CRIMINAL PROCEDURE—ARREST—SYSTEM PROVIDING PROBABLE CAUSE DETERMINATION BY JUDICIAL OFFICER WITHIN FORTY-EIGHT HOURS OF WARRANTLESS ARREST IS PRESUMPTIVELY REASONABLE VIA FOURTH AMENDMENT—*County of Riverside v. McLaughlin*, 111 S. Ct. 1661 (1991).

Common law tradition served as the prototype for the criminal procedure embodied in the Bill of Rights.[1] The Fourth Amendment[2] directs that seizures of persons must be reasonable and that warrants are to be issued only on probable cause.[3] The mandated standards of reasonableness and probable cause represent an historical, procedural compromise[4] between the individual's right to liberty and society's need for effective law enforcement.[5] As part of the effort to maintain an equilibrium between these competing concerns, the United States Supreme Court has deemed it permissible for an officer to make certain arrests, based on her own assessment of probable cause, without

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[1] Gerstein v. Pugh, 420 U.S. 103, 114-16 (1975). *See* Jane H. Settle, Comment, *Williams v. Ward: Compromising the Constitutional Right to Prompt Determination of Probable Cause Upon Arrest*, 74 MINN. L. REV, 196, 198 (1989) (framers used common law system as model for seizure provision of the Bill of Rights). *See also* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 709 (1987) (Fourth Amendment "is little more than the affirmance of a great constitutional doctrine of the common law").

[2] U.S. CONST. amend. IV. The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. . . ." *Id.*

[3] *See* Terry v. Ohio, 392 U.S. 1, 21-22 (1968) ("the reasonableness of a particular search or seizure" must be "judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?"); Beck v. Ohio, 379 U.S. 89, 91 (1964) (arresting officer has probable cause to arrest when "the facts and circumstances within [his] knowledge and of which [he] had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense"); Brinegar v. United States, 338 U.S. 160, 176 (1949) (Fourth Amendment's requirement of probable cause is designed "to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime," while giving fair leeway for enforcing the law in the community's protection").

[4] Comment, *Pretrial Detainees Have a Fourth Amendment Right to a Nonadversary, Judicial Determination of Probable Cause*, 10 VAL. U. L. REV. 199, 199 (1976) (procedural compromise is the central component of the Fourth Amendment). *Compare* United States v. Garsson, 291 F. Supp. 646, 649 (S.D.N.Y. 1923)(Hand, J.)("What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.") *with* McNabb v. United States, 318 U.S. 332, 347 (1943)(Frankfurter, J.) ("The history of liberty has largely been the history of observance of procedural safeguards.").

[5] *See* Settle, *supra* note 1, at 198 (governments historically have sought to balance individual's liberty with need for crime control).

first obtaining a warrant.[6] To counterbalance this privilege, the Court has established that an individual arrested without a warrant is entitled to a prompt judicial determination of probable cause.[7] The Court, however, has only defined the time frame within which such an assessment must be provided through the application of a vague "promptness" standard.[8] This obscure standard has created a nationwide divergence in pretrial procedure and has subjected individuals to unjustifiably prolonged restraints on liberty.[9]

Recently, in *County of Riverside v. McLaughlin*,[10] the Supreme Court considered what constituted a "prompt" probable cause determination following a warrantless arrest.[11] Specifically, the Court addressed the constitutionality of a county's policy to postpone determinations of probable cause to combine such assessments with arraignment procedures.[12] The Court concluded that

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[6] *See* United States v. Watson, 423 U.S. 411, 423 (1976) (requiring more than probable cause for public arrests would be too burdensome on the criminal justice system); Gerstein v. Pugh, 420 U.S. 103, 113 (1975) (an arrest based on probable cause is not invalidated solely because a warrant was not obtained first). *But cf.* Beck v. Ohio, 379 U.S. 89, 96 (1964) (exemplifying strong preference for use of arrest warrants when feasible by stating that "[a]n arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment").

[7] Johnson v. United States, 333 U.S. 10, 13-14 (1948). The Court declared:

> The point of the Fourth Amendment, which often 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.

Id.

[8] *See Gerstein*, 420 U.S. at 125. In *Gerstein*, the Supreme Court held that a state must provide a probable cause determination "by a judicial officer either before or *promptly after* arrest." *Id.* (emphasis added). The Court elaborated somewhat on the meaning of "promptly" by stating that when a suspect is arrested without a warrant, there may be only "a brief period of detention to take the administrative steps incident to arrest" before the suspect is presented to a magistrate. *Id.* at 113-14. *See also infra* notes 63-79 and accompanying text for a discussion of *Gerstein*.

[9] *See* Wendy L. Brandes, *Post-Arrest Detention and the Fourth Amendment: Refining the Standard of Gerstein v. Pugh*, 22 COLUM. J.L. & SOC. PROBS. 445, 457-74 (1989) (discussing various federal court approaches toward applying the promptness standard).

[10] 111 S. Ct. 1661 (1991).

[11] *Id.* at 1665.

[12] *Id.* For purposes of this Note, "arraignment" shall be considered the equivalent of a preliminary hearing at which a judge decides whether a person charged with a crime should be held for trial, determines bail and hears pleas. *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 13-15, 595-97 (1985).

a judicial probable-cause determination may be combined with other pretrial proceedings but must be furnished within forty-eight hours of a warrantless arrest.[13]

In August, 1987, Donald Lee McLaughlin was detained in California's Riverside County jail following a warrantless arrest.[14] While incarcerated, McLaughlin filed a complaint for declaratory and injunctive relief in the United States District Court for the Central District of California on his own behalf and for those similarly situated.[15] The complaint stated a section 1983 claim[16] against Riverside County (County) based on allegations that McLaughlin and others, who had been incarcerated for over thirty-six hours,[17] had not been provided probable cause determinations.[18] The County's policy was to provide determinations of probable cause at arraignment within two days of a warrantless arrest.[19] Shortly after filing his complaint, McLaughlin moved

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"Arraignment" shall be distinguished from an "initial appearance," "presentment" or "probable cause hearing" before a magistrate which would occur prior to arraignment. *Id.* Pretrial procedures vary from one jurisdiction to another and are sometimes merged, causing some confusion when terms such as "probable cause determination", "arraignment" and "preliminary hearing" are used in reference to procedures which have been combined. *Id.*

13 *Riverside*, 111 S. Ct. at 1670.

14 *Id.* at 1665.

15 *Id.*

16 *Id.* Under section 1983, any person acting under color of state law who deprives a citizen of constitutional rights, privileges or immunities is liable to the injured party in an action at law or equity. 42 U.S.C. § 1983 (1988). *See also* Monroe v. Pape, 365 U.S. 167, 170, 186-87 (1961) (illegal search and seizure by Chicago police constituted action under color of state law within § 1983), *overruled in part*, Monell v. Dep't of Social Services, 436 U.S. 658 (1978). Many section 1983 suits in which pretrial detainees have alleged unlawful detentions by state officials have been unsuccessful because of the difficulty in demonstrating that the detention resulted from the enforcement of government policy. *See, e.g.*, Patton v. Przybylski, 822 F.2d 697, 701 (7th Cir. 1987) (seven-day detention did not support section 1983 claim where plaintiff failed to establish who was responsible for the delay); Talbert v. Kelly, 799 F.2d 62, 67 (3d Cir. 1986) (four-day detention did not result from execution of government policy but from failure to implement policy); King v. Massarweh, 782 F.2d 825, 827 (9th Cir. 1986) (two-day detention did not sustain section 1983 claim because police acted in violation of department's policy).

17 McLaughlin v. County of Riverside, 888 F.2d 1276, 1277 (9th Cir. 1989), *vacated*, 111 S. Ct. 1661 (1991).

18 *Riverside*, 111 S. Ct. at 1665.

19 *Id.* The County's policy closely followed the provisions of section 825 of the California Penal Code. *Id.* The statute provides, in pertinent part: "[t]he defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays. . . ." CAL. PENAL CODE § 825 (West 1985). The County's policy also excluded Saturdays and, as a result of this weekend/holiday exclusion, delays of up to seven days were possible. *Riverside*, 111 S. Ct. at 1665.

for class certification.[20]

McLaughlin, joined by three additional plaintiffs,[21] later filed an amended complaint in the district court and class certification was subsequently granted by that court.[22] Upon the plaintiffs' request, the district court issued a preliminary injunction requiring the County to provide determinations of probable cause within thirty-six hours after a warrantless arrest, except in emergencies.[23]

The United States Court of Appeals for the Ninth Circuit affirmed the preliminary injunction against the County.[24] After rejecting the County's argument that plaintiffs lacked standing to bring the action,[25] the Ninth Circuit found that the County needed no more than thirty-six hours to conclude the administrative procedures incident to arrest.[26] Therefore, the court of ap-

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[20] *Id.* The County, in turn, moved to dismiss McLaughlin's claim on the grounds that he lacked standing pursuant to *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), because he could not show that he would be subject to another warrantless detention without a determination of probable cause in the future. *Riverside*, 111 S. Ct. at 1665-66. The district court did not explicitly rule on the County's motion to dismiss. *Id.* at 1666.

[21] *Id.* The additional plaintiffs were Johnny E. James, Diana Ray Simon, and Michael Scott Hyde, and each sought relief "individually and as class representatives." *Id.* The amended complaint made the same allegations set forth by McLaughlin in the original complaint. *Id.*

[22] *Id.* The class was comprised of "all present and future prisoners in the Riverside County Jail including those pretrial detainees arrested without warrants and held in the Riverside County Jail from August 1, 1987 to the present, and all such future detainees who have been or may be denied prompt probable cause, bail or arraignment hearings." *Id.*

[23] *Id.* The district court held that the County's policy violated the promptness standard of *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975) (judicial determination of probable cause must be made promptly after arrest). *Id. See infra* notes 63-79 and accompanying text.

[24] McLaughlin v. County of Riverside, 888 F.2d 1276, 1279 (9th Cir. 1989). The case was consolidated with a nearly identical case brought against San Bernardino County. *Riverside*, 111 S. Ct. at 1666; McGregor v. County of San Bernardino, 888 F.2d 1276 (9th Cir. 1989).

[25] *McLaughlin*, 888 F.2d at 1277. The court of appeals distinguished the plaintiffs' position from that of the plaintiff in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), which the County relied upon, because the *Lyons* plaintiff complained of a past constitutional violation (an officer's choke hold), whereas McLaughlin and the others were actually suffering harm when they filed for injunctive relief. *McLaughlin*, 888 F.2d at 1277.

