SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 63 | Issue 3 Article 6

2013

"Hold" On: The Remarkably Resilient, Constitutionally Dubious 48-Hour Hold

Steven J. Mulroy

"HOLD" ON: THE REMARKABLY RESILIENT, CONSTITUTIONALLY DUBIOUS 48-HOUR HOLD

Steven J. Mulroy†

ABSTRACT

This Article discusses the surprisingly widespread, little-known practice of "48-hour holds," where police detain a suspect—without charge or access to bail—for up to 48 hours to continue their investigation; at the end of 48 hours, they either charge or release him. Although it has not been discussed in the scholarly literature, this practice has occurred in a number of large jurisdictions over the past few decades, and continues today in some of them. The "holds" often take place, admittedly or tacitly, without the probable cause needed to charge a defendant, and thus in violation of the Fourth Amendment. Even with probable cause, this Article argues, it is constitutionally problematic to deliberately detain a person for 48 hours without charging him with a crime. This Article traces the development of the practice over the last few decades, including its surprising persistence despite repeated (though sporadic) criticism by courts and the media. It rejects the justifications for the practice asserted by its defenders and suggests that the practice improperly allows the prosecution to achieve two "end runs" around normal procedural protections. First, the practice allows detention for 48 hours without starting the clock for a prompt bail determination. Second, it delays for 48 hours the point at which the Sixth Amendment right to counsel protections against interrogation attach, thus allowing an extra 48 hours for the police to "sweat" the defendant and potentially achieve confessions.

† Associate Professor, Cecil C. Humphreys School of Law, University of Memphis. The author participated in public discussions of the 48-hour hold controversy in his role as a Shelby County Commissioner. He expresses his gratitude to attorneys Robert Hutton and Jenny Case and to Professor Eugene Shapiro of the Cecil C. Humphreys School of Law, University of Memphis, for their thoughtful comments on the Article, as well as to Razvan Axente for his research assistance. This Article is dedicated to Molly.

CONTENTS

INTRODUCTION

For the past several decades, a number of local jurisdictions around the country have had a publicly acknowledged, routinized procedure for holding criminal suspects against their will for up to 48 hours without charging them with a crime, in order for the police to continue their investigation of the suspect. In many (if not most) cases, this was done without proof amounting to probable cause—either with no judicial scrutiny or judicial scrutiny that was pro forma at best. In all cases, there was no formal charge; thus, there was no access to bail, or a bail hearing, or starting of the clock for a prompt bail determination. Suspects were routinely interrogated during this period. At the end of the prescribed period—variously 20 to 72 hours, but usually 48—the suspect would either be charged or released.[1] Despite occasional criticism of this practice by courts, the bar, and the press, the practice continued, resulting in many thousands of such detentions.

These policies and practices occurred in various jurisdictions around the United States, at various periods of time, with some continuing to the present day. Jurisdictions with this practice include

1. *See infra* Part I. It is difficult to say precisely how many of the detainees were charged versus released, although in some jurisdictions a significant fraction of them were released. *See infra* notes 72–77 and accompanying text (discussing Memphis's uses of an early version of the 48-hour hold). This Article argues that even where the suspect is ultimately charged, the 48-hour hold procedure raises constitutional and policy concerns.

Chicago, Illinois, which had a written police policy from 1978 to 1986[2] and a recorded complaint as late as November 2002;[3] Austin, Texas throughout the 1970s and 1980s,[4] which has never formally been discontinued, and an unofficial policy in Missouri at least throughout the 1990s.[5] An even more aggressive version from Orleans Parish, Louisiana, purported to allow a magistrate to extend a detention by 48 hours even *after* finding no probable cause.[6] This practice occurred within the last few years.

