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Probable Cause for Pretrial Detention: Does Gerstein v. Pugh Adequately Insure Its Existence?

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The purpose of this article is threefold. First, it will analyze and comment upon the reasoning of *Gerstein v. Pugh*,[1] a recent United States Supreme Court decision holding that defendants in criminal cases are entitled to an independent judicial determination of probable cause as a precondition to significant pretrial restraints on liberty. Second, the article will survey state authority underlying California criminal procedure, and discuss its application to the probable cause hearing required by *Gerstein*, in an attempt to define the form this hearing should take in California. Third, the article will explore the scope of the right to a probable cause hearing, with special attention to the question of whether a significant restraint on the exercise of first amendment liberties would confer a right to a hearing. A subject discussed throughout the article will be the *Gerstein* majority's reliance on the fourth amendment as the exclusive federal constitutional source of the defendant's right to a probable cause hearing and to procedural safeguards at that hearing.

I. GERSTEIN V. PUGH: ANALYSIS AND CRITIQUE

A. Statement of the Case

Pugh v. Rainwater[2] involved a class action seeking injunctive and declaratory relief from the United States District Court for the Southern District of Florida.[3] The plaintiffs alleged that provisions of Florida criminal procedure violated fourth and fourteenth amendment rights by permitting the pretrial detention of criminal defendants without an independent judicial determination of

*Member, third year class.

1. 420 U.S. 103 (1975).

2. 332 F. Supp. 1107 (S.D. Fla. 1971).

3. Jurisdiction was founded upon 28 U.S.C. §§ 1343(3)-(4) (1970). The action was based on 42 U.S.C. § 1983 (1970). 332 F. Supp. at 1108. The suit was ruled a valid class action under Fed. R. Civ. P. 23(b)(2). *Id.* at 1115.

probable cause. The procedures in question allowed prosecutors to charge all crimes, other than capital offenses, by information, without a preliminary hearing.[4] A judicial determination of probable cause was provided for by statute, but only for persons confined without trial for thirty days after arrest.[5] The arraignment procedure also resulted in a judicial determination of probable cause, but it was frequently delayed a month or more after arrest.[6] The district court declared these procedures unconstitutional, and ordered the defendants to submit a plan providing for a preliminary hearing before a judicial officer.[7] A plan subsequently proposed by defendant Sheriff E. Wilson Purdy was ordered adopted by the court.[8] The plan was stayed pending appeal to the Court of Appeals for the Fifth Circuit, but was finally ordered adopted after the district court found, on remand, that certain amendments to the Florida Rules of Criminal Procedure failed to satisfy the basic constitutional objections.[9] The court of appeals affirmed with minor alterations.[10] Certiorari was granted,[11] and in *Gerstein v. Pugh*[12] the Supreme Court held unanimously that the United States Constitution requires that a judicial officer make a determination of probable cause as a prerequisite to any significant pretrial restraint on liberty.[13] However, the Court was sharply divided on the decision to hold that the Constitution does not mandate that the accused have a right, at the required hearing, to confront and cross-examine hostile witnesses, or a right to subpoena witnesses in the accused's behalf, or a right to the assistance of counsel.[14]

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4. 332 F. Supp. at 1109-10.
5. Gerstein v. Pugh, 420 U.S. 103, 106 (1975).
6. *Id.* at 106.
7. 332 F. Supp. at 1115-16.
8. Pugh v. Rainwater, 336 F. Supp. 490 (S.D. Fla. 1972).
9. Pugh v. Rainwater, 355 F. Supp. 1286 (S.D. Fla. 1973).
10. Pugh v. Rainwater, 483 F.2d 778 (5th Cir. 1973).
11. 414 U.S. 1062 (1973).
12. 420 U.S. 103 (1975).
13. *Id.* at 105-19, 126-27.
14. Those Justices separately concurring would not have reached these issues:

> Having determined that Florida's current pretrial detention procedures are constitutionally inadequate, I think it is unnecessary to go further by way of dicta. In particular, I would not, in the abstract, attempt to specify those procedural protections that constitutionally need not be accorded incarcerated suspects awaiting trial.

Id. at 126 (Stewart, J., concurring).

B. The Constitutional Basis of the Decision

In an opinion by Justice Powell, a majority of five[15] held that the fourth amendment requires the judicial determination of probable cause.[16] The Court gave the following reasons for relying on the fourth amendment as the source of this requirement: (1) "[B]oth the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common law antecedents";[17] (2) "[T]he Fourth Amendment was tailored explicitly for the criminal justice system";[18] and (3) The fourth amendment's "balance between individual and public interests always has been thought to define the 'process that is due' for seizures of person or property in criminal cases, including the detention of suspects pending trial."[19]

In his concurring opinion, Justice Stewart[20] refused to

> join the Court's effort to foreclose any claim that the traditional requirements of constitutional due process are applicable in the context of pretrial detention.[21]

The conflict presented by the Justices' opinions is whether the fourth amendment is the sole constitutional source of objections to a state criminal procedure which results in pretrial detention.

Justice Powell's position is that the fourth amendment is the exclusive source of the accused's claim to a judicial determination of probable cause and to adversary safeguards at that proceeding. The gist of his argument seems to be that criminal procedure is a unique area, involving a special problem in balancing society's interests in security and economy against the individual's interest in liberty and privacy.[22] The fourth amendment was designed to resolve this conflict and has been interpreted to serve this purpose. Reliance on the fourth amendment will suffice to maintain an appropriate balance between these competing interests. The recourse had by the concurring opinion to cases requiring procedural protections when a commercial bank account is

15. Chief Justice Burger and Justices Powell, White, Blackman and Rehnquist.
16. 420 U.S. at 114.
17. *Id.* at 111.
18. *Id.* at 125 n.27.
19. *Id.*
20. Joined by Justices Douglas, Brennan and Marshall.
21. 420 U.S. at 127.
22. *Id.* at 112, 122 n.23.

garnished,[23] a refrigerator is sequestered,[24] or a public school student is suspended[25] is therefore unnecessary and inappropriate. Comparisons with

> the relatively simple civil procedures . . . presented in the cases cited in the concurring opinion are [therefore] inapposite and irrelevant in the wholly different context of the criminal justice system.[26]

Warren Court cases on procedural due process recognized the right of persons in a wide variety of situations to notice and an adversary hearing before any taking of property, where "state action" was involved in the taking.[27] However, it appears that the Burger Court is retreating from its predecessor's initiatives in the field of procedural due process.[28] Reluctant to continue the development begun by the Warren Court, it is hardly surprising to see the *Gerstein* majority balk at its extension into a new area of criminal procedure.[29] By saying that the fourth amendment "defines" due process in this area, Justice Powell has attempted to forestall comparisons between the procedural safeguards afforded debtors in civil cases and those afforded the accused.

The lucidity of Justice Powell's distinction between constitutional bases for criminal, as opposed to civil, procedure is clouded by certain facts of constitutional history. His assertion that the

23. North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).

24. Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974).

25. Goss v. Lopez, 419 U.S. 565 (1975).

26. 420 U.S. at 125 n.27. Justice Powell adds that the probable cause hearing is "only the first stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct." *Id.* This argument seems wholly beside the point. We are concerned here with the disparity between the procedural guarantees enjoyed by a person threatened with loss of a refrigerator as opposed to those extended the accused, threatened with the loss of liberty pending trial. The glories of criminal procedure enjoyed by the accused subsequent to this detention are irrelevant.

27. Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

28. *See* Mitchell v. W.T. Grant Co., 416 U.S. 600, 623, 629 (1974) (Powell, J., concurring; Stewart, J., dissenting). *See generally The Supreme Court, 1973 Term*, 88 HARV. L. REV. 43, 71-83 (1974); Comment, *Procedural Due Process: The United States Supreme Court Retraces Its Steps*, 27 U. FLA. L. REV. 273 (1974).

29. For a discussion of the Warren Court's work in the area of criminal procedure, extolling that Court's "implementation of constitutional rights which have existed only in theory in the past" see Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 258 (1968). For a summary of the Burger Court's decisions on criminal procedure see *Robinson at Large in the Fifty States: A Continuation of the State Bills of Rights Debate in the Search and Seizure Context*, 5 GOLDEN GATE L. REV. 1, 25-27 (1974).

fourth amendment has "always" been thought to define the "process that is due" in this area is inexplicable in the face of long-standing precedents,[30] controlling until just 26 years ago,[31] which held that the fourth amendment did not apply to the states. In the 96 years preceding *Wolf v. Colorado*[32] the constitutionality of state criminal procedure was measured against the fourteenth amendment due process clause. Ironically, as a result of *Gerstein* the guarantees of the fourth amendment, which were recently held applicable to the states through the fourteenth amendment's due process clause,[33] apparently preclude consideration of fourteenth amendment precedents. The result is that the fourth amendment's once inapplicable specific minimum guarantees have been converted into the maximum measure, and exclusive source, of the criminal defendant's constitutional claim to liberty.

Justice Powell's theory that there is but one source of constitutional protection for the accused against state impairment of liberty finds more recent contradiction in his concurring opinion in *Johnson v. Louisiana*,[34] where he stated that:

> Due process, as consistently interpreted by this Court, commands that citizens subjected to criminal process in state courts be accorded those rights that are fundamental to a fair trial in the context of our "American scheme of justice."[35]

The question which concerned Justice Powell in *Johnson* was whether the due process clause should be read as incorporating, and thereby making enforceable against the states, the sixth amendment right to a unanimous jury verdict in criminal cases.[36]

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30. Smith v. Maryland, 59 U.S. (18 How.) 71, 76 (1855); National Safe Deposit Co. v. Stead, 232 U.S. 58, 71 (1914).

31. Wolf v. Colorado, 338 U.S. 25 (1949).

32. *Id.*

33. *Id.* In relevant part *Wolf* states:

> The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause.

Id. at 27-28. *See also* Mapp v. Ohio, 367 U.S. 643 (1961).

34. 406 U.S. 356, 366 (1972) (Powell, J., concurring).

35. *Id.* at 366-67.

