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PRETRIAL DETAINEES HAVE A FOURTH AMENDMENT RIGHT TO A NONADVERSARY, JUDICIAL DETERMINATION OF PROBABLE CAUSE

INTRODUCTION

The principle objective of criminal procedure, like that of procedure generally, is to assure a just disposition of the case.[1] This procedural system inevitably represents a series of compromises, because time, resources and the ability to determine what is just are limited.[2] Foremost among procedural compromises is that which is made when the individual's right to liberty clashes with the countervailing state interest in combating crime. This tension is apparent when one contrasts Learned Hand's admonishment that "what we need to fear is the archaic formalism and the watery sentiment that obstructs, delays and defeats the prosecution of crime,"[3] with Justice Frankfurter's assertion that "the history of liberty has largely been the history of observance of procedural safeguards."[4]

Procedural compromise lies at the heart of the fourth amendment's directive that searches and seizures be reasonable and that warrants be issued only on probable cause.[5] The "reasonable" and "probable cause" standards mandated are in fact the result of weighing the need for protection of individual rights against society's need for law enforcement.[6] The wrong condemned by the

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1. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, in A. GOLDSTEIN AND J. GOLDSTEIN, CRIME, LAW, AND SOCIETY 173 (1971) [hereinafter cited as GOLDSTEIN].

2. *Id.*

3. United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923). *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN L. REV. 349, 354 (1974) [hereinafter cited as Amsterdam].

4. McNabb v. United States, 318 U.S. 332, 347 (1943). *See* Amsterdam, *supra* note 3, at 354.

5.

> The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation. . . ."

U.S. CONST., amend. IV. *See* Berner, *Search and Seizure: Status and Methodology*, 8 VAL. U.L. REV. 471, 505 (1974) [hereinafter cited as Berner].

6. Brinegar v. United States, 338 U.S. 160, 175-76 (1949). "The substance of all the definitions of probable cause is a reasonable ground for belief of guilt." *Id.* at 175. The standard is "less than evidence which would justify condemnation, Locke v. United States, 2 U.S. (7 Cranch) 560, 569 (1813), and more than 'bare suspicion'." 338 U.S. at 175-76. *See* note 37 *infra* and accompanying text.

fourth amendment is the unjustified governmental intrusion into certain areas of an individual's life.[7] In *Gerstein v. Pugh*,[8] the Supreme Court held that the pretrial detention of an accused without a determination of probable cause by a judicial officer is such an intrusion. The concept of procedural compromise pervades the Court's holding in *Gerstein* that a state must provide an accused with a judicial determination of probable cause as a condition for any "significant pretrial restraint on liberty."[9] In accommodating the compromise between state and individual interests, however, the Court has softened the impact which *Gerstein* might have had in the realm of defendant pretrial rights. This commentary will examine how the holding in *Gerstein* reflects, to some extent, the Court's consideration of individual and state interests, the effect and shortcomings of the nonadversary determination mandated, and the way in which states will incorporate the *Gerstein* directive into existing pretrial procedure.

THE FACTUAL CONTEXT

In March, 1971, Robert Pugh and Nathaniel Henderson were arrested in Dade County, Florida. Each defendant was charged with several offenses under a prosecutor's information, and each was detained prior to trial.[10] At the time of their arrest, Florida law did not provide for a preliminary hearing where the prosecutor had filed an information;[11] hence, an arrestee could be detained prior to trial solely on the probable cause determination of the prosecutor.

Requesting declaratory and injunctive relief,[12] Pugh and Hen-

7. United States v. Calandra, 414 U.S. 338, 354 (1974).

8. —— U.S. ——, 95 S. Ct. 854 (1975).

9. *Id.* at 868-69.

10. Pugh was denied bail because a robbery charge against him carried a life sentence; Henderson remained in custody because he was unable to post a $4,500 bond. *Id.* at 858.

11. At the time the two were arrested, a Florida rule authorized adversary preliminary hearings to test probable cause for detention in all cases. FLA. R. CRIM. P. 1.122 (*amended* 1972). But the Florida courts had held that the filing of an information foreclosed the accused's right to a preliminary hearing. *See* State *ex rel.* Hardy v. Blount, 261 So. 2d 172 (Fla. 1972). Florida law also denied preliminary hearings to persons confined under indictment. *See* Sangaree v. Hamlin, 235 So. 2d 729 (Fla. 1970); FLA. R. CRIM. P. 3.131(a) (*amended* 1972).

12. Pugh and Henderson did not ask for release from state custody, even as an alternative remedy; they asked only that state authorities be ordered to give them a probable cause hearing. *See* Pugh v. Rainwater, 332 F. Supp. 1107, 1115-16 (S.D. Fla. 1971). Hence, the lawsuit did not come

derson filed a class action[13] against Dade County officials in the federal district court,[14] claiming a constitutional right to a judicial hearing on the issue of probable cause. The district court agreed that the plaintiffs had such a right under the fourth and fourteenth amendments and found that they had been deprived of that right.[15] In granting the plaintiffs their requested relief, the court ordered the defendants to give plaintiffs an immediate preliminary hearing to determine probable cause for further confinement.[16] The court also ordered the defendants to sub-

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within the class of cases for which habeas corpus is the exclusive remedy, which thus requires exhaustion of state remedies. 28 U.S.C. § 2254(b) (1970). Pugh and Henderson could therefore seek immediate relief in the federal courts. —— U.S. ——, 95 S. Ct. at 859 n.6. *See* Preiser v. Rodriguez, 411 U.S. 475 (1973).

