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Notes and Comments: Pretrial Detention in Maryland: The Aftermath of Gerstein v. Pugh

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PRETRIAL DETENTION IN MARYLAND: THE AFTERMATH OF *GERSTEIN V. PUGH*

In Gerstein v. Pugh *the United States Supreme Court held that although a suspect arrested without a warrant is entitled to a judicial determination of probable cause to detain, the procedure for such a determination is not a "critical stage" of the prosecution. The author examines the implementation of the* Gerstein *decision in Maryland and concludes that the present procedures are inadequate to safeguard Fourth Amendment rights of an accused.*

A deep-seated tradition in the American legal system is its repugnance toward arbitrary arrest.[1] The Fourth Amendment of the United States Constitution[2] expressly forbids it and similar provisions are contained in most of the state constitutions.[3] Nevertheless, pretrial

1. The American attitude is founded upon precedents set by the British courts. Curtis Case, 168 Eng. Rep. 67 (1756) (killing an arresting officer termed justifiable homicide due to officer's failure to adequately announce his mission prior to breaking into arrestee's home); Semayne's Case, 77 Eng. Rep. 194 (1604) (the sheriff may break into a suspect's dwelling to arrest him, but must first signify to the suspect the reason for the arrest); *see* Boyd v. United States, 116 U.S. 616 (1886) (the Fourth Amendment implemented by the self-incrimination clause of the Fifth Amendment, forbids the federal government from convicting a man of a crime by using testimony or papers obtained from him by arbitrary searches and seizures); Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541 (1924); Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361 (1921).
2. U.S. CONST. amend. IV, reads:
   > The right of the people *to be secure in their persons*, houses, papers, and effects, *against unreasonable* searches and *seizures*, shall not be violated, and no Warrants shall issue, but upon *probable cause*, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized [emphasis added].

   The Fourth Amendment covers something other than the form of the warrant, creating a *zone of privacy* that no government official may enter, Katz v. United States, 389 U.S. 347, 356-58 (1967); Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 315 (1967) (dissenting opinion) and applies to arrest as well as search warrants; United States v. Watson, 44 U.S.L.W. 4112, 4117 (U.S. Jan. 26, 1976) (No. 74-538) (concurring opinion); Beck v. Ohio, 379 U.S. 89, 96 (1964); Ker v. California, 374 U.S. 23, 32 (1963); Giordenello v. United States, 357 U.S. 480, 485-86 (1958); *Ex parte* Burford, 7 U.S. (3 Cranch) 448 (1806).
3. MD. DEC. OF RIGHTS, art. 26, provides:
   > That *all warrants, without oath or affirmation*, to search suspected places, or *to seize any person* or property, *are grievous and oppressive*; and *all general warrants* to search suspected places, or *to apprehend suspected persons, without naming or describing* the place, or *the person in special, are illegal and ought not to be granted* [emphasis added].

   This article is derived verbatim from article 28 of the original Declaration of Rights, which was embodied in the Constitution of 1776. Despite the fact that the Fourth Amendment of the United States Constitution was adopted several years later, both have the same historical background. Givner v. State, 210 Md. 484, 124 A.2d 764 (1956); Salmon v. State, 2 Md. App. 513, 235 A.2d 758 (1967). *See also*, N.C. DEC. OF RIGHTS, art. 11 (1776); PA. CONST., art. 10 (1776); VA. DEC. OF RIGHTS, art 1, § 10 (1776); MASS. CONST., art. 14 (1780); N.H. CONST., art. 19 (1784); CALIF. DEC. OF RIGHTS, art. 1, § 19 (1849).

criminal procedures in many jurisdictions have tolerated the incarceration of the criminally accused without a determination by a judicial officer of the legality of the detention. Recently, however, the United States Supreme Court, in *Gerstein v. Pugh*,[4] unanimously held that any suspect arrested without a warrant and charged by information must, as a Fourth Amendment right,[5] be afforded a prompt[6] judicial determination of probable cause[7] before pretrial restraint of his liberty is permissable.

4. 420 U.S. 103 (1975).
5. The Fourth Amendment was made applicable to the states through the Due Process Clause of the Fourteenth Amendment. Wolf v. Colorado, 338 U.S. 25, 27-28 (1949).
6. The precise time within which the probable cause determination must be made has not been set by the Supreme Court and the Circuit Courts follow no uniform yardstick. *Cf.* United States v. Johnson, 461 F.2d 285 (10th Cir. 1972) (the existence of probable cause cannot be quantified by counting the number of days that have elapsed between the act in question and the issuance of the warrant). Article 310 of the American Law Institute Model Code of Pre-Arraignment Procedure divides the first appearance into two sessions, when the arrestee is in custody, and recommends that the probable cause hearing be held during the second session within forty-eight hours after arrest., ABA-ALI Model Code of Pre-Arraignment Procedure §§ 310.1(8), and 310.2(2) (1975). The Model Code proposal embodies the concept that while it is imperative that an arrestee be brought before a judicial officer as soon as possible to inform him of his rights, arrange for counsel and consider preliminary release on bail, it is also vital that once counsel is obtained he have an opportunity to argue effectively on behalf of his client that charges be dropped or that the arrestee be released on his own recognizance. *Id.* at Commentary § 310. Currently, notions as to the time within which a probable cause determination must be made vary from one jurisdiction to another. Only a minority of states specify definite time limitations for the probable cause hearing. *Id.* at Appendix I.
7. The concept of probable cause does not lend itself to a rigid definition. In the United States the requirement appears to have originated in Chief Justice Marshall's opinion in the trial of Aaron Burr. United States v. Burr, 25 Fed. Cas. 2, 12 (No. 14692a) (C.C. Va. 1807). The traditional definition is that stated in Beck v. Ohio, 379 U.S. 89, 91 (1964);

> [W]hether at that moment the facts and circumstances within their [the arresting officers] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.

Accord, United States v. Watson, 44 U.S.L.W. 4112, 4114 (U.S. Jan. 26, 1976); Gerstein v. Pugh, 420 U.S. 103, 115 (1975); Spinelli v. United States, 393 U.S. 410, 419 (1969) (only the probability and not a prima facie showing of criminal activity is the standard of probable cause); Henry v. United States, 361 U.S. 98, 100-02 (1959) (the evidence necessary to establish probable cause need not rise to the level required to prove guilt beyond a reasonable doubt); Director General v. Kastenbaum, 263 U.S. 25, 28 (1923) (probable cause is a mixture of questions of law and fact: the truth and existence of the circumstances bearing on the issue being a question of fact, and the determination of whether the facts and circumstances found to exist and to be true constitute probable cause being a question of law); *see, e.g.*, Brinegar v. United States, 338 U.S. 160, 175 (1948); Husty v. United States, 282 U.S. 694, 700-01 (1931); Dumbra v. United States, 268 U.S. 435, 441 (1925); Steele v. United States, 267 U.S. 498, 504-05 (1925); Stacey v. Emery, 97 U.S. 642, 645 (1878); Locke v. United States, 11 U.S. (7 Cranch) 339, 348 (1813); Edwardsen v. State, 243 Md. 131, 135, 220 A.2d 547, 549 (1965); Johnson v. State, 8 Md. App. 187, 191, 259 A.2d 97, 99 (1969);

The rationale behind the probable cause concept and its importance was explained in Brinegar v. United States, 338 U.S. 160, 176 (1949):

> These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. . . . The rule of probable cause is a practical, non-technical conception affording the

In *Gerstein*, the respondents were arrested and imprisoned solely upon the authority of a prosecutor's information and were denied a probable cause hearing subsequent to their arrest.[8] Alleging a constitutional right to a judicial hearing on the issue of probable cause, respondents sought declaratory and injunctive relief by filing a class action against various county officials.[9] After an initial delay while the Florida legislature considered a bill allowing preliminary hearings[10] for persons charged by information, the district court granted the relief sought.[11] The lower court held that a neutral and detached arbiter must promptly determine the existence of probable cause and ordered Dade County officials to submit a plan for providing a preliminary examination in all cases prosecuted by information.[12] On appeal the

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best compromise that has been found for accomodating 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.

8. In Florida, at the time of respondents' arrest, when an accused was charged by information by the State Attorney and arrested, processing of the information did not commence until the arresting officer appeared before an assistant State Attorney and filed his affidavit of facts. Periods ranging from twenty-four hours to two weeks could elapse before the affidavit was filed and processing began. After filing the information twenty-four to seventy-two hours were required to prepare the information for filing with the Clerk of the Criminal Court of Record. The filing of the information foreclosed the suspect's right to a preliminary hearing. *See* State *ex rel.* Hardy v. Blount, 261 So. 2d 172 (Fla. 1972). The only means of obtaining a judicial determination of probable cause was a special statute allowing a preliminary hearing after thirty days, FLA. STAT. ANN. § 907.045 (1973) or arraignment which the District Court found was often delayed a month or more after arrest. Pugh v. Rainwater, 332 F. Supp. 1107, 1110 (S.D. Fla. 1971). It was also the policy and practice of the State Attorney's office to resist any attempt to have a preliminary hearing after any information was filed or an indictment was filed. Brief for Petitioner at 4, Gerstein v. Pugh, 420 U.S. 103 (1975).
9. The named defendants originally included the sheriff, police chiefs, the state attorney, justices of the peace, and judges of the small claims courts. Pugh v. Rainwater, 332 F. Supp. 1107, 1109 (S.D. Fla. 1971). Of the original defendants only Richard Gerstein, State Attorney for Dade County, Florida, petitioned for certiorari. 420 U.S. at 107 n. 8.
10. *Preliminary hearing* is a term of art which generally refers to a probable cause hearing accorded a person charged by information. A preliminary hearing, if held early in the proceedings, is only one method of determining probable cause. This determination may also be incorporated into bail proceedings or the initial appearance. Gerstein v. Pugh, 420 U.S. at 123-24.

