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Criminal Procedure—Filing by Information: Determination of Probable Cause Required Before Extended Restraint on Liberty—Gerstein v. Pugh, 420 U.S. 103 (1975)

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CRIMINAL PROCEDURE—FILING BY INFORMATION: DETERMINATION OF PROBABLE CAUSE REQUIRED BEFORE EXTENDED RESTRAINT ON LIBERTY—*Gerstein v. Pugh*, 420 U.S. 103 (1975).

Robert Pugh was arrested in Florida without a warrant[1] and charged by prosecutor's information.[2] Pugh and other incarcerated arrestees charged by information without a preliminary hearing[3] brought a class action suit in federal district court challenging the constitutionality of the charging procedure.[4] Plaintiffs maintained that the due process clause of the fourteenth amendment required that accused persons be accorded a determination of probable cause for

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1. Although the record in *Gerstein* does not indicate whether the arrests involved were made with or without warrant, *see* 420 U.S. at 105 n.1, the Court's discusson is relevant only in the context of warrantless arrests. *See In re* Walters, 543 P.2d 607, 125 Cal. Rptr. 239 (1975), where the California Supreme Court held that when a magistrate has determined the existence of probable cause for arrest in an informal *ex parte* proceeding before arrest (*i.e.*, that results in the issuance of an arrest warrant), the *Gerstein* requirements are satisfied. 543 P.2d at 615, 125 Cal. Rptr. at 247.

2. An information is an accusation in the nature of an indictment which is presented by a public officer on his oath of office rather than by a grand jury. The information process begins when a police officer files a complaint with the prosecutor, either after he has made an arrest (*i.e.*, without a warrant) or before, as part of the procedure to obtain a warrant. *See, e.g.*, WASH. SUPER. CT. (CRIM.) R. 2.2.

On the basis of an officer's complaint the prosecutor makes an assessment of probable cause and decides whether to file the information, and if so, determines which charges shall be made. The information is then filed with the clerk of the criminal court. The accused is subsequently presented for arraignment where the charges set out in the information are read to him.

In Florida the complaint is filed from one day to two weeks after arrest. The period from arrest to arraignment (defendant's first appearance before a judicial officer) averages 10 to 15 days, but can be extended for as long as a month. Deposition of James Reagan, Jr., *in* Appendix to Brief for Petitioner at 43–60, Gerstein v. Pugh, 420 US. 103 (1975). In Washington a person arrested and not released must be taken before a judge by the close of the next judicial day, and if a charge is not filed within that time, the suspect must be released. WASH. JUSTICE CT. (CRIM.) R. 2.03. For good cause shown, the court may extend the time prior to preliminary appearance.

3. *See* FLA. R. CRIM. P. 3.140(a) (1973). Florida courts have held that the filing of an information forecloses the suspect's right to a preliminary hearing. Gerstein v. Pugh, 420 U.S. 103, 106 (1975), *citing* State *ex rel.* Hardy v. Blount, 261 So. 2d 172 (Fla. 1972). Preliminary hearings are also denied to persons confined under indictment, 420 U.S. at 106 n.2, *citing* Sangaree v. Hamlin, 235 So. 2d 729 (Fla. 1970) and FLA. R. CRIM. P. 3.131(a) (1973).

4. In most states that use this method the information cannot be filed until the accused has been committed (bound over) following preliminary examination in front of a judicial officer or upon waiver of the examination. *See, e.g.*, CALIF. CONST. art. I, § 14. In Florida, however, as in Arkansas, Connecticut, Iowa, Montana, Washington, and Wyoming, a preliminary hearing is not required when an accused is charged by information. Brief for Petitioner at 13–14, Gerstein v. Pugh, 420 U.S. 103 (1975). Consequently, in these jurisdictions individuals have been arrested, incarcerated, and held for trial without the judicial determination of probable cause afforded by a preliminary hearing. The determination of probable cause before seizure required by the

detention soon after their arrest.[5] They also argued that the prosecuting attorney was not sufficiently neutral or detached to make the necessary determination.[6] The district court accepted the plaintiffs' arguments, and the Court of Appeals for the Fifth Circuit affirmed.[7] The United States Supreme Court granted certiorari,[8] and affirmed the Fifth Circuit's decision in part and reversed in part. *Held:* Although pretrial detention pursuant to the filing of an information without a judicial determination of probable cause is an unconstitutional violation of the fourth amendment guarantee against unreasonable seizures,[9] that determination need not be made at an adversary proceeding. *Gerstein v. Pugh,* 420 U.S. 103 (1975).

This note analyzes the Court's conclusion that adversary safeguards are not required during proceedings conducted to determine whether probable cause exists to hold an arrestee for trial. The *Gerstein* Court held that a finding of probable cause to arrest is sufficient to justify extended pretrial detention, so long as the existence of probable cause is determined by a neutral magistrate.[10] It is submitted, however, that the Court erred in looking exclusively to the fourth amendment to determine the procedure and standards required in the *Gerstein* situation. Although the fourth amendment analysis is relevant in the context of the initial arrest, it is not relevant in the context of extended detention.

I. INTRODUCTION: THE *GERSTEIN* COURT'S FAILURE TO BALANCE PUBLIC AND INDIVIDUAL INTERESTS

In *Gerstein v. Pugh* the Court ignored the fact that the fourteenth

fourth amendment in such states is deemed to have been made by the prosecutor filing the information.

5. 420 U.S. at 107. *See also* Brief for Respondents at 6–7, Gerstein v. Pugh, 420 U.S. 103 (1975).

6. Brief for Respondents at 8, *id.*

7. The district court had held that the Florida procedure violated the fourth and fourteenth amendments because a prosecuting attorney could obviate the requirement of determination of probable cause by a neutral and detached magistrate. Pugh v. Rainwater, 332 F. Supp. 1107 (S.D. Fla. 1971). The Court of Appeals for the Fifth Circuit affirmed, holding on due process grounds that arrested persons detained pursuant to filings of informations are entitled to adversary proceedings to determine probable cause. Pugh v. Rainwater, 483 F.2d 778 (5th Cir. 1973).

8. 414 U.S. 1062 (1973).

9. The fourth amendment's guarantee against uneasonable seizures has been held to be applicable to the states through the due process clause of the fourteenth amendment. Mapp v. Ohio, 367 U.S. 643 (1961).

10. 420 U.S. at 120–21.

amendment provides independent safeguards for an individual detained during the pretrial stage of a criminal prosecution. "Without doubt, [the fourteenth amendment] denotes . . . freedom from bodily restraint."[11] When determining the required procedure in a post-arrest detention situation, the Court should have looked to the fourteenth amendment's due process clause as the independent source of more stringent safeguards rather than relying on the less stringent safeguards required by the fourth amendment. Had the Court done so, Pugh's situation could have been analyzed in a manner similar to several recent cases defining procedures for protection against deprivation of property and other significant benefits without due process.[12] By failing to apply the due process balancing procedures adopted in such cases and instead looking to the standards required in the initial arrest situation, the Court failed to adequately protect the rights of the accused during pretrial detention. The Court should have balanced the arrestees' rights of individual liberty against the state's interest in incarcerating without procedural safeguards. The reason for the Court's use of the fourth amendment analysis was its refusal to distinguish between initial seizure and continuing detention of a presumptively innocent[13] person. Because the degree of deprivation imposed upon an individual increases when he or she is detained beyond the initial arrest, the fourteenth amendment prohibition against deprivation of liberty without due process should govern post-arrest detentions.

In determining what the fourteenth amendment required of the State of Florida in relation to its pretrial detention procedures, the *Gerstein* Court looked exclusively to the fourth amendment for its

11. Board of Regents v. Roth, 408 U.S. 564, 572 (1973). The *Roth* case involved a university teacher hired for a fixed term of one year who was not rehired at the expiration of the term. The Court held that the fourteenth amendment does not require the opportunity for a hearing prior to the nonrenewal of a nontenured state teacher's contract unless he can show he had a property interest in continued employment. 408 U.S. at 578.

12. *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975) (temporary suspension of school students); North Georgia Finishing, Inc. v. Di-Chem, 419 U.S. 601 (1975) (garnishment of corporation bank account); Stanley v. Illinois, 405 U.S. 645 (1972) (custody hearings for unwed fathers); Bell v. Burson, 402 U.S. 535 (1971) (suspension of driver's license); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (suspension of privilege to buy liquor); Goldberg v. Kelly, 397 U.S. 254 (1970) (revocation of welfare payments).