36. *Id.* at 373.

This "incorporation" doctrine is basically the same theory used to make the fourth amendment applicable to the states. However, according to Justice Powell, for pretrial detention the fourth amendment controls the process that is due, but where sixth amendment rights are at issue the due process clause is controlling. The majority opinion in *Gerstein* does not satisfactorily explain why, for some aspects of state criminal procedure, a particular provision of the Bill of Rights obviates consideration of due process precedents.

Given this infirmity in the theory on which the Court rests its approach, one is inclined to question why the Court did not simply distinguish the creditor's remedies cases on the nature and weight of the interests involved. Different interests are obviously presented by a criminal prosecution. It would seem that ultimately it is the balance of those interests, rather than the precise source of their constitutional protection, which must be relied upon to distinguish the two areas. It would further seem that, in weighing those interests, it would be consistent with past practice and good sense to say that the accused's interests find two sources of constitutional protection. It is doubtful that such an admission would even affect the outcome of the balancing process. If the foregoing is correct, then why did the *Gerstein* majority distinguish on the constitutional basis, rather than on the weight of the competing interests? Perhaps the answer lies in the Burger Court's attitude toward the line of procedural due process cases stemming from *Sniadach v. Family Finance Corp.* and *Fuentes v. Shevin*.[37] If it were said that this case is unlike the *Fuentes-Sniadach* cases in that here the balance of interests does not support various procedural safeguards, then this would imply that in the *Fuentes-Sniadach* cases the balance of interests does support those safeguards. This would in turn imply a measure of approval of those cases, a step the present Court is unlikely to take. In other words, perhaps Justice Powell did not attempt to distinguish the *Fuentes-Sniadach* line of cases on the balance of interests involved because he thought they were indistinguishable on that basis, and he was not at that time disposed to disapprove them.

A distinction on the balance of interests may indeed be problematical. However, the validity of Justice Powell's "exclusive

37. Fuentes v. Shevin, 407 U.S. 67 (1972) (holding state replevin statutes invalid as violative of due process because they permitted a deprivation of property without a prior hearing); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (holding prejudgment wage garnishment unconstitutional as violative of due process).

constitutional basis" distinction is questionable. The "distinction" at the heart of the matter is in the evaluation of the individual's rights vis-a-vis the government. Putting this case on the ground of the fourth amendment neatly distinguishes away the conflict between the underlying constitutional perspectives of this case as opposed to the Warren Court cases on procedural due process. Justice Powell need not concern himself with the comparative interests involved in the loss of a kitchen appliance as opposed to the loss of one's liberty; there is no point of comparison, because the constitutional bases are different.

Having found that the "due process" defined by the fourth amendment requires a probable cause hearing, the Court's five man majority goes on to find that the fourth amendment does not entitle the defendant to rights of compulsory process, confrontation, cross-examination and counsel.[38] The argument has two parts. First, it is concluded that no adversary hearing (compulsory process, confrontation and cross-examination) is required.[39] Second, the majority states that

> [b]ecause of its limited function and its nonadversary character, [it is concluded that] the probable cause determination is not a "critical stage" in the prosecution that would require appointed counsel.[40]

C. No Adversary Safeguards at the Probable Cause Hearing

The *Gerstein* majority states that the probable cause hearing need not be an adversary proceeding because probable cause can be determined with sufficient reliability at a nonadversary hearing. The Court cites their past approval of this traditional method of proof[41] as indicative of this reliability. This approval is said to be based on two factors. First, an "informal procedure" is justified by the lesser consequences of a probable cause determination, *i.e.*, although the probability of error in a nonadversary proceeding may increase, the harm flowing from such error will be less than the harm which might flow from error at trial. Second, an "informal procedure" is justified

38. 420 U.S. at 119-25.
39. *Id.* at 119-20.
40. *Id.* at 122.
41. *Id.* at 120-22, *citing* Brinegar v. United States, 338 U.S. 160, 174-75 (1949); McCray v. Illinois, 386 U.S. 300 (1967).

> by the nature of the determination itself. It does not require the fine resolution of conflicting evidence that a reasonable doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt.[42]

In other words, the factfinder is less likely to err to the defendant's prejudice when finding a reasonable belief in guilt than in finding the absence of a reasonable doubt. The lesser likelihood of error was thought to make acceptable a less reliable procedure.

The first factor seems paradoxical. It will be recalled that the hearing is required in the first place by the prospect of a significant impairment of the individual's liberty. It is true that the accused held for trial following a probable cause hearing may not experience the disability and stigma of one jailed following a criminal conviction; but this may be small comfort to a person behind bars, and it is likely that some stigma will attach to a person jailed pending trial. Justice Powell seems quite correct in his argument that there is more room for error to the defendant's prejudice when applying a reasonable doubt standard than when trying to determine probable cause.

However, neither *Brinegar v. United States*[43] nor *McCray v. Illinois*,[44] the two cases which the Court cites as indicating its past approval of a nonadversary proceeding, furnish much support for that proposition. *Brinegar* involved the application of the rules of evidence to a pretrial motion to suppress. A conviction for illegally hauling liquor was obtained based in part upon evidence seized in a search of petitioner's car. Petitioner challenged the probable cause for this search, pointing out that evidence of his reputation for hauling liquor, and evidence of a prior arrest and pending prosecution for illegally hauling liquor (both known to the officer at the time of the search) were admitted at the hearing on the motion to suppress, but excluded from the trial which followed the denial of the motion. Petitioner argued that

> the factors relating to inadmissibility of the evidence . . . for purposes of proving guilt at

42. 420 U.S. at 121.
43. 338 U.S. 160 (1948).
44. 386 U.S. 300 (1966).

> the trial, deprive the evidence as a whole of sufficiency to show probable cause for the search . . . .[45]

A majority of five,[46] after emphasizing that there was sufficient evidence without the hearsay to sustain a finding of probable cause,[47] rejected the petitioner's argument. The Court first noted the significant difference between the standard of guilt proved beyond a reasonable doubt and the standard of probable cause to believe the suspect has committed a crime "and . . . a like difference in the *quanta* and modes of proof required to establish them."[48]

The *Brinegar* Court next stated that a number of reasons other than lack of probative value and trustworthiness required the exclusion of evidence at trial. Among them were the possible prejudicial effect upon a trial jury, the possibility that the jury would misunderstand or misuse the evidence, and the absence of opportunity for cross-examination.[49] The Court concluded that if the rules of evidence were applied to determinations of probable cause for an arrest or search, this would greatly reduce the number of situations in which the police could take effective action.[50]

In short, *Brinegar* stands for the proposition that rules of evidence designed to guard against jury prejudice, confusion or misuse of evidence need not be applied in hearings before the court on motions to suppress. A careful reading of *Brinegar* does not support Justice Powell's assertion that the Court has given approval to nonadversary hearings; but it does support the admission of hearsay at hearings on probable cause, given sufficient guarantees of trustworthiness.

McCray v. Illinois[51] was a 5 to 4 decision upholding the assertion of the informer's privilege at a pretrial motion to suppress. The Court described the informer's privilege as "a well-established testimonial privilege, long familiar to the law of evidence."[52] The purpose of such a rule is to protect the flow of

45. 338 U.S. at 172.
46. A sixth Justice concurred on separate grounds.
47. 338 U.S. at 172.
48. *Id.* at 173.
49. *Id.*
50. *Id.* at 174.
51. McCray v. Illinois, 386 U.S. 300 (1966).
52. *Id.* at 308.

information from informers who are thought to be "a vital part of society's defensive arsenal."[53] *McCray* recognized that this privilege need give way at trial only where "the disclosure of the informer's identify is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause . . . ." [54] From this it followed that the accused could not claim this right to disclosure at a hearing on a motion to suppress, where guilt or innocence was not at stake.[55] It should be noted that at the hearing on the motion to suppress in *McCray* the arresting officers testified

> fully and in precise detail as to what the informer told them and as to why they had reason to believe his information was trustworthy. Each officer was under oath. *Each was subjected to searching cross-examination.* The judge was obviously satisfied that each was telling the truth, and for that reason he exercised the discretion conferred upon him by the established law of Illinois to respect the informer's privilege.[56]

Such authority hardly supports Justice Powell's contention that the Court has approved decisions "by a magistrate in a nonadversary proceeding on hearsay and written testimony . . . ." [57] The suppression hearings in *Brinegar* and *McCray* were clearly adversary proceedings. The defendants had the benefit of counsel[58] and the right of cross-examination, at least of those persons claiming a privilege or repeating hearsay.[59]

Even assuming that there were precedent approving informal modes of proof and a nonadversary procedure at suppression hearings, such precedent should not support a like procedure at a pretrial detention hearing. The issue of probable cause for a search may be raised again by objection to the admission of evi-

53. *Id.* at 307, *quoting* State v. Burnett, 42 N.J. 377, 201 A.2d 39 (1964).

54. 386 U.S. at 310, *quoting* Roviaro v. United States, 353 U.S. 53 (1956).

55. 386 U.S. at 311-12.

56. *Id.* at 313 (emphasis added).

57. Gerstein v. Pugh, 420 U.S. 103, 120 (1975).

58. *See* FED. R. CRIM. P. 44.