13. By the time their suit reached the Supreme Court, Pugh and Henderson had been convicted. Because the suit was filed as a class action on behalf of all persons detained pretrial without a neutral probable cause determination, the claim avoided summary disposition on the basis of mootness:

> This case belongs . . . to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class. *See* Sosna v. Iowa, —— U.S. ——, 95 S. Ct. 553 (1975). Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual nonetheless could suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly capable of repetition, yet evading review.

—— U.S. ——, 95 S. Ct. at 861 n.11.

14. The federal court obtained jurisdiction of the case and was empowered to give relief through exceptions to the principle regarding federal-state comity in Younger v. Harris, 401 U.S. 37 (1971). The claim in *Gerstein* was not directed at the state prosecutions *per se*, but only at the legality of pretrial detention without a judicial hearing, an issue which could not be raised in defense of the criminal prosecution. "The order to hold preliminary hearings could not prejudice the conduct of trial on the merits." —— U.S. ——, 95 S. Ct. at 860 n.9. Thus, the interference which the Court in *Younger* feared, was absent, and concepts of federalism did not dictate absention.

15.

> A criminal system wherein the individual faces prolonged imprisonment upon the sole authority of the police or prosecutor violates the principles which underly this country's founding and which are the essence of the constitutional guarantees of freedom . . . from deprivation of liberty without due process of law. . . . A preliminary hearing in direct information cases is compelled by the Fourth Amendment as well as by the Fourteenth Amendment.

Pugh v. Rainwater, 332 F. Supp. 1107, 1113-14 (S.D. Fla. 1971).

16. *Id.*

mit a plan providing preliminary hearings in all cases initiated by information.'[17]

The district court's mandate provoked a flurry of planning activity in Florida. The court first adopted a plan submitted by Dade County Sheriff E. Wilson Purdy (the Purdy Plan) which required that persons arrested with or without warrants in Dade County be afforded expeditious preliminary hearings before a magistrate; those not provided such hearings were to be released immediately.'[18] Implementation of the Purdy Plan was stayed by the Fifth Circuit Court of Appeals during the pendency of the appeal, at which time Dade County's judiciary voluntarily moved to establish its own plan for providing preliminary hearings.

About the same time, the Florida Supreme Court amended the rules regarding preliminary hearings statewide.'[19] While the amended rules provided for a first appearance hearing, they did not require a determination of probable cause. The rules also changed the procedure for preliminary hearings by restricting them to felony charges and denying them to defendants charged by information or indictment.[20]

On remand to the district court, the parties stipulated that the court should consider the amended state rules rather than the Dade County procedures.[21] In a supplemental opinion, the court declared that the continuation of the practice of detaining a suspect charged by information without a judicial determination of probable cause was unconstitutional.[22] The Fifth Circuit affirmed in part and suggested further that the form of preliminary hearing dictated by the amended Florida rules would be acceptable as long as the hearing were afforded to all defendants in custody.[23]

The United States Supreme Court affirmed on the right of an incarcerated defendant to a probable cause hearing but reversed on the requirement that it be an adversary hearing. The Court, per Mr. Justice Powell, held that the fourth amendment requires a judicial determination of probable cause as a prerequisite

17. *Id.*

18. 336 F. Supp. 490, 491 (S.D. Fla. 1972).

19. 355 F. Supp. 1286, 1287-88 (S.D. Fla. 1973).

20. *Id.* at 1289. The rules now conformed to the accepted Florida practice. *See* note 11 *supra.*

21. 355 F. Supp. at 1288. *See also* Pugh v. Rainwater, 483 F.2d 778, 788-90 (5th Cir. 1973) (amended rules and Purdy Plan examined).

22. 355 F. Supp. at 1289.

23. 483 F.2d at 790.

to extended restraint of liberty following arrest.[24] A prosecutor's decision to file an information, based on probable cause, is insufficient to justify detaining a suspect prior to trial, since the prosecutor is too closely affiliated with law enforcement authorities; the determination must be made by a "neutral and detached" magistrate or other judicial officer.[25] The Court disagreed, however, with the Fifth Circuit's finding that the determination must be made in an adversary proceeding and held that the nature of the hearing justified an informal procedure.[26] In a concurring opinion, per Mr. Justice Stewart, four Justices confirmed the majority's holding that Florida's pretrial detention procedure was inadequate and that the Constitution requires "a timely judicial determination of probable cause as a prerequisite to pretrial detention."[27] The Justices objected, however, to the majority's ruling that the hearing need not be adversary in nature and contended that the due process clause of the fifth amendment requires an adversary hearing.[28]