[26] *Id.* at 1279. The administrative procedures utilized by the police incident to arrest are commonly and collectively referred to as the process of "booking" a suspect. BLACK'S LAW DICTIONARY 183 (6th ed. 1990). "Booking" occurs after an arrestee is brought to the police station and, generally, consists of recording the suspect's name, the crime for which she was arrested and other relevant data. *Id.* The procedure may also include photographing and fingerprinting. *Id.* The Supreme Court, however, has not identified the police activities that constitute ad-

peals held that the County's policy did not afford probable cause determinations with the requisite promptness.[27]

Noting a conflict between the Fourth,[28] Seventh,[29] and Ninth[30] and Second Circuits,[31] the United States Supreme Court granted certiorari.[32] The Supreme Court held that a pretrial system is presumed reasonable under the Fourth Amendment if the system provides judicial probable cause determinations within forty-eight hours of a warrantless arrest.[33] The Court concluded that while a jurisdiction may properly combine pretrial procedures, the County's practice was presumptively unconstitutional because it promoted delays which exceeded the forty-eight hour limit.[34]

The Supreme Court's attempts to clarify the timing of probable cause determinations began in *McNabb v. United States*.[35] In *McNabb*, the Court focused on the evidentiary consequences of

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ministrative steps which may delay a probable cause determination and debate on this issue continues. *See* Kanekoa v. City and County of Honolulu, 879 F.2d 607, 615 (9th Cir. 1989) (Nelson, J., dissenting). *Compare* Doulin v. City of Chicago, 662 F. Supp. 318, 332 (N.D. Ill. 1986) (mandatory fingerprint clearing process exceeded the period needed to complete the administrative steps incident to arrest), *rev'd. on other grounds sub nom.* Robinson v. City of Chicago, 868 F.2d 959 (7th Cir. 1989) *and* Lively v. Cullinane, 451 F. Supp. 1000, 1005 (D.D.C. 1978) (police must justify a delay in presentment "by a strong showing that it is necessitated by a substantial administrative need") *with* Fisher v. Washington Metro Area Transit Auth., 690 F.2d 1133, 1140 (4th Cir. 1982) (administrative steps "will necessarily vary with geographical factors and with local police and court system practices as well as with innumerable factual exigencies") *and* Sanders v. City of Houston, 543 F. Supp. 694, 700 (S.D. Tex. 1982) (administrative steps include "completing paperwork, photographing, checking for prior record, laboratory testing, interrogating the suspect, verifying alibis, ascertaining similarities to other related crimes, and conducting line-ups."), *aff'd mem.*, 741 F.2d 1379 (5th Cir. 1984). For purposes of this Note, the term "processing" arrestees is inter-changeable with the notions of "taking the administrative steps incident to arrest" or "booking" the arrestee.

27 *McLaughlin*, 888 F.2d at 1279.

28 *See Fisher*, 690 F.2d at 1140-41 (determination must be provided immediately following administrative steps incident to arrest).

29 *See* Llaguno v. Mingey, 763 F.2d 1450, 1567-68 (7th Cir. 1985) (en banc) (42-hour detention exceeded constitutional limits because detention continued beyond brief period needed to complete booking and essential paperwork).

30 *See* McLaughlin v. County of Riverside, 888 F.2d 1276, 1278 (9th Cir. 1989) (probable cause determination must be provided as soon as administrative steps incident to arrest are completed and such steps should only require a brief period).

31 *See* Williams v. Ward, 845 F.2d 374, 387 (2d Cir. 1988), *cert. denied*, 488 U.S. 1020 (1989) (72 hours is an acceptable period of delay between warrantless arrest and probable cause determination).

32 County of Riverside v. McLaughlin, 111 S. Ct. 40 (1990) (mem).

33 County of Riverside v. McLaughlin, 111 S. Ct. 1661, 1671 (1991).

34 *Id.*

35 318 U.S. 332 (1943).

delaying a probable cause hearing following a warrantless arrest.[36] Three brothers suspected of murder were arrested without warrants and relentlessly interrogated for nearly two days before they were brought to a magistrate for probable cause determinations.[37] During the lengthy interrogation, Benjamin McNabb confessed to shooting at the victim and implicated his two cousins in the crime.[38] The Court held that arresting officers must establish in a reasonably prompt manner that there is legal cause to detain a suspect.[39] The Court maintained that McNabb's confession was inadmissible at trial because the officers' investigative tactics deprived him of an opportunity to effectively challenge probable cause.[40]

Writing for the Court, Justice Frankfurter decried the officers' actions as being incompatible with the important, but restricted, duties of government officers and as undermining the integrity of criminal proceedings.[41] Citing several statutes which

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[36] *Id.* at 338. The Court was not primarily concerned with the arrestee's liberty interests but rather with the ramifications of improperly obtained confessions. *See id.* at 338-39. The Supreme Court has subsequently explored the evidentiary effects of illegal arrests. *See* Taylor v. Alabama, 457 U.S. 687 (1982)(for an intervening event to break casual connection between illegal arrest and confession, it must be meaningful); Rawlings v. Kentucky, 448 U.S. 98 (1980) (whether an admission is tainted by an illegal arrest depends on the facts of each case); Dunaway v. New York, 442 U.S. 200 (1979) (taking into custody and not permitting to leave constitute arrest for Fourth Amendment purposes); Brown v. Illinois, 422 U.S. 590 (1975) (warnings concerning Fourth and Fifth Amendment privileges do not purge taint of illegal arrest); Johnson v. Louisiana, 406 U.S. 356 (1972)(magistrate's subsequent determination of probable cause purges later line-up of taint of illegal arrest); Wong Sun v. United States, 371 U.S. 471 (1963) (evidence that was fruit of an unlawful arrest was not admissible).

[37] McNabb v. United States, 318 U.S. 332, 334-38 (1943). Informers told the Internal Revenue Service (IRS) that members of the McNabb family were going to sell whiskey for which they had not paid federal taxes. *Id.* at 333. That night, an IRS officer was shot and killed by an unidentified assailant after pursuing McNabb family members into a graveyard. *Id.* at 333-34.

[38] *Id.* at 337. Police continuously questioned Benjamin McNabb for five to six hours before obtaining a confession. *Id.* The three men were sentenced to 45 years in prison for murder. *Id.* at 333.

[39] *Id.* at 343-44.

[40] *Id.* at 345. Before the controversial *McNabb* opinion, delay had little effect on the admissibility of a confession procured during the pre-arraignment period. *See* Jerald P. Keene, Comment, *The Ill-Advised State Court Revival of the McNabb-Mallory Rule*, 72 J. CRIM. L. & CRIMINOLOGY 204, 207 n.15 (1981). Prior to *McNabb*, confessions only needed to pass the due process voluntariness test. *Id.* After the *McNabb* decision, a confession obtained during delay could be excluded regardless of whether it was made voluntarily because the nature and purpose of the delay itself became the focus of judicial inquiry, as opposed to the delay's effect on the defendant. *See* Upshaw v. United States, 335 U.S. 410, 413 (1948).

[41] *McNabb*, 318 U.S. at 341-42.

directed arresting officers to take suspected federal offenders to a judicial officer "immediately"[42] or "forthwith," the Justice noted the pervasiveness of a promptness requirement in federal criminal procedure statutes.[43] The Court further observed that nearly every state required prompt delivery of arrested persons before a committing authority.[44] According to Justice Frankfurter, such federal and state legislation safeguarded the innocent and assured that law enforcement techniques would remain consistent with the ideals of a progressive society.[45] The Court declined, however, to incorporate the federal statutes' immediacy rule into a due process requirement binding upon the states.[46] Instead, Justice Frankfurter delivered the opinion using the Court's supervisory powers over federal court procedures and evidence.[47]

In 1945, following the *McNabb* decision, Rule 5(a) of the Federal Rules of Criminal Procedure was adopted.[48] The rule

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[42] *Id.* at 342 (quoting 5 U.S.C. § 300a (1942)). Section 300a required that any person arrested by an FBI agent "be immediately taken before a committing officer." 5 U.S.C. § 300a (1942), *amended by* 18 U.S.C. § 3052 (1982).

[43] *McNabb*, 318 U.S. at 432 (quoting 18 U.S.C. § 593 (1943)). Section 593 required that persons arrested for operating an illegal distillery "shall be taken forthwith before a judicial officer residing in the county where the arrests were made, or if none, in the county nearest to the place of arrest." 18 U.S.C. § 593 (1943).

The third statute the Court relied on was 18 U.S.C. section 595 (1942), requiring "the marshal, his deputy, or other officer, who may arrest a person charged with a crime or offense, to take the defendant before the nearest United States commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial. . . ." 18 U.S.C. § 595 (1942).

[44] *McNabb*, 318 U.S. at 342 & n.7.

[45] *Id.* at 343-44. The Justice set forth the observation of an unnamed civil officer concerning the reason police sometimes act in a less than commendable manner while investigating crimes: "[t]here is a great deal of laziness in it. It is far more pleasant to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence." *Id.* at 344 n.8 (quoting 1 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 442 n.1 (1883)).

[46] *Id.* at 338-39. The Court declined to perform a Fifth Amendment analysis. *Id.* The McNabbs argued that the confession was inadmissible pursuant to the Fifth Amendment's guarantee against compelled self-incrimination. *Id.* The government countered that the Constitution only prohibited involuntary confessions and that McNabb's was voluntarily given. *Id.* at 339. The Court responded that it was "unnecessary to reach the [c]onstitutional issue pressed upon" it. *Id.* at 340.

[47] *Id.* Justice Frankfurter declared that "[j]udicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." *Id.*

[48] FED. R. CRIM. P. 5(a). Rule 5(a) provides, in pertinent part:

> An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate . . . .

Id.

required officers to bring federal arrestees before a committing officer "without unnecessary delay."[49] Twelve years later, in *Mallory v. United States*,[50] the Supreme Court attempted to clarify the meaning of Rule 5(a)'s "unnecessary delay" provision and, in so doing, reaffirmed the *McNabb* holding.[51] Andrew Mallory, a rape suspect, was arrested and interrogated several times at police headquarters over a period of ten hours.[52] The police did not attempt to locate a committing magistrate until Mallory signed a written confession.[53] The confession was admitted into evidence at trial, and Mallory was convicted of rape.[54]

Applying Rule 5(a), the Supreme Court unanimously reversed the conviction and reaffirmed the rule from *McNabb* that confessions must be excluded from evidence if obtained from suspects during unnecessary delays in bringing them before a judicial officer.[55] Justice Frankfurter indicated that Congress designed Rule 5(a) to maintain a necessary balance between an individual's liberty interests and effective and reputable law enforcement.[56] The Court clearly denounced delays for the purpose of eliciting confessions.[57]

Again, Justice Frankfurter avoided placing the "unnecessary delay" doctrine within a constitutional framework, defining the rule simply as part of the federal criminal procedure established by Congress.[58] The Justice reiterated that, upon completion of

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49 *Id.*

50 354 U.S. 449 (1957).

51 *See id.* at 453-54.

52 *Id.* at 450-51.

53 *Id.* at 455. According to the Court, police headquarters was located "within the vicinity of numerous committing magistrates," and "arraignment could easily have been made in the same building. . . ." *Id.*

54 *Id.* at 449, 451.

55 *Id.* at 453. The rule became known generally as the *McNabb-Mallory* rule. *See generally* Annotation, 12 A.L.R. FED. 377, 380 (1972). Following the *McNabb* and *Mallory* decisions, many federal courts have commented upon what constitutes unnecessary delay under Rule 5(a). *See* United States v. Brown, 459 F.2d 319, 325 (5th Cir. 1971) (questioning arrestee prior to presentation before magistrate is not unnecessary delay under Rule 5(a)), *cert. denied*, 409 U.S. 864 (1972); United States v. Mayes, 417 F.2d 771, 772 (9th Cir. 1969) (per curiam) (unnecessary delay occurs when magistrate is available and no justification for detention exists); Granza v. United States, 377 F.2d 746, 749 (5th Cir. 1967) (obtaining writing samples of suspect does not constitute Rule 5(a) unnecessary delay), *cert. denied*, 389 U.S. 939 (1967); United States v. D'Argento, 373 F.2d 307, 313 (7th Cir. 1967) (photographing and fingerprinting is not unnecessary delay under Rule 5(a)).

56 *Mallory*, 354 U.S. at 453.

57 *Id.* at 455.