59: As to whether the admissibility of hearsay is indicative of a non-adversary proceeding with "informal modes of proof," see FED. R. EVIDENCE 803, *Hearsay Exceptions: Availability of Declarant Immaterial*, and especially 803 (24), *Other Exceptions*. Also see FED. R. EVIDENCE 804(b), *Hearsay Exceptions: Declarant Unavailable*, and especially 804(b)(5), *Other Exceptions*.

dence at trial and, if this objection is overruled and the defendant is found guilty, the conviction may be appealed.[60] If the defendant prevails on appeal the conviction will be reversed. Thus, any informal modes of proof and concomitant high likelihood of error at the motion to suppress are supplemented by precedures at trial (at which the defendant may be acquitted) and provisions for appeal, all of which may be exhausted before the defendant's conviction becomes final. However, in the case of the probable cause hearing, the potential harm, pretrial detention without probable cause, is an irremediable injury which cannot be avoided or mitigated by procedures available at trial or afterwards. If the defendant's rights are to be adequately protected, it must be at the probable cause hearing,[61] because, as the Court emphasized in *Gerstein*, lack of probable cause to arrest or detain does not void a subsequent conviction.[62]

In spite of the facts in *Brinegar* and *McCray*, it may be that Justice Powell's assertion that the Court has approved nonadversary proceedings which use informal proofs to determine probable cause refers to the procedure required for the issuance of a search or arrest warrant. In this connection a note from *Brinegar* is instructive:

> The inappropriateness of applying the rules of

60. *See* CAL. PENAL CODE § 1538.5(m) (West Supp. 1975). Section 1538.5(m) states:

> A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Such review on appeal may be obtained by the defendant providing that at some stage of the proceedings prior to conviction he has moved for the return of property or the suppression of the evidence.

Id.

61. In California a finding of probable cause would probably be reviewable by petition for a writ of prohibition under CAL. PENAL CODE § 999(a) (West 1970). However, the scope of such review is limited, the reviewing court not being permitted to substitute its judgment on the weight of the evidence for that of the trial court. Buck v. Superior Court, 232 Cal. App. 2d 153, 42 Cal. Rptr. 527 (1965). Moreover, reliance upon such a proceeding would mean that the accused would suffer a restraint upon liberty pending disposition of the petition. The purpose of a judicial determination of probable cause is to avoid unwarranted restraints on liberty. The adequacy of the protection given liberty is not enhanced by a writ proceeding which determines that liberty was wrongfully invaded but does nothing by such determination to deter similar future invasions.

62. 420 U.S. at 119, *citing* Frisbie v. Collins, 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 436 (1886).

> evidence as a criterion to determine probable cause is apparent in the case of an application for a warrant before a magistrate, the context in which the issue of probable cause most frequently arises. The ordinary rules of evidence are generally not applied in *ex parte* proceedings, "partly because there is no opponent to invoke them, partly because the judge's determination is usually discretionary, partly because it is seldom final, but mainly because the system of Evidence rules was devised for the special control of trials by jury."[63]

One would hardly expect the Court to disapprove an application for an arrest warrant on the ground that it is not an adversary proceeding. It is likewise reasonable, where an opponent is not available and a jury does not decide the issue, to dispense with rules of evidence designed particularly for adversary proceedings before a jury, as long as sufficient guarantees of probative value and trustworthiness are retained.

There is, however, considerable difficulty in maintaining that the approval of informal ex parte procedures for the issuance of an arrest warrant implies approval of a similar procedure for the probable cause hearing after an arrest. Three factors distinguish the situations. First, after arrest the accused is obviously available. There is therefore no need to proceed without the accused. Second, a summary procedure is no longer necessary to prevent the suspect from escaping, committing further crimes or destroying evidence.[64] Third, as Justice Powell himself points out, a suspect's interests may be prejudiced substantially more by pretrial confinement than by the interference with personal privacy and liberty occasioned by an arrest.[65] Pretrial detention "may imperil the suspect's job, interrupt his source of income, and impair his family relationship."[66] This increase in the potential prejudice to the suspect would seem to require a corresponding increase in the procedural measures designed for the suspect's protection. Justice Powell provides a rationale to answer this third point by noting that the Court "has never invalidated an arrest based upon probable cause solely because the officers failed to

63. 338 U.S. at 174 n.12, *quoting* 1 WIGMORE, EVIDENCE 19 (3d ed. 1940).
64. *Cf.* 420 U.S. at 114.
65. *Id.*
66. *Id.*

secure a warrant."[67] This means that an ex parte judicial determination of probable cause is not required for an arrest. Therefore, making this kind of proceeding mandatory for pretrial detention does reflect some increase in the procedural safeguards to which the accused has a right. The question, however, is whether the interests of a person faced with a pretrial confinement require greater procedural protection than that provided by a warrant proceeding.

Justice Powell commented upon the need to proceed without the accused and without adversary safeguards; the basis of his assessment of the balance between the competing interest of society and the accused appears in a footnote:

> Criminal justice is already overburdened by the volume of cases and the complexities of our system. The processing of misdemeanors, in particular, and the early stages of prosecution generally are marked by delays that can seriously affect the quality of justice. A constitutional doctrine requiring adversary hearings for all persons detained pending trial could exacerbate the problem of pretrial delay.[68]

Thus, in Justice Powell's view, the value of providing "the full panoply of adversary safeguards" would, in most cases, be too slight to justify such a delay.[69]

In summary, it appears Justice Powell is not relying on the Court's past approval for his conclusion that adversary safeguards are not required at the probable cause hearing. Rather, the conclusion seems to be the product of an analysis of competing interests, in which analysis the decisive weight is given to "the volume of cases and the complexities of our system," and the resulting problem of pretrial delay.

D. No Right To Counsel

Having concluded that the probable cause hearing need not be an adversary proceeding with rights of compulsory process, confrontation and cross-examination, the majority opinion goes

67. *Id.* at 113, *citing* Ker v. California, 374 U.S. 23 (1963); Draper v. United States, 358 U.S. 307 (1959); Trupiano v. United States, 334 U.S. 699 (1948).

68. 420 U.S. at 122 n.23.

69. *Id.* at 122.

on to hold that this hearing "is not a 'critical stage' in the prosecution, which would require appointed counsel."[70] The opinion attempts to distinguish *Coleman v. Alabama*,[71] which held that a defendant has a right to counsel at a preliminary hearing. The Alabama preliminary hearing involved in *Coleman* was not a required step in the prosecution. Its purposes were to determine whether there was sufficient evidence to warrant presenting the case to a grand jury[72] (*i.e.*, probable cause), and, if so, to fix bail if the offense were bailable.[73] If no probable cause were found, the accused would be discharged, although such a discharge would not bar a later indictment.[74] In *Coleman* the Court advanced four reasons why counsel is required at the preliminary hearing.

> First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can

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70. *Id.*

71. 399 U.S. 1 (1970), *discussed at* 420 U.S. at 122-23.

72. 399 U.S. at 8 n.3, *quoting* M. CLINTON MCGEE, CRIMINAL PROCEDURE IN ALABAMA 41 (1954), which states:

> A preliminary hearing or examination is not a trial in its ordinary sense nor is it a final determination of guilt. It is a proceeding whereby an accused is discharged or held to answer, as the facts warrant. It seeks to determine whether there is probable cause for believing that a crime has been committed and whether the accused is probably guilty, in order that he may be informed of the nature of such charge and to allow the state to take the necessary steps to bring him to trial. Such hearing also serves to perpetuate evidence and to keep the necessary witnesses within the control of the state. It also safeguards the accused against groundless and vindictive prosecutions, and avoids for both the accused and the state the expense and inconvenience of a public trial.

Id.

73. 399 U.S. at 8.

74. *Id.* at 24 (Burger, C.J., dissenting).

> also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.[75]

The majority opinion in *Gerstein* states that *Coleman* is distinguishable for two reasons. The *Gerstein* probable cause hearing was first distinguished from the *Coleman* preliminary examination on the basis of the potential benefit which would flow to the defendant by prevailing, implying a commensurately disparate interest in the assistance of counsel. It was said that, under Alabama law, a finding of no probable cause at the preliminary hearing could mean that the suspect would not be tried at all, whereas the *Gerstein* probable cause hearing, required by the fourth amendment, is addressed only to pretrial custody.[76] However, Chief Justice Burger, who joined in Justice Powell's majority opinion in *Gerstein*, pointed out in his dissenting opinion in *Coleman* that a finding of no probable cause at the Alabama preliminary hearing was no bar to a subsequent indictment.[77] Moreover, under the Dade County plan under review in *Gerstein*, a finding of no probable cause meant the accused could not be charged again for the same offense by complaint or information, but only by indictment returned within thirty days.[78] Thus, as to the first distinguishing factor, the majority opinion seems to have the facts almost completely backwards. The Dade County plan placed a greater limitation on defendants' liability to continued prosecution than did the Alabama preliminary examination. This would suggest there is even more benefit to be gained by counsel's presence at the probable cause hearing than at the preliminary examination involved in *Coleman*, where such presence was held to be constitutionally required. Perhaps it will be said, in defense of the majority opinion, that the probable cause hearing to which the Court was referring when distinguishing *Coleman* was only that proceeding which is constitutionally required, and that the constitution does not require a limitation on liability to prosecution. The *Gerstein* Court did not state whether,[79] absent

75. *Id.* at 9.
76. 420 U.S. at 123.
77. 399 U.S. at 24.
78. 420 U.S. at 108.
79. However, Justice Powell does state:

> In holding that the prosecutor's assessment of probable cause is not sufficient alone to justify restraint of liberty pending trial, we do not imply that the accused is entitled to judicial

new evidence, a finding of no probable cause would require some restriction on continued prosecution. However, even assuming it would not, the possibility of prosecution by indictment in the *Coleman* situation would seem to render *Gerstein* and *Coleman* substantially indistinguishable in terms of the benefit flowing to the prevailing defendant.

The second factor relied on to distinguish *Coleman* was the availability there of cross-examination.

> The [*Coleman*] Court noted that the suspect's defense on the merits could be compromised if he had no legal assistance for exploring or preserving the witnesses' testimony. This consideration does not apply when the prosecution is not required to produce witnesses for cross-examination.[80]

This argument overlooks the fact that the entire preliminary hearing involved in *Coleman*, and with it, of course, the "right" to confront and cross-examine witnesses, was required by neither state nor federal law.[81] The prosecution could instead elect to seek an indictment directly from a grand jury, without a preliminary hearing.[82] Therefore, generally speaking, the accused had no right of cross-examination. However, where a preliminary hearing was granted, the accused did have the right to cross-examine. *Coleman* held that in this situation the accused was entitled to the assistance of counsel. As noted above, the benefits derived from exploring and preserving witnesses' testimony were not the only factors underlying the holding in *Coleman*. The Court also relied on the opportunity for discovery and counsel's skill in making effective arguments for the need for an early psychiatric examination or bail. Eliminating the right to cross-examine will obviously circumscribe discovery, and thereby lessen the advantages to be had by counsel's presence. However, to whatever

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> oversight or review of the decision to prosecute. Instead, we adhere to the Court's prior holding that a judicial hearing is not prerequisite to prosecution by information.