BALANCING INTERESTS IN GERSTEIN

State and Individual Interests in Arrest

In *Gerstein*, the Court displayed respect for the delicate compromise between the state's interest in law enforcement and the individual's right to be secure in his person, interests which necessarily clash on occasion of arrest. In *Terry v. Ohio*,[29] the Court stated:

> An arrest . . . is intended to vindicate society's interest in having its laws obeyed and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows.[30]

The interference occasioned by arrest, besides restricting freedom of movement, impinges on the arrestee's personal dignity, reputation, and his right to be free from arbitrary actions by the state.[31] On the cognitive map of the average citizen, the no-

24. —— U.S. ——, 95 S. Ct. 854, 863 (1975).
25. *Id.*
26. *Id.* at 866.
27. *Id.* at 869-70.
28. *Id.*
29. 392 U.S. 1 (1968).
30. *Id.* at 26.
31. *See generally* L. KATZ, JUSTICE IS THE CRIME: PRETRIAL DELAY IN FELONY CASES, 51-62 (1972). [hereinafter cited as KATZ].

tion "arrest" is far too easily associated with the concept of guilt. On the other hand, the state has the right to demand that its laws be obeyed. The duty to control criminal activity belongs to the state. Community needs dictate that the state remove an individual, as soon as possible, if he represents a threat to the community's physical security.[32] The state's interest in an arrest, then, lies in initiating criminal proceedings against an offender of its laws and in removing him from society.

The Standard for Arrest

To accommodate both state and individual interests, arrest is based on a probable cause standard. In effect a standard of reasonableness,[33] the probable cause measure represents a "necessary accommodation between the individual's right to liberty and the State's duty to control crime."[34] Citing language from *Brinegar v. United States*,[35] the Court in *Gerstein* noted that the probable cause standard is a,

> practical, non-technical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law abiding citizens at the mercy of the officer's whim or caprice.[36]

In promoting individual liberty, the probable cause formula deprives police of the use of mass arrest tactics and arrests on suspicion, on open charges, and for questioning. The Court has traditionally held that common rumor or report, suspicion, or even "strong reason to suspect" are not sufficient for an arrest.[37] Depriving an individual of his liberty is mandated only when there exists probable cause to believe that a crime has been committed and that the accused committed it.[38]

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32. *Id.* at 52.

33. Draper v. United States, 358 U.S. 307, 317-20 (1959).

34. —— U.S. ——, 95 S. Ct. at 862.

35. 338 U.S. 160 (1949).

36. —— U.S. ——, 95 S. Ct. at 862, *quoting* Brinegar v. United States, 338 U.S. 160, 176 (1949).

37. Henry v. United States, 361 U.S. 98, 101 (1959). *See also* Giordenello v. United States, 357 U.S. 480, 487 (1958); Hogan and Snee, *The McNabb-Mallory Rule: Its Rise, Rationale, and Rescue*, 47 GEO. L.J. 1, 22 (1958) ("Arrest on mere suspicion collides violently with the basic human right of liberty"). For a discussion of the standard of arrest in early American decisions before and after the adoption of the fourth amendment, see *Henry, supra* at 101-02; Draper v. United States, 358 U.S. 307, 317-20 (1959).

38. *See* Berner, *supra* note 5, at 493-94.

But the probable cause standard also takes into account the state's need for effective law enforcement. In *Locke v. United States*,[39] Chief Justice Marshall wrote that "probable cause means less than evidence which would justify condemnation [that is, conviction]."[40] Evidence required to establish guilt is not necessary for arrest;[41] the standard is not one of reasonable doubt:

> In dealing with probable cause, as the name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.[42]

Individual and State Interest in Detention

The personal losses resulting from an individual's arrest may be compounded by his subsequent detention. Incarcerated persons are deprived of "personal freedom in the most immediate and literal sense of those words."[43] Necessarily at stake is the person's "right to be let alone," which Justice Brandeis once termed "the most comprehensive of rights and the right most valued by civilized men."[44]

The loss of liberty in the detention of an individual may have disastrous effects. Pretrial confinement disrupts employment and education and may weaken or destroy family relationships.[45] Inevitably the accused is exposed to oppressive and degrading living

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39. 2 U.S. (7 Cranch) 560 (1813).

40. *Id.* at 569.

41. Henry v. United States, 361 U.S. 98, 102 (1959).

42. Brinegar v. United States, 338 U.S. 160, 174-75 (1949). *See generally* Berner, *supra* note 5, at 493-505.

43. United States v. Thompson, 452 F.2d 1333, 1340 (D.C. Cir. 1971).

44. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Other rights which are placed in jeopardy when an individual is detained may include: the fundamental rights to privacy, Roe v. Wade, 410 U.S. 113, 152-53 (1973); and to travel, Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); the freedom to walk about, Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); the freedom to associate freely with persons of one's own choice, Kusper v. Pontikes, 414 U.S. 51 (1973); and the right to choose and maintain one's family relationships, Stanley v. Illinois, 405 U.S. 645, 651-52 (1972); Loving v. Virginia, 388 U.S. 1, 12 (1972). *See also* Note, *Bail and Its Discrimination Against the Poor: A Civil Rights Action As a Vehicle of Reform*, 9 VAL. U.L. REV. 167, 184-85 (1974) [hereinafter cited as *Bail*].