13. *See, e.g.* WASH. REV. CODE § 10.58.020 (1974) which provides: "Every person charged with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt . . . ."

definition of "due process." In so doing, the Court followed the tradition of the incorporation theory:[14] that is, the fourth amendment safeguard against unreasonable seizures was incorporated into the fourteenth amendment and applied to Florida's pretrial procedures. The incorporation theory differs from the "fundamental fairness" doctrine,[15] which analyzes a certain procedure and determines, in light of the totality of the circumstances, which safeguards are "implicit in the concept of ordered liberty."[16] Those procedures found to be implicit are constitutionally required.

Neither of these two theories can be adequately utilized, however, to determine what is required in pretrial detention procedures. The incorporation theory is too narrow[17] to provide adequate protection for the arrestee, and the fundamental fairness doctrine is too nebulous and subjective for proper administration of justice.[18] In recognizing that the fourteenth amendment specifically forbids deprivation of liberty without due process of law, due process should be defined in terms of all available precedents, not just in terms of a narrow range of fourth amendment search and seizure cases. Examination of the

14. *See generally* G. GUNTHER, CONSTITUTIONAL LAW 506–07 (9th ed. 1975); M. FORKOSCH, CONSTITUTIONAL LAW 416–18 (2d ed. 1969).

15. For a recent discussion of the concept of "fundamental fairness," see Justice Powell's concurring opinion in Argersinger v. Hamlin, 407 U.S. 25 (1972). Basically, this doctrine finds no necessary relationship between the fourteenth amendment and the guarantees of the Bill of Rights. The fourteenth amendment due process clause is viewed as incorporating "traditional notions" of due process.

16. *See, e.g.*, Justice Cardozo's opinion in Palko v. Connecticut, 302 U.S. 319, 325 (1937).

17. *See* Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965), where the author states:

> The Court ought not to forget the reminder of one of its greatest members [Justice Holmes, dissenting in Truax v. Corrigan, 257 U.S. 312, 342 (1921)]: "Delusive exactness is a source of fallacy throughout the law." However ardent the desire may be, no facile formula will enable the Court to escape its assigned task of deciding just what the Constitution protects from state action . . . . Mr. Justice Goldberg had it right when he said, at the previous term, [in Haynes v. Washington, 373 U.S. 503, 515 (1963)] "we cannot escape the demands of judging or of making the difficult appraisals inherent in determining whether constitutional rights have been violated." Especially in constitutional adjudication, "an unwillingness to face the responsibility of judicial freedom in the name of a spurious objectivity may also cripple the exercise of creativity." So let us hope, as true friends of the Court, that in the fullness of time it will escape from the "verbal prison" it has been building for itself by the selective incorporation doctrine, and will regain the "sovereign prerogative of choice."

Id. at 937–38 (footnotes omitted).

18. Justice Black has argued that standards such as fundamental fairness grant an unconfined power to the judiciary that is inapposite to the idea of a written constitution. Duncan v. Louisiana, 391 U.S. 145 (1968).

broader range of fourteenth amendment cases[19] reveals a due process balancing analysis more applicable to the pretrial deprivation of liberty than are the fourth amendment seizure cases used by the Court. This due process conceptual analysis results in the requirement of different procedures and the employment of different standards in determining probable cause for post-arrest detention. This analysis, which should have been applied in *Gerstein,* is developed in Part III. The Court's focus upon the fourth amendment as its model for all pretrial procedures also limited its analysis of the standard to be applied in determining whether an accused should be detained beyond the initial seizure. This problem is examined next.

II. THE STANDARD REQUIRED TO HOLD AN ACCUSED FOR TRIAL

The *Gerstein* Court erred in viewing the situation before it in terms of procedures surrounding initial arrest.[20] The Court's use of the fourth amendment analysis and its references to fourth amendment cases, *i.e.,* search and seizure cases, to determine what procedure should be required are evidence of this error. Thus, the basic fault of

19. *See, e.g.,* the cases cited in note 12 *supra.*

20. For instance, the cases cited by Justice Powell to support the majority opinion that the "standards and procedures for arrest and detention have been derived from the Fourth Amendment" dealt with a government's power to initially arrest an individual. *See* 420 U.S. at 111, where Justice Powell cited Cupp v. Murphy, 412 U.S. 291 (1972), *Ex parte* Bollman, 8 U.S. (4 Cranch) 74 (1807), and *Ex parte* Burford, 7 U.S. (3 Cranch) 448 (1806). *Bollman* and *Burford* were habeus corpus cases. In *Bollman* the Court concluded that there was insufficient evidence to hold the defendant on a charge of treason; therefore he could not be prosecuted or held. In *Burford,* the Court stated that the jailer had no authority to detain the defendant unless detention were justified by the arrest warrant. Since the warrant did not state "good cause certain" and was not supported by oath, it was defective and the defendant could not be held. Both these cases focused on the validity of the *arrest.*

In *Cupp* the defendant voluntarily came to the police station after hearing his wife had been murdered. The police did not arrest him, but took samples from under his fingernails despite his protests. The formal arrest came one month later. The question presented to the Court was whether the samples should have been suppressed as evidence gained by an illegal search. The Court first decided there had been probable cause to arrest the suspect at the time he voluntarily came to the police station and that the search, if it had been incident to that arrest, would have been legal under the rule in Chimel v. California, 395 U.S. 752 (1969). The Court then held that the search was lawful: "[C]onsidering the existence of probable cause, the very *limited intrusion* undertaken incident to the station house detention, and the ready destructibility of the evidence, we cannot say this search violated the Fourth and Fourteenth Amendments." 412 U.S. at 296 (emphasis added). Significantly, the Court noted that "the vice of detention" was absent. 412 U.S. at 294–95. Again, the conclusion was that the conduct involved surrounded the arrest, not the post-arrest detention.

the Court was that it failed to make the distinction between improper arrest and improper deprivation of liberty.[21] Improper arrests can be adequately analyzed by reference to the fourth amendment,[22] but improper detention beyond the time of arrest calls the fourteenth amendment into play.

A. The Difference Between Arrest and Post-Arrest Detention

The distinction between arrest and post-arrest detention is evident if one concentrates on the difference between the brief detention involved in a street arrest and the extended detention (60 days[23] or whatever time is specified by the state speedy trial rule[24]) that follows it in cases where the state decides to prosecute. To apply the same standard to both situations is unfair to the individual.

The deprivation of liberty suffered by an incarcerated arrestee is serious. Such deprivation "may result in . . . the degradation and expense of a criminal trial and irreparable harm to the accused's reputation, regardless of the ultimate outcome at the subsequent trial."[25] The fact that the defendant may be exonerated at his trial does not

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21. *See* discussion of Morrissey v. Brewer, 408 U.S. 471 (1972), Part III-D *infra*. *See also* Justice Stewart's concurring opinion wherein he states that he "cannot join in the Court's effort to foreclose any claim that the traditional requirements of constitutional due process are applicable in the context of pretrial detention." 420 U.S. at 127.

22. *See* Henry v. United States, 361 U.S. 98, 100 (1959) ("[I]t is the command of the Fourth Amendment that no warrants for either searches or arrests shall issue except 'upon probable cause. . . .' "); Terry v. Ohio, 392 U.S. 1, 18 n.15 (1968) ("[T]he Fourth Amendment governs all intrusions by agents of the public upon personal security. . . ."); State v. Licari, 153 Conn. 127, 214 A.2d 900, 902 (1965) ("[I]t is obvious that the amendment's reference to 'persons . . . to be seized' is inapt to refer to anything other than a seizure of the person, which certainly is inclusive of an arrest.").

23. Washington requires that a defendant unable to obtain pretrial release be brought to trial within 60 days following the preliminary appearance. WASH. SUPER. CT. (CRIM.) R. 3.3(c). In Florida it was determined that defendants often spent more than a month in jail before they were even arraigned, and then several more months before their trial date. Deposition of James Reagan, Jr., *in* Appendix to Brief for Petitioner at 43–60, Gerstein v. Pugh, 420 U.S. 103 (1975).