    In Maryland the term initial appearance refers to "the defendant's first appearance before a District Court judge or commissioner after he is arrested or summoned." MD. DIST. RULE 702(e).
11. Pugh v. Rainwater, 332 F. Supp. 1107 (S.D. Fla. 1971).
12. The court accepted the "Purdy Plan," submitted by Sheriff E. Wilson Purdy, calling for a judicial determination of probable cause at the initial appearance unless either the accused or the prosecutor was unprepared. In such event the hearing would be held within four days if the accused was in custody or within ten days if he was released pending trial. Committing magistrates were to be available for first appearance hearings on a twenty-four hour, seven day a week basis. The hearing was to be adversary in nature and if no probable cause was found the accused would be discharged. He could not be held to answer to a subsequent charge for the same offense filed by the State Attorney. The defendant could only be so charged upon an indictment by the grand jury returned within thirty days of defendant's discharge. Gerstein v. Pugh, 420 U.S. 103 (1975); Pugh v. Rainwater, 336 F. Supp. 490 (S.D. Fla. 1972). The district court declared certain aspects of the "Purdy Plan" invalid after the Florida Supreme Court issued amended

Fifth Circuit affirmed[13] and State Attorney Gerstein petitioned for review.[14] A five to four majority of the Supreme Court decided that this determination need not be attended by the full panoply of rights applicable to "critical stages"[15] of the prosecution, which normally include an evidentiary hearing, right to counsel, confrontation and cross-examination.[16]

The effect of *Gerstein* is that states, such as Maryland, which customarily grant hearings only to a select few[17] must revise their pretrial procedures. Maryland must now extend to all arrestees at least a cursory hearing examining probable cause to *detain pending trial* regardless of the nature of the crime.[18] A probable cause examination *investigating the merits of scheduling a citizen for trial* in Maryland is still confined to a limited class of arrestees, i.e. felons.[19]

The importance of the *Gerstein* decision is magnified by the prevalence of warrantless arrests in the United States.[20] Although less persuasive evidence is required to justify issuance of a warrant than would justify a warrantless arrest[21] "it is routine [for officers] to make

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rules of criminal procedure. Pugh v. Rainwater, 335 F. Supp. 1286 (S.D. Fla. 1972). Brief for Petitioner at 6-7, Gerstein v. Pugh, 420 U.S. 103 (1975).

13. Pugh v. Rainwater, 483 F.2d 778 (5th Cir. 1975).
14. Gerstein v. Pugh, 414 U.S. 1062 (1973). Although the named respondents had been convicted and their pretrial detention thus ended, the Court ruled that this case belongs to a narrow class of cases in which the termination of a class representative's claim does not moot the claims of unnamed members of the class. Sosna v. Iowa, 419 U.S. 393 (1975) cited by the Court in Gerstein v. Pugh, 420 U.S. at 110 n. 11 (1975); *cf.* Powell v. McCormack, 395 U.S. 486 (1969); Plato v. Roudebush, 397 F. Supp. 1295 (D. Md. 1975).
15. *Critical stage* is that portion of the proceedings in which what transpires is likely to prejudice an ensuing trial. Coleman v. Alabama, 399 U.S. 1 (1970); White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961); *see* DeToro v. Pepersack, 332 F.2d 341 (4th Cir. 1964), *cert. denied*, 379 U.S. 909 (1964); Commonwealth v. Redshaw, 226 Pa. Super. 534, 322 A.2d 92 (1974); Timbers v. State, 2 Md. App. 672, 236 A.2d 756 (1968) (the Maryland initial appearance is not a critical stage since nothing occurs that would restrict the accused's right to trial or affect him adversely at trial).
16. 420 U.S. at 121-22; ABA-ALI Model Code of Pre-Arraignment Procedure, Commentary § 310 (1975).
17. Prior to *Gerstein* only felons were entitled to a probable cause determination. *See* section I, *infra*. Now a determination of probable cause to *detain* is accorded all arrestees during the initial appearance. Administrative Directive to District Court of Maryland dated March 31, 1975.
18. *Id.*
19. Misdemeanants, though currently receiving a determination of probable cause to *detain* pending trial, are denied a determination of probable cause *to continue on to trial. See* section II, *infra*.
20. W. La Fave, Arrest, The Decision to Take a Suspect Into Custody (1965) (Professor LaFave repeatedly notes that arrest by warrant is the exception rather than the rule in modern law enforcement procedure). *See also* State v. Williams, 117 N.J. Super. 372, 285 A.2d 23 (1971) *aff'd* 59 N.J. 535, 284 A.2d 531 (1971) (warrants are rare in the case of narcotics offenses).
21. > Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained. Otherwise, a principal incentive now existing for the procurement of arrest warrants would be destroyed. Wong Sun v. United States, 371 U.S. 471, 479-80 (1963).

arrests without a warrant, and thus without the prior approval of a judicial officer, even though there is adequate opportunity to obtain a warrant.[22] The Supreme Court recently upheld this policy approving warrantless arrests in *United States v. Watson*[23] where it stated:

> [W]e decline to transform this judicial preference [for obtaining a warrant prior to arrest] into a constitutional rule when the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause rather than to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like.[24]

The Court refused to require an officer to obtain a warrant prior to making an arrest even if a reasonable opportunity to secure a warrant existed. In *Watson* the arresting agents could have obtained a warrant as early as six days prior to the arrest.[25] *Watson* placed no greater significance upon a warrant authorizing the seizure of a person than upon a warrant authorizing the seizure of personal property.[26]

In view of the Supreme Court's sanction of warrantless arrests, a prompt determination of probable cause to detain is necessary to safeguard the Fourth Amendment rights of the accused. When a citizen

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Accord, Whiteley v. Warden, 401 U.S. 560 (1971). *See also* Jones v. United States, 362 U.S. 257, 270-71 (1960); Hignut v. State, 17 Md. App. 399, 303 A.2d 173 (1973).

22. W. LaFave, Arrest, The Decision to Take a Suspect Into Custody 15 (1965).
23. United States v. Watson, 44 U.S.L.W. 4112 (U.S. Jan. 26, 1976).
24. *Id.* at 4116. Justice Powell in his concurring opinion noted that arrest probably constitutes a far more serious invasion of privacy than a search and seizure since no decision to release the suspect can come quickly enough to erase the invasion of privacy that already will have occurred. Then, typifying the majority's reasoning, Justice Powell continued:

> Logic therefore would seem to dictate that arrests be subject to the warrant requirement at least to the same extent as searches.
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> *But logic sometimes must defer to history and experience*.... There is no historical evidence that the framers or proponents of the Fourth Amendment, ... were at all concerned about warrantless arrests by local constables and other peace officers. *Id.* at 4117 (concurring opinion) (emphasis added).

25. 44 U.S.L.W. 4112 (U.S. Jan. 26, 1976). In Trupiano v. United States, 334 U.S. 699 (1948) the Court stated:

> The absence of a warrant of arrest, even though there was sufficient time to obtain one, does not destroy the validity of an arrest under these circumstances [felony committed in the presence of the arresting officer]. Warrants of arrest are designed to meet the dangers of unlimited and unreasonable arrests of persons who are not at the moment committing any crime. Those dangers, obviously, are not present where a felony plainly occurs before the eyes of an officer of the law at a place where he is lawfully present. Common sense then dictates that an arrest in that situation is valid despite the failure to obtain a warrant of arrest. *Id.* at 705.

The Model Code of Pre-Arraignment Procedure follows this policy. ABA-ALI Model Code of Pre-Arraignment Procedure, Commentary § 120.1(8) (1975).

26. 44 U.S.L.W. 4112.

is arrested pursuant to a warrant, the magistrate has already decided that sufficient evidence exists to justify taking the suspect into custody and presenting him before a judicial officer to obtain his assurance of further appearance or detaining him pending a preliminary hearing or grand jury proceeding.[27] When an arrest is made *without* a warrant, however, there has been no such judicial determination of probable cause. Unless the first appearance proceeding includes such a determination the arrestee may be unjustly held in custody for a substantial period of time.

I. PRE—GERSTEIN PROCEDURE IN MARYLAND

Prior to *Gerstein* it was common practice in Maryland and elsewhere[28] for a magistrate[29] in a criminal prosecution to set bail or send an accused to jail without determining whether the arresting officers had probable cause to believe the accused committed the crime with which he was charged. Maryland procedure required that anyone apprehended without a warrant be taken before a conveniently available judicial officer[30] without unnecessary delay and in no event later than the earlier of twenty-four hours after arrest or the first session of court after the charging of the suspect. At the initial appearance the accused was provided with a copy of the charging document, informed of each offense with which he was charged, and told certain of his rights.[31] The commissioner then determined eligibility for pretrial release and set bail in accordance with Maryland District Rule 777.[32] If an indigent defendant desired counsel, the commissioner notified either the public defender or the court. In the

27. MD. DIST. RULE 706(c)(1) provides:
> [A]n arrest warrant shall be issued if it appears to the issuing officer upon application pursuant to Section a of this Rule that there is probable cause to believe that a crime has been committed and that the defendant has committed it.

28. For an in-depth analysis of Federal procedure in this area see Note, *Probable Cause at the Initial Appearance in Warrantless Arrests*, 45 S. CAL. L. REV. 1128 (1972).

29. Historically, a magistrate has been defined as "a public civil officer, possessing such power, legislative, executive or judicial, as the government appointing him may ordain [or,] [i]n a narrow[er] sense, an inferior judicial officer, such as a justice of the peace." Compton v. Alabama, 214 U.S. 1, 7 (1909). In Maryland the judicial officer is referred to as a *commissioner* rather than a magistrate. MD. ANN. CODE, Cts. & Jud. Proc. Art., § 2-607 (1974); *see* Administrative Directive to District Court of Maryland dated September 29, 1972.

30. In Maryland a commissioner serves as the judicial officer. District Court commissioners are appointed by the Administrative Judge of each District with the approval of the Chief Judge of the District Court. Administrative Directive to District Court Commissioners from the Chief Judge of the District Court of Maryland dated September 29, 1972, at 1.