45. *See* Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study; Foreword*, 39 N.Y.U.L. REV. 631, 632 (1964) [hereinafter cited as Wald]; *Bail, supra* note 44, at 184-85; Note, *An Answer to the Problem of Bail: A Proposal in Need of Empirical Confirmation*, 9 COLUM. J.L. & SOC. PROB. 394, 396 (1973) [hereinafter cited as *Answer*].

conditions; the quality of life in most "holding" jails is recognized as abject.[46] Incarceration may further create resentment, bitterness, apathy, and anxiety in the accused.[47]

Most significantly, perhaps, detention may impede preparation of the detainee's defense[48] or even jeopardize his right to any trial at all.[49] Furthermore, empirical studies have concluded that

46. KATZ, *supra* note 31, at 56-57; *See also Answer, supra* note 45, at 396-98; Note, *Constitutional Limitations on the Condition of Pretrial Detention*, 79 YALE L.J. 941, 942 (1970). A holding jail is a county or municipal institution whose inmates are serving minor sentences or awaiting disposition of their cases.

47. Wald, *supra* note 45, at 632.

48. The problems of trial preparation that accompany pretrial incarceration are myriad. "Detention drastically limits the accused person's ability to marshall evidence, locate witnesses, and consult with counsel." Smith v. Hooey, 393 U.S. 374, 379-80 (1969); Stack v. Boyle, 342 U.S. 1, 8 (1951) (Jackson, J., concurring). The task of locating witnesses often falls on the defendant's attorney; when the lawyer is white and his client is black and a ghetto resident, further problems are created.

> Tracking down ordinary defense witnesses in the slums to support the defendant's alibi or to act as character witnesses often has a Runyanesque aspect to it. The defendant in jail tells his counsel he has known the witnesses for years but only by the name of "Toothpick," "Malachi Joe," and "Jet." He does not know where they live or if they have a phone, he is sure he could find them at the old haunts, but his descriptive faculties leave something to be desired. Since a subpoena cannot be issued for "Toothpick," of no known address, counsel sets off on a painstaking, often frustrating, search of the defendant's neighborhood. He stops children at play; he attempts door-to-door conversations with hostile and suspicious slum dwellers.

P. Wald, *Poverty and Criminal Justice* in THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS (app. C) 139, 145 (1967). Even if the witnesses are found, the attorney must induce them to appear at trial without the help of the accused.

Other inconveniences burden the defendant's attorney. He must schedule consultation with his client around jail visitation hours, and he is unable to make needed spot calls to the defendant to check details. *Bail, supra* note 44, at 179-80. These and other inconveniences can be considered prejudicial to the defendant's case. *See also Answer, supra* note 45, at 400.

49.

> In light of the personal losses caused by removal from society, the uncertain and often long and brutal pretrial detention period, and the defendant's doubts of acquittal, plea bargaining becomes a defendant's most realistic course. Despite actual innocence, he confesses in order to begin serving a *known*, relatively light sentence in a more humane prison facility . . . it has been found that where the court calls are backlogged and the period of pretrial detention long, the percentage of guilty pleas increases . . . thus, pretrial detention can improperly influence the defendant to plead guilty.

Answer, supra note 45, at 398-400.

a greater percentage of detained defendants are subsequently convicted than are defendants who are released pending trial;[50] and, it has been shown that detainees are customarily handed harsher sentences.[51] Thus, pretrial detention can have an effect on the disposition of the defendant's case.

The state's interest in pretrial detention is roughly the same as that in arrest;[52] the urgency to sustain the interest, however, lessens. The criminal process has begun, and with the alleged offender behind bars, the need for immediate further action dissipates. Because of this discrepancy between individual and state interests at the time of detention, closer scrutiny of the decision to incarcerate is required.

What Is Required for Detention

The fourth amendment prevents unlawful detention as well as unlawful apprehension. To this end, the standard needed to detain is held to be the same as that needed to arrest—probable cause.[53] In the case of arrest, police are empowered to act on their own probable cause beliefs.[54] *Gerstein,* however, holds that more is required for the lengthy detention of an arrestee. Consider the following hypotheticals:

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50. A New York study, completed in 1964, showed that fifty-seven percent of those released prior to trial were not convicted, while only twenty-seven percent of those detained were not convicted. Independent factors such as prior convictions and type of counsel were held constant throughout the study. Ranking, *The Effect of Pretrial Detention,* 39 N.Y.U.L. REV. 641, 642-43, 655 (1964). *See also Answer, supra* note 45, at 401-03, wherein a similar study conducted in 1971 by the New York Legal Aid Society is discussed.

51. Wald, *supra* note 45, at 635; *Answer, supra* note 45, at 403.

52. It may be added that the state has a further interest in pretrial detention: to insure the appearance of the defendant at trial. This interest has also been considered the purpose of bail. Answer, *supra* note 45, at 898.