24. Speedy trial rules vary by state and federal rule according to amount of time allotted and point in time the "right" attaches. *See, e.g.*, ILL. ANN. STAT. ch. 38 §§ 103–05(a) (Smith-Hurd 1970) (trial must occur for those in custody within 120 days of arrest); CAL. PENAL CODE § 1382 (West Supp. 1975) (defendant must be brought to trial within 60 days after the finding of the indictment or filing of the information). The Speedy Trial Act of 1974, 18 U.S.C. § 3161 (b), (c) (Supp. IV 1975), signed into law by President Ford on Jan. 13, 1975, provides that an information or indictment must be filed within 30 days after arrest, arraignment must occur within 10 days after the filing of the information, and the defendant must be brought to trial within 60 days of arraignment.

25. Comment, *Preliminary Examination—Evidence and Due Process*, 15 KAN. L. REV. 374, 376 (1967) (footnotes omitted).

significantly reduce the impact of the deprivation. The Court recognized an analogous principle in *Stanley v. Illinois*,[26] where the state had argued that an unwed father was not entitled to a hearing on his fitness as a parent before being deprived of his children because he could regain custody as a guardian or through adoption proceedings. The Court concluded:[27]

> This Court has not, however, embraced the general proposition that a wrong may be done if it can be undone . . . . Surely, in the case before us, if there is delay between the doing and the undoing petitioner suffers from the deprivation of his children, and the children suffer from uncertainty and dislocation.

This reasoning should be valid in criminal, as well as civil, cases.

That the arrestee is detained for a "short" period of time does not alter the nature of the underlying deprivation of liberty. This was made clear in *Goss v. Lopez*,[28] which involved temporary suspension of students from school. In *Goss* the Court stated that in determining whether due process requirements apply, the nature of the interest at stake must be considered most heavily.[29] The Court also mentioned the length and severity of deprivation as additional factors that may be taken into consideration when deciding the issue.

Thus, the severity of a deprivation, although not controlling as to whether due process is required, may nevertheless be relevant in defining the scope of due process in a particular instance. The law of criminal procedure recognizes the validity of applying a sliding scale of standards, with the most stringent standard being applied to help test the most severe deprivation of liberty. For example, the standard that the state must meet to justify interference with a person's liberty ranges from the minimal showing in a stop-and-frisk situation that a police officer had an articulable suspicion that "criminal activity may

26. 405 U.S. 645 (1972).
27. *Id.* at 647 (citations omitted).
28. 419 U.S. 565 (1975). *See also* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 600 (1975), where the Court stated that although the debtor was deprived (through garnishment) of the use and possession of its property only temporarily, the seizure was not beyond the reach of the due process clause: " 'The Fourteenth Amendment draws no bright lines around the three-day, 10-day, or 50-day deprivations of property. Any significant taking of property by the state is within the purview of the Due Process Clause.' " *Id.* at 606, *quoting* Fuentes v. Shevin, 407 U.S. 67, 86 (1972).
29. Goss v. Lopez, 419 U.S. at 575–76.

be afoot"[30] to the substantial burden of "proof beyond a reasonable doubt" applicable to a criminal trial.[31]

B. *The Standard for Post-Arrest Detention: The Prima Facie Case Test*

Considerations of correlation between the stringency of standard and the severity of deprivation dictate that the probable cause standard[32] traditionally applied to test the validity of arrests should not be applied to test the validity of the more intrusive post-arrest detention and criminal prosecution. In *Goldsmith v. United States*[33] the Court of Appeals for the District of Columbia Circuit recognized that "[w]hat may constitute probable cause for arrest does not necessarily constitute probable cause for a charge on arraignment."[34] In other words, because the brief detention on the street or at the stationhouse is a much different matter than the deprivation of liberty that occurs when the full brunt of the criminal prosecution process is brought to bear on the individual, a showing adequate under the fourth amendment to justify arresting an individual may not necessarily be sufficient to meet the fourteenth amendment requirement of due process before a deprivation of liberty. Accordingly, due process dictates that the prosecutor be held to a more stringent standard than that applicable to the policeman on the street.

Before allowing the infringement of rights inherent in any post-arrest detention and prosecution, courts should require the police and prosecutor to show not merely probable cause to *arrest,* but rather a reasonable possibility of *conviction.* This standard is sometimes referred to as the "prima facie case" test.[35] Under this test, an accused is not bound over for trial unless at the preliminary hearing the state can produce the amount of proof needed in a trial to get the case to the

30. Terry v. Ohio, 393 U.S. 1, 30 (1968).
31. *In re* Winship, 397 U.S. 358 (1970).
32. The showing required to justify an arrest is that at the time of the seizure, the police officer had reasonable grounds to believe that a felony had been committed by the person to be arrested. *See* Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment,* 28 U. CHI. L. REV. 664, 687 (1961).
33. 277 F.2d 335 (D.C. Cir.), *cert. denied,* 364 U.S. 863 (1960).
34. *Id.* at 345.
35. F. MILLER, PROSECUTION 88 (1969).

jury.[36] A majority of the states appear to apply this more stringent standard,[37] but Washington has rejected it.[38]

Applying the probable cause to arrest standard to validate post-arrest detentions in a grand jury system is justifiable because the accused is detained under this standard only the relatively short period of time[39] until an indictment is returned by the grand jury, which traditionally operates under the prima facie case standard.[40] In contrast, under the information system, the accused is not afforded the back-up protection of grand jury review[41] and consequently may be detained and subjected to prosecution upon a minimal showing of probable

36. *Id.*

37. *Id.*

38. State v. Wright, 51 Wn. 2d 606, 608, 320 P.2d 646, 648 (1958) (standard at justice court preliminary hearing is probable cause to believe accused committed a crime).

39. *See* Graham & Letwin, *The Preliminary Hearing in Los Angeles: Some Field Findings and Legal-Policy Observations*, 18 U.C.L.A.L. REV. 635, 686–88 (1971).

40. *See, e.g.*, FED. R. CRIM. P. 5(c) which contemplates delays of less than 10 days between defendant's initial appearance and the return of the indictment. *See also* 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 80 (1969).

41. The fact that the grand jury typically employs the more stringent prima facie case test does not necessarily mean that the grand jury is the best possible device for protecting the rights of the accused during post-arrest detention. As suggested in Part III, application of the proper standard may be meaningless if the accused lacks the opportunity to challenge the state's evidence in an adversary proceeding. The non-adversarial nature of the grand jury leads some commentators to conclude that it acts as a rubber stamp for the prosecutor rather than the check on prosecutorial power it was intended to be. Alexander & Portman, *Grand Jury Indictment Versus Prosecution by Information: An Equal Protection Due Process Issue*, 25 HAST. L.J. 997 (1974). One commentator has noted critically:

> Grand juries are likely to be a fifth wheel in the administration of criminal justice in that they tend to stamp with approval, and often uncritically, the wishes of the prosecuting attorney. At best the grand jury tends to duplicate the work of the committing magistrate and prosecutor.

Morse, *A Survey of the Grand Jury System*, 10 ORE. L. REV. 101, 363 (1931). *See also* 4 NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 124 (1931); Moley, *The Initiation of Criminal Prosecutions by Indictment and Information*, 29 MICH. L. REV. 403 (1931); Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174 (1973).

One explanation for the Supreme Court's reluctance to use due process analysis in *Gerstein*, thereby requiring an adversary hearing, may be its concern for the effect such a holding would have on the grand jury system. Raymond L. Marky, Assistant Attorney General of Florida, argued to the Court that an information is tantamount to an indictment, and that if the Fifth Circuit decision were upheld, the same objection could be made with respect to grand jury proceedings. 43 U.S.L.W. 3245–46 (Oct. 29, 1974). Justice Rehnquist inquired of respondent's counsel, "Aren't you asking for something that is not even available in a grand jury proceeding?" *Id.* at 3246. Although the respondents in *Gerstein* argued that a grand jury proceeding could be distinguished from an information because of the grand jury's "historical nature," *id.*, the due process analysis recommended in Part III would apply to both.

cause—a showing designed to govern the arrest process, not the charging process.[42]

The Court of Appeals for the Fifth Circuit, in its well-reasoned *Gerstein* opinion, recognized the impropriety of lengthy detentions of persons against whom the state lacked sufficient evidence for a successful prosecution.[43] From a practical standpoint, it seems clear that often more evidence is necessary to present a prima facie case than is necessary merely to justify an arrest.[44] A majority of the Supreme Court in *Gerstein,* however, over Justice Stewart's vigorous protests,[45] declined to recognize any distinction between initial arrest and post-arrest incarceration. *Gerstein* therefore may require individuals who perhaps have been arrested with good cause to remain in jail until either the prosecutor decides not to press charges or a trial determines he or she is innocent (bail considerations aside).[46] It clearly should be

42. Arguably the fourth amendment applies only to the arrest process, while fifth amendment principles should govern the charging process. Such an analysis would seem to support the application of the broad principles of fourteenth amendment due process to the charging procedure. One commentary has concluded that California's application of the probable cause standard to the preliminary hearing is the result of an oversight:

> It therefore seems plausible to suppose that the probable cause standard for bind over was derived from the same sources as the fourth amendment, in the era when the commitment decision was concerned only with legality of the detention of the defendant pending screening by the grand jury. There is nothing in the [California Constitutional] debates leading to the adoption of the information system to suggest that framers of the preliminary [hearing] intended to make it easier to put defendants on trial than under the grand jury system. It is thus likely that the old standard for judging the legality of commitment pending screening was carried over to the information system without any appreciation of the fact that the preliminary hearing was now to perform the screening function.