58 *Id.* at 453. Because the right to a prompt hearing was not incorporated into either the Fifth or Fourteenth Amendment due-process requirements, the states

the ordinary administrative steps requisite to arrest, the failure to bring a suspect before an available magistrate constitutes an unnecessary delay and a willful disobedience of law.[59] The Court noted, however, that the varying and unavoidable circumstances of each case may justify brief delays and must therefore be considered when Rule 5(a) requirements are implemented.[60]

McNabb and *Mallory* disclosed the Court's growing concern with the extended detention of arrested individuals preceding a judicial determination of probable cause.[61] Although *Mallory* articulated that delays for procuring confessions were intolerable, the outer limits of permissible delay were not so clearly demarcated.[62] Thereafter, in 1975, the Supreme Court elucidated another aspect of pretrial detention, namely, the applicability of the Constitution to probable cause determinations.[63]

In *Gerstein v. Pugh*,[64] a prosecutor in Dade County, Florida, filed an "information"[65] according to the state's arrest proce-

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were not required to adopt the *McNabb-Mallory* rule. Keene, *supra* note 40, at 208. In interpreting their own equivalents to Rule 5(a), most state courts rejected the Supreme Court's rule. *Id. See also* F. INBAU & J. REID, CRIMINAL INTERROGATION & CONFESSIONS 165 n.45 (2d ed. 1967) (1974 reprinting) (providing comprehensive list of state court decisions which rejected the *McNabb-Mallory* rule).

59 *Mallory*, 354 U.S. at 453.

60 *Id.* at 455. Specifically, Justice Frankfurter stated:

> The duty enjoined upon arresting officers to arraign 'without unnecessary delay' indicates that the command does not call for mechanical or automatic obedience. Circumstances may justify a brief delay between arrest and arraignment, as for instance, where the story volunteered by the accused is susceptible of quick verification through third parties. But the delay must not be of a nature to give opportunity for the extraction of a confession.

Id.

61 Brandes, *supra* note 9, at 451 (the Supreme Court began to focus on the consequences of pretrial detention more closely in *McNabb* and *Mallory*).

62 Stacey Weldele-Wade, Note, *The McNabb-Mallory Rule: Is The Benefit Worth the Burden?*, 44 MONT. L. REV. 137, 139 (1983). *See* United States v. Fuller, 243 F. Supp. 178, 182-83 (D.D.C. 1965) (pointing out inconsistent circuit court decisions on what comprises unnecessary delay and stressing the need for Supreme Court clarification), *aff'd*, 407 F.2d 1199 (D.C. Cir. 1967), *cert. denied*, 393 U.S. 1120 (1969).

63 *See* Gerstein v. Pugh, 420 U.S. 103, 111 (1975) ("Both the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents.").

64 420 U.S. 103 (1975).

65 *Id.* at 105. "An 'information' is a written accusation made by a public prosecutor, without the intervention of a grand jury." Salvail v. Sharkey, 271 A.2d 814, 817 (R.I. 1970). *See* Hurtado v. California, 110 U.S. 516, 538 (1884) (holding that the right to a grand jury under the Fifth Amendment is inapplicable to the states and, therefore, the states may permit prosecution by information instead of indictment).

dure[66] charging Pugh with various noncapital offenses.[67] Pugh brought a section 1983 class action against Dade County officials alleging that the arrest procedure and subsequent detention violated his constitutional rights because the officials did not afford him a judicial probable cause determination.[68] In a unanimous decision, the Supreme Court held that plaintiffs had a Fourth Amendment right to a "prompt" determination of probable cause by a judicial officer following a warrantless arrest.[69]

Writing for the Court, Justice Powell emphasized that the standards and procedures regarding arrest and detention arose out of both the Fourth Amendment and the common law system

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66 *See* FLA. R. CRIM. P. 3.140(a) (authorizing initiation of noncapital prosecutions by direct information without prior preliminary hearing or leave of court).

67 *Gerstein*, 420 U.S. at 105. Pugh was arrested on March 3, 1971, and 13 days later the prosecutor filed the information "charging him with robbery, carrying a concealed weapon, and possession of a firearm during commission of a felony." *Id.* at 105 n.1. Under Florida law, no arrest warrant was necessary if an information was filed. *Id.* at 105.

68 *See* Pugh v. Rainwater, 332 F. Supp. 1107, 1108-09 (S.D. Fla. 1971) *aff'd.*, 493 F.2d 778 (5th Cir. 1973), *aff'd in part, rev'd in part sub nom* Gerstein v. Pugh, 420 U.S. 103 (1975). The Florida courts had previously held that a filed information foreclosed a suspect's right to any preliminary hearing. *See* Florida *ex rel.* Hardy v. Blount, 261 So.2d 172, 174 (Fla. 1972) (filing an information by a prosecuting officer is authorized under the Florida constitution even where grand jury refused to indict). Only two methods existed for obtaining a judicial probable cause determination in direct information cases. *Gerstein*, 420 U.S. at 106. The first method was through a Florida statute which allowed a preliminary hearing following 30 days of detention. *Id.* (citing FLA. STAT. ANN. § 907.045 (West 1973)). The second method was through an arraignment which was often delayed for over a month after arrest. *Pugh*, 332 F. Supp. at 1110. Therefore, it was solely within the prosecutor's discretion to detain an individual charged by information without a probable cause determination for a substantial period of time. *Gerstein*, 420 U.S. at 106. The district court held that the Fourth and Fourteenth Amendments require judicial probable cause hearings for arrestees in direct information cases regardless of whether arrestees are released on bond. *Pugh*, 332 F. Supp. at 1114-15.

69 *Gerstein*, 420 U.S. at 124-25. The Court pointed out that the right to a prompt probable cause determination applies whether suspects are charged by information or otherwise if suspects "suffer [any] restraints on liberty other than the condition that they appear for trial." *Id.* at 125 n.26. Based on the Fourth Amendment's prohibition against unreasonable searches and seizures, the decision impliedly bound the states through incorporation under the Due Process Clause of the Fourteenth Amendment. *Id.* at 124-25. *See* Duncan v. Louisiana, 391 U.S. 145, 147-48 (1968); Mapp v. Ohio, 367 U.S. 643 (1961). In *Duncan*, Justice White stated:

> [M]any of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment. That clause now protects. . . [the] Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized . . . .

Duncan, 391 U.S. at 148.

which preceded the amendment.[70] The Justice reviewed the elements of a properly executed probable cause determination following a warrantless arrest.[71] The Court first noted that the Fourth Amendment's probable cause standard represents a necessary compromise between the liberty rights of an individual and the state's obligation to prevent crime.[72] The Court explained that an officer's on-the-scene probable cause determination allows the officer to legally arrest and detain a criminal suspect for a brief period to process him through incidental administrative steps.[73] Once a suspect is secured, the Court stressed, a magistrate's impartial judgment is essential to protect against unfounded encroachments on liberty and privacy.[74] The Court rationalized that, upon incarceration, the danger the state sought to prevent subsides, while the need for a detached probable cause determination increases significantly.[75]

The majority also found that a reliable probable cause determination could be made without an adversarial hearing.[76] The majority argued that an adversarial hearing would needlessly de-

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70 *Gerstein*, 420 U.S. at 111, 114-15. The Court observed that at common law an arrested individual was to be presented to a magistrate "shortly after arrest," and that this practice served as the model for American criminal procedure following the Fourth Amendment's adoption. *Id.* at 114-16.

71 *Id.* at 111-14. The Court reiterated that the probable cause arrest standard is "defined in terms of facts and circumstances 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.' " *Id.* at 111-12 (quoting Beck v. Ohio, 379 U.S. 89, 91 (1964)).

72 *Id.* at 112. The Court stated:

> The rule of probable cause is a practical, nontechnical 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 officers' whim or caprice.

Id. (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).

73 *Id.* at 113-14.

74 *Id.* at 112, 114. *See* Johnson v. United States, 333 U.S. 10, 13-14 (1948) (judicial officer must decide when right of privacy must yield to right of search, not police or government agents); Terry v. Ohio, 392 U.S. 1, 21-22 (1968) (scheme of Fourth Amendment is only meaningful when conduct of law enforcement officers is subjected to detached, neutral scrutiny of judicial officer). *See also* United States v. United States Dist. Court, 407 U.S. 297, 316 (1972) ("very heart of the Fourth Amendment directive" is the requirement that "a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation"). *See also supra* note 7 and accompanying text.

75 *Gerstein*, 420 U.S. at 114.

76 *Id.* at 120. Four concurring Justices argued that it was unnecessary to reach such a conclusion at that time. *Id.* at 126 (Stewart, J., concurring). The concurrence claimed that the majority should not have foreclosed, by way of dicta, any

lay presentment and that, whether before or after arrest, probable cause was traditionally decided on informal modes of proof in a nonadversary proceeding.[77]

Recognizing that systems of criminal procedure vary by state, Justice Powell reasoned that each sovereign must be permitted a certain degree of flexibility and experimentation to structure and incorporate probable cause hearings into its own pretrial system.[78] The Court concluded that whatever procedure is adopted, a state must provide a judicial probable cause determination as a prerequisite to any meaningful pretrial restraint of liberty "either before or *promptly* after arrest."[79]

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future claim that due process requirements are applicable in the pretrial detention context. *Id.* (Stewart, J., dissenting).

77 *Id.* at 120, 122 & n.12. The majority reasoned that the American criminal justice system is overburdened with cases and complexities and that both the processing of misdemeanors and the beginning stages of prosecution are already marked by delays. *Id.* at 122 n.23. Thus, the majority maintained that requiring adversary hearings on probable cause would only exacerbate pretrial delay problems. *Id.*

The majority also posited that the determination of probable cause is not a "critical stage" during the prosecution and, therefore, would not require the appointment of counsel. *Id.* at 122. The Court defined "critical stages" as "those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel." *Id.* (citing Coleman v. Alabama, 399 U.S. 1 (1970); United States v. Wade, 388 U.S. 218, 226-27 (1967)). According to the majority, while adversary proceedings might enhance reliability in some cases, their value would be insufficient in the overall context of probable cause determinations to hold that they are constitutionally mandated. *Id.* The majority asserted that a "defendant's ability to aid in preparing his defense may be affected to some degree by pretrial custody, but that there is not the likelihood of substantial harm that was controlling in *Wade* and *Coleman*." *Id.* at 123. Further, the majority stated that an adversary proceeding was unnecessary because hearsay and written testimony had traditionally been deemed acceptable modes of proof for probable cause before a committing officer. *Id.* at 120. *But see* Robert I. Berdon, *Liberty and Property Under the Procedural Due Process Clause: The Requirement of an Adversary Hearing to Determine Probable Cause*, 53 CONN. B.J. 31, 44 (1979) (all deprivations of liberty must be accompanied by procedural safeguards provided in adversary hearing, and pretrial incarceration presents the strongest case).

78 *Gerstein*, 420 U.S. at 123. The Court advanced that "[t]here is no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole." *Id.*

79 *Id.* at 124-25 (emphasis added). The Court explicitly remarked that probable cause determinations may be made at a suspect's initial appearance before a committing officer or may be incorporated into bail setting and other pretrial release procedures. *Id.* at 123-24.

The Court also suggested that states may choose to test probable cause by adopting various proposals for reform. *Id.* at 124. The Court discussed two such proposals—the Uniform Rules of Criminal Procedure (Proposed Final Draft 1974) (Uniform Rules) and the ALI Model Code of Pre-Arraignment Procedure adopted

Following *Gerstein*, federal courts grappled with the vague "promptness" standard, attempting to define its boundaries.[80]

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in 1975 (Tent. Draft No. 5, 1972, and Tent. Draft No. 5A, 1973) (Model Code). *Id.* at 124 n.25.

Under the Uniform Rules, an individual arrested without a warrant was entitled to a first appearance before a magistrate "without unnecessary delay" for a determination that probable cause existed to issue an arrest warrant. *Id.* (citing UNIF. R. CRIM. P. § 311 (Proposed Final Draft 1974)). Today, the Uniform Rules retain the "without unnecessary delay" standard and provide, in pertinent part, that "[e]xcept during nighttime hours, every accused should be presented no later than [six] hours after arrest. Judicial officers should be readily available to conduct first appearances within the time limits established by this standard." UNIF. R. CRIM. P. § 10-4.1, 10 U.L.A. 207 (1987).