The issue of bail is closely intertwined with the problem of pretrial detention. In evaluating *Gerstein,* it may be assumed that the defendant has also been considered the purpose of bail. *Answer, supra* note 45, at 898. ditions for that release. But the Court implied in *Gerstein* that where a defendant is subjected to overly restrictive conditions for his release, he is entitled to a *Gerstein* hearing, despite the fact that he is not incarcerated. The *Gerstein* directive is required for all defendants who suffer restraints on liberty "other than the condition that they appear for trial . . . the key factor is significant restraint on liberty." —— U.S. ——, 95 S. Ct. at 869 n.26.

53. *Id.* at 866.

54. *Id.* at 862-63; Beck v. Ohio, 379 U.S. 89, 96 (1964) (There is a preference, however, for the use of arrest warrants when feasible.)

(1) Police officers have probable cause to believe that suspect X committed a crime. The police, armed with the facts and circumstances supporting their belief, seek out a judicial officer and obtain an arrest warrant. The police seize X and incarcerate him pending further proceedings. The prosecutor files an information against X. X remains in jail.

(2) Police officers have probable cause to believe that suspect Y committed a crime. The police weigh the facts and circumstances of their belief, seek out Y, and incarcerate her. Shortly thereafter the police confront the prosecutor with the facts and evidence, and he in good faith files an information against Y. Y languishes in jail.

Maximum protection of an individual's rights to liberty and to be free from unfounded charges might be assured by requiring judicial scrutiny of the factual justification prior to every arrest[55] — that is, the procurement of an arrest warrant, as in situations analogous to (1). A person arrested under a warrant receives a judicial determination of probable cause prior to his arrest, and because the standards for arrest and detention are identical, probable cause for the suspect's subsequent confinement has been found. Hence, *Gerstein* does not apply where the suspect is arrested and detained on a warrant.[56] The requirement of a warrant in every case of arrest, however, would unduly burden law enforcement. There necessarily are times when police officers cannot wait for the issuance of a warrant; circumstances may justify the immediate apprehension of a suspect.[57]

Gerstein concerns itself with situations analogous to (2), where the suspect is arrested and detained on the probable cause belief of the police and prosecutor. In an arrest situation, the compromise between state and individual interests justifies a police officer assessing probable cause for himself in order to arrest and to detain the individual briefly to take the administrative steps incident to the arrest.[58] Once the individual is committed to custody, however, the reasons that justified the policeman's assessment of probable cause diminish:

55. —— U.S. ——, 95 S. Ct. at 862.

56. *Id.* at 864 n.18.

57. Such circumstances include: the suspected immediate flight of the accused, or the police officer's presence at the crime.

58. —— U.S. ——, 95 S. Ct. at 863.

> Once the suspect is in custody . . . there no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. And, while the State's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly. The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. . . . When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty.[59]

Thus, *Gerstein* requires a judicial determination of probable cause, either before or promptly after arrest, to safeguard an individual's right to liberty when that right is jeopardized by detention. Two recent cases[60] have stressed the proposition that judicial detachment in a probable cause determination is mandated by the fourth amendment.[61] In *Johnson v. United States*,[62]

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59. *Id.*

60. Shadwick v. City of Tampa, 407 U.S. 345 (1972), and Coolidge v. New Hampshire, 403 U.S. 443 (1971), both held that judicial detachment is constitutionally mandated in the areas of arrest and search. In *Coolidge*, the State of New Hampshire argued that its Attorney General, who was authorized to issue warrants under state law, did in fact act as a neutral judicial officer. The Court responded: "[P]olice and prosecutors simply cannot be asked to maintain the requisite neutrality with regard to their own investigations — the competitive enterprise that must rightly engage their single minded attention." 403 U.S. at 450. The holding of *Coolidge* was reaffirmed in *Shadwick*, where the City of Tampa authorized the issuance of arrest warrants by clerks of the municipal court. Petitioner Shadwick challenged a warrant on the basis that the clerks were not neutral and detached magistrates for purposes of the fourth amendment. The Court held that the Constitution mandates that arrest warrants be issued only by judicial officers or magistrates, and that the clerks were judicial officers. If there is sufficient detachment from law enforcement authorities and capability to determine whether probable cause exists, then the judicial officer has satisfied the fourth amendment's purpose. 407 U.S. at 350.

61. Professor Berner in his article offered the rationale underlying this requirement:

> Since such person [a magistrate] is not involved in the "competitive enterprise of ferreting out crime," his judgment, presumably, will be made strictly on facts and legitimate inferences untainted by emotion, hunch, or the compulsion of his job. There is no reason to think a police officer is less aware of individual rights or the underlying rationales for those rights than most others, and much to sug-

the Court expressed the view that judicial scrutiny is an integral part of the fourth amendment:

> The point of the Fourth Amendment, which is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.[63]

The key to the *Gerstein* decision is prolonged detention and its serious consequences; when an individual faces lengthy pretrial detention, judicial scrutiny of probable cause is required to give individual rights some degree of protection against opposing state interests as mandated by the fourth amendment.[64]

THE GERSTEIN DIRECTIVE

In *Gerstein*, the Court recognized that a suspect's detention following his warrantless arrest requires a greater, judicial scrutiny than that required for the arrest itself.[65] The hazards of prolonged pretrial confinement, the Court noted, may be more

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gest he is more aware than many. Yet the nature of his charge offers both the opportunity and, often, the seeming necessity for the compromise of such rights.