31. MD. DIST. RULE 709(b)(3). The accused is informed of his right to consult with and be represented by a lawyer from the time the Charging Document is delivered to him and at all stages of the proceedings thereafter. He is also advised of his right to representation by a Public Defender if unable to afford a private attorney.

32. MD. DIST. RULE 777(c) provides that any defendant charged with a non-capital offense be released on his personal recognizance pending trial, *unless the commissioner thinks*

case of a felony the judicial officer advised the arrestee of his right to a preliminary hearing, to determine *probable cause to continue to trial*, if requested within ten days.[33]

Thus, before *Gerstein* a misdemeanant was denied any opportunity for a hearing to determine the reasonableness of the arrest.[34] The rationale for denying a hearing to misdemeanants was probably that, theoretically, higher standards apply to arrests without a warrant of misdemeanants than apply to warrantless arrests of felons.[35] The general rule is that a police officer may arrest without a warrant one

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that this type of release will not reasonably assure the accused's appearance at trial. Administrative Directive to District Court Commissioners from the Chief Judge of the District Court of Maryland dated September 29, 1972, at 21. *See also* United States v. Melville, 306 F. Supp. 124 (S.D.N.Y. 1969).

33. Md. Ann. Code art. 27 § 592 (Rep. vol. 1976); Md. Dist. Rule 709(f); Md. Ann. Code, Cts. & Jud. Proc. Art., § 4-304 (1974). *See also* United States v. Kelly, 285 A.2d 694 (D.C.C. App. 1972); M.A.P. v. Ryan, 285 A.2d 310 (D.C.C. App. 1971).

34. The lack of justification for denying a hearing to a misdemeanant is particularly glaring in light of the fact that it is the amount of punishment that *can be* imposed that determines the class, felony or misdemeanor, not the punishment *actually* imposed. "[I]t is well known that the *actual* punishment for many felonies is less harsh and severe than the penalties which *may be* inflicted in some misdemeanor cases." City of Piqua v. Hinger, 13 Ohio App. 2d 108, 112, 234 N.E.2d 321, 324 (1967) (emphasis added); *see* People v. Williams, 27 Cal. 2d 22, 163 P.2d 692 (1945); People v. Pryor, 17 Cal. App. 2d 147, 61 P.2d 773 (1936).

    In Maryland many misdemeanors carry penalties as great as those normally reserved for felonies, *e.g.*, Md. Ann. Code art. 27 § 122A-1 (1957) (delivering to or receiving from a detainee money or anything of value carries a penalty of up to one-thousand dollars and up to three years imprisonment); *Id.* at § 139A (manufacturing, using or possessing a molotov cocktail carries a penalty of not more than one-thousand dollars and not more than three years imprisonment); *Id.* at § 174 (any officer or agent of a corporation who signs or assents to statements for the public or shareholders containing untruthful representations of its affairs, assets or liabilities is liable for a fine of one-thousand to ten-thousand dollars and six months to three years imprisonment); *Id.* at § 467 (receiving stolen goods worth under one-hundred dollars carries a penalty of not more than one-hundred dollars and up to eighteen months imprisonment); *Id.* at § 464 (carnal knowledge of a female between fourteen to sixteen years of age carries a penalty of up to five-hundred dollars and up to two years imprisonment).

35. The felony-misdemeanor classification is firmly entrenched in the criminal justice system. The common law felonies were murder, manslaughter, burglary, robbery, arson, rape, larceny, mayhem, sodomy and escape from a penal facility. 1 W. Burdick, Law of Crime 77 at § 77 (1946) cited in Note, *Crime Classification and Its Effect on Constitutional Rights: An Analytical Approach*, Law & the Social Order 492 n. 1 (1970). The misdemeanor class simply encompasses all crimes other than felonies. *Id.* Today a majority of jurisdictions define a felony as a crime punishable by death or imprisonment in the state prison. *E.g.*, 18 U.S.C. § 1(1) (1975); Ala. Code tit. 1, § 7 (1960); Ga. Code Ann. § 26-401(e) (1975); Fla. Stat. Ann. § 775.08 (Supp. 1975); Ind. Ann. Stat. § 35-1-1-1 (1975); Ill. Ann. Stat. § 2-7 (1972); Iowa Code Ann. § 687.2 (Supp. 1975); Ky. Rev. Stat. Ann. § 431.060 (1975); Mass. Gen. Laws Ann. ch. 274 § 1 (1970); Mich. Compiled Laws Ann. § 28.197 (1970); Miss. Code Ann. § 1-3-11 (1972); Mo. Ann. Stat. § 556.020 (Supp. 1975); Nev. Rev. Stat. § 193.120(2) (1973); N.H. Rev. Stat. Ann. § 594:1 (Rep. vol. 1974); N.C. Gen. Stat. § 14-1 (Rep. vol. 1969); Ohio Rev. Code Ann. § 1.05 (Supp. 1975); Okla. Stat. Ann. tit. 21 § 5 (1958); S.D. Compiled Laws Ann. § 22-1-4 (1967); Tenn. Code Ann. § 39-103 (Rep. vol. 1975); Utah Code Ann. § 76-1-13 (1953); Vt. Stat. Ann. tit. 13 § 1 (1974); Va. Code Ann. § 18.2-8 (Rep. vol. 1975); Rev. Code Wash. § 9.01.020 (1961); W. Va. Code Ann. § 61-11-1 (1966); Wyo. Stat. Ann. § 6-2 (1957).

believed by the arresting agent upon reasonable grounds to have been guilty of a felony and that he may only arrest without a warrant one guilty of a misdemeanor *if committed in his presence.*[36] In ascertaining whether a misdemeanor has been committed in the officer's presence, the term *presence* denotes that the commission of the offense is perceptible to the officer's senses, whether they be visual, auditory, or olfactory.[37] This standard leaves room for error and, conceivably, an officer could be empowered to make a warrantless arrest for a misdemeanor with supposed probable cause, though the criminal act was not committed in his presence.[38] Despite the baseless nature of such an arrest the alleged misdemeanant would still be held or sentenced without a preliminary opportunity to refute the grounds for the arrest.

The injustice of the dual standard is even more apparent when the reasons for the arrests are analyzed. The rule permitting warrantless arrests for felonies, as distinguished from misdemeanors, upon rea-

36. United States v. Watson, 44 U.S.L.W. 4112, 4114 (U.S. Jan. 26, 1976); Carroll v. United States, 267 U.S. 132, 156-57 (1925); Elk v. United States, 177 U.S. 529, 534 (1900); Kurtz v. Moffitt, 115 U.S. 487, 504-05 (1885). In Maryland *see*, Johnson v. State, 8 Md. App. 187, 259 A.2d 97 (1969); Winebrenner v. State, 6 Md. App. 440, 251 A.2d 610 (1969); Robinson v. State, 4 Md. App. 515, 243 A.2d 879 (1968); Salmon v. State, 2 Md. App. 513, 235 A.2d 758 (1967). *See also* Robinson v. Warden, Md. Penitentiary, 5 Md. App. 68, 245 A.2d 407 (1968). For a list of state statutes prescribing the in presence requirement see ABA-ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE Appendix X (1975).

Several state statutes expressly eliminate the necessity for a preliminary hearing in misdemeanor cases. *See, e.g.*, State v. Watkins, 40 Wis. 2d 398, 162 N.W.2d 48 (1968); People v. Caldwell, 54 Misc. 2d 674, 283 N.Y.S.2d 273 (1967); Clark v. State, 417 S.W.2d 402 (Tex. Cr. App. 1967).

37. United States v. Brown, 463 F.2d 949 (D.C. Cir. 1972) (reputation may combine with other factors to constitute probable cause); State v. Romonto, 190 Neb. 825, 212 N.W.2d 641 (1973) (the odor of illegal drugs can provide probable cause to arrest). In Maryland *see*, Davids v. State, 208 Md. 377, 382-83, 118 A.2d 636, 638 (1955) (a crime is within an officer's presence if it is committed within his hearing and so near that he cannot be mistaken as to the offender); Johnson v. State, 8 Md. App. 187, 191, 259 A.2d 97, 99 (1969) (arrest of person writing numbers on a brown paper bag for writing and possession of non-conventional lottery slip); Ramsey v. State, 5 Md. App. 563, 567, 248 A.2d 659, 661 (1968) (officer sighted a bulge in suspect's coat indicating the presence of a gun); *cf.* Salmon v. State, 2 Md. App. 513, 235 A.2d 763 (1967).

38. An arrest by a police officer or a private person for a misdemeanor or offense not committed "in their presence" violates no constitutional standard, state or federal. Several state statutes authorize such arrests for "past" misdemeanors. Lurie v. District Attorney of Kings County, 56 Misc. 68, 72, 288 N.Y.S.2d 256, 261 (1968).

For a list of states, including Maryland, which have statutes authorizing warrantless misdemeanor arrests even though the offense is not committed in the presence of the officer see, ABA-ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE Appendix X 1975. In Maryland see MD. ANN. CODE art. 27 § 594(B) (Supp. 1974), listing crimes for which an officer may arrest without a warrant based on probable cause. These offenses include the burning of cribs, hay, corn, setting fire while perpetrating crime, carrying a weapon, destroying another's property, possession of hypodermic syringes, assault and specified attempts. Cuffia v. State, 14 Md. App. 521, 287 A.2d 319 (1972) (officer may base arrest on trustworthiness of information provided by an informer).

sonable belief, grew out of the need to protect the public safety by making prompt arrests.[39]

> The reason for arrest for misdemeanors without warrant at common law was promptly to suppress breaches of the peace . . . while the reasons for arrest without a warrant on a reliable report of a felony was because the public safety and the due apprehension of criminals charged with heinous offenses required that such arrests should be made at once without warrant.[40]

Denied the opportunity for a hearing, a misdemeanant faced harsher standards in attempting to avoid pretrial confinement, though his arrest usually did not involve guarding the public safety. Pre-*Gerstein* procedures in effect, rendered the law enforcement officer the final arbiter of probable cause since his decision was never questioned.