Id. at 118-19. It is unclear whether Justice Powell meant this language to refer only to the original power to prosecute, or to a power to continue prosecution, without pretrial restraints on liberty, in the face of a judicial determination of no probable cause.

80. *Id.* at 123.

81. 399 U.S. at 8, *citing Ex parte* Campbell, 278 Ala. 114, 176 So. 2d 242 (1965).

82. 399 U.S. at 8. Note the concern expressed, in the concurring opinion of Justice White, that the holding in the case may "invite eliminating the preliminary hearing system entirely." *Id.* at 17-18.

extent possible, discovery and argument concerning the conditions attached to bail would seem to be appropriate even at a probable cause hearing where there is no right of cross-examination. Therefore, at least part of the *Coleman* rationale supporting a right to counsel would seem to apply even if the right to cross-examine is denied.

The *Gerstein* Court might have attempted to distinguish *Coleman* by putting a different construction on its holding. *Coleman* could be said to hold that if a state allows counsel at a preliminary examination, it must provide counsel for an indigent defendant. This would be to construe *Coleman* as an equal protection case. *Gerstein* could then be said to be distinguishable because it deals with a situation in which the state may elect to allow counsel for neither rich nor poor. *United States v. Wade*,[83] relied upon heavily by the *Coleman* Court, seems to indicate that *Coleman*, and the "critical stage" analysis applied in that case, are not grounded on an equal protection theory. *Wade* held that police lineups were "critical stages" of the prosecution which could not be conducted without notice to defense counsel, or in defense counsel's absence. The requirement of notice to counsel already retained seems to imply that the "critical stage" analysis is not directed to the question of an indigent's right to appointed counsel, and that therefore the "critical stage" cases, including *Coleman*, should not be interpreted in terms of equal protection. This conclusion is buttressed by analysis of the *Wade* rationale.

The ultimate concern in *Wade* was with the prejudice to defendant which would result at trial if the defendant were denied counsel during a preliminary proceeding. It is clear that a defendant has a federal constitutional right to the effective assistance of counsel at trial.[84] *Wade* protects this right by holding that if a state elects to conduct a preliminary proceeding which, absent the assistance of counsel, might result in prejudice to the defendant's right to the effective assistance of counsel at trial, then the state may not elect to deny counsel at this preliminary proceeding. The *Wade* rationale would not apply in a situation where the state is free to deny all defendants a right to counsel. If a "critical stage" were found to exist in such a situation, it would have to be on a

83. 388 U.S. 218 (1967).

84. Gideon v. Wainwright, 372 U.S. 335 (1963). The right to counsel was expressly extended to defendants in misdemeanor cases in Argersinger v. Hamlin, 407 U.S. 25 (1972).

different theory. However, there may indeed be two theories of a "critical stage." The case-by-case development of the "critical stage" test[85] has yielded no clear statement as to whether, in some situations, a state may render an otherwise "critical stage" of the prosecution "non-critical" simply by denying every defendant the right to counsel. *Coleman* left it unclear whether Alabama could constitutionally have denied all defendants a right to counsel at the Alabama preliminary examination. If we assume that such a denial would have been constitutional, then it would follow that the rationale underlying *Wade* is not the exclusive basis for concluding that a proceeding is a "critical stage" in the prosecution. Therefore, although *Wade* is not an equal protection case, *Wade* does not foreclose the possibility that *Coleman* is. In other words, it might reasonably be said that a "critical stage" exists, and therefore the assistance of counsel is required, in either of two situations: (1) where denying counsel impairs the effective assistance of counsel at trial; or (2) where the state has allowed some defendants to retain counsel, and this will likely benefit those defendants in a significant way.[86] If the foregoing is correct it would follow that *Coleman* does not control the *Gerstein* situation, except to the extent of requiring the appointment of counsel for indigents if participation by retained counsel is permitted by the state. However, a strong argument can be made that the real basis of the *Coleman* decision was due process. *Powell v. Alabama*[87] was cited by the *Coleman* Court as holding that "a person accused of crime 'requires the guiding hand of counsel at every step in the proceedings against him' . . . ." [88] The rationale of *Powell* is simple but compelling: due process requires notice and a hearing whenever government action threatens one with loss of life, liberty or property; "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[89] If *Coleman* is interpreted in light of this rationale, then it would seem that the basis of *Coleman* is indeed due process, rather than equal protection. Since a defendant at a probable cause hearing would be faced with loss of liberty

85. *See* United States v. Wade, 388 U.S. 218 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961).

86. *See* note 75 *supra* and accompanying text.

87. 287 U.S. 45 (1932).

88. 399 U.S. at 7. Powell overturned state convictions in a capital case by holding that, on the facts of that case, the sixth amendment guarantee of the right to counsel was enforceable against the states through the fourteenth amendment due process clause.

89. 287 U.S. at 68-69.

through government action, it would follow that *Powell* and *Coleman* do control the *Gerstein* situation, and that the defendant should therefore have a right to the assistance of counsel at the probable cause hearing.

Although the conclusion that *Coleman* does not control the *Gerstein* situation may rest on a misstatement of facts and a shallow analysis of the *Coleman* rationale, one's initial impression is that Justice Powell has at least taken a reasonable approach to the question of whether the assistance of counsel is required at the hearing on probable cause. It at first appears that the test involves an assessment of the dangers to which the defendant is exposed at this point in the proceedings, as well as the benefits which would accrue to the defendant by providing a right to counsel.[90] Unfortunately, the Court attempts to make of this analysis an application of the "critical stage" test. A "critical stage" is defined as a pretrial procedure which would impair defense on the merits if the accused were required to proceed without counsel.[91] This definition leads the Court to an unduly narrow consideration of the harm flowing to the defendant by denying counsel.

The Court's brief discussion of the factors which distinguish *Coleman* is intertwined with an explanation of why this hearing is not a "critical stage." It is here that we find what appears to be the only attention given to the harm caused the defendant by denying counsel. The sole source of concern is the effect of pretrial custody on the defendant's ability to assist counsel in the preparation of his defense. It is said that "this does not present the high probability of substantial harm identified as controlling in *Wade* and *Coleman*."[92] This "interest analysis" nicely illustrates the inappropriateness of the test which the Court applies.

To begin with, the Court's definition of a "critical stage," *i.e.*, one which would impair defense on the merits[93] if the accused is required to proceed without counsel, places an unduly narrow

90. 420 U.S. at 121-22. *Compare* Coleman v. Alabama, 399 U.S. 1, 9 (1970) *with* 420 U.S. at 121-22.

91. 420 U.S. at 122, *citing* Coleman v. Alabama, 399 U.S. 1 (1970); United States v. Wade, 388 U.S. 218 (1967).

92. 420 U.S. at 123. It would appear to be a matter of perspective whether *Wade* and *Coleman* were concerned with securing the opportunities for discovery, preserving testimony, etc. (*i.e.*, the probable substantial benefits), or protecting against the loss of these opportunities (*i.e.*, the probable substantial harm).

93. The analysis of the possible harm to the defendant's interests makes it clear that Justice Powell's concern was the defense on the merits at trial.

construction on the language in *Wade* and *Coleman*. Consider the following from *Coleman*:

> The determination whether the hearing is a "critical stage" requiring the provision of counsel depends, as noted [in *Wade*], upon an analysis "whether potential substantial prejudice to defendant's rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice." . . . Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution.[94]

This language suggests that, in addition to proceedings which might impair a defense on the merits, proceedings which may make such a defense unnecessary are "critical stages," at which the accused is entitled to counsel. If it were held that a finding of no probable cause entitled a defendant to some degree of immunity from prosecution,[95] then a probable cause hearing would be a "critical stage" within the meaning of a more liberal reading of *Coleman* and *Wade*, and a defendant would therefore be entitled to the assistance of counsel.

But even assuming that a finding of no probable cause will not affect a defendant's liability to continued prosecution, or that the narrow reading given *Coleman* is correct, does it make sense to restrict the inquiry on the right to counsel to the application of the test proposed in that case? The impact on the defense on the merits, or, as the Court said in *Wade*, on the accused's right to a fair trial,[96] is surely the proper concern of the Court where the "proceeding" may yield a statement by the defendant,[97] or an identification of the defendant,[98] which would be admissible at trial. Such proceedings may cause the defendant a harm only realized at trial—a guilty verdict.[99] However, unlike other situa-

94. 399 U.S. at 9.

95. Authority for such an immunity might be found in a statute such as CAL. PENAL CODE § 1385 (West 1970) (dismissal, on the court's motion, in furtherance of justice). *But see* CAL. PENAL CODE § 999 (West 1970) (order setting aside indictment or information not bar to subsequent prosecution).

96. 388 U.S. at 226.

97. *See* Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1963); Massiah v. United States, 377 U.S. 201 (1963).

98. United States v. Wade, 388 U.S. 218, 236-37 (1967).

99. That this was the true concern of the Court in *Wade* is evidenced by the following:

tions in which the Court has passed on the defendant's right to counsel, the harm which may be realized at the probable cause hearing is immediate. Denying the effective assistance of counsel at this hearing may result in the defendant wrongfully suffering a "significant impairment of liberty." How is such harm distinguishable from the "substantial prejudice to defendant's rights," said to be controlling in *Wade* and *Coleman*? Especially in misdemeanor cases, the restrictions imposed on personal liberty may be as onerous before as after trial. Indeed, the prospect of such detention may be a significant factor encouraging defendants to plead guilty, thus preventing the case from even coming to trial.