Graham & Letwin, *supra* note 39, at 688–89 (footnotes omitted).

43. Pugh v. Rainwater, 483 F.2d at 783 n.12 (1973), *noted in* 60 VA. L. REV. 540 (1974).

44. It has been stated:

> Probably in 99% of all cases submitted to the Prosecuting Attorney for consideration, there would be sufficient evidence to meet the definition of probable cause, but there is a tremendous difference between probable cause and the amount of evidence that a Prosecuting Attorney considers necessary to justify bringing a case to trial . . . .

Brief for Wash. State Ass'n of Prosecuting Attorneys as Amicus Curiae at 4–5, State v. Kanistanaux, 68 Wn. 2d 652, 414 P.2d 784 (1966).

45. Justice Stewart observed: "[T]his case does not involve an initial arrest, but rather the continuing incarceration of a presumptively innocent person." 420 U.S. at 127.

46. If an individual is released on bond, the "vice" of continued detention is absent. As the Court recognized, however, "[e]ven pretrial release may be accompanied by burdensome conditions that effect a significant restraint on liberty." 420 U.S. at 114. Arguably, these restraints mandate an adversary hearing even for the arrestee out on bail. Restrictions on the travel, association, or place of abode of the arrestee may be

improper, however, to incarcerate in anticipation of trial when there is insufficient evidence to charge.[47]

Although it is not suggested that a full trial before detention is necessary, there should be a fair assessment of the sufficiency of the state's case prior to any extended post-arrest detention.[48] This procedure would supplement, not replace, the procedure required by *Gerstein*. The procedure required by *Gerstein* is similar to that of ob-

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imposed. *See, e.g.*, 18 U.S.C. § 3146(a)(2) (1970). Additionally, the federal statute allows the judge to impose "any other condition deemed reasonably necessary to assure appearance" including a condition requiring that the person return to custody after specified hours. *Id.* § 3146(a)(5) (1970). Even the arrestee out on unconditional bond is required to appear for trial and bears the stigma of criminal accusation. *Cf.* Wisconsin v. Constantineau, 400 U.S. 433 (1970); *see* notes 69 & 70 and accompanying text *infra*.

47. Even if a lawful arrest has been made, it does not necessarily follow that a charge may be properly based upon the same evidence supporting the arrest because the arrest may stem from "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Brinegar v. United States, 338 U.S. 160, 175 (1949) (warrantless auto search upheld). For a telling criticism of the *Gerstein* Court's application of the *Brinegar* standard to the preliminary hearing, see Note, 3 WESTERN ST. L. REV. 134, 140 (1975).

Although the choice of the proper standard at the proper time is vital to the administration of the criminal law process, American law is ambiguous on this point. Miller & Remington, *Procedures Before Trial*, 339 ANNALS 111, 115–16 (1962). Miller and Remington cite Mallory v. United States, 354 U.S. 449, 456 (1957), as supporting the proposition that the Court requires the same test for arrest as for charging: "It is not the function of the police to arrest . . . at large and to use an interrogating process . . . in order to determine whom they should charge . . . ." Goldsmith v. United States, 277 F.2d 335 (D.C. Cir.), *cert. denied*, 364 U.S. 863 (1960), is cited as expressing a decidedly different view:

> A vital factor to bear in mind is that as these steps progress the burden of the law enforcement agency increases. What may constitute probable cause for arrest does not necessarily constitute probable cause for a charge on arraignment . . . .

277 F.2d at 345, *cited in* Miller & Remington, *supra*, at 116.

48. Anticipated criticism of imposing this procedure include the argument that the preliminary hearing (probable cause determination) will be a "mini-trial" and that this imposes an unjustifiable burden upon the state. The standard at trial, however, is "beyond all reasonable doubt" while the suggested standard for the preliminary hearing can best be defined as a "reasonable possibility" of conviction. The Court recognized a similar distinction in Bell v. Burson, 402 U.S. 535 (1971). *Bell* involved a Georgia statute that provided for the automatic suspension of the license of an uninsured motorist involved in an accident unless the driver posted security to cover the amount of damage claimed by aggrieved parties in the accident report. The hearing provided the driver specifically excluded any consideration of fault. The Court held that the fourteenth amendment due process clause required a hearing that considered fault:

> Clearly, however, the inquiry into fault or liability requisite to afford the licensee due process need not take the form of a full adjudication on the question of liability. That adjudication can only be made in litigation between the parties involded in the accident. . . . [W]e hold that procedural due process will be satisfied by an inquiry limited to the determination whether there is a *reasonable possibility* of judgments in the amounts claimed being rendered against the licencsee.

Id. at 540 (emphasis added).

taining a warrant prior to arrest[49] except that the *Gerstein* procedure must come immediately after a warrantless arrest. The procedure required under the due process clause of the fourteenth amendment, however, would have to follow regardless of whether the arrest had been made pursuant to a warrant, or whether probable cause was established after the arrest as required by *Gerstein,* in order to protect an arrestee against the deprivation of liberty caused by his or her extended pretrial detention.

III. DUE PROCESS REQUIRES A PRETRIAL ADVERSARY HEARING IMMEDIATELY AFTER ARREST

The Court's erroneous application of the fourth amendment standard of probable cause to arrest to situations of pretrial incarceration is only half the problem presented by *Gerstein.* The other half is the Court's failure to require an adversary hearing to make the determination of probable cause, whatever the standard. The question is reduced to how much process an arrestee is due before he or she can be subjected to extended pretrial detention.

A. The Reasoning of the Gerstein *Court: Due Process Adversary Proceedings Are Not Necessary for Post-Arrest Detention*

The *Gerstein* Court stated that "adversary safeguards are not essential for the probable cause determination required by the fourth amendment" where the sole issue is "whether there is probable cause for detaining the arrested person pending further proceedings."[50] The Court justified its conclusion by stating that since the standard is the same as that required for arrest, "ordinarily there is no need for fur-

49. An arrest warrant is issued only when a judicial officer determines the existence of probable cause to arrest, *see* WASH. JUSTICE CT. (CRIM.) R. 2.02(a), or when an indictment is found or an information filed, *see* WASH. SUPER. CT. (CRIM.) R. 2.2(a). An accused may also be arrested after indictment by a grand jury, for such indictment itself establishes probable cause. *See* Giordenello v. United States, 357 U.S. 480, 487 (1958), where the Court stated that "[a] warrant of arrest can be based upon an indictment because the grand jury's determination that probable cause existed for the indictment also establishes that element for the purpose of issuing a warrant for the apprehension of the person so charged. . . ."; and Beavers v. Henkel, 194 U.S. 73, 85 (1904), where the Court stated that "an indictment . . . should be accepted everywhere through the United States as at least *prima facie* evidence of the existence of probable cause." An arrest without a warrant is valid "only if for a crime committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe defendant guilty." Johnson v. United States, 333 U.S. 10, 15 (1948).

50. 420 U.S. at 120.

ther investigation before the probable cause determination can be made."[51] The Court added that "[p]resumably, whomever the police arrest they must arrest on 'probable cause.' "[52] This justification for denying an adversary hearing is inadequate for two reasons. First, as argued in Part II, the standard should not be merely probable cause to arrest.[53] Second, as the Court itself recognized in *Stanley v. Illinois*, even though "procedure by presumption" may be easier and cheaper than individualized determination, it cannot be tolerated where an important interest hangs in the balance;[54] this concept should apply whether that interest be continued freedom in the arrestee's case or continued custody of one's child as in *Stanley*.

