People v. Pompa-Ortiz, 27 Cal. 3d 519 (1980).
144. See supra note 1.
146. See supra note 1.
147. See supra note 129.
of the balancing test for preliminary hearing closure that was advanced by Justice Stewart in *Gannett v. DePasquale*,\(^\text{150}\) where closure of pretrial suppression hearings was at issue. The California Supreme Court has pointed out the weakness of using such a test to close a preliminary hearing in *San Jose Mercury-News*, saying that the quickness with which a preliminary examination is held may preclude a showing of prejudice to the defendant's fair trial.\(^\text{151}\) Whether, . . . . in any given case actual prejudice can be proven if the case goes to trial, the accused's privacy rights still demand a closed preliminary hearing.

In fact, it is the case that does not go to trial that makes the point. The accused has a right to a final screening to determine if there is probable cause to send him to the superior court. Because the accused is presumed innocent, a magistrate has no valid means of predicting the outcome of the hearing. The magistrate must presume that the defendant will *not* be held to answer to an information and that probable cause will not be found. The magistrate must maintain this presumption until he hears all the evidence. Therefore the magistrate must presume from the outset that the government has already improperly intruded into the defendant's life by the arrest and filing of the complaint. To avoid compounding the intrusion, the magistrate should keep the proceeding closed to the public until probable cause for the government's actions has been found.

It is one thing for a judge to determine if an open pretrial hearing might endanger a defendant's right to a fair trial. At the time of such a hearing in superior court, probable cause for a trial has been established and it is apparent, if not certain, that a trial will occur. *Gannett* leaves it to the court's discretion to balance the danger of prejudicial publicity against the dangers of denying public access.\(^\text{152}\)

It is quite another thing, however, to require a magistrate to make such a finding before it is decided there will be a trial. The new law requires the defendant to request closure because he presumes he will be bound over for a trial and what comes out at the preliminary hearing will prejudice his chance for a fair trial. The magistrate must close the preliminary hearing if he, at the outset, finds there will be a trial and what will

\(^{150}\) 443 U.S. 368 (1979).

\(^{151}\) 30 Cal. 3d at 513.

\(^{152}\) See supra text accompanying notes 100-110.
be revealed at the preliminary hearing is going to make it difficult to have a fair trial. The whole purpose of the preliminary hearing is to require the prosecution to prove to a neutral and detached magistrate that there is probable cause for a trial. Yet under the new law one of the magistrate's first acts might require him to prejudge the case and act on the assumption that there will be a trial. Surely such a presumption conflicts with a principle that is fundamental to our system of justice: the presumption of innocence.

VII

Conclusion

Prior to being amended, Penal Code section 868 allowed one accused of a felony to protect his privacy until the prosecution had established, before a magistrate, the existence of probable cause to try the defendant.

Absent probable cause to believe an accused has committed a particular crime, the state has no grounds for compelling a defendant to defend himself in a public forum against his will. It is important to distinguish the state's interest in establishing probable cause for a trial from its interest in forcing the accused to surrender his right of privacy to the public before probable cause for a trial is established. The need for criminal justice and law enforcement has been held sufficient to warrant the state's gathering and retaining information about possible criminal activity by a particular person. However, the need to make that information available to the public is a separable and less compelling need than that of law enforcement.

Courts have recognized that the right of privacy is a protection against dissemination of criminal process records that might be misinterpreted by the public. The California Supreme Court has recognized that the public might misapprehend the significance of the preliminary hearing or confuse the hearing with a trial on the issue of guilt or innocence. This is especially threatening to the defendant who for whatever reason does not present a defense at the preliminary hearing. The specter of onesided publicity might induce the

153. Id.
154. Id.
155. Id.
accused to abandon his right to silence in favor of "trying the case in the media."\textsuperscript{157}

Both the California Supreme Court and the United States Supreme Court have recognized limits on the constitutional rights of access that the public and the press have to the courtroom. Among these limits is a restriction on access to the preliminary examination.

The right to privacy can only be breached by the state if there is a compelling state need. In the context of the Penal Code, that need ought to be probable cause, whether it be to arrest, search, indict, or bind over for a trial. Where probable cause has not been established before a neutral and detached magistrate, forcing the accused to appear in a public forum unconstitutionally abridges his right to privacy.

In the past, section 868 provided a statutory method for one accused of a crime in California to assert this fundamental, constitutional right. As amended, section 868 takes no cognizance of this right. The revised section merely frames the issue of the closed preliminary hearing as one of due process: the right to a fair trial. Clearly, one's right to privacy in California is not adequately protected by such a view. Absent legislation to repeal the recent amendment, it seems clear that California courts should find the change constitutionally objectionable.

\textsuperscript{157} Id.