Berner, *supra* note 5, at 505.

62. 333 U.S. 10 (1948).

63. *Id.* at 14. Justice Frankfurter also spoke of the need for separating the functions of law enforcement and judicial officers. In McNabb v. United States, 318 U.S. 332 (1943), he stated:

> [S]afeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication.

Id. at 343.

64. The Court in *Gerstein* noted, however, that it was not overruling its prior decisions holding that a judicial hearing is not a prerequisite to a prosecution by information. Beck v. Washington, 369 U.S. 541, 545 (1962); Lem Woon v. Oregon, 229 U.S. 586 (1913). In addition, the Court stated that it did not intend to retreat from its established rule that an illegal arrest or detention would not void a subsequent conviction. Frisbie v. Collins, 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 436 (1886. —— U.S. ——, 95 S. Ct. at 865.

65. —— U.S. ——, 95 S. Ct. at 863.

serious than the interference occasioned by arrest.[66] Yet the Court also held that the standards for detention and arrest are identical, and that the procedure involved in determining whether there is probable cause to detain resembles that followed to obtain an arrest warrant.[67] As such, *Gerstein* merely requires that the prosecutor procure an arrest warrant after the defendant's arrest. The probable cause hearing therefore becomes susceptible to the rubber-stamping habits of hurried magistrates or those who tend to be influenced by prosecutors.[68] While the same argument has been used to criticize the warrant-issuing process before arrest,[69] the possibility exists that the practice might become even more prevalent once the magistrate is aware that the suspect is in custody.

Because the loss occasioned by pretrial detention is greater than the interference caused by arrest, the question arises whether the Court went far enough in its attempt to protect individuals from unfounded loss of liberty. The Court's distinction between arrest and detention, and the significantly greater interest involved in the latter, suggests that a standard more stringent than probable cause be required to test the validity of confinement, or that the hearing be held in an adversary proceeding.

Imposing a Higher Standard to Test the Validity of Pretrial Incarceration

If a standard higher than probable cause (for example, an evidentiary standard tending to establish guilt or preponderance of the evidence) were required to justify a suspect's pretrial detention, more investigation by police following a probable cause arrest would be necessary before the validity of the incarceration could be tested.[70] Although a higher standard would better protect

66. *Id.*

67. *Id.* at 866.

68. *See* Aguilar v. Texas, 378 U.S. 108, 111 (1964), wherein the Court asserted that the magistrate must perform his "neutral and detached" function and not serve merely as a rubber stamp for police.

69. *See, e.g.*, L. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 75 (1947); Berner, *supra* note 5, at 505-06; GOLDSTEIN, *supra* note 1, at 186; Comment, *Constitutional Requirements for the Authority to Issue Warrants*, 1972 WASH. U.L.Q. 777, 781 (1972).

70. Because the standards for arrest and detention are the same, there should be no need for further investigation before the probable cause determination can be made. *See* Mallory v. United States, 354 U.S. 449, 456 (1957). If further investigation is needed after arrest, the police have arrested without the requisite probable cause and the suspect must be re-

the defendant from the many losses accompanying pretrial confinement, it would also diminish the possibility that the hearing could be held promptly after arrest. As well as handicapping police, who would have to obtain more evidence to detain criminals than to arrest them, a higher standard would also act to incarcerate innocent as well as guilty for a significantly longer period, since it is doubtful that police investigations could be concluded within 48 hours or so after arrest. Hence, while more suspects might be discharged if a higher standard of proof were utilized, more would also remain in jail for a longer period of time to compensate for the more detailed investigation required. Further, a marked inequality of standards would result for those arrested on warrants vis-à-vis warrantless arrestees: suspects arrested on warrants could be detained on the probable cause necessary for the warrant, while warrantless arrestees would have the benefit of the higher standard.

Requiring an Adversary Hearing

The Court reversed the holdings of both the district court and the Fifth Circuit which held that an accused must be afforded an adversary hearing to determine probable cause.[71] The single issue of probable cause for detention, the Court believed, could be determined fairly and reliably without an adversary hearing.[72] Because of the hearing's limited function, it was held not to be a "critical stage" in the prosecution that would require the presence of counsel.[73]

The Court further justified its nonadversary holding on the basis that the nature of the determination and its resulting con-

leased. If it is doubtful whether probable cause exists, the investigation must precede the arrest; anything less infringes on the fourth amendment directive.

71. —— U.S. ——, 95 S. Ct. at 866. *See* Pugh v. Rainwater, 336 F. Supp. 490 (S.D. Fla. 1972), and the Fifth Circuit's opinion at 483 F.2d 778 (5th Cir. 1973). What the lower courts had in mind was a full preliminary hearing where the accused has the right to counsel and the right to confront and cross-examine witnesses for the state. It is significant to note that the issue in the instant case concerns the validity of pretrial incarceration without a judicial determination of probable cause, not, strictly speaking, the unconditional right to a preliminary hearing.