The Court also justified the denial of adversary safeguards by stating that the consequences of the probable cause determination were less serious than those stemming from a full preliminary hearing as provided for by the procedures of some states.[55] This justification, however, is inadequate because the practical result in the two instances is the same: the accused is held for trial. The *Gerstein* Court should have either allowed room for a subsequent case dealing with the fourteenth amendment issues (instead of indulging in dicta showing their disapproval of such a future holding)[56] or accepted the arrestees' arguments based on the fourteenth amendment and used the *Gerstein* case as an opportunity to outline the proper procedure.

B. *Due Process Adversary Proceedings Are Necessary for Post-Arrest Detention*

Whether fourteenth amendment due process applies to a given procedure depends on the extent to which an individual may be condemned to "suffer a grievous loss."[57] For procedural protection to be

51. *Id.* n.21.
52. *Id.*
53. *See* notes 35–42 and accompanying text *supra*.
54. 405 U.S. 645, 656–57 (1972).
55. 420 U.S. at 122–23. The consequences of a more complete preliminary hearing are the solidification of issues and testimony and the determination of whether the state is justified in charging the accused. *See* Part III of the *Gerstein* Court's opinion. See Coleman v. Alabama, 399 U.S. 1 (1970), for a description of a state-afforded full preliminary hearing and for the Court's treatment of it.
56. *See* 420 U.S. at 126–27 (Stewart, J., concurring).
57. *See, e.g.*, Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (organization brought suit to have name removed from list of communist associations); Goldberg v. Kelly, 397 U.S. 254, 263 (1970) (deprivation of welfare benefits); Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (parole revocation).

afforded, the individual's interests must fall within the language and spirit of the fourteenth amendment: "nor shall any State deprive any person of life, liberty, or property without due process of law . . . ."[58]

Keeping in mind the distinction between initial arrest and pretrial detention discussed in Part II, it is apparent that the requirements of due process should apply at the detention stage. The loss an accused suffers by virtue of being denied a post-arrest hearing is indeed grievous. First, an arrestee is deprived of liberty[59] in that he or she might spend an extended period of time in jail awaiting trial.[60] Liberty also encompasses the protection of an individual's "good name, reputation, honor or integrity," and when this interest is threatened by government action toward an individual, notice and opportunity to be heard are essential.[61] Second, the arrestee might be subjected to an unnecessary prosecution and trial because the charges are unfounded or the detention illegal. A post-arrest hearing would give the accused an opportunity to establish these facts.[62] Third, pretrial detention

58. U.S. CONST. amend. XIV, § 1. *See* Fuentes v. Shevin, 407 U.S. 67 (1972) (procedure for replevin held to violate due process), where the Court stated: "The right to a prior hearing, of course, attaches only to the deprivation of an interest encompassed within the Fourteenth Amendment's protection." *Id.* at 84.

59. Even if bail is available, the arrestee may nevertheless suffer financial hardship. In one instance a suspected felon was arrested, jailed, and bail set at $10,000. After bond was set, the arrestee paid $700 to a bail bondsman to meet bail. Although the prosecutor subsequently determined at arraignment that sufficient evidence to charge was lacking, the $700 paid to the bail bondsman was not recoverable. Interview with Larry Lund, Law Reform Attorney for Seattle-King County Public Defender Office in Seattle, Washington, Sept. 10, 1975.

60. This deprivation may take the form of actual incarceration or conditions in release. *See* note 46 *supra*. The California Supreme Court outlined the post-arrest procedure required by *Gerstein* in the case of arrested misdemeanants in *In re* Walters, 543 P.2d 607, 125 Cal. Rptr. 239 (1975). Regarding bail the court stated: "As the posting of bail may impose an unwarranted burden on an accused if probable cause to detain is lacking, the accused is entitled to have that determination made prior to electing to post or not to post bail." 543 P.2d at 616, 126 Cal. Rptr. at 248.

61. *See* Wisconsin v. Constantineau, 400 U.S. 433, 437 (1970); Goss v. Lopez, 419 U.S. 565, 574 (1975).

62. For the proposition that the preliminary hearing serves the purpose of eliminating cases based on unfounded charges see Wells v. State, 234 F. Supp. 467 (S.D. Cal. 1964); People v. White, 18 Misc. 2d 56, 188 N.Y.S.2d 585 (1959). For the proposition that the preliminary hearing is an effective mechanism for determining the legality of detention, see Anderson, *The Preliminary Hearing: Better Alternatives or More of the Same?*, 35 MO. L. REV. 281, 291 (1970). *See also* Note, *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, 83 YALE L.J. 771 (1974), where the author formulates two conceptual models of the preliminary examination, the "backward looking" and the "forward looking." The first model is concerned primarily with legality of arrest and validity of detention of the arrested person; the second with whether there is sufficient probability of conviction to warrant further proceedings.

The underlying protective purpose of the preliminary examination formed the basis

without a preliminary hearing may prejudice the accused's preparation for his defense. A hearing would inform the accused of the details of the charge against him, thereby acting as a discovery device and operating to fix the testimony of witnesses and set the basis for their impeachment.[63] Fourth, pretrial detention of the accused may prejudice the disposition of the case at trial. Studies have established a relationship between pretrial detention and unfavorable sentencing.[64]

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of the plaintiffs' complaint in *Gerstein*. It was plaintiffs' view that the historic reason for the preliminary hearing was to "prevent hasty, malicious, improvident and oppressive prosecutions, to protect the person charged from open and public accusations of crime. . . ." Brief for Respondents at 19, Gerstein v. Pugh, 420 U.S. 103 (1975), *quoting* Thies v. State, 178 Wis. 98, 189 N.W. 539 (1922).

63. This procedure was examined by the Supreme Court in Coleman v. Alabama. 399 U.S. 1 (1969), holding that if an Alabama preliminary hearing were determined to be a "critical stage" of the state's criminal process, defendant would be entitled to representation by counsel. In support of its holding the Court stated that the presence of counsel at the preliminary hearing was "essential to protect the indigent accused against erroneous or improper prosecution." *Id.* at 9. The Court indicated that discovery and preparation of the defense were two vital functions counsel should perform.

The importance of the discovery function in the pretrial stage is recognized by Washington in its omnibus hearing procedure. WASH. SUPER. CT. (CRIM.) R. 4.5(a) provides for an omnibus hearing when a plea of not guilty is entered. One commentator notes:

> [The omnibus hearing] eliminates unnecessary motion practice and effectuates the discovery proces [*sic*]. Furthermore, the omnibus hearing allows the court promptly to dispose of latent constitutional issues and affords the defendant the opportunity to make an informed decision as to his plea.

Clark, *The Omnibus Hearing in State and Federal Courts*, 59 CORNELL L. REV. 761, 764 (1974). *See also* ABA STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL § 5.3 (1970).

64. The *Gerstein* Court held that because of its limited function and nonadversary character, the probable cause determination was not a "critical stage" of prosecution which would entitle the accused to appointment of counsel. The Court observed that "critical stages" are those pretrial procedures which have the potential to impair a defense on the merits if the accused were required to proceed without counsel. 420 U.S. at 122. For a well-reasoned attack on the Court's analysis of the critical stage issue, see Note, 3 WESTERN ST. L. REV. 134 (1975).