The arresting officer's judgment was rarely subject to question even in the case of alleged felonies. Under the Maryland Rules an accused felon faced formidable barriers to receiving a determination of probable cause to proceed to trial. Election by the State's Attorney to charge the suspect by grand jury indictment abrogated any right to a preliminary hearing.[41] The prosecutor generally arranged for the grand jury to meet before the date set for the preliminary examination.[42] Complicating

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39. United States v. Watson, 44 U.S.L.W. at 4114; Draper v. United States, 358 U.S. 307, 315-16 (1959) (dissenting opinion). Carroll v. United States 267 U.S. 132, 157 (1925). In Rohan v. Sawin, 59 Mass. (5 Cush.) 281, 285 (1851) the Supreme Judicial Court of Massachusetts noted that

    > [t]he public safety, and the due apprehension of criminals, charged with heinous offenses, imperiously require that such arrests should be made without warrant by officers of the law.

40. Carroll v. United States, 267 U.S. 132, 157 (1925).

41. Md. Ann. Code art. 27 § 592(3) (Rep. vol. 1976) provides:

    > (3) If the state's attorney elects to charge the accused by grand jury indictment, the preliminary hearing is not a matter of right to the defendant but may be afforded in the court's discretion.

    See Md. Dist. Rule 741(a)(2) *and* Md. Dist. Rule 741(a)(3). *See also* Lem Woon v. Oregon, 229 U.S. 586 (1913) (no right to a preliminary hearing prior to indictment); Rivera v. Gov't. of the Virgin Islands, 375 F.2d 988, 990 (3d Cir. 1967); Ferrell v. Warden, Md. Penitentiary, 241 Md. 432, 216 A.2d 740 (1966); Kardy v. Shook, 237 Md. 524, 207 A.2d 83 (1965).

42. According to Professor Irving Younger of the Cornell University School of Law:

    > Prosecutors have been successful in avoiding hearings; to my knowledge no defendant in a criminal case in the southern district of New York ever received a preliminary hearing. . . . If the defendant says that he does not wish to waive a preliminary hearing, the commissioner will set the hearing down for a date five or six days hence. If possible the prosecutor will simply obtain an indictment before the date for the preliminary hearing; the hearing then becomes moot. If, for whatever reason, the prosecutor cannot obtain an indictment within that time, he postpones the hearing. He may then obtain an indictment before the new date. If he fails to do so, he will adjourn the hearing again, and so on. . . . *Hearings on S. 3474, S. 945 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Judiciary Comm.*, 89th Cong., 2d Sess., 90th Cong., 1st Sess. at 212

the problem was the fact that the arrestee was given the seemingly tempting option to elect an immediate trial. A request for immediate trial rarely insures being brought to trial with added speed but it does compel the arrestee to sacrifice his right to either a preliminary hearing or a grand jury indictment.[43] Since a preliminary hearing to determine probable cause was not assured an arrestee in Maryland, new procedures to meet the standards imposed by *Gerstein* were mandated.

II. THE EFFECT OF GERSTEIN ON MARYLAND PROCEDURE

New procedures became effective in the District Court on April 10, 1975. These procedures supplement existing methods of dealing with the arrestee. In *all* warrantless arrests, including motor vehicle or natural resources cases in which the citizen is actually taken into custody, a probable cause determination is now made during the arrestee's initial appearance.[44] Since the majority of arrests are made without a warrant[45] the new procedures apply to most arrestees. Maryland is now faced with two probable cause determinations; the first testing the *necessity for detention* pending trial and the second reviewing the *possible merits of continuing to trial.*

A. Stage One—The Initial Appearance

During the initial appearance, both misdemeanants and felons receive a mandatory assessment of the validity of the present detention or restraint.[46] This addition to Maryland procedure can be termed the *Gerstein proceeding.* The *Gerstein proceeding* focuses on the legality of the arrest and the concentration is upon the factual, as opposed to the legal, guilt or innocence of the accused.[47] Its purpose is, apparently, to

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(1967), quoted in Note, *Probable Cause at the Initial Appearance in Warrantless Arrests*, 45 S. CAL. L. REV. 1128, 1131 n. 11 (1972).

Defense attorneys generally consider the preliminary hearing the preferred means of determining probable cause. Opponents of the grand jury system assert that the prosecutor dominates the grand jury's actions to the extent that it has become a mere rubber stamp for him. According to several critics, the prosecution may press for the result it desires so strongly as to render the grand jury unable to make an intelligent, independent determination of probable cause. Calkins, *Abolition of the Grand Jury Indictment in Illinois*, 1966 ILL. L.E. 423, 432-33 (1966); Moley, *The Institution of Criminal Prosecutions by Indictment or Information*, 29 MICH. L. REV. 403, 414-15 (1931); Tigar & Levy, *The Grand Jury as the New Inquisition*, 50 MICH. ST. B.J. 693 (1971); Note, *Grand Jury Proceedings: The Prosecutor, the Trial Judge, and Undue Influence*, 39 U. CHI. L. REV. 761, 766 n. 29 (1972). *Contra*, R. YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES 1634-1941 (1963).

43. MD. RULE 709. This rule creates the interesting situation of compelling an arrestee to forfeit one constitutional right, a grand jury hearing, for another, a speedy trial.
44. Administrative Directive to District Court Commissioners from the Chief Judge of the District Court of Maryland dated March 31, 1975.
45. *See* note 20 *supra.*
46. *See* M.A.P. v. Ryan, 285 A.2d 310, 315 (D.C.C. App. 1971).
47. The distinction between factual guilt and legal guilt refers to the difference between those persons who are "guilty" of committing the proscribed act but are

ferret out illegal detentions which usually fall into three basic categories: first, where the arrest, though made in good faith, was nevertheless illegal; second, where the arrest was knowingly illegal; and, lastly, where the arrest was legal when made but subsequent events indicate that the suspect should no longer be detained. The value of promptly detecting illegal arrests lies both in preventing continued unjustified detention and in deterring future illegal police conduct.[48]

Since "[t]he sole issue [in a *Gerstein proceeding*] is whether probable cause exists for detaining the arrested person pending further proceedings,"[49] the Supreme Court deemed an adversary hearing after warrantless arrests unnecessary.[50] Proof of reasonable grounds for believing a crime was being committed need not be evidence admissible at trial.[51] The *lesser consequences* of ascertaining probable cause do not "require the fine resolution of conflicting evidence that a reasonable doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt."[52] Because of its limited function the initial appearance is not considered a critical stage mandating counsel.[53] The arresting officer submits a statement,[54] under oath, to a district court commissioner at the time of the arrestee's initial appearance. The standard applied by the commissioner in determining probable cause is identical to that utilized in issuing pre-arrest warrants or summonses.[55] Neither the officer nor the

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nevertheless found "innocent" by the criminal justice system because the police, prosecutor, or judiciary have violated certain of the defendant's legal rights, and those who are both "guilty" of the proscribed act and are found "guilty" by the criminal justice system. Note, *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, 83 YALE L.J. 771, 776 (1974).

48. *See* United States v. Quinn, 357 F. Supp. 1348, 1351-52 (N.D. Ga. 1973). For a complete discussion of the nature of this type of hearing see, Note, *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, 83 YALE L.J. 771 (1974).
49. 420 U.S. at 120; *see* Administrative Directive to District Court Commissioners from the Chief Judge of the District Court of Maryland dated March 31, 1975.
50. *Id.*
51. Proof of reasonable grounds could encompass inferences from suspicious acts, *e.g.*, consort with known drug dealers, the surreptitious passing of a package or an intercepted message suggestive of criminal activities. *See* People v. Rios, 46 Cal. 2d 297, 294 P.2d 39 (1956). *See also* Draper v. United States, 358 U.S. 307 (1959) (dissenting opinion).
52. 420 U.S. at 121.
53. *Id.*; MD. DIST. RULE 709 prescribes the procedure followed at the initial appearance and does not require any of the protections normally accompanying a critical stage. *See* Administrative Directive to District Court Commissioners from the Chief Judge of the District Court of Maryland dated March 31, 1975.
54. District Court Form CR 704. A Statement of Charges is used only in situations where the accused has already been arrested by a law enforcement officer, without an arrest warrant, and is in the custody of the officer at the time the Statement of Charges is presented to the commissioner. Only a law enforcement officer may file a Statement of Charges. *See* Moaney v. Maryland, Md. App. , 346 A.2d 466 (1975); Administrative Directive to District Court Commissioners from the Chief Judge of the District Court of Maryland dated September 29, 1972, at 14-15.
55. The information submitted to the commissioner issuing a warrant must be sufficient to enable him to make an independent evaluation of whether probable cause exists. *See*

arrestee need be present at this hearing and it need not be evidentiary in nature. If the commissioner finds reasonable grounds for detention he so indicates on the Statement of Charges and continues with the normal processing of the arrested citizen.[56] "If, however, the commissioner determines that 'probable cause' does not exist, he shall so indicate on the Statement of Charges, complete all normal processing of the arrestee, and then release him on his own recognizance *pending trial.*"[57] When the commissioner decides whether the factual situation justifies taking the accused into custody, he refrains from passing judgment on the validity of the legal charges. The *Gerstein proceeding* permits a suspect the liberty to continue his daily activities with a semblance of normalcy pending trial but affords no means of avoiding continued criminal proceedings.