While the maximum period involved is 48 hours, shorter periods are sometimes used. For example, relying on a state statute requiring warrantless arrestees to be charged within 20 hours or released, local authorities in Missouri have deliberately detained persons without charge on "20-hour hold[s]."[7] In some Missouri jurisdictions, there was an

2. *See* Chicago Police, General Order 78-1 (Jan. 1, 1978), *rescinded by* Teletype Order No. 05328 (July 1, 1986); *see also* Robinson v. City of Chicago, 638 F. Supp. 186, 188, 192 (N.D. Ill. 1986) (finding that Paragraph VI.C.2 of General Order 78-1 permitted prolonged detention in order for officers to continue investigations and holding that the policy was "repugnant to Fourth Amendment rights"), *rev'd on standing grounds*, 868 F.2d 959 (7th Cir. 1989); Bullock v. Dioguardi, 847 F. Supp. 553, 563 (N.D. Ill. 1993) (alleging prolonged detention under 78-1 even though the policy had apparently been rescinded); Willis v. Bell, 726 F. Supp. 1118, 1127 (N.D. Ill. 1989) (following *Robinson* and granting summary judgment in favor of plaintiff for prolonged detention under 78-1).

3. Second Amended Complaint at 1, Lopez v. City of Chicago, No. 01 C 1823, 2005 WL 711986 (N.D. Ill. Nov. 12, 2002) (alleging that the Chicago Police Department's "hold past court call" procedure is unconstitutional).

4. E-mail from Prof. Steve Russell, Indiana University-Bloomington School of Law, former Municipal Court Judge, Austin, Texas (July 11, 2012, 7:33 AM) (on file with author). Prof. Russell observed this practice while a sitting judge and while serving on a Municipal Court Task Force on jail overcrowding. *Id.* Judge David Phillips of Travis County, Austin, Texas, also confirmed the use to the procedure as late as the 1990s. Correspondence with Judge David Phillips of Travis County, Austin, Texas (July 12, 2012, 10:03 AM) (on file with author).

5. *See, e.g.*, United States v. Roberts, 928 F. Supp. 910, 933 & n.14 (W.D. Mo. 1996) (noting that officers were relying upon an "oxymoronic interpretation" of section 544.170 of the Missouri Revised Code, which set a time limit on a lawful detention pending evidence gathering, as a tool to detain suspects for investigative arrests). It is unclear whether the practice continues today to any extent.

6. *See* State v. Wallace, 25 So. 3d 720, 723–27 (La. 2009) (holding that local magistrate failed to comply with LA. CODE CRIM. PROC. art. 230.2's requirement that probable cause determinations for detained criminal suspects be made within 48 hours of arrest); *see also* Original Writ Application of the Defendant at 3–4, Louisiana v. Charles (La. Ct. App. 2009) (No. 2009-K-0477) (on file with author).

7. *Roberts*, 928 F. Supp. at 933 (citing MO. REV. STAT. § 544.170 (2011)).

"unwritten policy" of automatically holding all domestic violence suspects for the full statutory 20-hour period.[8] In at least one case, police adhered to this policy even after a judge ordered such a suspect released.[9] Litigants in Michigan have alleged a similar unofficial policy regarding domestic violence suspects.[10] At least one federal court has suggested that such a deliberate policy of extensive detention without charge, despite the availability of a magistrate, might violate the Fourth Amendment.[11]

At the other temporal extreme is Cleveland, Ohio. Until as recently as last year, the Cleveland Police Department had a policy of detaining persons without charge for up to 72 hours. At the end of this period, the suspect would either be formally charged or released.[12] An administrative law judge discontinued the practice in 2012.[13]

---

8. *See In re* Conard, 944 S.W.2d 191, 193 (Mo. 1997) (en banc). The statute actually required all types of criminal suspects to be released within 20 hours if the suspect had not yet been charged. *Id.* at 193 n.1. That statute now authorizes pre-charge detention for up to 24 hours before charges must be filed. MO. REV. STAT. § 544.170 (2011).

9. *In re Conard*, 944 S.W.2d at 194.