The Court's conclusion that pretrial custody does not present a high probability of substantial harm to a defense appears unfounded. Statistics on the relationship between pretrial detention and unfavorable sentencing indicate that suspects detained in jail before trial are sentenced to prison almost four times more often than those released on bail. Persons accused and held in pretrial custody are convicted almost twice as often as those released prior to trial. The following table illustrates the relationship between pretrial detention and unfavorable sentencing:

Disposition	Released On Bail	Detained In Jail
Sentenced to prison	17%	64%
Convicted w/o prison sentence	36%	9%
Not Convicted (Acquittal, dismissal or discharge on own recognizance)	47%	27%

While an individual's post-arrest hearing may not necessarily result in a finding of no probable cause to charge (and thereby require dismissal), such a hearing would be more effective than the cursory bail hearing in offering the individual a chance to be released prior to trial on his or her own recognizance.[65]

It is apparent, then, that the accused has a substantial interest in a post-arrest hearing. Once it has been determined that the due process framework applies, the next question is the nature of the hearing to be afforded, for the due process concept is flexible and calls only for such procedural protection as each particular situation demands.[66]

C. *The Nature of the Due Process Adversary Proceeding*

The Supreme Court has stated that "[i]n almost every setting where important decisions turn on questions of fact, due process re-

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This table was compiled by Rankin and appears in her article *The Effect of Pretrial Detention*, 39 N.Y.U.L. REV. 641, 642 (1964). The table also appears in Foote, *The Coming Constitutional Crisis in Bail: Part II*, 113 U. PA. L. REV. 1125, 1149 (1965). The fact that there are correlations between pretrial detention and subsequent unfavorable sentencing does not conclusively establish a causal relationship. It may show that dangerous or habitual offenders are more likely to be both detained prior to trial and convicted. However, Rankin's study represents the most thorough effort to control variables which might affect more severe dispositions. Such factors as prior arrest record, the amount of bail (both indicators of dangerousness) and representation by public or private counsel (possibility of differential representation effectiveness) were held constant. Her report concluded: "The results as they now stand, however, do add strong support to the argument that pretrial detention increases a defendant's chance of receiving a prison sentence." Rankin, *supra*, at 655. *See also* Comment, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489 (1966); Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pretrial Parole*, 38 N.Y.U.L. REV. 67, 87–88 (1963).

65. The bail hearing after arrest does not give an accused the chance to vindicate his fourteenth amendment due process rights because in such hearing the magistrate does not consider whether there is sufficient evidence to charge the person. The only issue at the bail hearing is the likelihood that the accused will appear for trial. WASH. JUSTICE CT. (CRIM.) R. 2.09 provides:

> (a) Any defendant charged with an offense shall at his first court appearance be ordered released on his personal recognizance pending trial unless the court determines that such recognizance will not reasonably assure his appearance . . . .
> (b) In determining which conditions of release will reasonably assure the defendant's appearance, the court shall, on the available information, consider the relevant facts including: the length and character of the defendant's residence in the community; his employment status and history and financial conditions; his family ties and relationships; his reputation, character and mental condition; his history of response to legal process, his prior criminal record; the willingness of responsible members of the community to vouch for the defendant's reliability and assist him in appearing in court; the nature of the charge; and any other factors indicating the defendant's ties to the community.

The bail hearing fails to insure the individual's fourteenth amendment rights because it does not give him the due process opportunity to rebut the prosecutor's assessment

quires an opportunity to confront and cross-examine adverse witnesses."[67] This opportunity is especially important where an arrest may have been based on incorrect or misleading factual premises.[68] The important decision to incarcerate an individual pending trial should not be made without giving that person an opportunity to establish the true circumstances of the arrest. In *Wisconsin v. Constantineau*[69] the Court emphasized that the individual who suffered a deprivation of liberty was not afforded an opportunity to defend herself. This case involved a Wisconsin statute that permitted designated persons to forbid the sale or gift of liquor to one who had exhibited certain traits due to excessive drinking (*i.e.*, becoming "dangerous to the peace") by posting notices concerning the individual around the community. The Court held that although the state had the power to "post" against an individual, the posting was such a stigma or badge of disgrace that procedural due process required she be given an opportunity to be heard.[70] This opportunity to defend oneself against charges was also stressed in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,[71] where Justice Powell stated that the most

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of the facts preceding arrest. *See In re* Walters, 543 P.2d 607, 125 Cal. Rptr. 239 (1975), where the California Supreme Court applied *Gerstein* to all misdemeanor post-arrest detentions where defendant was not released prior to arraignment, or at time of arraignment, or did not waive the procedure. Regarding bail, the court stated that "[t]he mere fixing of bail does not satisfy *Gerstein*, of course." 543 P.2d at 616, 126 Cal. Rptr. at 248.

66. *See* Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961) (cafeteria worker was refused permission to work on military premises due to failure to meet security requirements), wherein the Court stated:

> The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation . . . . "'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."

Id. at 895, *quoting* Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 162–63 (1951). *See also* Morrissey v. Brewer, 408 U.S. at 481.

67. Goldberg v. Kelly, 397 U.S. 254, 269 (1970) (termination of welfare benefits).

68. *See* Goldberg v. Kelly, *id.*, determining the proper procedure for terminating welfare benefits. In *Goldberg* the court stated that an effective opportunity to defend by confronting adverse witnesses and presenting arguments orally was important in cases where welfare recipients challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of the particular case. *Id.* at 268.

69. 400 U.S. 433 (1970).

70. The Court stated:

> This appellee was not afforded a chance to defend herself. She may have been the victim of an official's caprice. Only when the whole proceedings leading to a pinning of an unsavory label on a person are aired can oppressive results be prevented.

Id. at 437.

71. 419 U.S. 601 (1975).

compelling deficiency in the garnishment procedure under scrutiny was the absence of any provision enabling the debtor to obtain prompt dissolution of the garnishment upon a showing of facts contrary to the creditor's affidavit: "Georgia law does not authorize the alleged debtor to question facts contained in the garnishor's affidavit or to make contrary submission of fact indicating that the garnishor's apprehension of possible loss is misconceived or is insufficient to warrant the . . . garnishment."[72] Because of this deficiency, Justice Powell felt that the statutory provisions failed to afford fairness in their accommodation of the respective interests of creditor and debtor.

Similarly, the important decision to infringe on an individual's liberty by imposing the criminal process should not be made without affording the individual an opportunity to establish the true circumstances of an arrest. It is here that the distinction between probable cause to arrest and probable cause to incarcerate (charge) becomes most clear. Although it is firmly established that the policeman has the power to arrest an individual without inquiring into the accused's side of the story, the circumstances resulting in arrest may be so misleading that the arrestee's mere explanation would result in the reasonable conclusion that there was insufficient evidence to charge the arrestee. Incarceration of the individual should occur only after such inquiry is made.

D. Due Process Adversary Proceedings Are Required for Parole Revocation

In *Morrissey v. Brewer*[73] the Court weighed the interests of the state against those of a parolee and determined that the parolee should be afforded a factual inquiry into the reason for his detention and a determination of whether there existed probable cause to detain pending future parole revocation proceedings. The petitioner in *Morrissey* had been convicted and sentenced to seven years confinement but was released on parole. Seven months after his release he was arrested for alleged violations of the terms of his parole and was placed in the county jail. On the basis of his parole officer's report, petitioner's parole was revoked, and he was returned to the penitentiary. Petitioner

72. *Id.* at 726 n.6 (Powell, J., concurring in the judgment).
73. 408 U.S. 471 (1972).

challenged this procedure, alleging that it violated the fourteenth amendment due process clause because he had not been afforded a hearing.[74]

In its analysis the *Morrissey* Court distinguished a preliminary hearing to determine probable cause to hold the parolee from a subsequent parole revocation proceeding, holding, *inter alia*, that due process requires a preliminary hearing by an impartial hearing officer to determine whether reasonable grounds exist for detaining the parolee pending revocation hearing. The Court concluded that termination of parole inflicts a "grievous loss" on the individual[75] and that while there is an overwhelming state interest in taking into custody a parolee suspected of violating his parole conditions, there is no state interest in revoking parole without procedural guarantees.

The Court held that the parolee should be allowed to present relevant evidence and witnesses and to question adverse informants at the hearing. If after hearing the evidence the officer determined that sufficient grounds existed, the parolee could be detained pending the revocation proceeding.[76] Thus, the preliminary hearing deemed necessary by the Court was in the nature of an adversary hearing.