Under the Model Code, any person arrested without a warrant must "be brought before a court" for a probable cause determination "at the earliest time after the arrest that a judicial officer . . . is available and in any event within 24 hours after the arrest." MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 310.1(1) (1975). If the first appearance does not take place within 24 hours, the arrestee must "be released with a citation or on bail." *Id.* The arrestee may waive the first appearance if he has consulted counsel and may request an adjourned session to be held within 48 hours. *Id.* at §§ 310.1(1), 2(1). At the first appearance, "[t]he court need not determine whether there is reasonable cause to believe the arrested person committed the crime of which he is accused," but the arrestee must be discharged if the court determines there is no reasonable cause. *Id.* at § 310.1(6). Unless the arrestee is discharged or released from custody on bail or other conditions pending further proceedings, the "court shall adjourn the hearing for no longer than 48 hours to permit" the arrestee to prepare for the adjourned session. *Id.* at § 310.1(8). At the adjourned session, "the magistrate makes a determination of probable cause upon a combination of written and live testimony. . . ." *Gerstein*, 420 U.S. at 124 n.25. Note that in the draft Model Code at the time of the *Gerstein* decision, the adjourned session was "to be held within two 'court days' " as opposed to the 48 hours standard in the current provision. *See id.*

[80] *See* County of Riverside v. McLaughlin, 111 S. Ct. 1661, 1669 (1991). Federal district and appellate courts faced with allegations of post-arrest detentions in violation of the Fourth Amendment have consistently responded by examining police efficiency in executing the administrative procedures incident to arrest and the reasonableness of any delay in deciding probable cause. *See* Settle, *supra* note 1, at 206. Some courts played a very active role and applied a strict interpretation of *Gerstein*. *See, e.g.*, Gramenos v. Jewel Co., 797 F.2d 432, 437 (7th Cir. 1986) (unexplained four-hour delay in taking shoplifting arrestee before magistrate required explanation as to what must be done after such an arrest and why officers needed more than four hours to do it).

Perhaps the most extreme example of judicial activism and strict scrutiny in this context is *Lively v. Cullinane*, 451 F. Supp. 1000 (D.D.C. 1978), where a class action was brought against the District of Columbia Police Department (Department), alleging that the Department failed to provide arrestees with prompt probable cause determinations. *Id.* at 1002. Relying on empirical studies of the Department's arrest procedures, the district judge found that it normally took only one and a half hours to process arrestees and held that, pursuant to *Gerstein*, an arrestee must be brought before a magistrate within that time. *Id.* at 1003. The court declared that the standard used in judging whether processing procedures "pass constitutional muster is whether they lead to the detainment of the arrestee only so long as needed to complete 'the administrative steps incident to arrest.' " *Id.* at 1004. (quoting *Gerstein*, 420 U.S. at 114). Further, the court asserted that

The Fourth Circuit applied the standard in *Fisher v. Washington Metropolitan Area Transit Authority*.[81] Caricia Fisher brought a sec-

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delay between arrest and presentment to a magistrate can be justified "only by a strong showing that it is *necessitated* by a *substantial* administrative need." *Id.* at 1005 (emphasis added). The court stated that delays for fingerprinting, photographing, completing required paperwork and even verifying a suspect's name are unjustified if they prolong detention beyond the established "normal" processing period. *Id.* at 1006. The court insisted that any procedure performed before the probable cause hearing must be the "least restrictive means by which to process" a suspect and must comport with "a high standard of reasonableness." *Id.* at 1005. In addition, the court ordered both parties to submit proposals on how to prevent future delays in presentment. *Id.* at 1009.

Conversely, most federal courts hold that judicial determinations of probable cause must be provided upon completion of the administrative steps incident to arrest, and that such steps must be reasonable under the circumstances in terms of their nature and the amount of time taken to complete them. *See* Kanekoa v. City of Honolulu, 879 F.2d 607, 610 (9th Cir. 1989) (language in *Lively* that delays must be "necessitated by a substantial administrative need" is inconsistent with the phrase "incident to arrest" employed in *Gerstein* which recognizes that police need flexibility in processing different suspects); Dommer v. Hatcher, 427 F. Supp. 1040, 1044 (N.D. Ind. 1975) (limiting detention without an appearance to 24 hours, court refused to impose strict procedural regulations on police department and emphasized that such regulations would only thwart efforts to control crime), *rev'd. in part on other grounds sub. nom.*, Dommer v. Crawford, 653 F.2d 289 (7th Cir. 1981) (per curiam). *But see* Mabry v. County of Kalamazoo, 626 F. Supp. 912, 915 (W.D. Mich. 1986) (*Gerstein* Court's allowance of only a brief detention to take administrative steps sharply curtailed the balancing and other factors which a court may consider when examining the reasonableness of administrative delays).

While some courts have rejected per se rules regarding specific time periods, many have maintained that 24 hours is a sufficient amount of time in which to complete the "booking" process and that judicial determinations of probable cause following a warrantless arrest must be provided within that time or earlier if reasonably possible. *Compare Kanekoa*, 879 F.2d at 610 (rejecting any per se timing rules and holding that "the time period required by the [F]ourth [A]mendment depends on the circumstances of each case") *with* Bernard v. City of Palo Alto, 699 F.2d 1023, 1025 (9th Cir. 1983) (per curiam) (maximum period of 24 hours is adequate time to process suspects and "[d]etention for less than 24 hours without a probable cause hearing would violate the Constitution . . . if the circumstances were such that the administrative steps leading to a magistrate's determination reasonably could have been completed in less than 24 hours") *and* Sanders v. City of Houston, 543 F. Supp. 594, 701-02 (S.D. Tex. 1982) (most effective way to prevent improper police activity is to "fix a specific period of permissible pre-examination detention and the 24 hour deadline must be met even if approved administrative procedures have not been concluded"), *aff'd mem.*, 741 F.2d 1379 (5th Cir. 1984) *and* Dommer v. Hatcher, 427 F. Supp. 1040, 1047 (N.D. Ind. 1975) (establishing bright line rule that "no person shall be detained longer than 24 hours without [a probable cause determination], except where a Sunday (or legal holiday) intervenes, in which case no person shall be detained longer than 48 hours"). It should be noted that all courts that have commented on the issue seem to agree that the Fourth Amendment does not allow the police to detain a suspect merely to investigate. *See, e.g.*, Llaguno v. Mingey, 763 F.2d 1560, 1568 (7th Cir. 1985). *See also* cases cited *infra* note 140 and accompanying text.

[81] 690 F.2d 1133 (4th Cir. 1982).

tion 1983 action against both the Washington Metropolitan Area Transit Authority (WMATA) and a WMATA police officer (Mickelson), alleging an unconstitutional detention after Mickelson arrested Fisher for violating a Virginia law which prohibited eating food on trains.[82] Fisher claimed that the warrantless arrest and detention violated her Fourteenth Amendment rights because Mickelson did not take her "forthwith" or "immediately" before a magistrate pursuant to Virginia misdemeanor law.[83] The Fourth Circuit declared that Fisher's Fourteenth Amendment Due Process theory was misguided and reiterated that the constitutional rights she asserted were derived solely from the Fourth Amendment.[84]

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[82] *Id.* at 1135-36. Officer Mickelson observed Fisher eating several small sandwiches on board a train travelling from Arlington National Airport to downtown Washington, D.C. *Id.* at 1135. The officer advised Fisher that she was breaking an Arlington County ordinance and repeatedly requested that she cease eating but Fisher refused to comply. *Id.*

[83] *Id.* at 1137. *See* VA. CODE ANN. § 19.2-74 (Michie 1975). The statute instructed arresting officers to take the name and address of a misdemeanant arrested for violating a county, town or city ordinance. *Fisher*, 690 F.2d at 1137. The arresting officer was then to issue a summons notifying the arrestee to appear in court at a later date and then to release the arrestee from his custody. *Id.* If the arrestee refused to sign the summons or if the officer had reason to believe that the summons would be disregarded, the officer was required to take the arrestee forthwith before the nearest judicial officer for a determination of whether there was probable cause to believe that the arrestee would disregard the summons. *Id.*

After Fisher refused to comply with Mickelson's requests to stop eating the sandwiches, the officer placed Fisher under arrest, escorted her off the train at the next stop and transported her to the Arlington County Police Station. *Fisher*, 690 F.2d at 1135-36. It appears that Mickelson felt it was unwise to release Fisher from his custody due to Fisher's complete lack of cooperation. *See id.* When asked for identification, Fisher produced an I.D. card bearing only her name, although later a valid driver's license was found in her purse; when Fisher exited the train, she resisted transportation by lying on the platform floor and cursing; at the police station, after Mickelson obtained an arrest warrant and served it on Fisher, Fisher refused to answer any identification questions because she had been advised of her right to remain silent; later, after being transferred to a cell, Fisher flooded the cell by clogging the toilet; finally, Fisher tried to hang herself with her brassiere. *Id.* Ultimately, Fisher was isolated in a cell, wearing nothing but her underpants, and was monitored by closed-circuit cameras on screens visible to male inmates in the facility. *Id.* at 1136. Fisher was discharged the next afternoon to the custody of her family, less than 24 hours after her arrest. *Id.*

[84] *Id.* at 1138 & n.5 (quoting *Gerstein*, 420 U.S. at 111). Fisher relied specifically on the Due Process Clause of the Fourteenth Amendment and the Bail Clause of the Eighth Amendment. *Id.* at 1138 n.5. Her theory was that "the right to have bail set at a non-excessive amount also includes the right to have it set without unreasonable delay resulting from post-arrest detention." *Id.*

At least one federal court of appeals has applied a Fourteenth Amendment analysis in considering limits on prehearing detention. *See* Patzig v. O'Neil, 577 F.2d 841, 846-47 (3d Cir. 1978) (five hour detention of drunken driving arrestee does not violate due process). *See also* Cynthia B. Whitaker, Comment, *Criminal*

The *Fisher* court noted that state procedural rules imposing more stringent standards and procedures on police did not increase Fourth Amendment constitutional protections.[85] The court opined that the Fourth Amendment's reasonableness requirement ultimately limits the period of detainment between a warrantless arrest and the subsequent probable cause hearing.[86] The court found that the reasonable period of prehearing detention is that time needed to complete the administrative procedures incident to arrest.[87] The court posited that the surrounding circumstances of each case must be considered in applying this principle because incidental administrative steps will necessarily vary due to unique factors arising with every arrest.[88] Accordingly, the Fourth Circuit held that Fisher's Fourth Amendment right to a prompt determination of probable cause had not been violated because the arresting officer procured an arrest warrant as soon as the police completed the administrative steps incident to the arrest.[89]

In 1985, the Seventh Circuit also confronted the issue of timing for post-arrest probable cause determinations.[90] In *Llaguno v. Mingey*,[91] Chicago police in pursuit of a murderer arrested and detained David Llaguno, the owner of the getaway

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Procedure—Filing by Information: Determination of Probable Cause Before Extended Restraint of Liberty, 51 WASH. L. REV. 425, 426-27 (1976) (Fourteenth Amendment affords independent safeguards for persons detained during pretrial stage of criminal prosecution).

85 *Fisher*, 690 F.2d at 1138. *See also* Street v. Surdyka, 492 F.2d 368, 372 (4th Cir. 1974) ("The states are free to impose greater restrictions on arrests, but their citizens do not thereby acquire a greater federal right.").