10. Davis v. City of Detroit, No. 98-1254, 1999 WL 1111482, at *1 (6th Cir. Nov. 24, 1999).

11. *Id.* (citing Brennan v. Twp. of Northville, 78 F.3d 1152, 1155–56 (6th Cir. 1996)). The Sixth Circuit has distinguished (1) a practice of deliberately holding such suspects for the full statutory period despite the availability of a magistrate, which is constitutionally suspect, from (2) a constitutionally valid policy against releasing such suspects prior to 20 hours unless a magistrate has reviewed their case. *See* Turner v. City of Taylor, 412 F.3d 629, 639–40 (6th Cir. 2005). The latter constitutional approach is an official policy in some Michigan jurisdictions, relying on state statutes that allow police to issue cash bonds to misdemeanants, but which forbid police from releasing misdemeanor domestic assault suspects in the first 20 hours unless they can be brought before a magistrate. *Id.* at 639 (citing MICH. COMP. LAWS ANN. § 780.581(1) (West 2007)). Laws such as these allow the magistrate to consider whether premature release might endanger a family member involved in the alleged altercation with the defendant, and whether additional hours of detention might allow those potential victims to relocate or take other protective action. Because this procedure is still predicated on making best efforts to promptly bring a defendant before a magistrate, it is analytically distinct from a blanket "20-hour hold minimum" policy, and thus not as vulnerable to constitutional challenge.

12. E-mail from Professor Yuri Linetsky, Case Western Reserve University School of Law, Cleveland, Ohio (July 18, 2012, 1:38 PM) (on file with author). Professor Linetsky learned about this practice while taking courses at the local police academy. *Id.*

13. *Id.*

But, by far, the broadest practice is in Tennessee, where several jurisdictions have had internal policies of placing certain suspects "on 48-hour hold," did so fairly frequently, and in some cases, still do.[14] The purpose of the hold has been to allow the police extra time to develop their investigation. If the investigation is fruitful, the suspect would be charged; if not, he would be released. Sometimes these detentions were done by court order and sometimes on the authority of law enforcement alone. In no case was it expressly authorized by statute or court rule.

In one 10-day period in 2012, three separate developments focused attention on this little-discussed, surprisingly frequent, and constitutionally suspect practice. On March 14, the Tennessee Court of Criminal Appeals reversed a first-degree murder conviction in a scathing opinion criticizing the use of "48-hour hold[s]" by the Memphis Police Department.[15] This was the third time this court had issued an opinion criticizing the practice.[16]

Independently, on March 21, the County Commission for Shelby County, Tennessee, (which includes Memphis) conducted a previously scheduled hearing on the use of 48-hour holds. The supervising judge of the court approved such holds in Shelby County and defended the practice.[17] Two days later, a federal district court issued an opinion after a bench trial holding the sheriff of nearby Lauderdale County, Tennessee, liable under § 1983 for continuing the practice despite a 2010 court order enjoining it.[18]

This confluence of events triggered sustained media attention and controversy,[19] including editorials questioning the practice[20] and state-

14. *See infra* Part I.

15. State v. Bishop, No. W2010-01207-CCA-R3-CD, 2012 WL 938969, at *7 (Tenn. Crim. App. Mar. 14, 2012).

16. *See* State v. Rush, No. W2005-02809-CCA-R3-CD, 2006 WL 2884457 at *1 & n.2 (Tenn. Crim. App. Oct. 11, 2006) ("We know of no authority which would permit the police to book a person 'into jail on a 48-hour hold,' or as additionally referred to in the record as placing a person 'on the hook,' without preferring any criminal charges in order that the police could complete their investigation, as suggested by the testimony."); State v. Ficklin, No. W2000-01534-CCA-R3-CD, 2001 WL 1011470, at *8 (Tenn. Crim. App. Aug. 27, 2001) ("[T]he seizure of the defendant for custodial interrogation was [without probable cause and] illegal.").

17. Transcript of Shelby County Commission Committee #4 Proceedings, Mar. 21, 2012, at 9 [hereinafter Shelby County Commission Transcript] (testimony of Shelby County General Sessions Court Judge Loyce Lambert Ryan) (on file with author).