The *Morrissey* rationale, which protects parolees' conditional freedom from incarceration, should be applied to persons threatened with deprivation of their unconditional liberty. The issues involved in *Morrissey* and *Gerstein* are, in the broadest sense, the same: whether probable cause exists to detain a person pending further proceedings. The results reached in the two cases differ because of the different constitutional bases relied upon by the Court. The *Morrissey* Court based its decision on due process and held that the detention issue should be resolved by inquiry into, and verification of, the facts alleged by the state.[77] The *Gerstein* Court rejected the *Morrissey* parallel and rested its decision on the fourth amendment, requiring only that the issue of continued detention be resolved according to the ar-

74. *Id.* at 472–73.
75. *Id.* at 482.
76. The parole revocation process has two stages. At the preliminary hearing a determination must be made that there is probable cause to believe the parolee violated parole. The actual revocation hearing follows where a final evaluation of contested facts and a decision whether revocation is warranted must be made. Due process procedural safeguards are also required at the subsequent revocation hearing. The parolee must have an opportunity to show that parole conditions were not violated, or if they were, that the circumstances do not warrant revocation. *See* 408 U.S. at 485–88.
77. *Id.* at 484.

rest standard and finding no need for "further investigation" into the facts.[78]

The Court did not require a specific procedure for the probable cause determination; it stated merely that the nature of the determination "will be shaped to accord with a state's pretrial procedure viewed as a whole."[79] It suggested that the determination of probable cause to arrest as well as to detain could be made at the accused's first appearance before a judicial officer, or on affidavits or testimony in the presence of the accused.[80] Obviously, such procedures would not be as protective of the accused's interests as would a *Morrissey*-type hearing or a full preliminary hearing with representation by counsel.

Consequently, in two similar situations—detention pending parole revocation and post-arrest detention—a person may be deprived of liberty. In the first, deprivation is deemed serious enough for due pro-

78. 420 U.S. at 120 n.21.

79. *Id.* at 123.

80. *Id.* at 123--24. The City of Seattle, in response to a *Gerstein*-based suit in federal court brought by the Seattle-King County Public Defenders Association (Fultz v. Waldt, No. C75–466S (Wash. Super. Ct., King County, Nov. 19, 1975) has set up a new pretrial procedure. The procedure was agreed upon out of court by the Public Defender and the City of Seattle. Beginning August 11, 1975, the procedure required that each arrestee appear before a judicial officer, with an attorney present, within 24 hours after arrest. The police report containing circumstances surrounding the individual's arrest will be used to determine if probable cause for the arrest existed. This new procedure is viewed as being most useful in that the attorney will have an opportunity to argue that the arrestee should be released on personal recognizance (without bail). In the period from August 18, 1975 to February 17, 1976, 70 cases out of 589 cases on the calendar were argued on the basis of lack of probable cause, and of those 70, 23 arrestees were released for lack of probable cause. In the same period, 220 of the 589 arrestees were released on personal recognizance. Interview with Larry Lund, Law Reform Attorney for Seattle-King County Public Defender Officer in Seattle, Washington, February 17, 1976.

King County prosecutors are responding to the requirements of *Gerstein* by attaching an extra affidavit to the information or complaint (if in Justice Court) upon filing. Interview with David Boerner, Chief Criminal Deputy Prosecuting Attorney, King County in Seattle, Washington, Feb. 20, 1976. Mr. Boerner stated that after nearly a year of *Gerstein* procedure probable cause has been found lacking in no case.

An amendment to WASH. SUPER. CT. (CRIM.) R. 2.2(a) also has been proposed to comply with *Gerstein*:

> When an information is filed a warrant shall issue on an affidavit or affidavits or sworn testimony establishing the grounds for issuing the warrant. If the judge finds that probable cause for the issuance of a warrant exists, he shall issue a warrant. The finding of probable cause shall be based on evidence, which may be hearsay in whole or in part provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is factual basis for the information furnished. Before ruling on a request for a warrant the court may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce. The warrant shall be directed to any peace officer and may be served at any time.

Washington Supreme Court, Proposed Court Rules, Sept. 1975, at 10. As of February 20, 1976, the rule had not yet been approved by the state supreme court.

cess to require an adversary proceeding and verification of alleged facts; in the second, a lesser degree of protection is afforded, and an accused may be incarcerated as the result of an informal proceeding not even requiring his presence.

The Supreme Court sought to distinguish *Gerstein* from *Morrissey* by focusing on the differences between a parole revocation hearing and a criminal trial, and by emphasizing the evidence-preserving aspects of a preliminary hearing in the parole context. The Court observed that revocation proceedings are more prone to initial error than is the "more formal criminal process, where violations are defined by statute and the prosecutor has a professional duty not to charge a suspect with a crime unless he is satisfied of probable cause."[81] These reasons offered by the Court do not seem adequate to justify denying an arrestee the chance to defend himself and avoid pretrial incarceration, for the interests of the parolee and the arrestee are the same, *viz.*, avoiding detention pending later proceedings. To state that the criminal process is more accurate because prosecutors do not charge without probable cause seems to be embracing the theory of "procedure by presumption,"[82] and does not leave room for judging each case on its facts. To state that the criminal process is more accurate because violations are defined by statute is short-sighted. While it is true that a parolee may be given the vague instruction to stay out of "areas of prostitution," he or she may also be specifically warned not to carry a weapon or associate with specific people. In contrast, a nonparolee may be arrested for such crimes as vagrancy, loitering, prowling, disturbing the peace, or soliciting, all defined at least as vaguely as some parole conditions.[83]

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81. 420 U.S. at 122 n.22, *citing* ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7–103(A).

82. *See* text accompanying note 54 *supra*.

83. *See* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), where the City's vagrancy ordinance was held void for vagueness in that the ordinance placed "unfettered discretion . . . in the hands of the . . . police," *id.* at 168, and permits an arbitrary and discriminatory enforcement of the law, *id.* at 170. In *Papachristou* the Court stated:

> A presumption that people who might walk or loaf or loiter or stroll or frequent houses where liquor is sold, or who are supported by their wives or who look suspicious to the police are to become future criminals is too precarious for a rule of law. The implicit presumption in these generalized vagrancy standards—that crime is being nipped in the bud—is too extravagant to deserve extended treatment.

Id. at 171. *See also* Bellevue v. Miller, 85 Wn. 2d 539, 536 P.2d 603 (1975), where the Washington Supreme Court held a prowling ordinance unconstitutionally vague: "A determination of whether particular activity manifests an unlawful purpose or

Although it is undoubtedly true that a parolee's preliminary hearing to determine probable cause serves the purpose of gathering and preserving live testimony for a subsequent revocation proceeding, this distinction is also less than convincing. The preliminary hearing could also serve the evidence-gathering purpose for the *Gerstein* accused. More important, the accused's primary interest, as well as the parolee's, is to avoid pretrial detention. The attempt to distinguish *Morrissey* fails because of the basic flaw in reasoning evidenced by the Court's choice of constitutional protections—that is, a narrow application of fourth amendment arrest doctrine, rather than the more flexible analysis of the fourteenth amendment due process clause.

In *Gerstein* the Court should have engaged in the balancing procedure typical of fourteenth amendment due process analysis. It should have weighed the individual's interest in avoiding pretrial detention against the state's interest in incarcerating without procedural safeguards. Instead, the Court merely stated: "That standard—probable cause to believe the suspect has committed a crime—traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony," and the Court has approved these informal modes of proof.[84]

E. Due Process Adversary Proceedings Are Required for Welfare Benefit Revocation

The Supreme Court decision in *Goldberg v. Kelly*[85] also lends support to the application of a fourteenth amendment due process balancing analysis to the *Gerstein* situation. In *Goldberg*, New York residents receiving welfare benefits alleged that their aid benefits were about to be terminated without prior notice and hearing and that consequently they were being denied due process. The Court held that the due process framework applied to termination of welfare benefits and that the interest of the recipient in receiving uninterrupted aid outweighed the increase in the state's administrative and fiscal burdens.

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creates alarm is entirely dependent upon a police officer's opinion. . . . Such extravagant police discretion is plainly improper." 85 Wn. 2d at 544–45, 536 P.2d at 607.

84. 420 U.S. at 120. To support this observation, the Court quoted from Brinegar v. United States, 338 U.S. 160 (1949), a fourth amendment search and seizure case dealing with a motion to suppress evidence.

85. 397 U.S. 254 (1970).