72. —— U.S. ——, 95 S. Ct. at 866.

73. *Id.* at 867. A "critical stage" is a pretrial procedure that would impair defense on the merits if the accused is required to proceed without counsel. *Id. See* Coleman v. Alabama, 399 U.S. 1 (1970); United States v. Wade, 388 U.S. 218 (1967). While the hearing to test pretrial detention would not directly impair defense on the merits, it may have that effect indirectly. *See* notes 48-51 *supra* and accompanying text.

sequences render an adversary proceeding unnecessary. Probable cause,

> does not require the fine resolution of conflicting evidence that a reasonable doubt or even preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt.[74]

A finding that there is probable cause sufficient to support the apprehension of the accused will result in his further confinement. These consequences were considered by the Court to be "lesser" than those stemming from the ultimate disposition of the suspect's case, where the outcome may be conviction.[75] As such, adversary features were not deemed required at the hearing.[76]

Maximum protection of a detainee's rights might conceivably be better protected if he were provided a full adversarial hearing; the presence of defense counsel, at least, could insure that the decision to further confine the defendant was not arbitrary or made on suspicion. There is a strong argument, raised in Mr. Justice Stewart's concurring opinion, that such a hearing is mandated by the due process clause of the fifth amendment and applicable in the criminal as well as the civil realm.[77] The argu-

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74. The Court acknowledged, however, that rights to confrontation and cross-examination at the hearing may "enhance the reliability of the probable cause determination in some cases." —— U.S. ——, 95 S. Ct. at 867. But the value of these adversary features,

> would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause.

Id.

75. *Id.*

76. *Id.* at 866-67.

77. Both the district court and the Fifth Circuit held that the plaintiffs had a due process right to a preliminary hearing to test probable cause for detention. Pugh v. Rainwater, 332 F. Supp. 1107, 1113-14 (S.D. Fla. 1971); 483 F.2d 778, 786-87 (5th Cir. 1973). Justice Stewart in his concurring opinion carried further the reasoning of the lower courts on the due process right to a hearing:

> Specifically, I see no need in this case for the Court to say that the Constitution extends less procedural protection to an imprisoned human being than is required to test the propriety of garnisheeing a commercial bank account, North Georgia Finishing, Inc. v. DiChem, Inc., —— U.S. ——, 95 S. Ct. 719 (1975); the custody of a refrigerator, Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), the temporary suspension of a public school student, *Goss v. Lopez*, —— U.S. ——, 95 S. Ct. 729 (1975), or the suspension of a driver's

ment was summarily rebutted in a footnote to the majority opinion on the grounds that the fourth amendment "always has been thought to define the 'process that is due' for seizures of person or property in criminal cases. . . ."[78]

Instead of avoiding the due process/adversary hearing issue, the Court might have replied that such a holding would render it impossible to schedule the hearing promptly after arrest. Counsel would have to be appointed or retained, and witnesses would have to be summoned in the effort to determine whether probable cause existed for the defendant's further confinement. It has been held that procedural due process requires the opportunity to be heard;[79] but an adversary hearing mandate would make a prompt post-arrest determination of probable cause impossible, thereby detaining a suspect for a longer period of time and contributing to general pretrial delay.

Incorporating Gerstein into Existing State Pretrial Procedure

The Supreme Court in *Gerstein* set no definitive time limit within which a suspect must be provided a hearing.[80] Clearly, however, *Gerstein* evidences the need for the earliest possible

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license, Bell v. Burson, 402 U.S. 535 (1971). . . . I cannot 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.

—— U.S. ——, 95 S. Ct. at 869-70. A test for providing procedural due process was offered in Goldberg v. Kelly, 397 U.S. 254 (1970):

> The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweights the governmental interest in summary adjudication.

397 U.S. at 262-63.

78. Justice Powell defended the fourth amendment rationale of *Gerstein* by asserting that the fourth amendment guaranteed the threshold right to a probable cause determination, and that this determination was only the first stage of the elaborate criminal justice system. "The relatively simple civil procedures . . . [cited in Justice Stewart's concurring opinion] are inapposite and irrelevant in the wholly different context of the criminal justice system." —— U.S. ——, 95 S. Ct. at 869 n.27.

79. Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Grannis v. Ordean, 234 U.S. 385 (1914).

80. The Court did, however, speak of a "*brief* period of detention," —— U.S. ——, 95 S. Ct. at 863, and ultimately held that "the determination must be made either before or *promptly* after arrests." *Id.* at 869. (emphasis added).

It may be suggested that the absence of a definitive time limit allows for differences in the pretrial procedures of states. For example, Montana

determination of probable cause in warrantless arrest cases, and the Court's sanctioning of the informal procedure enables state court systems to make the determination soon after the accused is taken into custody. In examining existing state pretrial procedure with a view toward incorporating the *Gerstein* directive, one finds that the hearing is easily accommodated by the "initial appearance" procedures of every state.[81] Indeed, it appears as if the Court decided *Gerstein* with the intent of disrupting as little as possible current state pretrial practices, despite dicta recognizing "the desirability of flexibility and experimentation by the States"[82] in adopting the *Gerstein* hearing.