86 *Fisher*, 690 F.2d at 1139-40.

87 *Id.* at 1140 (quoting *Gerstein*, 420 U.S. at 113-14). The court indicated that the reasonableness of detention resulting from post-arrest administrative procedures must also be determined by observing the Supreme Court's declaration that any such detention must be "brief." *Id.*

88 *Id.* The court pointed out that geographical factors, local police and court practices, and innumerable factual exigencies, including obstruction by the arrestee, make case-by-case analysis necessary. *Id.*

89 *Id.* at 1141. The Court found:

> [F]ollowing the arrest Mickelson promptly arranged for Fisher's transportation to the Arlington County Police Station; that . . . at the station [he] made appropriate inquiry . . . as to the booking procedure; that he followed the advice given, procured an arrest warrant, served it on Fisher, . . . read her *Miranda* rights to her [and] presented her to the booking desk where he relinquished custody to authorized officers . . . .

Id.

90 *See* Llaguno v. Mingey, 763 F.2d 1560, 1567-68 (7th Cir. 1985).

91 *Id.*

car, for forty-two hours without a judicial determination of probable cause.[92] At trial, testimony revealed that the arresting officers did not need forty-two hours to book Llaguno, that magistrates were available during the entire period and that assistant prosecutors told the officers twice that they had insufficient evidence to charge Llaguno.[93] Asserting that *Gerstein* permitted only "brief" restraints of liberty to process an arrestee and to complete paperwork necessary for presentment before a magistrate, the court held that Llaguno's post-arrest detention was unconstitutional.[94] Finding that the police postponed Llaguno's hearing for the purpose of building a case against him, the court stated that the need for further investigation was an impermissible reason for delay and that imprisonment on suspicion is unjustifiable.[95]

Three years later in *Williams v. Ward*,[96] the Second Circuit became the first federal court to condone delays of more than twenty-four hours between warrantless arrests and probable cause determinations.[97] In *Williams*, arrestees filed a class action against New York City (City) on grounds that the City violated the Fourth and Fourteenth Amendments in detaining arrestees

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92 *Id.* at 1563. In a single night in 1980, two young men committed two robberies, murdered four people, wounded three others and kidnapped a young girl in Chicago. *Id.* A car chase ensued and police captured one of the killers, Garcia, when the killers' getaway car crashed; the other man escaped on foot. *Id.* The getaway car was registered to Vilma Llaguno who lived near the crash site. *Id.* Suspecting that the other killer may have gone there, police entered the Llaguno residence without any warrant and found 10 members of the Llaguno family, including Vilma's husband, David. *Id.* David Llaguno told the police that the car in question belonged to him and that he loaned it to a friend. *Id.* The police arrested Llaguno when he refused to tell him the friend's name. *Id.* The police eventually shot and killed the fleeing murderer and later identified him as David's brother, Roger Llaguno. *Id.* Garcia was sentenced to death, but no charges were ever brought against David or any other members of the Llaguno family. *Id.*

93 *Id.* at 1568.

94 *Id.* (quoting Gerstein v. Pugh, 420 U.S. 103, 113-14 (1975)). The court conceded that in using the phrase "brief detention," the *Gerstein* Court intended to refute the notion that suspects are required to "be brought before a magistrate *immediately* upon arrival at the station house . . . ." *Id.* at 1567-68 (emphasis added) (quoting *Gerstein*, 420 U.S. at 114).

95 *Id.* at 1568. Thus, the court held the police civilly liable to Llaguno for the time he was held incarcerated beyond the interval necessary for booking and presentation to a magistrate. *Id.*

96 845 F.2d 374 (2d Cir. 1988), *cert. denied*, 488 U.S. 1020 (1989).

97 *Id.* at 387. The court determined that a 72 hour delay between a warrantless arrest and a subsequent probable cause determination was constitutionally allowable due to considerations of administrative convenience and in view of procedural benefits provided to arrestees under New York City's arraignment system. *Id.* at 387-89. *But see infra* note 151 and accompanying text.

beyond the brief period required for administrative procedures without a judicial probable cause determination.[98] Under the City's pretrial system, a suspect's first appearance before a judicial officer was at an arraignment which was often held more than two days after the warrantless arrest.[99] The district court enjoined the City from taking more than seven hours to complete the administrative steps incidental to the arrest and from detaining any suspect for more than twenty-four hours in the absence of a judicial determination of probable cause.[100]

The court of appeals rejected the twenty-four hour limit and held that a seventy-two hour delay for a probable cause hearing following a warrantless arrest was constitutionally justified.[101] The court asserted that the Constitution does not mandate a specific time schedule for probable cause determinations or a uniform system for pretrial procedure throughout the states.[102] The court also noted that the United States Supreme Court acknowl-

98 *Williams*, 845 F.2d at 375, 382. It was later stipulated that the plaintiffs, Williams, Altman, Richards and Lewis, had been held approximately 55, 49, 56 and 56 hours, respectively, prior to their probable cause reviews. *Id.* at 380 n.6. The class action was brought on behalf of the plaintiffs "and all persons in the boroughs of Manhattan, the Bronx, Brooklyn and Queens . . . ." *Id.* at 375. Plaintiffs alleged that the average period of detention without a probable cause determination between January 1, 1984 and January 31, 1985 ranged from 26 hours in August 1984 to 50 hours in May 1984. *Id.* at 380.

99 *Id.* at 375. Under the City's arraignment procedure, an arrestee is afforded counsel, conditions for pretrial release are established, a determination of probable cause is rendered, plea bargains are struck and charges against the accused may be dropped. *Id.* The court explained that "[o]ver one-third of such arrestees have their cases finally disposed of at arraignment." *Id.*

100 Williams v. Ward, 671 F. Supp. 225, 227-28 (S.D.N.Y. 1987), *rev'd.*, 845 F.2d 374 (2d Cir. 1988). The district court defined the administrative steps taken after a warrantless arrest to be those "*necessarily* incident to an arrest and which must be completed in order for a state judge to review the probable cause basis of the arrest." *Id.* at 226. (emphasis added). The court found that the City needed no more than seven hours to complete the necessary administrative steps in connection with an arrest. *Id.* The court also found that certain steps, such as fingerprinting and interviewing by counsel which expanded the processing period to 17 hours, were not absolutely necessary. *Id.* at 226, 228. Thus, granting some leeway, the district court concluded that all administrative steps could be and must be finalized by the City within 24 hours. *Id.*

101 *Williams*, 845 F.2d at 387. The Second Circuit asserted that although the district court's conclusions as to the amount of time required by the City were couched as factual findings, such statements were actually legal conclusions, compelling the City to act within a 24 hour period as a matter of law, regardless of the resources actually available to the City. *Id.* at 382. The court therefore found that the district court's findings were subject to review and that the case turned on whether the constitution imposed absolute temporal limits on detentions preceding a judicial determination of probable cause. *Id.*

102 *Id.* at 383 (citing Schall v. Martin, 467 U.S. 253, 275 (1984)).

edged the need for flexibility in framing pretrial procedures and that the Supreme Court expressly approved the incorporation of probable cause hearings into other pretrial-release procedures.[103] The majority reasoned that the Supreme Court's endorsement of such an array of procedures, coupled with its observation that additional procedures require extra time, required the courts to examine "the totality of the processes afforded" the arrestee.[104] The court additionally asserted that imposing a twenty-four hour limit on the City would actually cause enormous harm to arrestees[105] and would unduly burden

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[103] *Id.* at 384. The court pointed out that the *Gerstein* court cited the proposed pretrial procedure in the tentative draft of the American Law Institute's Model Code with apparent approval. *Id.* (citing Gerstein v. Pugh, 420 U.S. 103, 124 n.25 (1975)). The court emphasized that the draft Model Code did not require a magistrate to render a probable cause determination at a suspect's first appearance, which must be held within 24 hours of the arrest. *Id.* (citing MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 310.1(6) (Tentative Draft No. 5A, 1973)). Instead, the court stressed that the determination of probable cause would be at an adjourned session held within 48 hours of the initial appearance. *Id.* (citing § 310.2(2)). The court also expressed that, like the City's system, the Model Code's procedure for adjourned sessions provides the accused with "the right to an attorney and the right to make an appearance." *Id.* at 387.

[104] *Id.* at 386. The court maintained that the *Gerstein* Court's declaration that probable cause determinations might be incorporated into pretrial release procedures "is a dispositive statement that completion of the 'administrative steps incident to arrest' does not trigger a right to an immediate probable-cause hearing in light of the fact that numerous other steps are necessary to complete the pretrial release procedures into which the probable-cause determinations may be merged." *Id.* (citing *Gerstein*, 420 U.S. at 123-25).

[105] *Id.* at 388. While recognizing that *Gerstein* did not mandate adversarial probable cause hearings, the court maintained that adversarial hearings were not prohibited and stated that such hearings provide benefits to arrestees that are not available through ex parte procedures held immediately upon conclusion of the administrative procedures incident to arrest. *Id.* at 386, 387. The court illustrated that, under the City's system, prosecutors review the appropriateness of all charges and make recommendations for pretrial release before arraignment. *Id.* at 387. The arrestee, at this time, is present with counsel at the arraignment and a final disposition of the case may be negotiated. *Id.* The court disagreed with prior cases which held that probable cause must be decided "immediately" after the administrative steps are concluded. *Id.* at 386 n.15. None of these previous cases, charged the court, reviewed the "totality of the processes afforded the arrestees" or "involved arraignment systems similar to New York City's." *Id.* According to the court, a 24-hour limit on prehearing detention in the City would actually lengthen the overall detention period for a vast majority of the plaintiff class. *Id.* at 388-89. The court suggested that, under the district court's decision, over 200,000 separate probable cause hearings each year would be necessary and the time from arrest to arraignment would increase for all suspects not released after such hearings, because the same judges who presided over the hearings would thereafter have to conduct arraignments. *Id.* at 388. The court indicated that an experiment conducted in Manhattan disclosed that "probable cause was found to be lacking in only 13 of the 1,407 cases" before the City's criminal courts between July 28 and August

the City's criminal justice system.[106] Finally, the court concluded that the constitutionality of a seventy-two hour "arrest-to-arraignment" period was supported by a previous Supreme Court decision[107] that declared that a delay of seventy-two hours between the initial appearance and probable cause hearing of a juvenile was permissible.[108]

3, 1987. *Id.* at 389 n.19. Thus, the court acknowledged that release would be accelerated for less than one percent of all arrestees by only a few hours, while necessarily "delaying the release of two-thirds of all arrestees who normally are released at the time of arraignment . . . ." *Id.* (quoting Supplemental Affidavit of Judge Milton L. Williams, August 6, 1987, at 5).

106 *Id.* at 389. The court argued that the district court's decision reflected an unrealistic view of the City's resources in light of ever-present and unavoidable conditions such as tremendous crime rates, heavy traffic, a limited number of police, judges, prosecutors and Legal Aid lawyers and a lack of courthouse detention space. *Id.*

107 Schall v. Martin, 467 U.S. 253 (1984).

108 *Williams*, 845 F.2d at 388. *Schall* involved a challenge to sections of the New York Family Court Act, N.Y. FAM. CT. ACT §§ 111 to 1211 (Consol. 1987), which authorized preventive detention of suspected juvenile delinquents. *Schall*, 467 U.S. at 255-56. Under the Act, if a juvenile is not released to his parents and issued an "appearance ticket," requiring a later appearance at the probation service, he is normally entitled to an initial appearance in the Family Court immediately after arrest. N.Y. FAM. CT. ACT at §§ 305.2(3), 307.1(1) (Consol. 1987). The Family Court judge need not make a probable cause determination at the initial appearance. *Id.* at § 315.1. If the judge declines to determine probable cause at the initial appearance, however, the juvenile is entitled to an adversarial hearing to determine probable clause within three days. *Id.* at §§ 320.2(3), 320.4(1). The *Schall* Court upheld the Act's provisions as "constitutionally adequate under the Fourth Amendment . . . ." *Schall*, 467 U.S. at 277. In doing so, the Court contended: "*Gerstein* indicated approval of pretrial detention procedures that supplied a probable-cause hearing within five days of the initial detention." *Id.* at 277 n.28 (citing *Gerstein*, 420 U.S. at 124 n.25).