Undeniably, the *Gerstein proceeding* will lead to better arrests, since the officer's rationale will be subjected to prompt judicial scrutiny. Thus, the arresting agent's reasons for detaining a citizen must be expressed more clearly than ever before. As the Court noted in *Johnson v. United States*:[58]

> 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.[59]

A decision to arrest without a warrant is faced initially not in the courtroom but at the scene of the arrest where the totality of the circumstances facing the officer is weighed against his split-second decision to make the arrest.[60] The standard set by the Constitution and by the interpretation of the Court is one that will protect both the officer and the citizen, for if the officer acts with probable cause he is

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Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964). These cases held that a warrant could be based upon hearsay where the informant was reliable and the warrant was obtained in a manner justifying reliance upon it; or the number and precision of details furnished or corroborating evidence justify reliance. Although these were search cases, the Court has on occasion cited search cases to explain its meaning in arrest cases. Beck v. Ohio, 379 U.S. 89 (1964). *See also* Administrative Directive to District Court Commissioners from the Chief Judge of the District Court of Maryland dated September 29, 1972 at 5-13.

56. Administrative Directive to District Court Commissioners from the Chief Judge of the District Court of Maryland dated March 31, 1975.
57. *Id.*
58. 333 U.S. 10 (1948).
59. *Id.* at 13-14, quoted in 420 U.S. at 112-13.
60. Wong Sun v. United States, 371 U.S. 471, 499 (1963).

protected from civil suit for false arrest even though the citizen is innocent.[61]

The Fourth Amendment also rejects the notion that executive officers of the government can function as neutral and disinterested magistrates since unreviewed executive discretion could yield too readily to pressures to obtain incriminating evidence and to overlook potential invasions of privacy and protected speech.[62] An impartial decision maker is essential[63] to protect against abridgment of the Fourth Amendment by warrantless arrests on less than probable cause, the resulting pendency of prosecution being the evil to be avoided. The magistrate is an impartial arbiter. His examination stands as a safeguard to insure that the defendant will not be held in custody without probable cause.[64]

Nevertheless, the efficacy of the *Gerstein proceeding* is highly suspect. While the examination at the initial appearance grants freedom from incarceration to arrestees found taken into custody without probable cause to detain, it compels potential detainees to face judicial evaluation without counsel, a right of confrontation or even a right to be present.[65] It is at this early stage that key discretionary decisions are made, such as whether to charge the arrestee and what crimes are to be charged. Whether the accused is free affects his ability to aid in preparing his defense and to make a good record for himself in anticipation of sentencing. The *Gerstein* Court chose to overlook the principle that a fundamental requisite of due process of law is the opportunity to be heard.[66] The Court itself has held that the right to be heard implies that the hearing take place at "a meaningful time and in a meaningful manner."[67] When a person is denied the right to be represented by counsel, as well as the right to be present at his own hearing, it can scarcely be said that he is receiving a *meaningful* appraisal of probable cause.

B. Stage Two—The Preliminary Hearing

The second probable cause determination is implemented during the preliminary hearing and existed before the Court's decision in *Ger-*

61. Pierson v. Ray, 386 U.S. 547 (1967); Monroe v. Pape, 365 U.S. 167 (1961); Maghan v. Jerome, 88 F.2d 1001, 1002 (D.C. Cir. 1937); Pritchett v. Sullivan, 182 F. 480, 482 (8th Cir. 1910); *see* Ravenscroft v. Casey, 139 F.2d 776 (2d Cir. 1944).
62. United States v. United States District Court, 407 U.S. 297, 317 (1972).
63. Goldberg v. Kelly, 397 U.S. 254, 271 (1970); *In re* Murchison, 349 U.S. 133, 137 (1955); Wong Yang Sung v. McGrath, 339 U.S. 33, 45-46 (1950).
64. Shadwick v. City of Tampa, 407 U.S. 345 (1972); Wong Sun v. United States, 371 U.S. 471, 481-82 (1963); Jones v. United States, 362 U.S. 257, 270 (1960); United States v. Quinn, 357 F. Supp. 1343, 1351 (N.D. Ga. 1973); 8 J. MOORE'S FEDERAL PRACTICE § 3.02(2) (2d ed. 1971).
65. Administrative Directive to District Court Commissioners from the Chief Judge of the District Court of Maryland dated March 31, 1975, at 3.
66. Grannis v. Ordean, 234 U.S. 385, 394 (1914).
67. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

stein.[68] During this stage the major concern is whether there is a sufficient probability of conviction at trial to merit further proceedings.[69] Those cases for which such a probability does not exist are screened out; the perspective is forward toward trial as opposed to backward toward arrest. The inquiry centers on legal, rather than factual, guilt or innocence, thereby protecting the interests of the accused in avoiding further unnecessary proceedings. The judicial role at this stage entails weighing and judgment rather than a wooden comparison of the charge sheet and testimonial with the elements of the crime. The type of examination employed in the preliminary hearing serves as a safeguard for the accused by shielding him against unfounded charges.[70]

The Supreme Court requires adversary procedures in inquiries, such as Maryland's preliminary hearing, that determine whether the evidence justifies charging the accused with the offense.[71] In Maryland an arrested citizen has the right to counsel during the preliminary hearing.[72] The benefits to be derived from this *right* are substantially decreased due to the restrictions placed upon the attorney's actions during the hearing. Because the preliminary examination is not a critical stage of the proceedings[73] the defense may not present its case, offer

68. *See* note 33 *supra*.

69. For an in-depth analysis of the benefits derived from this type of hearing see, Note, *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, 83 YALE L.J. 771 (1974). *See also* F. MILLER, PROSECUTION, at 87-88, 101-02, 348 (1969).

70. Weinberg & Weinberg, *The Congressional Invitation to Avoid the Preliminary Hearing: An Analysis of Section 303 of the Magistrates Act of 1968*, 67 MICH. L. REV. 1361, 1368-70 (1969); Note, *The Preliminary Hearing—An Interest Analysis*, 51 IOWA L. REV. 164, 165-67 (1965). It is important to note, however, that the function of the preliminary hearing is not simply to give *advantages* to the defendant as against the state.

> The issue is not giving "advantages" to either "side" in the struggle between prosecutors and defendants, but rather the degree to which the system should avoid convicting, incarcerating, or otherwise disturbing the innocent accused. . . . In any event, . . . there seems to be no disadvantage to the "peace forces" in ending the incarceration of an individual who cannot be proven guilty. Note, *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, 83 YALE L.J. 771, 784 n. 60 (1974).

See also, DeToro v. Pepersack, 332 F.2d 341 (4th Cir. 1964), *cert. denied*, 379 U.S. 909 (1964); Williams v. State, 214 Md. 143, 132 A.2d 605 (1957).

71. Gerstein v. Pugh, 420 U.S. at 122-23; Coleman v. Alabama, 399 U.S. 1 (1970); White v. Maryland, 373 U.S. 59 (1963) (absence of counsel for petitioner when he entered a plea of guilty before a magistrate violated his rights under the Due Process Clause of the Fourteenth Amendment. In this instance Maryland's preliminary hearing was deemed a *critical stage* of the proceedings).

72. MD. DIST. RULE 709(b)(3). The accused is entitled to representation by counsel from the time the Charging Document is delivered to him and at all stages of the proceedings thereafter.

73. DeToro v. Pepersack, 332 F.2d 341 (4th Cir. 1964), *cert. denied*, 379 U.S. 909 (1964). Emphasizing the limited function of the preliminary hearing the Court of Special Appeals stated in Perkins v. State, 26 Md. App. 526, 529, 339 A.2d 360, 363 (1975), that Maryland has always been in accord with the *Rutz* rule that

> the discharge of an accused person upon a preliminary examination for want of probable cause constitutes no bar to a subsequent preliminary examination before another magistrate. Such an examination is not a trial in any sense and does not

evidence or cross-examine witnesses. What remains is a forum for presentation of the State's case.[74] Several states, however, allow a full examination and commentators have noted that a complete adversary hearing is the preferred means of determining probable cause to try a suspect.[75]

The Maryland preliminary examination at least offers the defense an opportunity to discover elements of the prosecution's case, and allows the prosecutor to test the substance of his case before expending additional time and effort. In addition, when the preliminary hearing discloses a lack of probable cause, the accused is released and charges are dropped. As a consequence of the somewhat higher standards imposed by the preliminary hearing and its forward-looking orientation the accused has a greater chance to escape the anxiety, humiliation, and stigma of an unjustified public accusation and prosecution, as well as to avoid the expense and inconvenience of the trial.[76] While the *Gerstein hearing* is now applied to *all* arrestees the forward-looking preliminary hearing with its added protections was not mandated by *Gerstein* and applied only to a limited class of alleged felons.[77]

III. DUE PROCESS CONSIDERATIONS

The Fourth and Fourteenth Amendments prohibit deprivations of liberty by the states without due process of law. Courts have held that

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operate to put the defendant in jeopardy. U.S. *ex rel.* Rutz v. Levy, 268 U.S. 390, 393 (1925); *see* Note, *The Preliminary Hearing—An Interest Analysis*, 51 Iowa L. Rev. 164 (1965). Failure to hold a preliminary hearing is not ground for post conviction relief. Ferrell v. Warden of Md. Penitentiary, 241 Md. 432, 435, 216 A.2d 740, 743 (1966); State *ex rel.* Sanner v. Warden, 191 Md. 743, 744, 59 A.2d 762, 763 (1948); Sykes v. Warden, 201 Md. 662, 663, 93 A.2d 549, 550 (1953); State *ex rel.* Cave v. Superintendent, 198 Md. 675, 676, 81 A.2d 461, 462 (1951); Harnett v. Warden, 194 Md. 727, 728, 71 A.2d 303, 304 (1951); *cf.* Pritchard v. Warden, 209 Md. 662, 121 A.2d 696 (1956).

74. This procedure has been criticized for its non-evidentiary nature. In 1949 the Attorney General of Maryland expressed the opinion that the right to cross-examine the State's witnesses at the preliminary hearing was a fundamental right guaranteed an accused by the Maryland Declaration of Rights. 34 *Opinions of the Attorney General of Maryland*, No. 137 (1949); *see* DeToro v. Pepersack, 332 F.2d 341 (4th Cir. 1964), *cert. denied*, 379 U.S. 909 (1964). On variations in state law regarding preliminary hearings see, McIntyre & Lippman, *Prosecutors and Early Disposition of Felony Cases*, 56 A.B.A.J. 1154, 1155-57 (1970); McIntyre, *A Study of Judicial Dominance of the Charging Process*, 59 J. Crim. L.C. & P.S. 463 (1968).