In summary, it seems that in many cases the defendant will have nearly as much at stake at the probable cause hearing as at a subsequent trial. Where the potential prejudice to defendant's rights is so great, it would seem that defendant is entitled to the assistance of counsel. For this assistance to be effective there must be a right to cross-examine witnesses. This conclusion should not be otherwise merely because the harm is not the product of a trial, but rather of a preliminary clash between the state and the individual.

II. THE PROBABLE CAUSE HEARING IN CALIFORNIA

The California Municipal and Justice courts, commonly referred to as the "inferior courts,"[100] have jurisdiction of misdemeanors.[101] The California Penal Code requires that all misdemeanors be prosecuted by written complaint,[102] but there is no provision for a judicial determination of probable cause where a misdemeanor, as opposed to a felony, is prosecuted by

> [T]oday's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the result might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the sixth amendment guarantee to apply to "critical" stages of the proceedings. The guarantee reads: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel *for his defense*." (Emphasis supplied). The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful "defense."

388 U.S. at 224-25.

100. CAL. PENAL CODE § 691(1) (West 1970).

101. *Id.* §§ 1425, 1462.

102. *Id.* §§ 740, 949.

complaint.[103] The misdemeanor defendant has a right to a dismissal with prejudice if not brought to trial within thirty days after arraignment, if in custody, or forty-five days, if not in custody.[104] However, a statute providing for a judicial determination of probable cause for those persons detained for thirty days without trial failed to save Florida's criminal procedure from being found unconstitutional in *Gerstein*.[105] It therefore seems that the decision of the United States Supreme Court in *Gerstein* will require California to either provide a new step in its misdemeanor criminal procedure, or give a new function to an existing step. The *Gerstein* court seemed to invite the states to go beyond the protections afforded by that case, if they found it desirable to do so.[106] It is therefore necessary to consider the laws, precedents and policies of California, and the interests of the state and of the individual, to determine what form the probable cause hearing should take in California. Attention will first be focused on the accused's rights to be personally present and have the assistance of counsel. Rights to compulsory process, confrontation and cross-examination will then be analyzed.

A. The Right of Defendant To Be Present, and To Have Counsel's Assistance

California courts have frequently relied upon the United States Constitution and the *Wade* "critical stage" analysis to determine the accused's right to counsel, particularly in the area of pre-indictment lineups.[107] However, in at least one other area, the freedom from an unreasonable search or seizure, the California Supreme Court has drawn upon the California Constitution and state statutes for a measure of protection not afforded the accused by the Federal Constitution.[108] State courts which have compared the California and federal rights to counsel have pointed out a difference between the two.[109] While the federal right attaches only when the proceeding is at a critical or crucial stage, "California law entitles a defendant to the effective aid of

103. *Id.* § 806.
104. *Id.* § 1382(3).
105. 420 U.S. at 106.
106. *Id.* at 123-25.
107. *See, e.g.*, People v. Williams, 3 Cal. 3d 853, 478 P.2d 942, 92 Cal. Rptr. 6 (1971); People v. Fowler, 1 Cal. 3d 335, 461 P.2d 643, 82 Cal. Rptr. 363 (1969).
108. People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975).
109. People v. Goldman, 245 Cal. App. 2d 376, 379, 53 Cal. Rptr. 810, 813 (1966).

counsel . . . at *all stages* of the proceedings."[110] Thus, the question is whether a state right to counsel extends to the probable cause hearing in California.

Constitutional, Statutory and Case Authority For A State Right To Presence and Counsel

The California Constitution provides that:

> *The defendant in a criminal cause has the right* to a speedy public trial, to compel attendance of witnesses in the defendant's behalf, *to have the assistance of counsel for the defendant's defense, to be personally present with counsel*, and to be confronted with the witnesses against the defendant.[111]

The California Supreme Court has broadly construed this language, stating that "[a]ll persons accused of crime in any court in the state have a right to counsel."[112] It would appear that, so construed, the constitutional mandate requires the presence of the accused and his or her counsel at the probable cause hearing. It should be noted that a state constitutional right to counsel's presence would strongly suggest a right to the defendant's presence. The two are linked together in the constitutional clause,[113] and it can be argued that the process of construction which includes the one should sweep in the other.

In addition to the constitutional grant of the right to be personally present with counsel, a number of statutes have been enacted to "implement"[114] this right. Penal Code section 686 provides:

> In a criminal action the defendant is entitled:
> . . . .
> 2) to be allowed counsel as in civil actions, or to appear and defend in person and with counsel . . . .[115]

Penal Code section 858 gives the defendant the "right to the aid of

110. *In re* Johnson, 62 Cal. 2d 325, 329, 398 P.2d 420, 422, 42 Cal. Rptr. 228, 230 (1965); People v. Avilez, 86 Cal. App. 2d 289, 294, 194 P.2d 829, 833 (1948).

111. CAL. CONST. art. I, § 15 (West Supp. 1975) (emphasis added).

112. *In re* Newbern, 53 Cal. 2d 786, 790, 350 P.2d 116, 119, 3 Cal. Rptr. 364, 367 (1960).

113. CAL. CONST. art. I, § 15 (West Supp. 1975).

114. People v. Mattson, 51 Cal. 2d 777, 788, 336 P.2d 937, 946 (1959).

115. CAL. PENAL CODE § 686 (West Supp. 1975).

counsel in *every stage* of the proceedings,"[116] and Government Code section 27706 imposes upon the public defender the duty to defend indigents "charged with the commission of any contempt or offense triable in the superior, municipal or justice courts at *all stages* of the proceedings, including the preliminary examination."[117] Even though the legislators may not have had a probable cause hearing in mind when they enacted the above laws, it can be persuasively argued that the statutes manifest a broad social policy favoring the presence of the accused and his or her counsel at every stage of a criminal proceeding, and that this includes a hearing on probable cause. Thus, both the statutory and the constitutional grants could be interpreted to include the probable cause hearing.

As stated above, the California rule is that the right to counsel applies to all criminal proceedings. It would follow that this right applies to the probable cause hearing, if it is viewed as a "criminal proceeding." The following discussion gives special attention to a review of statutory and case authority as to the meaning of this term.

California codes define criminal and civil actions, and special proceedings.[118] Penal Code section 683 states that "[t]he proceeding by which a party charged with a public offense is accused and brought to trial and punishment is known as a criminal action."[119] The probable cause determination is a precondition of pretrial restraints on liberty, restraints which will have as their objective securing the defendant's presence at trial. The probable cause hearing is thus part of the proceedings by which an accused is brought to trial, and seems to be clearly within the statutory definition of Penal Code section 683.

A "criminal proceeding" was also defined in *Gibson v. Sacramento County*[120] as "some authorized step taken before a judicial

116. *Id.* § 858 (West 1970) (emphasis added).

117. CAL. GOV'T CODE § 27706 (West Supp. 1975) (emphasis added).

118. CAL. CODE OF CIV. PRO. §§ 23, 30 (West 1954) (defining civil actions and special proceedings); CAL. PENAL CODE § 683 (West 1970) (criminal action defined). The California Constitution, codes and case law seem to use the terms "criminal cause," "criminal action" and "criminal proceeding" interchangeably. It is unclear whether any difference in meaning is intended by the choice of any one of these terms.

119. CAL. PENAL CODE § 683 (West 1970).

120. 37 Cal. App. 523, 174 P. 935 (1918). This case involved an action for the fair value of services rendered. Suit was brought by two attorneys appointed under authority of Penal Code section 771 to prosecute a complaint lodged against the district attorney. At issue was whether such an action was a "criminal proceeding" within the meaning of a statute, CAL. POLITICAL CODE § 4307(3) (Deering 1915), *as amended*, CAL.

tribunal against some person or persons charged with the violation of some provision of the criminal law."[121] If this construction is put upon the constitutional guarantee of a right to be present, in person and with counsel, then there can be no question that this right extends to the probable cause hearing.

Even if one were to conclude that the probable cause hearing was not a "criminal proceeding," that the *Gibson* definition did not apply here, and that the probable cause hearing was outside the definition of Penal Code section 683, one must still conclude that there is a California constitutional right to counsel at the probable cause hearing, under the authority of *People v. Fields*.[122] In that case the California Supreme Court said that

> the right of an accused to counsel is not limited to proceedings which are labeled criminal but additionally extends to proceedings, whatever the label, which "must be regarded as part of the proceedings in the criminal case."[123]

It would seem that a hearing to determine the legality of detaining the accused pending trial is certainly a "part of the proceedings in the criminal case." It would follow that the accused should enjoy the right to the assistance of counsel at the probable cause hearing.

GOV'T CODE § 29602 (West 1968), authorizing payment by a county to persons rendering services "in relation to criminal proceedings." Judgment for the defendant was reversed.

121. *Id.* at 526, 174 P. at 936.

122. 62 Cal. 2d 538, 399 P.2d 369, 42 Cal. Rptr. 833 (1965), *cert. denied*, 382 U.S. 858 (1965).

123. *Id.* at 542, 399 P.2d at 371, 42 Cal. Rptr. at 835. In this case the defendant had been charged with receiving stolen property, but found insane, under Penal Code section 1368 procedures, prior to trial. Defendant appealed from the order committing him to the state hospital, and requested the appointment of counsel to assist him on the appeal. The court had the case on a motion to dismiss the appeal as taken from a non-appealable order. Though not "directly" before the court, consideration was given the request for the appointment of counsel. The motion to dismiss was denied; the request for counsel was granted. The following was the rationale for the court's decision on the right to counsel:

> The order from which defendant appeals involves an indefinite and for that reason possibly a final deprivation of liberty. The proceeding in which the order was rendered is a part of the administration of the criminal law, and an assignment of counsel will promote effective appellate court administration and minimize the hazards of affirming an erroneous judgment.

Id. at 543, 399 P.2d at 372, 42 Cal. Rptr. at 836.

Case Law Exceptions To the Right To Presence or Counsel

It may be observed that certain procedures which are related to the criminal process are conducted without the presence of counsel or the defendant, and yet are said to be consistent with constitutuional guarantees. The following is a brief survey of some of these procedures. Included is an examination of the reasons the courts have given for concluding that there is no right to the presence of defendant or counsel at such procedures, and consideration of whether those reasons support a similar rule for the probable cause hearing.