The *Williams* court noted that pursuant to the draft Model Code's language adopted in the *Gerstein* opinion, the "requirement that an 'adjourned session' must be held within two 'court days' implies that a person who is arrested on the day preceding a three-day weekend might not receive a probable cause hearing until the fifth day after his arrest." *Williams*, 845 F.2d at 385 n.14. In view of *Gerstein's* call for flexibility, its seeming approval of a five-day delay for adults and *Schall's* clear acceptance of a three-day delay for juveniles, the Second Circuit promulgated the 72-hour "arrest-to-arraignment" rule for the City. *Id.* at 385 n.14, 386, 388.

The dissent in *Williams* argued for a rule that would compel the City to provide judicial probable cause determinations within a reasonable time after completing the administrative steps incident to arrest and contended that the 72-hour standard was clearly excessive. *Id.* at 396. (Stewart, J., dissenting). The dissent stated that while the Model Code does not require a magistrate to render a probable cause determination at an arrestee's initial appearance, the appearance at least provides the arrestee with an opportunity to prove his innocence where a readily ascertainable mistake has been made. *Id.* at 393-94 (Stewart, J., dissenting) (quoting MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 310.1(6) (Tentative Draft No. 5A, 1973)). The dissent perceived that no such "safety valve" exists within the City's system, which creates prolonged detainment of individuals who can easily prove their inno-

In 1991, the disparity between the circuit courts,[109] which reflected the ambiguity of the promptness standard established in *Gerstein*,[110] led the United States Supreme Court to consider *County of Riverside v. McLaughlin*.[111] In *Riverside*, the Court was called upon to define what constitutes a "prompt" determination of probable cause following a warrantless arrest.[112] The majority held that a probable cause determination is presumptively prompt under the Fourth Amendment if provided by a judicial officer within forty-eight hours of a warrantless arrest.[113]

Writing for the majority, Justice O'Connor began by rejecting Riverside County's contention that plaintiffs lacked standing.[114] The majority conceded that plaintiffs' claims were moot,[115] but recognized that class certification sustained the merits of the dispute for review under the "relation back" doctrine.[116] Having disposed of the County's standing argument,

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cence but must wait for arraignment. *Id.* at 394 (Stewart, J., dissenting). The dissent posited that the majority also failed to recognize a similar "safety valve" provided for juveniles in *Schall* through the initial appearance provision of the Family Court Act. *Id.* at 394-95 (Stewart, J., dissenting). Moreover, the dissent urged that, despite its heavy reliance on *Schall*, the majority disregarded the significant differences between the liberty rights of adults and those of juveniles which *Schall* itself clearly acknowledged. *Id.* at 395 (Stewart, J., dissenting) (quoting *Schall*, 467 U.S. at 265). The dissent reiterated that "juveniles, unlike adults, are always in some sort of custody . . . . They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*" and subordinate the juvenile's liberty interests when necessary to preserve the child's welfare. *Id.* (Stewart, J., dissenting) (quoting *Schall*, 467 U.S. at 265). The dissent concluded that the underlying premise of *Schall* was "that a juvenile's liberty interest in freedom from institutional constraints is less substantial than an adult's." *Id.* (Stewart, J., dissenting). Therefore, advanced the dissent, while a 72-hour delay for juveniles may be acceptable, it does not follow that such a delay is also acceptable in the case of adults. *Id.*

109 *See supra* notes 80-108 and accompanying text.

110 *See Gerstein*, 420 U.S. at 125. *See also supra* notes 63-79 and accompanying text.

111 111 S. Ct. 1661 (1991).

112 *Id.* at 1667. In defining "prompt," the Court necessarily reviewed the propriety of the County's policy of combining probable cause hearings with arraignment procedures. *See id.* at 1665.

113 *Id.* at 1670. Justice O'Connor authored the majority opinion and was joined by Chief Justice Rehnquist and Justices White, Kennedy and Souter. *Id.* at 1665.

114 *Riverside*, 111 S. Ct. at 1667. The County argued that there was no standing because too much time passed for a "prompt" probable cause determination for the named plaintiffs and the plaintiffs could not demonstrate that they were likely to be subjected to the constitutional violation again. *Id.*

115 *Id.* Generally, a claim "is considered 'moot' when it no longer presents a justiciable controversy because issues involved have become academic or dead." BLACK'S LAW DICTIONARY 1008 (6th ed. 1990).

116 *Riverside*, 111 S. Ct. at 1667. The Court stated that when plaintiffs filed their complaint, they were suffering injury due to their detention and such injury was capable of being redressed at that time through an injunction. *Id.* Therefore, the

the Court proceeded to examine the parameters of the *Gerstein* decision.[117]

Justice O'Connor first observed that the *Gerstein* Court was primarily concerned with striking a balance between the states' interest in guarding public safety[118] and the liberty interests of the arrestee.[119] The Justice explained that a practical compromise between these competing interests was established by *Gerstein's* holding that a probable cause determination must be rendered by a judicial officer promptly after a warrantless arrest.[120] The majority indicated that the *Gerstein* Court stopped short of finding a constitutional requirement for states to furnish probable cause hearings immediately after concluding the administrative steps incident to arrest.[121] The Justice reiterated that it was desirable to allow flexibility and experimentation for states to integrate probable cause determinations into their own pretrial systems because pretrial procedures vary nationwide.[122]

The Court stated that flexibility tolerates the combination of probable cause determinations, arraignments and bail hear-

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Court found that plaintiffs had standing at the controversy's outset and their present claims could relate back to the filing date of the complaint. *Id.*

The majority indicated that the "relation back" doctrine prevents inherently transitory claims from becoming moot before a court can rationally be expected to rule on the plaintiffs' motion for certification. *Id.* (quoting United States Parole Comm'n v. Geraghty, 445 U.S. 388, 399 (1980)). *See* Swisher v. Brady, 438 U.S. 204, 213-14 n.11 (1978) (quoting Sosna v. Iowa, 419 U.S. 393, 402 n.11 (1975)) (whether a "certification can be said to 'relate back' to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review").

117 *Riverside*, 111 S. Ct. at 1667-68.

118 *Id.* at 1668 (citing Gerstein v. Pugh, 420 U.S. 103, 112 (1975)). *See* Brown v. Texas, 443 U.S. 47, 52 (1979) (crime prevention is a weighty social goal); Terry v. Ohio, 392 U.S. 1, 24 (1968) (state's legitimate and compelling interest in protecting the community from crime cannot be denied).

119 *Riverside*, 111 S. Ct. at 1668. The majority recognized that prolonged detention, unsupported by probable cause, may endanger a suspect's job, disrupt income sources and impair family relationships. *Id.* (quoting *Gerstein*, 420 U.S. at 114). One commentator has stated: "[a]rrested persons detained before trial also risk loss of life or limb at the hands of other inmates. Many pretrial detainees have been beaten, raped, murdered, or driven to suicide in less than three nights in jail." Marc Zilversmit, *Granting Prosecutors' Requests for Continuances of Detention Hearings*, 39 STAN. L. REV. 761, 780 (1987). *See also* LEWIS KATZ, ET AL., JUSTICE IS THE CRIME: PRETRIAL DELAY IN FELONY CASES 51-62 (1972); RONALD GOLDFARB, RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM 32-36 (1965); Settle, *supra* note 1, at 200 (unwarranted confinement results in "tragic economic, social, and physical consequences").

120 *Riverside*, 111 S. Ct. at 1668 (quoting *Gerstein*, 420 U.S. at 125).

121 *Id.* at 1668.

122 *Id.* (citing *Gerstein*, 420 U.S. at 123). Justice O'Connor noted that "there is no single 'preferred' approach" for framing pretrial procedures. *Id.* (quoting *Gerstein*,

ings.[123] Justice O'Connor maintained that the Fourth Amendment allows a reasonable delay of probable cause determinations, particularly when incorporated with other pretrial proceedings, because of the inevitable problems associated with processing suspects.[124] The Justice recognized, however, that flexibility is limited because states do not have a legitimate interest in detaining innocent persons.[125] Justice O'Connor suggested that a vague term, such as "prompt," did not provide the necessary guidance for local law enforcement and resulted in increased systemic challenges.[126] Conversely, the Justice urged that, while several states require probable cause hearings immediately upon completion of the procedures incident to arrest, such a rigid schedule was not constitutionally compelled and could actually encumber criminal justice systems.[127] The major-

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420 U.S. at 123). The Justice also declared that the "[s]tates may choose to comply" with *Gerstein's* promptness requirement "in different ways." *Id.*

In dissent, Justice Scalia argued that 24 hours was ample time in which to complete arrest procedures and, therefore, a probable cause determination must be supplied within that period. *Id.* at 1676 (Scalia, J., dissenting). Likewise, in a separate dissent, Justice Marshall believed that promptness required a probable cause hearing to be furnished immediately after the administrative procedures incident to arrest are completed. *Id.* at 1671 (Marshall, J., dissenting).

The majority asserted that there would be no room for flexibility and experimentation if the states were compelled to provide probable cause hearings immediately after arrest procedures; moreover, incorporating pretrial proceedings would be impossible. *Id.* at 1668 (citing *Gerstein*, 420 U.S. at 124). The Court claimed that the dissenters' views completely prohibited flexibility because the dissent failed to acknowledge that *Gerstein* requires probable cause determinations to be made promptly, but not immediately. *Id.* at 1669. Furthermore, the Court maintained that early common-law decisions requiring individuals arrested without a warrant to be presented to a magistrate "as soon as possible" was no more influential than *Gerstein* itself. *Id.*

123 *Id.* at 1668 (citing *Gerstein*, 420 U.S. at 124). The majority noted that only proceedings arising "very early in the pretrial process . . . may be chosen" for combination. *Id.* at 1671. The Court also emphasized that multiple pretrial proceedings burden the system of criminal justice and do a disservice to the interests of those involved, including arrested individuals, by adding complexity to an already intricate system. *Id.* at 1668 (citing *Gerstein*, 420 U.S. at 119-23).

124 *Id.* at 1669. The Court observed that delays may legitimately be caused by logistical problems, paperwork, document drafting, the examination of records, arranging appearance of counsel, determining bail, high weekend crime rates, limited resources and personnel, transporting arrested individuals, the unavailability of a magistrate, and other practical realities. *Id.* at 1669, 1670.

125 *Id.* at 1669.

126 *Id.* Justice O'Connor set out a list of cases in support of this proposition. *Id.* at 1669-70. *See* McGregor v. County of San Bernardino, 888 F.2d 1276 (9th Cir. 1989); Bernard v. City of Palo Alto, 699 F.2d 1023 (9th Cir. 1983) (per curiam); Sanders v. City of Houston, 543 F. Supp. 694 (S.D. Tex. 1982), *aff'd mem.*, 741 F. 2d 1379 (5th Cir. 1984); Lively v. Cullinane, 451 F. Supp. 1000 (D.D.C. 1978).