As to what procedural safeguards were due them, the Court again, as in *Morrissey*, required an evidentiary hearing before the deprivation of benefits, in addition to the full administrative review accorded in the statutory post-termination hearing.[86] The Court held that due process requires that a welfare recipient be given adequate notice of the termination proceeding, an opportunity to present evidence and to confront and cross-examine witnesses, the right to retain counsel, and an impartial decisionmaker who must state the reasons for his determination and indicate which evidence he relied upon.[87]

But for their outcomes, the *Gerstein*, *Morrissey*, and *Goldberg* cases are quite similar. The parolee in *Morrissey* and the welfare recipient in *Goldberg* were each afforded a constitutionally guaranteed opportunity to immediately halt the procedure that was threatening their respective benefits, conditional freedom and monetary aid. This opportunity was held to have been required by the fourteenth amendment despite the fact that in each case a fully developed adversary procedure followed. It was deemed necessary because the immediate deprivation suffered by the individual was considered to outweigh the state's interest in avoiding additional hearings. Certainly the presumptively innocent *Gerstein* arrestee had as much interest in preserving his immediate freedom as had a parolee in retaining his conditional freedom or a welfare recipient in receiving a living allowance. Had it applied a fourteenth amendment due process analysis, the Court would have been obliged to require a post-arrest hearing for the *Gerstein* arrestee.

F. Due Process Adversary Proceedings Are Required for Taking of Debtors' Property

It is also pertinent to consider the Court's recent treatment of cases involving deprivation of property by garnishment, replevin, or seques-

86. The Court stated:
> We bear in mind that the statutory "fair hearing" will provide the recipient with a full administrative review. Accordingly, the pre-termination hearing has one function only: to produce an initial determination of the validity of the welfare department's grounds for discontinuance of payments in order to protect a recipient against an erroneous termination of his benefits.

Id. at 266–67.

87. *Id.* at 267–71.

tration. The cases of *Sniadach v. Family Finance Corp.*,[88] *Fuentes v. Shevin*,[89] *Mitchell v. W.T. Grant, Co.*,[90] and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[91] all dealt with the amount of due process afforded a debtor before deprivation of property by a creditor. Regarding these cases, one commentator has concluded that when both a secured creditor and a debtor have interests in the same goods, balancing their rights would result in requiring a procedure similar to that upheld in *Mitchell*.[92] The *Mitchell* case requires that the creditor obtain a writ issued by a judge upon a clear showing of entitlement and a demonstration that the debtor has power to conceal or dispose of the property prior to the sequestration. After sequestration of the property by the court, the defendant debtor has the opportunity to immediately file a motion to dissolve the writ.[93] In this manner the statutory procedure in *Mitchell* constitutionally accommodated the conflicting interests of the creditor and debtor. In contrast, where the debtor has *full* legal title to the property and garnishment is sought by an unsecured creditor, *Sniadach*, and arguably *Di-Chem*,[94] require the opportunity for an adversary hearing prior to garnishment.[95]

88. 395 U.S. 337 (1969) (Wisconsin statute permitting prejudgment wage garnishment without notice or opportunity for hearing held unconstitutional as violative of due process).

89. 407 U.S. 67 (1972) (replevin statutes providing for issuance, upon secured party's *ex parte* application, of a writ authorizing seizure by state agents of alleged debtor's property violative of due process).

90. 416 U.S. 600 (1974) (sequestration constitutional without prior notice and hearing where writ issues only on clear showing of entitlement and debtor could immediately request dissolution of the writ).

91. 419 U.S. 601 (1975) (prejudgment garnishment by unsecured creditor of corporation's bank account without prior notice and hearing violative of due process).

92. In Comment, *Justice White's Chemistry: The Mitchellization of Fuentes*, 50 WASH. L. REV. 901 (1975), the author states:

> The *Mitchell* Court introduced the use of a balancing test only in the context of secured transactions, where there are mutual property interests in goods. Where, as in the case of unsecured transactions, the debtor has "full legal title" to the property in question, a balancing approach is simply inappropriate.
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> . . . .
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> Read together, *Di-Chem*, *Fuentes* and *Sniadach* suggest that states will be required to provide for notice and opportunity for an adversary hearing prior to prejudgment garnishment (and by analogy attachment) by an unsecured creditor. In the context of secured transactions *Mitchell* remains controlling even after *Di-Chem*. Should a state fail to provide the full range of safeguards outlined in *Mitchell* and reiterated in *Di-Chem*'s discussion of *Mitchell*, it would then apparently be required to comply with the stricter *Fuentes* guidelines governing judicial repossessions by unsecured creditors.

Id. at 908–09, 910 (footnotes omitted).

93. LA. CODE CIV. PRO. art. 3506 (1960). Dissolution of the writ must be ordered unless the creditor proves the grounds on which the writ was issued.

94. The Court's reliance on Fuentes v. Shevin indicates that notice and an opportunity for hearing is still required prior to garnishment. 419 U.S. at 605–06. The

Applying this analysis to the arrestee's situation results in the discovery that property rights are better protected than an individual's right to freedom.[96] Analogizing from *Mitchell*, one can conclude that since the individual and the state both have an interest in the freedom of the individual being held pending trial the arrestee should be entitled to an immediate hearing after seizure and to dissolution of the arrest absent proof by the prosecution of the grounds on which it was made.[97]

In considering this analogy it is again important to note the distinction between initial seizure and continuing detention (of property or person). Justice Powell, concurring in *Di-Chem*, reasoned from the Court's decision in *Mitchell* that the most compelling deficiency in the procedure under scrutiny in *Di-Chem* was the failure to provide a "prompt and adequate post-garnishment hearing."[98] He noted that garnishment may impose serious hardships on the debtor and therefore the state procedure must include a provision enabling the debtor to obtain prompt dissolution of garnishment upon an appropriate showing of fact.[99] Although the Court may ultimately conclude in garnishment cases, as it did in the context of sequestration in *Mitchell*, that the *initial* seizure of property may, in some circumstances, be made without an adversary hearing preceding it, there must be provision for the individual to have an immediate opportunity to reverse the process once begun.[100] It is illogical to conclude that a re-

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Court, however, carefully framed its analysis in terms of "an early hearing" instead of "pregarnishment" hearing, leaving room for a later determination that an immediate post-garnishment hearing would qualify as "an early hearing."

95. For a further discussion of the constitutional framework constructed by the Court for the prejudgment accommodation of the conflicting rights of creditors and debtors see Comment, *supra* note 92.

96. This also appears to have been Justice Stewart's point when he remarked in his *Gerstein* concurrence:

> I see no need in this case for the Court to say that the Constitution extends less procedural protection to an imprisoned human being than is required to test the propriety of garnisheeing a commercial bank account, . . . the custody of a refrigerator, . . . the temporary suspension of a public school student, . . . or the suspension of a driver's license . . . .

420 U.S. at 127.

97. *See Di-Chem*, 419 U.S. at 607, where the Court distinguishes *Mitchell* by noting that "[t]he Louisiana law [involved in *Mitchell*] . . . expressly entitled the debtor to an immediate hearing after seizure and to dissolution of the writ absent proof by the creditor on the grounds on which the writ was issued."

98. 419 U.S. at 613.

99. *Id.* (Powell, J., concurring in the judgment).

100. This was the position taken by Justice Powell in *Di-Chem*. He further noted that except in cases where garnishment would drive the unfortunate debtor "to the wall," pregarnishment notice and a prior hearing are not constitutionally mandated.

frigerator receives more protection than an incarcerated individual. In order to protect his or her property, an individual is given either the opportunity before seizure to be heard at an adversary hearing, or an opportunity after seizure to immediately reverse the process. The arrestee deprived of his freedom, however, is given neither.

IV. CONCLUSION

The *Gerstein* Court failed to determine that the due process clause of the fourteenth amendment requires a judicially-supervised adversary hearing immediately after arrest. This hearing would ensure the accused an opportunity to be heard at the earliest possible time and provide an opportunity for the accused's interest in personal freedom to be balanced against the state's interest in his extended post-arrest detention. A criminal prosecution should therefore proceed in three stages: arrest, pretrial, and trial. At each of these stages the prosecution's burden would increase. In the first, the prosecution must show probable cause to arrest; in the second, a higher standard of probable cause to hold for trial (probable cause to charge) should be met; and, in the third, the prosecution must prove the state's case beyond a reasonable doubt. Only through the adoption of this procedure will arrestees' constitutional rights be fully protected.

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419 U.S. at 610–11. The majority, however, whether motivated by *stare decisis* or otherwise, made no attempt to relegate *Sniadach* to the narrow factual setting of prejudgment *wage* garnishment. After relying on *Fuentes* (requiring pre-replevin notice and an opportunity for hearing), the Court stated: "The Georgia [garnishment] statute is vulnerable for the *same* reasons." *Id.* at 606 (emphasis added).