In *Mooney v. Superior Court*[124] the court held that it was not error to set the case for trial in the defendant's absence, when counsel is present and sufficient time is given to prepare for trial. The court acknowledged the general rule that a defendant has a right to be present at arraignment and at every subsequent stage of the trial, but said that defendant's "presence is not necessary at proceedings which are merely preliminary or formal and no matters affecting his guilt or innocence are presented."[125] It could hardly be said that a probable cause hearing is "merely preliminary or formal," when at issue is "a significant impairment of liberty." Moreover, matters affecting guilt or innocence are presented at such a hearing. Another distinguishing factor in *Mooney* is the protection against possible prejudice to defendants' rights. Defendants' rights are protected in the hearing to set a case for trial by the presence of counsel and the provision of adequate time to prepare for trial. It is not clear that defendants will receive similar adequate insulation from prejudice to their interests if denied a right to be present at the probable cause hearing.

In *People v. Isby*[126] a gruesome photograph of a murder scene and the victim was displayed to the jury over defendant's objection. On motion of the prosecution, in defendant's absence, the photograph was later removed. The question on appeal was whether making and granting the motion to remove the photograph in defendant's absence constituted reversible error. The court held that it did not, citing *Mooney*, and stating that "[t]he determinative question is whether or not the accused suffered any damage by reason of absence at a particular stage of the

124. 130 Cal. App. 521, 20 P.2d 106 (1933).
125. *Id.* at 522, 20 P.2d at 107.
126. 30 Cal. 2d 879, 186 P.2d 405 (1947).

proceedings."[127] If the potential for harm to the accused is the benchmark, then it would appear that the accused should have a right to be present at the probable cause hearing.[128] If present, the accused may be able to satisfactorily explain away apparent guilt, or to direct the attention of counsel and court to facts which establish the untruth of testimony given against the accused. Thus the presence of the accused might avoid an unwarranted restraint on his or her liberty.

One case which considered the right to counsel at proceedings less directly associated with the criminal process than those in the foregoing examples was *People v. Coker*,[129] which held that:

> [S]ince the coroner's inquest was not a trial or any part of a criminal proceeding against him, defendant was not entitled to have counsel appointed to represent him as a matter of constitutional right.[130]

As indicated earlier,[131] a probable cause hearing clearly should be considered a part of the criminal proceeding. The function of such a hearing, from the prosecution's point of view, is to legitimize measures taken to insure defendant's presence throughout the prosecution. Moreover, the accused at the probable cause hearing will have been formally charged and taken into custody. By contrast, a coroner's inquest, even if it should *lead* to an arrest and the filing of any accusatory pleading, precedes the initiation of the prosecution. If the accused's rights to adversary safeguards against unwarranted restraints on liberty are to some extent dependent upon the immediacy of the threat of prosecution,[132] then it would follow that procedure at a coroner's inquest should not be dispositive of the accused's rights at a proceeding where the threat of a loss of liberty is much more immediate. Therefore, the denial of a right to counsel at a coroner's inquest should not control the accused's right to counsel at a hearing on probable cause.

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127. *Id.* at 894, 186 P.2d at 414.

128. *But see In re* Smiley, 66 Cal. 2d 606, 626, 427 P.2d 179, 192, 58 Cal. Rptr. 579, 592 (1967), which held that a misdemeanor conviction would be reversed, even absent a showing of prejudice, where the defendant is not provided with counsel at trial.

129. 104 Cal. App. 2d 224, 231 P.2d 81 (1951).

130. *Id.* at 225, 231 P.2d at 89. *See also* Comment, *The Rigors of Mortis: Participation by Counsel at Coroner's Inquests*, 43 S. CAL. L. REV. 329 (1970), arguing that witnesses at coroner's inquests should be given the right to the active assistance of counsel.

131. *See* discussion at text accompanying notes 118-23 *supra*.

132. *Cf.* Kirby v. Illinois, 406 U.S. 682 (1972).

So far from broadening existing exceptions to the right to be present with counsel, the current tendency of California decisions is to extend the reach of this right.[133] This trend, as well as the inapplicability of the *Mooney*, *Isby* and *Coker* rationales to the probable cause hearing, make it unlikely that the courts will rely on those cases to deny a right to be present with counsel.

Determining the State Right To Counsel: Interests and Approaches

It is very probable that, in construing the state constitutional and statutory right to counsel, the California courts will weigh the interests of the state against the interests of the individual. If so, an interest of primary importance will be the value attached to counsel's presence.[134] Contrary to Justice Powell's assertion in *Gerstein*,[135] this does not appear to be dependent upon the availability of cross-examination. Instead, California has provided for counsel at all stages of the criminal proceedings, which of course includes situations where there is no cross-examination, such as arraignment and sentencing. Behind such legislation seems to be a strong state policy favoring the right to an attorney's aid whenever a court takes action affecting one's interests and it is likely that those interests will be better protected with counsel present. The difficulty with applying this policy to the probable cause hearing is determining how much value an attorney's presence could have if other adversary safeguards are not available to give the attorney an active role. The *Gerstein* court approached this problem from the other end, stating first that there was no right of cross-examination, and second that the benefits of counsel's presence were therefore so diminished that there was no right to those benefits. California courts might reach an opposite result by beginning with the broad constitutional and statutory right to counsel, finding in that right an intent that counsel be present as an effective protector of the rights of the accused,[136] and inferring from this the necessity of a right to confront, cross-examine and compel the attendance of witnesses.

133. *See* Johnson v. Superior Court, 15 Cal. 3d 248, 255, 539 P.2d 792, 796, 124 Cal. Rptr. 32, 36 (1975) (Mosk, J., concurring), and cases cited therein.

134. The reader should be careful to note that we are concerned at this point only with the presence of the accused and counsel. The question of rights to confrontation, cross-examination and compulsory process is considered at text accompanying notes 141-65 *infra*.

135. 420 U.S. 103, 123 (1975). *See also* the discussion at text accompanying notes 80-82 *supra*.

136. *Cf.* People v. Stanworth, 11 Cal. 3d 588, 522 P.2d 1058, 114 Cal. Rptr. 250 (1974);

Alternatively, California courts could consider and determine the right of counsel independently and separately from the determination of the right to adversary safeguards. If the courts take this approach their analysis might begin by noting that, even in misdemeanor cases, the right to counsel is a fundamental right,[137] "carefully guarded by the courts of this state."[138] It has been said that

> the right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.[139]

Such language indicates the courts may respond to a proposed denial of the right to counsel by applying strict constitutional scrutiny. Under this test, the state would have to show that denying defendants the right to be present with counsel at the probable cause hearing is necessary to achieve a compelling state interest.[140]

In summary, it appears that constitutional and statutory authority, and the weight of relevant interests and policies, should lead California to provide the accused with the right to be present and to have counsel's assistance at the hearing on probable cause. It remains to consider what role the attorney should play at the hearing.

People v. Ibarra, 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963).

137. *In re* Smiley, 66 Cal. 2d 606, 614, 427 P.2d 179, 184, 58 Cal. Rptr. 579, 584 (1967); *In re* Johnson, 62 Cal. 2d 325, 398 P.2d 420, 42 Cal. Rptr. 228 (1965).

138. *In re* James, 38 Cal. 2d 302, 310, 240 P.2d 596, 600 (1952).

139. People v. Chacon, 69 Cal. 2d 765, 776-77, 447 P.2d 106, 113, 73 Cal. Rptr. 10, 17 (1968), *quoting* Glasser v. United States, 315 U.S. 60, 76 (1942).

140. Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

> [I]n cases involving "suspect classification" or touching on "fundamental interests," . . . the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny . . . . Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose.

Id. at 597, 487 P.2d at 1249, 96 Cal. Rptr. at 609 (citations and footnotes omitted). Denying misdemeanor defendants a right to counsel, or rights to compulsory process, confrontation or cross-examination, may raise a serious equal protection problem. Consider such salient aspects of the felony commitment procedure (preliminary examination) as the right to counsel, CAL. PENAL CODE § 859 (West Supp. 1975), the right to confrontation and cross-examination, *id.* § 865 (West 1970), and the right of the defendant to call and examine witnesses, *id.* § 866.

B. The Defendant's Right To Confront and Cross-examine Hostile Witnesses, and To Call and Compel The Attendance Of Witnesses In The Defendant's Behalf.

The California authority supporting adversary safeguards at the probable cause hearing very closely parallels the authority for a right to be present with counsel. The California constitutional provision set forth in the discussion of the rights to presence and counsel includes the guarantee to "[t]he defendant in a criminal cause" to have the right "to compel attendance of witnesses in the defendant's behalf . . . and to be confronted with the witnesses against the defendant."[141] Penal Code section 686, also previously considered in reference to its guarantee of the right to counsel, further provides a defendant with the right

> 3. [t]o produce witnesses on his behalf and to be confronted with the witnesses against him, in the presence of the court, except that:
> (a) Hearsay evidence may be admitted to the extent that it is otherwise admissible in a criminal action under the law of this state.
> (b) The deposition of a witness taken in the action may be read to the extent that it is otherwise admissible under the law of this state.[142]

The right of cross-examination is also secured by Evidence Code section 733(a), which provides that

> a witness examined by one party may be cross-examined upon any matter within the scope of the direct examination by each other party to the action in such order as the court directs.[143]

Penal Code section 1326 gives the defendant the right to "as many blank subpoenas . . . as the defendant may require.[144] Because of their shared constitutional and statutory foundations, one would expect that a process of construction would yield the same result for the defendant's right to adversary safeguards as for the defendant's right to be present and have the assistance of counsel. However, a full adversary hearing does raise certain problems

141. Cal. Const. art. I, § 15 (West Supp. 1975).
142. Cal. Penal Code § 686 (West Supp. 1975).
143. Cal. Evidence Code § 773(a) (West 1965).
144. Cal. Penal Code § 1326 (West Supp. 1975).

not presented by the mere presence of defendant and counsel. It is therefore necessary to consider the interests and policies which will probably be weighed in determining whether the accused will enjoy the "full panoply of adversary safeguards."