127 *Id.* at 1670-71.

ity resolved that an accommodation between the permissive and the rigid approaches to pretrial procedure could be reached without violating the Fourth Amendment.[128]

Seeking a compromise,[129] the Court held that probable cause determinations provided by a judicial officer within forty-eight hours of a warrantless arrest presumptively met *Gerstein's* promptness standard.[130] Further, Justice O'Connor declared that this presumption may be rebutted by proof that an individual's probable cause hearing was delayed unreasonably, even though it was furnished within the forty-eight hour limit.[131] Justice O'Connor stated that if an arrestee does not receive a probable cause determination within forty-eight hours, the burden is on the government to demonstrate that the delay was due to a genuine emergency or unavoidable circumstances.[132]

The Court concluded that the County was entitled to combine probable cause determinations with arraignments, but that its current practice was subject to challenge because the weekend and holiday exception permitted delays exceeding forty-eight hours.[133] Accordingly, the Supreme Court vacated the Ninth Circuit's judgment and remanded the case for further review of the County policy's reasonableness.[134]

In dissent, Justice Scalia argued that, absent extraordinary situations, an unreasonable seizure occurs when a probable cause

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128 *Id.* at 1670.

129 *Id.* The majority sought to accommodate two separate, albeit related, sets of competing concerns: first, the interests of individual liberty versus state crime control articulated in *Gerstein*; and, second, the interests of jurisdictions adhering to strict interpretations of *Gerstein* versus those desiring greater flexibility in shaping pretrial procedure. *See id.*

130 *Id.* Although reluctant to announce a constitutionally compelled time limit, the majority determined that providing some degree of certainty is important "so that [s]tates and counties may establish procedures with confidence that they fall within constitutional bounds." *Id.* The Court added that jurisdictions complying with the 48-hour rule would be exempt from systemic challenges. *Id.*

131 *Id.* The Court deemed delays for collecting more evidence needed to justify an arrest, delay for the sake of delaying, and delay due to ill-will toward the arrestee as unreasonable delays. *Id.*

132 *Id.* Justice O'Connor maintained that extraordinary circumstances do not include intervening weekends or consolidated pretrial proceedings that take more than 48 hours. *Id.*

133 *Id.* at 1671. The Court demonstrated that under the County's policy, those arrested on Thursdays would normally not be given a probable cause determination before the following Monday, and holidays would cause even longer delays. *Id.*

134 *Id.* The majority specifically let the lower courts determine whether the County's practice to provide arraignments "on the last day possible" during the week constituted "delay for delay's sake." *Id.*

determination is delayed for any reason other than to arrange the hearing or to process arrestees, or for more than twenty-four hours after a warrantless arrest.[135] The Justice stated that, by seeking a practical compromise between competing concerns, the majority ignored the balance inherently struck by the Fourth Amendment and generally observed at common law.[136] According to the Justice, it is firmly rooted in common law tradition that the person who makes a warrantless arrest must deliver the suspect to a judicial officer "as soon as he reasonably can."[137] Justice Scalia explained that common law only permitted delays encountered in arranging for a magistrate once the suspect was secured.[138]

The Justice related that *Gerstein* did not affirmatively condone delays for the purpose of combining probable cause determinations with other pretrial proceedings.[139] Justice Scalia posited that *Gerstein* relied on common law principles to plainly convey that detention exceeding the time required to complete administrative procedures and to procure a magistrate constitutes a breach of the promptness requirement.[140] The Justice

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135 *Riverside*, 111 S. Ct. at 1677 (Scalia, J., dissenting).

136 *Id.* at 1672 (Scalia, J., dissenting). Justice Scalia remarked that the common law protections embodied in the Bill of Rights remain constant, despite the changing views of the executive, legislative, and judicial branches of government. *Id.* (Scalia, J., dissenting). The dissent stressed that these protections, which include the prohibition of unreasonable seizures, existed at common law and are preserved through the Bill of Rights. *Id.* (Scalia, J., dissenting). For an interesting look at Justice Scalia's observations on the Bill of Rights, *see Foreword* to *The Bicentennial of the Bill of Rights*, 20 Seton Hall L. Rev. 341, 341-43 (1990).

137 *Id.* (Scalia, J., dissenting) (quoting 2 SIR MATTHEW HALE, PLEAS OF THE CROWN 95 n.13 (1st Am. ed. 1847)). Justice Scalia pointed out that the practice was the same in England and the United States. *Id.* (Scalia, J., dissenting). *See also* 2 WILLIAM HAWKINS, PLEAS OF THE CROWN 116-17 (4th ed. 1762) (common law long required that a suspect be brought to a justice of the peace soon after arrest).

138 *Riverside*, 111 S. Ct. at 1672 (Scalia, J., dissenting).

139 *Id.* at 1673-74 (Scalia, J., dissenting).

140 *Id.* at 1673 (Scalia, J., dissenting). The Justice argued that *Gerstein's* meaning was sufficiently clear that, with one exception, all federal courts faced with the question of how "promptly" a probable cause determination must be provided understood the *Gerstein* standard to mean that delay must be limited to the administrative steps related to the arrest. *Id.* (Scalia, J., dissenting). *See* Gramenos v. Jewel Cos., 797 F.2d 432, 437 (7th Cir. 1986) (four hours presumptively longer than needed to perform administrative steps), *cert. denied*, 481 U.S. 1028 (1987); Bernard v. City of Palo Alto, 699 F.2d 1023, 1025 (9th Cir. 1983) (per curiam) (24 hours is reasonably prompt); Fisher v. Washington Metro. Area Transit Auth., 690 F.2d 1133, 1140 (4th Cir. 1982) (time required for administrative steps to be determined on case-by-case basis); Mabry v. County of Kalamazoo, 626 F. Supp. 912, 914 (W.D. Mich. 1986)(60 hours is unreasonable even under liberal interpretation of "administrative steps"); Sanders v. City of Houston, 543 F. Supp. 694, 699-701 (S.D. Tex.

criticized the majority for incorrectly applying *Gerstein's* flexibility and experimentation rationale to the timing of probable cause hearings.[141] In Justice Scalia's view, flexibility and experimentation refer only to the nature of such a hearing.[142] The Justice imparted that, while the nature of a probable cause hearing may have been subject to change as a result of implications arising from dicta in *Gerstein*,[143] the timing requirement has clearly re-

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1982) (proper administrative steps include a wide breadth of police activities); *aff'd*, 741 F.2d 1379 (5th Cir. 1984); Lively v. Cullinane, 451 F. Supp. 1000, 1004 (D.D.C. 1978)(administrative steps consume only a short period of time); *See also* Kanekoa v. City of Honolulu, 879 F.2d 607, 610 (9th Cir. 1989) (probable cause determination to be made upon completion of steps incident to arrest); Rodgers v. Lincoln Towing Serv., 771 F.2d 194, 198-99 (7th Cir. 1985) (10 hour delay did not "shock the conscience" of the court and constituted mere negligence by state officials); Llaguno v. Mingey, 763 F.2d 1560, 1567-68 (7th Cir. 1985) (only brief period of detention is permitted after arrest to complete booking and necessary paperwork); McGill v. Parsons, 532 F.2d 484, 485, 487 n.3 (5th Cir. 1976) (dicta) (Fourth Amendment imposes limitations on post arrest detention prior to probable cause hearing); O'Brien v. Borough of Woodbury Heights, 679 F. Supp. 429, 437 (D.N.J. 1988) (whether detention violates *Gerstein* is a question of fact); Katona v. City of Cheyenne, 686 F. Supp. 287, 291-92 (D. Wyo. 1988) (27-day detention without presentment before magistrate violates *Gerstein*); McGaughey v. City of Chicago, 664 F. Supp. 1131, 1143 (N.D. Ill. 1987) (detention for 23 hours of person arrested for misdemeanor is facially unreasonable); Doulin v. City of Chicago, 662 F. Supp. 318, 332 (N.D. Ill. 1986) (fingerprint clearing of misdemeanor arrestees unconstitutionally exceeds brief period required to conclude the administrative procedures incident to arrest); Dommer v. Hatcher, 427 F. Supp. 1040, 1047 (N.D. Ind. 1975) (24 hours is appropriate time limit for detention without probable cause determination, 48 hours when Sunday intervenes), *rev'd in part sub nom.* Dommer v. Crawford, 653 F.2d 289 (7th Cir. 1981) (per curiam). *But see* Williams v. Ward, 845 F.2d 374, 387 (2d Cir. 1988) (72 hour arrest-to-arraignment period is constitutionally acceptable), *cert. denied*, 488 U.S. 1020 (1989).

According to Justice Scalia, the majority misinterpreted his dissent as requiring "immediate" determinations of probable cause. *Riverside*, 111 S. Ct. at 1673-74 (Scalia, J., dissenting). The Justice explained that he did not contend that "immediate" determinations are required, but rather, that delays of probable cause determinations cannot be attributed to anything other than finishing the necessary procedures incident to arrest. *Id.* (Scalia, J., dissenting).

141 *Id.* at 1674 (Scalia, J., dissenting).

142 *Id.* (Scalia, J., dissenting).

143 *Id.* (Scalia, J., dissenting). Justice Scalia criticized the majority for placing so much emphasis on the *Gerstein* dicta. *Id.* (Scalia, J., dissenting). The Justice set forth the statement in *Gerstein* from which he felt the majority wrongly inferred that delays caused by incorporating proceedings are permissible:

> [W]e recognize the desirability of flexibility and experimentation by the [s]tates. It may be found desirable, for example, to make the probable cause determination at the suspect's first appearance before a judicial officer . . . or the determination may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release.

Id. (Scalia, J., dissenting) (quoting *Gerstein*, 420 U.S. at 123-25).

mained constant.[144] According to Justice Scalia, when the practice of "piggybacking" various proceedings for convenience and experimentation collides with the Fourth Amendment's demand of prompt delivery to a magistrate, the former must yield.[145]

Justice Scalia then discussed the notion of an absolute time limit within which probable cause determinations must be provided.[146] The Justice stressed that the absence of a time limit would render the promptness guarantee worthless.[147] Justice Scalia explained that the reasons for delay are often within a state's control[148] and, without a limit, a state could potentially legitimize unreasonable delays under the guise of resource problems.[149] Noting the lack of standards for combining procedures, Justice Scalia suggested that setting an outer limit is an easier and more objective task if integration of procedures is eliminated as a postponement justification.[150]

Justice Scalia resolved that, on the data available, twenty-four hours is the most appropriate time limit for probable cause determinations because it allows sufficient time to conclude arrest procedures and to arrange for a magistrate.[151] In conclu-

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144 *Id.* (Scalia, J., dissenting).

145 *Id.* at 1674, 1675 (Scalia, J., dissenting). Justice Scalia declared that the Fourth Amendment's purpose was to put the question of timing "beyond time, place and judicial predilection, incorporating the traditional common-law guarantees against unlawful arrest." *Id.* at 1675 (Scalia, J., dissenting).

146 *Id.* (Scalia, J., dissenting).

147 *Id.* (Scalia, J., dissenting).

148 *Id.* (Scalia, J., dissenting). Justice Scalia added that the factors within a state's control include the magistrates' availability, personnel and facilities for conducting administrative procedures following arrest, and the timing of procedures. *Id.* (Scalia, J., dissenting).

149 *Id.* (Scalia, J., dissenting). Justice Scalia argued, through example, that if "it took a full year to obtain a probable cause determination in California because only a single magistrate had been authorized to perform that function throughout the State, the hearing would assuredly not qualify as 'reasonably prompt.' At some point, legitimate reasons for delay become illegitimate." *Id.* (Scalia, J., dissenting).

150 *Id.* (Scalia, J., dissenting).