In England, from the very beginning of the modern adversary preliminary hearing the accused, like the Crown, could call as witnesses anyone "who shall know anything relating to the Facts and Circumstances of the Case." 30 & 31 Vict. c.35 § 3. The accused could also call anyone who knew "anything tending to prove the Innocence of such accused Person." Washington v. Clemmer, 339 F.2d 725, 727 n. 2 (1964).

75. Note, *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, 83 Yale L.J. 771 (1974).

76. *See* Jones v. Super. Ct., 4 Cal. 3d 660, 667-68, 483 P.2d 1241, 1245-46, 94 Cal. Rptr. 289, 293-94 (1971); Myers v. Commonwealth, 298 N.E.2d 819, 822-25 (Mass. 1973); Thies v. State, 178 Wis. 98, 103, 198 N.W. 539, 541 (1922); Note, *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, 83 Yale L.J. 771, 784 (1974).

77. *See* note 33 *supra*.

not every deprivation qualifies for the protection of procedural due process.[78] Due process is flexible and requires different procedural protections for different situations. Whether procedural protections are to be extended depends upon the extent to which a person will be "condemned to suffer grievous loss"[79] and whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication.[80] The deprivation resulting from a decision to hold an accused for trial is normally loss of liberty. This is universally recognized as a very serious deprivation; in fact, freedom from incarceration constitutes one of the clearest examples of an interest protected by due process.[81]

By limiting themselves to the question of probable cause warranting detention the Court, in *Gerstein*, failed to award the arrestee a proper forum to present his case and remove it from the judicial system at an early stage. Arguably, even those who obtain their freedom from the state penal institutions pending trial still suffer a certain loss of liberty caused by pretrial release restraints on movement and association and

78. Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (application of due process turns not merely upon the weight of the interest, but whether the interest is within the contemplation of liberty or property under the Fourteenth Amendment); *accord*, Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972) (nontenured teacher's interest in renewal of his contract is neither liberty or property). *But see* Graham v. Richardson, 403 U.S. 365, 374 (1971) (rejection of the concept that constitutional rights turn upon whether a governmental benefit is characterized as a right or as a privilege); Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 304 (1967) (dissenting opinion) (the principal object of the Fourth Amendment is the protection of privacy rather than property). *See also* Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972) (a state law authorizing the seizure of goods and chattels in a person's possession or a writ of replevin without a prior hearing violates procedural due process).

79. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (concurring opinion), quoted in Goldberg v. Kelly, 397 U.S. 254, 263 (1970).

80. Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (defendant is entitled to be present at a bail determination hearing); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961). The due process clause of the Fourteenth Amendment mandates a hearing prior to deprivation of certain liberties: Perry v. Sindermann, 408 U.S. 593 (1972) (dismissal of professor); Regents of State Colleges v. Roth, 408 U.S. 564 (1972) (dismissal of professor); Fuentes v. Shevin, 407 U.S. 67 (1972) (replevin); Bell v. Burson, 402 U.S. 535 (1971) (driver's license); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits); Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337 (1969) (garnishment). *But see* Goss v. Lopez, 419 U.S. 565 (1975) (temporary suspension of high school student). *See also* Hannah v. Larche, 363 U.S. 420, 440-42 (1960).

81. *In re* Winship, 397 U.S. 358, 364 (1970); Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) (before the state may deprive an individual of his liberty, *an interest of transcending value*, it must comply with the demands of due process); *see* Brenneman v. Madigan, 343 F. Supp. 128, 142 (N.D. Cal. 1972) (it is a violation of due process to subject a pretrial detainee to restrictions other than those inhering in the confinement itself or justified by compelling necessities of the institution's administration); *cf.* Bell v. Burson, 402 U.S. 535 (1971) (suspension of an uninsured motorist's license and registration after involvement in an accident without first assessing the possibility of judgment being rendered against him is a deprivation of due process); Boddie v. Connecticut, 401 U.S. 371 (1971) (due process prohibits a state from denying, solely because of inability to pay court costs and fees, access to its courts to individuals seeking judicial dissolution of their marriage); Goldberg v. Kelly, 397 U.S. 254 (1970) (due process precludes suspension of welfare payments without a prior hearing).

the continued weight of pending litigation. Public accusation of criminal activity has serious consequences even on a *free* defendant;[82] indeed, the Supreme Court has acknowledged these consequences as an incarceration of sorts.[83] Arrest may seriously interfere with an accused's liberty, whether he is incarcerated or not, "disrupt his employment, drain his financial resources, curtail his associations, subject him to the public obloquy, and create anxiety in him, his family and his friends."[84]

Freedom from incarceration can have a major effect on the outcome of the accused's trial.[85] Pretrial detention impedes preparation for trial, and mounting evidence supports the belief that it has a positive effect on the probability of receiving a prison sentence upon conviction or receiving a longer prison sentence than would be imposed in the absence of pretrial detention.[86] As time passes between arrest and trial "evidence and witnesses disappear, memories fade, and events lose their perspective."[87] An additional consequence of being bound over for trial is that the arrestee suffers complete lack of mobility and denial of

82. United States v. Marion, 404 U.S. 307, 320 (1971) (arrest constitutes a public act that may seriously interfere with the accused's liberty whether he is free on bail or not); *see, e.g.*, Washington v. Clemmer, 339 F.2d 725, 727-28 (D.C. Cir. 1964) (the accused is entitled to his liberty unless the government can establish probable cause for his detention through procedures which accord with the concept of fair process); Thies v. State, 178 Wis. 98, 103, 189 N.W. 539, 541 (1922) (the purpose of the preliminary hearing is to protect the accused from open and public accusations of crime, and to spare him the humiliation and anxiety involved in public trial); Note, *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, 83 YALE L.J. 771, 784 n. 62 (1974); Note, *Preliminary Examination—Evidence and Due Process*, 15 KAN. L. REV. 374, 385-86 (1967). *But cf.* United States v. Ewell, 383 U.S. 116, 120 (1965) (a requirement of unreasonable speed in bringing an accused to trial would have a deleterious effect both upon the rights of the accused and the right of society to protect itself); Smith v. United States, 360 U.S. 1, 10 (1959) (the essential ingredient is orderly expedition and not mere speed); Pollard v. United States, 352 U.S. 354, 361 (1957) (whether delay in completing a prosecution amounts to an unconstitutional deprivation of rights depends upon the surrounding circumstances).

83. United States v. Watson, 44 U.S.L.W. 4112, 4122 (U.S. Jan. 26, 1976) (No. 74-538) (dissenting opinion):

> [a]n unjustified arrest that forces the individual temporarily to forfeit his right to control his person and movements and interrupts the course of his daily business may be more intrusive than an unjustified search. *See* ABA-ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Commentary § 120 (1975).

84. United States v. Marion, 404 U.S. 307, 320 (1971). *See also* Smith v. Hooey, 393 U.S. 374, 379 (1969) (outstanding criminal charge can have as depressive an effect on a person at large as on a prisoner); Klopfer v. State, 386 U.S. 213, 221-22 (1967) (petitioner, a university professor, contended that pendency of an indictment interfered with his professional activities and travel).

85. Note, *A Constitutional Right to Preliminary Hearings for All Pretrial Detainees*, 48 S. CAL. L. REV. 158, 165 (1974); *see* Kasanof & Single, *The Unconstitutional Administration of Bail: Bellamy v. The Judges of New York City*, 8 CRIM. L. BULL. 459, 462 (1972); Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. REV. 641 (1964).

86. *Id.*; Note, *Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions*, 77 YALE L.J. 767, 769 (1968); Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. PA. L. REV. 1125, 1137-51 (1965); Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study, Forward*, 39 N.Y.U.L. REV. 631 (1964).

87. Smith v. Hooey, 393 U.S. 374, 380 (1969).

the opportunity to earn a living for himself and his family.[88] A person isolated in jail is powerless to exert has own investigative efforts to mitigate the corrosive effects of the passage of time, whereas a defendant who is released pending trial is in a far better position to actively and effectively participate in his defense.[89]

Another major consideration in pretrial detention is the condition of the facility in which the accused will be held. The purposes of pretrial and post-conviction incarceration are fundamentally different. Imprisonment prior to trial

> [i]s only for safe custody and not for punishment: therefore, in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only. . . .[90]

In determining the function of pretrial detention the court must look to the purpose which the deprivation serves in practice,[91] not in theory. It is consistent with the due process requirement that a presumptively innocent man's right to personal mobility be curtailed only to the extent warranted by the State's interest in confining him.[92] Unconstitutionality is established if the real aims prove to be the punitive ones of retribution and deterrence.[93] Obviously, any depriva-

88. Kasanof & Single, *The Unconstitutional Administration of Bail: Bellamy v. The Judges of New York City*, 8 CRIM. L. BULL. 459, 462 (1972); Note, *A Constitutional Right to Preliminary Hearings for All Pretrial Detainees*, 48 S. CAL. L. REV. 158, 164 (1974). *See also* Note, *Evidence and Due Process* 15 KAN. L. REV. 374, 376 (1967) (binding over for trial may result in irreparable harm to the accused's reputation, regardless of the ultimate outcome of the subsequent trial); Note, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 701 (1961) (reporting on the damage to reputation inflicted by an unconstitutional search for criminal evidence, damage inflicted by this kind of invasion is magnified considerably when an individual is actually incarcerated because of alleged criminal activity).