As Justice Powell himself conceded,[145] a nonadversary hearing is likely to be less reliable than the adversary hearing customarily accorded defendants in civil proceedings. Nevertheless, this diminished reliability was said to be acceptable in what Justice Powell termed "the wholly different context of the criminal justice system."[146] However, California Penal Code section 1102 provides that:

> The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this Code.[147]

This implies that the California Legislature has rejected the notion that a fact-finding procedure may be used in criminal proceedings which is less reliable than that used in civil proceedings. If this is true, then the California courts should find persuasive the analogy between the probable cause hearing and the procedural due process cases cited in Justice Stewart's separate opinion in *Gerstein*.[148]

When weighing the right of the accused to adversary safeguards, the value attached to those safeguards will certainly be of great importance. California courts have termed the rights to compel the attendance of witnesses[149] and to testify in one's own behalf[150] "fundamental." Confrontation and cross-examination are also "fundamental"[151] and "basic,"[152] and should be "zealously"[153] protected. One would therefore expect the courts

145. 420 U.S. at 121-22.

146. *Id.* at 125 n.127.

147. CAL. PENAL CODE § 1102 (West 1970). *See also id.* § 1321, stating that the rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided in this code.

148. 420 U.S. at 127.

149. People v. Stone, 239 Cal. App. 2d 14, 21, 48 Cal. Rptr. 469, 474 (1965).

150. Guardianship of Waite, 14 Cal. 2d 727, 97 P.2d 238 (1939).

> Apart from the provisions of the statute applicable to this proceeding, it is the general rule that the right of a party to testify in his own behalf is fundamental.

Id. at 729-30, 97 P.2d at 238.

151. People v. Volk, 221 Cal. App. 2d 291, 296, 34 Cal. Rptr. 351, 353 (1963).

152. People v. Redwine, 166 Cal. App. 2d 371, 377, 333 P.2d 188, 192 (1958).

153. People v. Volk, 221 Cal. App. 2d 291, 296, 34 Cal. Rptr. 351, 353 (1963).

to be cautious that these highly esteemed[154] rights are not too lightly dispensed with. Again, this should mean the application of strict constitutional scrutiny.[155] Are there any state interests supporting a denial of an adversary hearing which might be considered "compelling," and for the furtherance of which a denial of adversary safeguards is necessary?[156]

The decisive factor in the *Gerstein* Court's holding that the adversary safeguards are not required was the problem of pretrial delay.[157] It was apparently thought that requiring the determina-

154. The high regard in which the traditional adversary safeguards are held is in large part owing to their function in helping to discover the truth. The California Supreme Court has observed that

> [t]he ability of the fact finder to evaluate a witness' credibility is severely hampered when such witness is absent and when his prior testimony is read into evidence.

In re Montgomery, 2 Cal. 3d 863, 867 471 P.2d 15, 87 Cal. Rptr. 695 (1970), *citing* Mattox v. United States, 156 U.S. 237 (1895). Some commentators have found even more lavish words of praise for the value of cross-examination:

> For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.
>
> Not even the abuses, the mishandlings, and the puerilities which are so often found associated with cross-examination have availed to nullify its value. It may be that in more than one sense it takes the place in our system which torture occupied in the mediaeval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth. However difficult it may be for the layman, the scientist, or the foreign jurist to appreciate this its wonderful power, there has probably never been a moment's doubt upon this point in the mind of a lawyer of experience. "You can do anything," said Wendell Phillips, "with a bayonet—except sit upon it." A lawyer can do anything with a cross-examination—if he is skillful enough not to impale his own cause upon it. He may, it is true, do more than he ought to do; he may "make the worse appear the better reason, to perplex and dash maturest counsels"—may make the truth appear like falsehood. But this abuse of its power is able to be remedied by proper control. The fact of this unique and irresistible power remains, and is the reason for our faith in its merits. If we omit political considerations of broader range, then cross-examination, not trial by jury, is the great

tion of probable cause to be made "promptly"[158] was incompatible with making this determination at an adversary hearing. It might further be said that an adversary proceeding will have an economic cost. The California courts must ultimately balance these costs against the interest of the individual and society in a procedure which is more reliable and provides the defendant with such additional benefits as discovery and a sworn version of witness observations at a time when the alleged crime should still be fresh in their minds. However, before the court weighs the benefits and the costs, it is important to ask whether dispensing with adversary safeguards at the probable cause hearing will in fact result in greater judicial economy. In other words, might there be an alternative basis for the evidentiary hearing if it is denied defendants at the probable cause hearing? For example, what if defendant were to controvert the facts in an affidavit presented at an ex parte hearing, and were to allege that the affidavit was fraudulent? The California Supreme Court confronted a similar problem in *Theodor v. Superior Court*.[159] In *Theodor*, the defendant sought a writ of prohibition against prosecution under an information. Based upon affidavits by a police officer and an undisclosed informant, a search warrant had been issued for a search of defendant's home. The search yielded a considerable amount of contraband. At a combined preliminary examination and hearing under Penal Code section 1538.5,[160] de-

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> and permanent contribution of the Anglo-American system of law to improved methods of trial procedure.

5 J. WIGMORE, EVIDENCE § 1367 (Chadbourn rev. 1974) (footnotes omitted).

155. *See* Johnson v. Superior Court, 15 Cal. 3d 248, 266, 539 P.2d 792, 803, 124 Cal. Rptr. 32, 43 (1975) (Mosk, J., concurring).

156. *See* note 140 *supra*.

157. 420 U.S. at 122 n.23.

158. *Id.* at 120.

159. 8 Cal. 3d 77, 501 P.2d 234, 104 Cal. Rptr. 226 (1972).

160. CAL. PENAL CODE § 1538.5(a) (West Supp. 1975) provides a statutory procedure for the return of property or suppression of evidence unlawfully seized. A motion under section 1538.5 may be based upon either of the following grounds:

> (1) The search or seizure without a warrant was unreasonable.
>
> (2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; or (v) there was any other violation of federal or state constitutional standards.

fendant was not permitted to: (1) controvert the factual allegation contained in the affidavits; (2) cross-examine the affiants; or (3) call his own witnesses. Defendant contended before the supreme court that both the fourth amendment and the Penal Code entitled him to go behind the face of the warrant to prove that there was no probable cause for its issuance. The supreme court did not reach the constitutional question, holding that the Penal Code entitled defendant to the hearing contended for.[161] However, the constitutional argument was discussed in a footnote.

> [T]he thrust of *Aguilar v. Texas*, with its emphasis on the factual basis for an affiant's conclusion of probable cause, naturally presupposes correct, and not perjured or erroneous facts.[162]

After a brief discussion of this issue, the note concluded:

> Because a search warrant issues without opportunity for rebuttal, courts should be willing to investigate the accuracy of an underlying affidavit to enhance Fourth Amendment protection against the issuance of groundless warrants. Otherwise police will not be deterred from intentionally or negligently falsifying their affidavits in the hope that the resulting search will yield conclusive proof of criminal conduct.[163]

The same rationale would seem to apply in the context of a probable cause hearing. If the content of an affidavit submitted at a probable cause hearing may not be rebutted, then the way is open for the prosecution, through intentional or negligent misstatements in the affidavit, to reduce the probable cause "hearing" to a sham. In order to avoid this result the defendant must be permit-

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Id. CAL. PENAL CODE § 1538.5(f) (West Supp. 1975) provides:

> If the property or evidence relates to a felony offense initiated by complaint, the motion may be made in the municipal or justice court at the preliminary hearing.

Id.

161. 8 Cal. 3d 77, 90, 501 P.2d 234, 243, 104 Cal. Rptr. 226, 235 (1972).

162. *Id.* at 90-91 n.6, 501 P.2d at 243-44 n.6, 104 Cal. Rptr. at 235-36 n.6.

163. *Id. See also* Comment, *The Outwardly Sufficient Search Warrant Affidavit: What If It's False?*, 19 U.C.L.A.L. REV. 96 (1971); Kipperman, *Inaccurate Search Warrant Affidavits As A Ground For Suppressing Evidence*, 84 HARV. L. REV. 825 (1971); Note, *Testing the Factual Basis For A Search Warrant*, 67 COLUM. L. REV. 1529 (1967); 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 673, at 106-08 and cases cited therein.

ted to controvert the evidence supporting probable cause. But if the defendant is to have this right, then "judicial economy," if it is a factor at all, would favor the magistrate hearing the prosecution's and defendant's evidence in one proceeding, rather than two. In other words, to the extent it can be achieved consistent with a meaningful hearing on probable cause, the interest of judicial economy would recommend an adversary hearing.

There is a rather closely related reason why the probable cause hearing should be an adversary proceeding. Justice Powell stated that credibility determinations are seldom crucial when determining probable cause.[164] This statement appears to be correct if limited to determination of probable cause to bind someone over for trial, as opposed to probable cause to detain. A decision to bind someone over simply allows the case to go to trial, where the ultimate decision (of guilt or innocence) will be in the hands of the jury. If the case goes to the jury, then the adversary safeguards at trial will help insure that relevant evidence, including the credibility of witnesses, will be carefully and dispassionately weighed. Thus, a judge passing on probable cause to bind a suspect over for trial may be disposed, in a close case, to let possible error be in the prosecution's favor and thereby allow the jury to assume the responsibility for the final decision. If this happens then credibility determinations do not become irrelevant. Rather, the responsibility for making them is shifted. However, the *Gerstein* probable cause hearing, like a hearing on a motion to suppress evidence, raises an issue which the judge must decide. In order for that decision to be reliable the credibility of witnesses must be tested; and for this to occur the probable cause hearing must be an adversary proceeding.

In summary, it appears that the interests opposing an adversary hearing on probable cause, though commendable, are less than compelling. Moreover, there is room for doubt that denying adversary safeguards at the probable cause hearing will result in substantial savings in pretrial delay and expense; thus it could hardly be said that such a denial is necessary to further those interests. Also, greater economies in the administration of justice could be realized if the prosecution were to employ pretrial procedures which did not constitute "a significant restraint of liberty," so that a probable cause hearing would not be required.