151 *See id.* at 1676 (Scalia, J., dissenting). The Justice claimed that his position was consistent with most federal courts that considered the timing question. *Id.* (Scalia, J., dissenting). Specifically, Justice Scalia stated that, with only one exception, the federal courts had not regarded 24 hours as an inadequate period to complete arrest procedures and that each court setting a limit chose 24 hours." *Id.* (Scalia, J., dissenting). *See also supra* note 140 and accompanying text (citing relevant cases).

Furthermore, the Justice noted that numerous other authorities supported his position. *Riverside*, 111 S. Ct. at 1676-77 (Scalia, J., dissenting) (citing UNIF. R. CRIM. P. 10-4.1, 10 U.L.A. 207 (Spec. pamphlet 1987); MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 310.1 (1975); Brandes, *supra* note 9, at 478-85). *See also* George C. Thomas III, *The Poisoned Fruit of Pretrial Detention*, 61 N.Y.U. L. REV. 413, 450 n.238 (1986) (listing federal cases that have applied the "without unnecessary

sion, Justice Scalia urged that the primary beneficiaries of the common law prompt-hearing requirement were the innocent,[152] but that the majority's decision suggests that the Fourth Amendment, itself derived from common law, is merely a vehicle for protecting the guilty.[153] The Justice declared that a system which permits the presumptively innocent to sit in jail for two full days lacks a sense of priority and derogates the Fourth Amendment.[154]

In a brief and separate dissent, Justice Marshall agreed substantially with the essence of Justice Scalia's dissenting opinion, but did not discuss a particular time limit.[155] Justice Marshall stated that *Gerstein*'s promptness standard calls for a determination of probable cause by a judicial officer when the administrative procedures incident to arrest are completed.[156]

Justifying the imprisonment of an individual who has not committed a crime is certainly a difficult task, however short the detention period. By allowing even limited deprivations of an innocent person's liberty, our nation's criminal justice system appears to devalue what is perhaps the most deeply rooted maxim in the American psyche—innocent until proven guilty.[157] More-

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delay" standard of Federal Rule of Criminal Procedure 5(a) and which indicate that delays of less than 24 hours are frequently unreasonable); Settle, *supra* note 1, at 207-09 (discussing recent federal cases that have adopted a 24 hour standard). Justice Scalia also noted that 30 state statutes "require presentment or arraignment 'without unnecessary delay' or 'forthwith'; eight [s]tates explicitly require presentment or arraignment within 24 hours; and only seven [s]tates have statutes explicitly permitting a period longer than 24 hours." *Id.* at 1676 (Scalia, J., dissenting) (citing Brandes, *supra* note 9, at 478 n.230). *See also* Brief of Amicus Curiae in Support of Petitioners Filed on Behalf of the District Attorney, County of Riverside, State of California at 6a-20a, County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991) (No. 89-1817) (charting initial hearing procedures for warrantless arrests by state or territory).

152 *Riverside*, 111 S. Ct. at 1677 (Scalia, J., dissenting).

153 *Id.* (Scalia, J., dissenting). The Justice observed that, today, a frequent complaint is that the Fourth Amendment "benefits the career criminal (through the exclusionary rule) often and directly, but the ordinary citizen remotely if at all." *Id.* (Scalia, J., dissenting).

154 *Id.* (Scalia, J., dissenting).

155 *Riverside*, 111 S. Ct. at 1671 (Marshall, J., dissenting). Justice Marshall was joined by Justices Blackmun and Stevens. *Id.* (Marshall, J., dissenting).

156 *Id.* (Marshall, J., dissenting) (quoting *Gerstein*, 420 U.S. at 114).

157 *See* Bell v. Wolfish, 441 U.S. 520, 533 (1979). The *Bell* Court acknowledged: " 'The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.' " *Id.* (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)); United States v. Ebbole, 917 F.2d 1495, 1500 (7th Cir. 1990) (in the traditions and conscience of Americans, " 'innocent until proven guilty' ranks among our most fundamental values")).

over, tragic consequences frequently accompany the loss of one's liberty.[158]

Conversely, the general public has a strong interest in curtailing crime, which threatens the highly cherished personal status of freedom. Thus, a paradox is created by our inherently imperfect, but vital, criminal justice system through the necessary process of weighing an individual's liberty interest against society's interest in crime control. Without the ability to impose certain restraints on liberty, law enforcement efforts would be severely hampered. While society might enjoy greater freedom under such a system, it bears risking a significant increase in crime.

In *County of Riverside v. McLaughlin*, the Supreme Court had to justify pretrial detentions of the presumably innocent following warrantless arrests.[159] The undefinable nature of the prevailing "promptness" standard compelled the Court to promulgate a more tangible rule regarding the timing of probable cause determinations.[160] A logical, if not unavoidable, approach was to set an ultimate time limit by which a jurisdiction could gauge its actions.[161] The majority's forty-eight hour standard was the result of "a reasonable accommodation between legitimate competing concerns" which "*Gerstein* clearly contemplated."[162] The competing concerns, most notably accommodated in *Riverside*, however, were not those of the individual and the state, but rather the varying interests in crime-control methodology among the states.

Despite *Riverside*'s seeming deference to *Gerstein*, the majority avoided any meaningful reflection upon the common law which was so central to the *Gerstein* analysis.[163] Indeed, the Court refuted the dissent's attempt to apply common law understanding to the timing issue by stating that the common law did not resolve the issue any better than the promptness standard.[164] Failing to adequately consider the basis for *Gerstein*'s strong common-law emphasis, the majority blunted the historical promi-

158 *See supra* note 119 and accompanying text.

159 *See Riverside*, 111 S. Ct. at 1665.

160 *Id.* at 1670.

161 *See id.*

162 *Id. See* Gerstein v. Pugh, 420 U.S. 103, 111-12 (1975) (Fourth Amendment's standard for arrest and detention represents common law's recognition of the need to balance individual's liberty interest and state's interest in controlling crime).

163 *See id.* at 1672-73 (Scalia, J., dissenting).

164 *Id.* at 1669.

nence of weighing the individual's liberty interest when that interest is adversely affected by law enforcement activities.[165] Instead, the Court concentrated on the uncertainty of prior decisions and exalted the importance of remedying such precedents' negative effects on state pretrial systems.[166] In this accommodating spirit, the Court justified restraints on personal liberty not with the states' fundamental need to control crime but with the states' derivative desire for flexibility and experimentation.[167]

It may be argued that integrated procedures which offer adversarial safeguards benefit arrestees even though the detention

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165 *See id.* at 1668. *See also* Ker v. California, 374 U.S. 23, 32 (1963) ("Implicit in the Fourth Amendment's protection from unreasonable searches and seizures is its recognition of individual freedom."); Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931) ("The [Fourth] Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted.") (citing Boyd v. United States, 116 U.S. 616, 623 (1886); Weeks v. United States, 232 U.S. 383, 389-92 (1914)).

In a peculiarly foresightful passage readily applicable to the *Riverside* analysis, the Court in Gouled v. United States, 255 U.S. 298 (1921), reflecting on the rights guaranteed by the Fourth and Fifth Amendments and prior Supreme Court decisions interpreting those rights, stated:

> [S]uch rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; . . . they are to be regarded as of the very essence of constitutional liberty; and . . . the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen . . . . It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers.

Id. at 304.

166 *Riverside*, 111 S. Ct. at 1669-70. The Court's limited observance of individual liberty interests is particularly disturbing in light of its statement that: "*Gerstein* struck a balance between competing interests; a proper understanding of the decision is possible only if one takes into account *both sides* of the equation." *Id.* at 1669 (emphasis added).

167 *See id.* at 1668. As Justice Scalia stated in dissent, *Gerstein*'s discussion of flexibility and experimentation was directed only to the nature of probable cause determinations, particularly to the possibility that such determinations may be combined with other pretrial procedures. *Id.* at 1674 (Scalia, J., dissenting). In contrast, noted Justice Scalia, the timing issue in *Gerstein* was assessed through the balancing process intrinsic in the Fourth Amendment's probable cause requirement and in common law antecedents. *Id.* (Scalia, J., dissenting). The probable cause standard promotes impartial consideration of both state and individual interests. *Id.* (Scalia, J., dissenting). At least one commentator maintains that *Gerstein* clearly "suggests that an arrestee's right to a 'prompt' hearing on probable cause overrides administrative considerations the state may have" and that "administrative efficiency must give way to constitutional guarantees." Brandes, *supra* note 9, at 476-77 (citing *Gerstein*, 420 U.S. at 114).

period may be extended.[168] An innocent individual, however, has a greater interest in demonstrating his innocence at the earliest possible moment than he does in waiting to participate in an adversarial proceeding.[169] Furthermore, the new forty-eight hour limit may cause increased inefficiency in many jurisdictions. While an innocent arrestee does not need an arraignment or bail hearing, the *Riverside* decision could require him to sit in jail while unneeded counsel is arranged for such proceedings.

Intending to reach a procedural compromise between differing jurisdictions, the Court created a heavy presumption of compliance where detention is less than forty-eight hours.[170] The Court stated that the arrestee may rebut this presumption by proving that the "probable cause determination was delayed unreasonably."[171] The majority strengthened the presumption by adding that "courts must allow a substantial degree of flexibility" in evaluating the reasonableness of delays.[172] It does not appear likely, therefore, that an arrestee will successfully challenge a detention of less than two days when the delay is caused by unnecessary, but plausible, prehearing procedures. A future Supreme Court decision—providing a workable definition of *necessary* administrative steps incident to arrest and integrated proceed-

168 *See* Williams v. Ward, 845 F.2d 374, 386, 387 (2d Cir. 1988) (arguing that adversarial probable cause hearings provide arrestees with benefits that are not available through immediate ex parte procedures), *cert. denied*, 488 U.S. 1020 (1989).

169 *Riverside*, 111 S. Ct. at 1677 (Scalia, J., dissenting). The accused's presence in an earlier, nonadversarial probable cause hearing would better preserve his rights than if such a hearing was provided completely ex parte. *See* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 310.1(1) (1975) (requiring that arrestees shall be brought before a court). There is little doubt that proliferated proceedings burden criminal justice systems to some extent, especially in urban areas where crime rates are typically higher and where studies have shown that probable cause is lacking in only a minimal number of cases. *See Williams*, 845 F.2d at 389 n.19 (citing study which revealed that, in a five-day period, only 13 out of 1,407 New York County arrests lacked probable cause). By giving an arrestee the choice between a separate, earlier probable cause determination and a postponed, but counseled determination, however, a pretrial system could deter proliferation and, at the same time, provide a means by which questionable arrestees, adamant about their innocence, could quickly have their cases heard.

170 *Riverside*, 111 S. Ct. at 1670.

171 *Id.* The Court then set forth three obvious and well-settled situations in which delay would be deemed unreasonable: "Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake." *Id.*

172 *Id. See supra* note 124 and accompanying text.

ings[173]—is needed to reestablish a justifiable and appropriately prioritized criminal justice system.

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[173] *See* Lively v. Cullinane, 451 F. Supp. 1000, 1005 (D.D.C. 1978) (holding that delay following a warrantless arrest can only be justified "by a strong showing that it is necessitated by a substantial administrative need"). While the *Lively* approach may be comparatively extreme, the decision recognized that a great deal of the uncertainty surrounding the probable cause determination timing issue rests on what constitutes the administrative steps incident to arrest. *See id.* Flexibility and experimentation by the states may not be so desirable in light of the voluminous litigation that has revolved around the reasonableness of administrative steps taken after warrantless arrests. *See* Settle, *supra* note 1, at 204-05 (While federal courts have consistently held that *Gerstein* permits detention only for the time needed to conclude the administrative steps incident to arrest, case results are inconsistent "because each jurisdiction decides independently what period of time is appropriate for booking an arrestee in that particular jurisdiction" and which procedures are "incident to arrest.").