89. Among the theories advanced to explain the tendency of released individuals to fare better at trial are the detainee's inability to contribute money and labor to investigations for his defense; the detainee's inability to locate witnesses and evidence peculiarly accessible to him; difficulties of contact with counsel; and the impact on judge and jury of prison pallor and the demeanor which a period in jail may produce. D. FREED & P. WALD, BAIL IN THE UNITED STATES, 45-48 (1964). *But see* Hodgdon v. United States, 365 F.2d 679, 686-87 (8th Cir. 1966) (the defendant contended unsuccessfully that pretrial detention interfered with preparation for trial).

90. 4 W. BLACKSTONE, COMMENTARIES *300, quoted in Brenneman v. Madigan, 343 F. Supp. 128, 136-37 n. 3 (N.D. Cal. 1972); *accord*, Jones v. Wittenberg, 323 F. Supp. 93, 100 (N.D. Ohio 1971).

91. *See, e.g.*, Flemming v. Nestor, 363 U.S. 603, 636-37 (1960) (dissenting opinion).

92. Wallace v. Kern, 520 F.2d 400, 401 (2d Cir. 1975) (the incarceration of indigent detainees unable to make bail violates the equal protection and due process clauses of the Fourteenth Amendment); Inmates of the Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 688 (D. Mass. 1973).

93. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963).

tion of liberty is, in reality, a form of punishment. In the case of pretrial detainees, however, this aspect of incarceration should be minimized to conform to the underlying purpose of the detention. The *only* legitimate purpose behind incarcerating those who are accused of crime is to guarantee their presence at trial.[94] Where incarceration is imposed prior to conviction, deterrence, punishment, and retribution are not legitimate functions of the incarcerating officials. Their role is but a temporary holding operation, and their necessary freedom of action is concomitantly diminished. "Punitive measures in such a context are out of harmony with the presumption of innocence."[95] Nevertheless, detainees are usually held in jails which are remnants of the nineteenth century,[96] when more retributive penal theories dictated harsh conditions.[97] Cells tend to be crowded, heating and lighting are inadequate, and the sanitary facilities primitive. The detainee may be placed alongside addicts, alcoholics and persons accused of more dangerous crimes.[98] The presumptively innocent man is forced to linger in these conditions for months prior to trial.[99]

The irony of the situation of pretrial detainees is apparent. Their condition should be of relatively slight concern to the law because the detention is so temporary. Under the Sixth Amendment they enjoy the "right to a speedy trial"[100] and presumably in the near future they will

94. Inmates of the Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 688 (D. Mass. 1973); *see* note 90 *supra*.

95. Anderson v. Nosser, 438 F.2d 183, 190 (5th Cir. 1971) quoted in Brenneman v. Madigan, 343 F. Supp. 128, 136 (N.D. Cal. 1972). *See also In re* Winship, 397 U.S. 358, 363 (1970); Coffin v. United States, 156 U.S. 432, 453 (1895).

96. *See*, Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L.J. 941 (1970) (for a vivid description of jail conditions in the United States). *See also* Inmates of the Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973); Brenneman v. Madigan, 343 F. Supp. 128 (N.D. Cal. 1972); Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio, 1971).

97. During the last few years the Jail Programming and Inspection Officer, MD. ANN. CODE, art. 27 § 704 (1957), has recommended that as many as twelve local jails be closed due to failure to meet minimum standards. These facilities were described as antiquated with "highly impersonal and authoritarian approaches to the persons confined." 3 REPORT OF THE MARYLAND COMMISSION ON THE FUNCTIONS OF GOVERNMENT, 62-63 (1975). Most local jails are administered by the Sheriff who may also have to perform police related activities as well as service the courts. It is generally believed by correction officials that an effective job cannot be done in the area of correction if it is necessary to devote part of the time to another major function. The Sheriff's staff tends to be small and relatively few staff members have had any training in the area of corrections. With rare exceptions, programs of any type are virtually non-existent. Even medical care is not always provided in-house. When such services are available it is generally on a limited basis. *Id.* at 63-86.

98. Inmates of the Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 688 (D. Mass. 1973); *see* note 70 *supra*.

99. ADMINISTRATIVE CLERK OF THE COURT, ANNUAL REPORT, 1973-1974 at 53 (1974); *see* Wallace v. Kern, 520 F.2d 400, 402 (2d Cir. 1975) (the court found that inmates at the Brooklyn House of Detention could be incarcerated for as long as forty-five days awaiting indictment on a felony charge).

100. U.S. CONST. AMEND. VI reads:

> In all criminal prosecutions, *the accused shall enjoy the right to a speedy* and public *trial*, by an impartial jury of the State and district wherein the crime shall

move along, either to prison after conviction or to freedom after acquittal. Too often this happens in the far future.[101] The plight of pretrial detainees has generated considerable debate in recent years over the causes and effects of the significant delay in the American criminal justice system between arrest and trial.[102] Even in the infrequent case of a citizen detained only a brief time awaiting trial it is significant to note that "[t]he Constitution draws no distinction between loss of liberty for a short period and such loss for a long one."[103]

> Being arrested and held by the police, even for a few hours, is, for most persons, awesome and frightening. Unlike other occasions on which one may be authoritatively required to be somewhere or do something, an arrest abruptly subjects a person to constraint, and removes him to unfamiliar and threatening surroundings. . . . The security of the individual requires that so abrupt and intrusive an authority be granted to public officials only on a guarded basis.[104]

A prompt determination of probable cause would spare a presumptively innocent person extended confinement while awaiting trial. The pendency of the trial will almost certainly force curtailment of the accused's speech, associations and participation in unpopular causes.[105] *Gerstein* gave the Court the opportunity to grant arrestees a *full* probable cause determination on the merits of the charge. The Court elected to bypass this chance in favor of a procedure offering less protection than is afforded a public school student suspension.[106]

Under Maryland's application of the perfunctory hearing, previously

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> have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. [Emphasis added].

See United States v. Marion, 404 U.S. 307, 313 (1971) (innovation of the speedy trial right need not await indictment, information or other charge, but begins with the actual restraints imposed by arrest).

101. *See* note 72 *supra*.

102. *E.g.*, Note, *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, 83 YALE L.J. 771 (1974); *see Hearings on S. 754 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 1-10, 109-31, 140-44, 154-64 (1973); *cf. President's Comm'n on Law Enforcement and Administration of Justice, Task Force Report: The Courts* 80-96 (1967).

103. Evans v. Rives, 126 F.2d 633, 638 (D.C. Cir. 1942).

104. ABA-ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Commentary § 120.1 at 290-91 (1975), quoted in United States v. Watson, 44 U.S.L.W. at 4122-23 (dissenting opinion).

105. *See* Klopfer v. State, 386 U.S. 213, 221-22 (1967).

106. Gerstein v. Pugh, 420 U.S. at 127 (dissenting opinion); Goldberg v. Kelly, 397 U.S. 254 (1970) (a full adversary hearing is required before termination of welfare benefits); *see* Note, *A Constitutional Right to Preliminary Hearings for All Pretrial Detainees*, 48 S. CAL. L. REV. 158 (1974).

described as the *Gerstein hearing*,[107] an accused may find it difficult, if not impossible, to reap much advantage from the prompt determination of probable cause to detain, thus, avoiding unnecessary confinement in substandard accomodations. "A less-than-probable-cause arrest followed by a *Gerstein* release is as offensive to the Fourth Amendment as a less-than-probable-cause-search that fails to uncover the evidence sought. . . ."[108] The fact that an unjustified intrusion into a citizen's sphere of personal privacy has occurred is not extinguished by the *Gerstein proceeding*. The Fourth Amendment violation is actually aggravated by the fact that even though the magistrate admits the lack of justification for the arrest by his no probable cause determination, the citizen is still bound over for trial, further infringing upon his right to be left alone.

Probably the only means of fully guarding a person's rights is "by requiring a magistrate's review of the factual justification prior to any arrest. . . ."[109] Since the Supreme Court, however, now gives complete approval to warrantless arrests, the states will probably have to develop procedures to mitigate the effects of indefensible arrests. If warrantless arrests are to remain a fact of life then the suspect taken into custody without probable cause should have the opportunity to exculpate himself as quickly as possible.

IV. A COMPROMISE—MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE

One possibility for fairly and rapidly determining the sufficiency of probable cause and terminating the case at an early stage is the procedure recommended by the American Law Institute's Model Code of Pre-Arraignment Procedure. [hereinafter referred to as the Code]. The *Gerstein* Court gave tacit approval to the first judicial appearance procedure of the Code's Article 310, citing it as an example of "other ways of testing probable cause for detention."[110]

A. The First Appearance

Under Article 310 the first appearance is divided in two sessions where the accused is in custody.[111] Within twenty-four hours[112] the arrestee would appear before a judicial officer[113] who would "(i) in-

107. *See* section II, A *supra*.
108. United States v. Watson, 44 U.S.L.W. at 4123 (dissenting opinion).
109. 420 U.S. at 113 (dictum); *see* United States v. Watson, 44 U.S.L.W. at 4123.
110. 420 U.S. at 124 n. 25.
111. *Compare* ABA-ALI Model Code of Pre-Arraignment Procedure § 310.1 (1975) *with Id.* § 310.2(2).
112. ABA-ALI Model Code of Pre-Arraignment Procedure § 310.1 (1975).
113. *Id.* at Commentary § 310.1 at 579. The Code requirement that the neutral and detached officer be a judge compensated on a salary or per diem basis comports with developments in many states and in Federal practice. The rule denies justices of the peace and other fee collecting judicial officials jurisdiction to conduct the first appearance.

form him about the complaint, (ii) warn him of his rights, (iii) temporarily fix conditions of release, and (iv) arrange for counsel."[114] The arrestee would not normally question probable cause during the first session but he could do so, in which case the procedures employed during the second session would be followed.[115]

Forty-eight hours later the accused would again appear before the judicial officer. During the second phase of the initial appearance conditions for release would be set and reasonable cause to hold for trial would be initially determined on the basis of the complaint and testimony or sworn written statements by the arresting agents or witnesses. The state would only be required to present testimony if called upon to do so by the magistrate.[116]

Since *Gerstein* determined that the examination of probable cause to detain is not a "critical stage" of the proceedings, the Code does not *require* the presence of counsel during the initial appearance. Although counsel is not mandated, the commentary to the Code highly recommends that

> [e]ven if there is not a constitutional right to counsel at the first appearance, as a matter of policy it is wise to assure that the defendant is represented at the first appearance. At the first appearance the judge is required to determine whether there exists reasonable cause to support the complaint and to fix bail or other pre-trial release conditions, both of which decisions are critical to the defendant's securing his immediate freedom and require representation and advocacy. Representation by counsel is particularly important to the indigent defendant who cannot post more than the most nominal bail.[117]

The Code recognizes that the effective participation of defense counsel is critical to the accused's rights and to assurance of rational decision-making. The draftsmen recognized that even non-indigents could experience difficulty securing an attorney on the short notice necessitated by the initial appearance. In order to assure the prompt implementation of the defendant's rights the Code recommends that the court assign defense counsel even though the defendant may not be indigent.[118] "[I]f it turns out that the defendant has funds to obtain counsel he may be required to pay a moderate fee to reimburse the court for the services rendered to him."[119] The attorney appointed at this stage would remain with the accused as his representative only

114. *Id.* at 578.
115. *Id.*
116. *See* note 74 *supra.*
117. ABA-ALI Model Code of Pre-Arraignment Procedure, Commentary § 310.1, 581 (1975).
118. *Id.* at 583.
119. *Id.*

during the initial appearance after which private counsel or a public defender would have to be retained.