164. 420 U.S. at 121.

The courts might consider release "O.R."[165] to be such a device. Thus, denying an adversary hearing on probable cause is not necessary to preserve judicial economy per se, but may be necessary to maintain the economies of the bail system. Regardless of the decision which the court ultimately reaches, it seems certain that the principal objection to an adversary hearing will indeed be its cost in time and money. It is hoped that this question will be forthrightly addressed, and that the balance between the interests of the individual and the interests of society will be struck by a court unencumbered by mechanistic distinctions between bases of constitutional protection.

III. FREEDOM OF SPEECH AND PROBABLE CAUSE

In *Gerstein* Justice Powell makes it quite clear that a significant restraint on personal liberty is the "key factor" in determining when a probable cause hearing is required,[166] and that burdensome conditions attached to pretrial release may constitute a sufficiently significant restraint.[167] It seems to be an open question whether simply bringing a case may require a probable cause hearing, where the pendency of the case chills first amendment rights. Consider, for example, a prosecution for a misdemeanor involving freedom of speech,[168] where the defendant is prosecuted by complaint, taken before a magistrate to be informed of the charges, and then released on the defendant's own recognizance, restrained by no "burdensome bail conditions." Might the pending prosecution's "chilling effect" on first amendment rights be an impairment of personal liberty sufficient to entitle the defendant to a probable cause hearing?

The importance of a state prosecution's chilling effect on the exercise of free speech was recognized by the United States Supreme Court in *Dombrowski v. Pfister*,[169] where the issue arose in the context of a suit in federal court to enjoin a pending state prosecution. Though the grant of relief was upheld in *Dombrowski*, the resulting federal interference with state courts met with opposition, and in *Younger v. Harris*[170] it was held that

165. CAL. PENAL CODE § 1318 *et seq.* (West Supp. 1975).
166. 420 U.S. at 125 n.26.
167. *Id.* at 114, 125 n.26.
168. *See, e.g.*, CAL. PENAL CODE § 311 *et seq.* (West 1970).
169. 380 U.S. 479 (1965).
170. 401 U.S. 37 (1971).

considerations of "comity," or "Our Federalism,"[171] and the traditional doctrine of restraint in the granting of equitable relief where there is an adequate remedy at law[172] barred a federal injunction against a pending state prosecution. However, an injunction could issue if the prosecution were accompanied by bad faith and harassment or other extraordinary circumstances.[173]

Two factors distinguish *Younger* from the probable cause situation. First, the question in the free speech-probable cause area does not involve the right to relief from a court of equity, but rather the right to a hearing in a state court of law. Thus the traditional restraint in the granting of equitable relief should not concern us and the requirements of "bad faith" and "harassment," which establish the likelihood of irreparable injury, should likewise be inapplicable. Second, the probable cause hearing would be before a state court. The interference with the pending state prosecution, if there is to be any, would not come from a federal court. Thus, considerations of "comity" or "Our Federalism" would also be irrelevant. We are left with a restraint of recognized significance on the exercise of a preferred personal liberty.[174]

Both *Dombrowski* and *Younger* involved the application of allegedly unconstitutional statutes, whereas the concern in a hearing on probable cause will be with statutes of admitted constitutionality. Does the importance of a chilling effect in generating a right to a probable cause hearing depend upon the unconstitutionality of the statute sought to be enforced? It would seem not. In situations such as those presented in *Dombrowski* and *Younger*, the unconstitutionality of the statute simply means that an un-

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171. *Id.* at 44. The Court defines "Our Federalism" as

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a union of separate state governments, and a continuance of the belief that the National Government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways.

Id.

172. *Id.* at 43-44.

173. *Id.* at 53-54.

174. Dennis v. United States, 341 U.S. 494 (1951).

> [I]t has been weightily reiterated that freedom of speech has a "preferred position" among constitutional safeguards.

Id. at 527 (Frankfurter, J., concurring), *quoting* Kovacs v. Cooper, 336 U.S. 77 (1949).

warranted invasion of personal liberties results from action by a legislature in excess of its constitutional powers. In the context of a probable cause hearing, the unlawful infringement of personal liberties is the result of prosecutorial excesses. The protection afforded individual liberty against assaults by government should be independent of whether the threatening branch is the executive or legislative.

Justice Powell wrote that the key factor giving rise to a right to a probable cause hearing was a significant impairment of personal liberty.[175] However, the constitutional basis of the *Gerstein* holding was a fourth amendment right against an unreasonable continuing seizure. Does this imply that a right to a hearing is contingent upon some physical restraint, for which a "mere" chilling effect on freedom of expression would not suffice? To help answer this question it may be useful to consider two cases which have dealt with the issue of procedural guarantees for first amendment rights. In *Freedman v. Maryland*,[176] the appellant was convicted of showing a motion picture without first submitting it to the State Board of Censors for approval. The appellant contended that the statute in its entirety impaired freedom of expression. The United States Supreme Court reversed the conviction, holding the existing procedures to be an invalid prior restraint. The Court held that the state must bear the burden of proving that the "speech" may lawfully be suppressed as obscenity.[177] Further, there must be "a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license."[178] And finally, "[a]ny restraint imposed in advance of a final judicial determination on the merits must . . . be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution."[179]

In *Blount v. Rizzi*,[180] the Supreme Court sustained challenges to two sections of the United States Code which established procedures for regulating the use of the mails for marketing obscene material.[181] The principle underlying the Court's decision was articulated thus:

175. 420 U.S. at 125 n.26.
176. 380 U.S. 51 (1965).
177. *Id.* at 58.
178. *Id.* at 59.
179. *Id.*
180. 400 U.S. 410 (1971).
181. 39 U.S.C. § 4006 (1960) gave the Postmaster General the power to return mail addressed to a person who had been found in an administrative hearing to be using

> [T]he First Amendment requires that procedures be incorporated that "ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line . . . . *Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards. . . is . . . but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks* . . . ."[182]

As this language makes clear, the right to procedural safeguards for first amendment freedoms is not limited to the area of administrative regulations for the control of obscenity. The teaching of *Freedman* and *Blount* is that the first amendment is the source of a right to procedural protections[183] whenever the exercise of freedom of expression is curtailed by government action. It has often been observed that first amendment liberties enjoy a "preferred" position.[184] It would therefore seem appropriate to provide freedom of speech procedural safeguards at least equal to those protecting the freedom from unreasonable searches and seizures, including a hearing on probable cause.

From the foregoing it would follow that, if a pending prosecution sufficiently chills the exercise of first amendment rights, the accused should be entitled to a hearing on the issue of probable cause. If it is so held we would have a further indication that the fourth amendment is not the sole source of the individual's right to be free from unwarranted state prosecutions, and that therefore Justice Powell's distinction between bases of constitutional protection is not well taken.[185]

CONCLUSION

The *Gerstein* majority's exclusive constitutional basis approach is distressing in its disingenuousness. It is most doubtful

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the mails to seek money for "an obscene . . . matter." 39 U.S.C. § 4007 (1960) permitted the district court to order a defendant's incoming mail detained upon a showing of probable cause to believe that 39 U.S.C. § 4006 had been violated.

182. 400 U.S. at 416, *quoting* Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) (emphasis added).

183. 400 U.S. at 418; 380 U.S. at 58. Procedural protection in both cases included an adversary judicial hearing.

184. *See* note 174 *supra*.

185. *See* discussion at text accompanying notes 2-6 *supra*.

that Justice Powell was unaware of the fourteenth amendment's role in adjusting the conflicting interests of society and the individual. Yet he has misrepresented the fourteenth amendment's role and has thereby avoided answering the basic question: why should persons faced with loss of their liberty be afforded less procedural protection than those faced with loss of their goods? Instead of an answer to this question the Court has given us a mechanical formula, leaving reasons unstated, or relegating them to footnotes. There is an air of unwholesome irresponsibility about the case. There is room for hope that the state courts may do better.[186]

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186. A recent California Supreme Court decision is especially noteworthy in this regard. As this article went to press, the supreme court handed down its decision in *In re* Walters, Crim. No. 18488, Cal. Sup. Ct., Dec. 18, 1975 (unanimous decision). In an opinion by Chief Justice Wright, the court held that the fourth amendment gives a person arrested and held for a misdemeanor the right to a judicial determination of probable cause. A person arrested on a warrant is entitled to a hearing after arrest to determine whether the warrant issued upon probable cause. If the warrant did not so issue, or if there was no warrant, then the prosecution must establish that there is probable cause to hold the suspect pending trial.

Walters indicates that arraignment is the "most appropriate state of the proceedings at which to make a judicial determination of probable cause. . . ." *Id.* at 16. However, the parties may stipulate to a later time, and the defendant, for good cause shown, may move to have the determination postponed. The defendant has a right to the determination of probable cause before a hearing to set bail. However, if released O.R., the defendant has no right to a hearing. If the defendant fails to move the court for a hearing, the right thereto will be waived.

At the hearing, the prosecution may rely on hearsay. It may suffice to establish probable cause if the prosecution produces a sworn statement (*e.g.*, a complaint or a police report) setting forth the factual basis for the conclusion that a crime was committed and that the accused committed it. Such a statement may be upon the personal knowledge of the declarant, or upon information and belief if there are facts demonstrating the information's trustworthiness.

The supreme court cited *state* authority for the rule that a defendant has a right to counsel at all stages of criminal proceedings, and added that counsel, if a defendant exercises the right to representation, will appear at the probable cause determination hearing, even though "*Gerstein* does not compel such representation." *Id.* However, the court did rely on *Gerstein* when it stated that

> the defendant is not entitled to challenge . . . [sworn] factual statements by confronting and cross-examining the declarer, [and] he likewise has no right to confront and cross-examine the witnesses who testify on the issue of probable cause to detain.

Id. at 20. The opinion makes no mention of state authority for the right to adversary safeguards.