State "initial appearance" or presentment statutes usually require the defendant to be brought before a magistrate or other judicial officer following arrest.[83] When the defendant is presented, the magistrate informs him of the charge against him and advises him of his constitutional rights and right to a preliminary hearing, if mandated.[84] Some states dictate that the preliminary hearing be held at this stage if feasible.[85] The magistrate may also admit the suspect to bail and appoint counsel if he is found to be indigent.[86]

As noted by the Court, some states already provide for a probable cause examination at the presentment;[87] *Gerstein* re-

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requires the defendant to be brought before a magistrate after arrest "without unnecessary delay." MONT. REV. CODES ANN. § 95-901 (1947). While in New Hampshire, the accused must be brought before a magistrate within 24 hours of his arrest. N.H. REV. STAT. ANN. § 594.20-a (Supp. 1970).

81. *See, e.g.*, ARIZ. R. CRIM. P. 4.1-.2 (1974); CAL. PENAL CODE § 858 (West 1970); COLO. REV. STAT. ANN. §§ 39-2-3, 39-2-20 (Supp. 1965); ILL. ANN. STAT. ch. 38, § 109-1 (Smith-Hurd 1970); IND. CODE §§ 35-1-8-1, 35-3.1-1-1 (1975); MASS. ANN. LAWS ch. 276, §§ 22, 34 (1968); MICH. COMP. LAWS ANN. § 764.26 (1968); N.Y. CRIM. PRO. LAW § 120.90, 140.20 (McKinney 1971); TEX. PENAL CODE ANN. arts. 14.06, 15.17 (1966).

82. —— U.S. ——, 95 S. Ct. at 868.

83. *See, e.g.*, ARIZ. R. CRIM. P. 4.1-.2 (1973); COLO. REV. STAT. ANN. §§ 39-2-3, 39-2-20 (Supp. 1965); MASS. ANN. LAWS ch. 276, §§ 22, 34 (1968). For a general discussion of the initial appearance procedure, see Y. KAMISAR, W. LAFAVE AND J. ISRAEL, MODERN CRIMINAL PROCEDURE 8-9 (4th ed. 1974) [hereinafter cited as MOD. CRIM. PRO.].

84. MOD. CRIM. PRO., *supra* note 83, at 8-9.

85. *See, e.g.*, ILL. ANN. STAT. ch. 38, § 109-1 (Smith-Hurd 1970).

86. MOD. CRIM. PRO., *supra* note 83, at 8.

87. —— U.S. ——, 95 S. Ct. at 861 n.24. Such states are Colorado, Hawaii, Indiana and Vermont. A typical statute or rule provides:

> If the defendant was arrested without a warrant . . . and the prosecution is upon information, the judicial officer shall determine in the manner provided . . . whether there is probable cause to be-

quires that other states adopt this practice. For these states, it would require little change in their initial appearance procedures to implement the *Gerstein* hearing; the burden on prosecutors and courts is no greater. The danger exists that the hearing will become as routine and methodical as other aspects of the presentment, thus rendering the *Gerstein* directive meaningless. But imposing defense counsel and other adversary features upon the hearing would defeat the expediency of the procedure, evidently the primary consideration in the *Gerstein* decision.

CONCLUSION

With a flourish the Supreme Court announced in *Gerstein* that suspects arrested without warrants and subsequently detained are constitutionally entitled to a prompt judicial determination of probable cause for that detention. In its struggle to maintain a balance between individual and state interests, the Court has merely sanctioned a procedure by which an arrest warrant, after the fact of arrest, is obtained. Ideally, such a procedure should have the effect of screening the innocent from unfounded charges and prolonged detention, while detaining only those against whom probable cause has been found; practically speaking, however, it remains to be seen whether the holding will provide an accused with an effective and meaningful right.

Because the standard for detention is the same as that for arrest, the *Gerstein* directive places no greater burden upon police and prosecutorial staffs.[88] And, while the accused is now afforded a probable cause hearing *promptly* after arrest, he nevertheless is denied an adversary proceeding which might more effectively ascertain the truth in a questionable arrest or detention situation. Further, states have relatively little adjustment to make in their pretrial procedures to implement the *Gerstein* requirement; *Gerstein* fits almost too comfortably into present state presentment vehicles. In view of these factors, *Gerstein* may be regarded as a narrow triumph for individual rights in the continuing conflict between individual and state interests in the realm of criminal procedure, perhaps a surer triumph for states.

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lieve that an offense has been committed and that the accused committed it.

VT. R. CRIM. P. 5(c) (1974). *See also* COLO. REV. STAT. ANN. §§ 39-2-3, 39-2-20 (Supp. 1965) (applies to warrant arrests as well); HAWAII REV. STAT. § 708-9 (1968) (defendant must be brought before magistrate for examination within 48 hours of arrest); IND. CODE §§ 35-1-8-1, 35-3.1-1-1(d) (1975).

88. *See* note 70 *supra*.