B. The Screening Conference

Article 320 of the Code provides for a screening conference between the parties. The conference is discretionary on the part of the defendant and

> [C]reates a statutory framework to encourage and guide the exercise of prosecutorial discretion in determining whether and what to charge; whether to decline prosecution unconditionally, or on the condition that the defendant abstain from any further illegal acts or that he participate in some rehabilitation program; and whether to agree to sentencing concessions in connection with a plea of guilty. The conference is designed as an opportunity for the parties to exchange information about the case in order to provide a basis for possible agreement on disposition of the case at this point.[120]

A screening conference may be held either before or after the preliminary hearing leaving to the defense the tactical decision as to the order of the two proceedings. The conference is an adversary procedure requiring the presence of defense counsel. The draftsmen believed that the chances of an accused being misled, or believing he was, when negotiating with the prosecutor are too great to forego defense counsel.[121]

C. The Preliminary Hearing

Finally, Article 330[122] provides for a preliminary hearing to be held within ten days if the accused is in custody and thirty days if he is not, with provision for limited adjournments. Since the function of the hearing is to screen out charges that should not go to trial more evidence is required to prove probable cause than is required for an arrest and detention. The judge need not be persuaded of the arrestee's guilt but should consider the case as if it were a trial and he were

120. *Id.* at Commentary § 320, 584-85.
121. *Id.* at 585-88.
122. Section 330.1 provides in part:

> (1) *Right to a Hearing.* If the crime charged in the complaint is a [felony], the defendant shall have a right to a preliminary hearing to determine whether there is sufficient evidence to proceed to trial. The filing of an indictment by the grand jury charging the defendant with the same or a related offense shall not terminate his right to a preliminary hearing. . . .

Felony is in brackets since it is at this point that the states must elect whether they wish to distinguish as to procedures for the preliminary hearings. The draftsmen appear to favor one procedure for all accused.

required to rule on the sufficiency of the evidence to send the case to the jury.[123]

The Code recognizes that a grand jury indictment is not a fair substitute for a preliminary hearing.

> Preliminary inquiries can on occasion have great value for one charged with crime. Where a defendant is denied out of hand the opportunity to consider utilizing that value, we do not think that that denial is to be swept under the rug of a grand jury indictment. Neither do we think that the availability of a remedy should depend upon the outcome of a race between counsel seeking habeas corpus or mandamus and the grand jury acting upon the charge.[124]

Under Article 330 the prosecutor would no longer be able to cut off the arrestee's right to a preliminary hearing by securing an indictment.[125]

The exact procedure suggested by the Code has not been implemented in any state. Arguments opposing adoption of the Code include the fact that its broad provisions exceed the cursory, simplistic system mandated by *Gerstein* and the expense involved in enacting the Code rules.

The major objection to an adversary probable cause hearing, such as the preliminary hearing, is the added expenditure involved. At present no empirical data exists concerning the costs of adversary preliminary examinations as opposed to the non-adversary, non-evidentiary variety.[126] General expenses may safely be said to include stenographer costs, transcript costs, court employee costs, additional commissioners, prosecutors and defense attorneys.[127] Off-setting these expenditures, however, is the probability that the incidental discovery accompanying such an evidentiary hearing should have the direct effect of increasing the number of guilty pleas entered before trial. An arrestee, who, with the advice of counsel, is made aware of the strength of the state's case may be more readily disposed to negotiate a plea early in the

123. The standard for submitting a case to the jury varies in each jurisdiction. Whatever the state standard for submitting the case to the jury, that state standard should also be applied to the preliminary hearing. *Id.* at Commentary § 330.1.

124. Blue v. United States, 343 F.2d 894, 900 (D.C. Cir. 1964) *cert. denied*, 380 U.S. 944 (1965) quoted in ABA-ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Commentary § 330.1 at 592 (1975).

125. *Contra*, Coleman v. Burnett, 477 F.2d 1187, 1207 (D.C. Cir. 1973) (an indictment establishes sufficient probable cause to hold an accused for trial thereby rendering a preliminary hearing unnecessary).

126. Note, *A Constitutional Right to Preliminary Hearings for All Pretrial Detainees*, 48 S. CAL. L. REV. 158, 179-82 (1974); Note, *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, 83 YALE L.J. 771, 789-90 (1974).

127. *Id.*

proceedings.[128] On the other hand, the prosecutor may learn more quickly that the case would fail under the strict burden of proof required at trial and is not worth pursuing further. Certainly a situation in which there is no probable cause even to detain is not a very strong case from a prosecutorial viewpoint. This is particularly true in light of the fact that the probable cause warranting detention is not clearly differentiated by the court from the probable cause necessary to arrest and trial.[129] By eliminating weak prosecutions the state stands to save substantial jail and prisoner maintenance expenses, court costs and attorney costs for those defendants unable to afford private counsel.[130]

Another cost-saving feature of granting all arrestees a preliminary hearing to determine probability of conviction at trial is the chance to consolidate a variety of pretrial motions promoting efficient allocation of judicial resources and speeding the cases through the system. Evidence produced at the examination could be preserved for trial. Both the defense and the prosecution could profit by records of the examination as impeachment tools at trial. Finally, a form of cost savings would be the enhancement in the skill and participation by the commissioner. The necessity for a full hearing and dismissal of charges where a finding of probable cause cannot be sustained could conceivably improve the commissioners' conduct in such matters as issuance of search warrants, and handling of bail hearings.[131] A similar effect should be had on police conduct in that even greater care than is mandated by the *Gerstein proceeding* standards would be necessitated in the making of arrests.

The increased expenditures required of a preliminary hearing and the potential economies occasioned by it are unknown factors. An analysis of what a defendant stands to lose by unwarranted prosecution, however, inevitably leads to the conclusion that this is an interest to be protected even at increased costs.[132] Nevertheless, the Supreme Court

128. Note, *A Constitutional Right to Preliminary Hearings for All Pretrial Detainees*, 48 S. CAL. L. REV. 158, 179-82 (1974). This contention is supported by California's experience with adversary hearings. In 1965-66 California municipal courts disposed of 48,601 felony filings, of which 16,200 involved no hearing at all because of guilty pleas and dismissed charges and 31,896 involved limited hearings in which the prosecution's evidence was uncontested. Thus, the advice of counsel prior to such hearing and the limited discovery necessary prior to such hearing can have a significant effect on the outcome of the proceedings. Note, *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, 83 YALE L.J. 771, 792 n. 91 (1974).

129. Gerstein v. Pugh, 420 U.S. at 116-17; *see* note 22 *supra*.

130. Note, *A Constitutional Right to Preliminary Hearings for All Pretrial Detainees*, 48 S. CAL. L. REV. 158, 179-82 (1974).

131. *Id.*; Note, *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, 83 YALE L.J. 771, 793-95 (1974).

132. "It is fundamental that a deprivation of constitutional rights may not be justified upon economic considerations." Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 687 (D. Mass. 1973); *accord*, Brenneman v. Madigan, 343 F. Supp. 128, 139 (N.D. Cal. 1972); *see* Rozecki v. Gaughan, 459 F.2d 6, 8 (1st Cir. 1972); Jackson v. Bishop,

in *Gerstein* severely limited the function of the probable cause determination, restricting it to a determination of reasonable cause to detain, and sanctioning the elimination or disregard of adversary safeguards. But, since the Court did not *expressly prohibit* an evidentiary hearing with assistance of counsel the states remain at liberty to enact programs patterned after the Model Code of Pre-Arraignment Procedure.

CONCLUSION

The Code provisions draw a reasonable compromise between the interests of the accused in securing his liberty and an expeditious end to the proceedings and the interests of the state in punishing criminal acts. The adversary proceedings recommended by the Code sharply contrast with Maryland's two examinations[133] and the opportunity for a full preliminary hearing is accorded *all* arrestees, whether misdemeanants or felons.

In its present form Maryland's response to *Gerstein* does not adequately protect the rights of citizens arrested without a warrant. Clearly, a prompt finding, for all accused, as to whether there is cause to proceed to trial is imperative. While Maryland has taken a significant step in the direction of fairer treatment for those accused of crime the state still has far to go in eliminating the injustices spawned by the new procedures.

Shelly E. Mintz

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404 F.2d 571, 580 (8th Cir. 1968). *See also* Goldberg v. Kelly, 397 U.S. 254, 266 (1970) where the Court found that increased financial burdens did not justify denial of pre-termination evidentiary hearings for welfare recipients.

133. *See* section II *supra*.