18. Rhodes v. Lauderdale Cnty., No. 2:10-cv-02068-JPM-dkv, 2012 WL 4434722 (W.D. Tenn. Sept. 24, 2012).

19. *See, e.g.*, Daniel Connolly, *Court Rejects 48-Hour Holds*, COM. APPEAL (Memphis), Mar. 23, 2012, at A1.

ments from the police and prosecutors' offices defending it.[21] Within a week, the uproar resulted in a decision to discontinue the practice in Shelby County.[22] But both the chief judge overseeing the practice in that county[23] and the District Attorney helping to implement it[24] continued thereafter to defend the holds, and the District Attorney announced that the State would appeal the case finding the practice unconstitutional to the Tennessee Supreme Court.[25] Additionally, the practice continued until 2012 in Lauderdale County,[26] and apparently still continues in Tipton County,[27] as well as Hardeman and McNairy Counties—the other counties in the state's 25th Judicial District.[28]

---

20. Editorial, *48-Hour Detentions*, COM. APPEAL (Memphis), Mar. 26, 2012, at A5.

21. *48-Hour Holds Defended; Will Continue*, COM. APPEAL (Memphis), Mar. 24, 2012, http://www.commercialappeal.com/news/2012/mar/24/officials-note-declines-in-crime/.

22. Lawrence Buser et al., *Sheriff's Office Will No Longer Hold Prisoners for 48-Hour Detention*, COM. APPEAL (Memphis), Mar. 30, 2012, http://www.commercialappeal.com/news/2012/mar/30/sheriffs-office-no-longer-hold-prisoners-detention/.

23. Transcript of Shelby County Commission Committee #4 Proceedings, Apr. 18, 2012, at 1 (testimony of Shelby County General Sessions Court Judge Loyce Lambert Ryan) (on file with author).

24. Buser et al., *supra* note 22.

25. *Id.*; *see also 48-Hour Holds Defended; Will Continue*, *supra* note 21 (quoting District Attorney Amy Weirich as defending the practice). The State Attorney General's appellate pleading does not explicitly list as an issue for appeal the constitutionality of 48-hour holds, focusing instead on challenges related to the suppression of the statement obtained during the 48-hour hold in that case—an argument which may or may not require a ruling on the 48-hour hold's overall validity. *See* Application of State of Tennessee for Permission to Appeal, at 2, 7–10, State v. Bishop (Tenn. Crim. App. Mar. 14, 2012) (No. W2010-01207-SC-R11-CD). The State does, however, criticize as "flawed analysis" the intermediate appellate court's discussion of the police department's use of 48-hour holds. *Id.* at 12. The appeal was granted and the oral argument was held on April 3, 2013.

26. Rhodes v. Lauderdale Cnty., No. 2:10-cv-02068-JPM-dkv, 2012 WL 4434722, at *2 (W.D. Tenn. Sept. 24, 2012) (indicating that relief for 48-hour holds was still being sought in April of 2012).

27. *See* List of Arrests, Tipton County Sheriff's Office (on file with author) [hereinafter Tipton County List of Arrests].

28. Telephone Interview by Razvan Axente with Gary Antrican, Pub. Defender, Tenn. 25th Jud. Dist. (May 25, 2012). Mr. Antrican stated that the 48-hour hold is used in the 25th Judicial District, except for Fayette County. *Id.* District Attorney Mark Davidson confirmed that the procedure is not used in Fayette County. Telephone Interview by Razvan Axente with Mark Davidson, Dist. Attorney, Fayette Cnty., 25th Jud. Dist. (May 23, 2012).

Although apparently rare, the practice survives in Tennessee's 31st Judicial District as well.[29] Moreover, as indicated above, a milder version of the practice continues in parts of Michigan and Missouri in cases involving allegations of domestic abuse.

The practice represents a basic misunderstanding of Supreme Court case law in the area of pretrial detentions and the Fourth Amendment. It was (and is) a systematic violation of Fourth Amendment principles carried out openly—despite years of criticism by media, local government, and the courts.

Defenders of this surprisingly resilient practice maintain that the detentions take place based upon probable cause, that they are little distinguishable from regular arrests, and that any controversy is misplaced concern over formalities.[30] But there is reason to believe that many detentions take place without probable cause. And, even with probable cause, detaining people without charge, and without access to bail, seems to constitute an independent constitutional violation.[31]

The phenomenon merits analysis. It has sprouted up repeatedly at different times, including within the last few years, all around the nation. It continues today in some places. The spirited defense of the practice in Shelby County, Tennessee, a major practitioner, suggests it might resurface in years to come. In any event, it appears not to have been discontinued in other parts of Tennessee, and continues in other parts of the country in the specific context of domestic violence cases. Even when the practice is supposedly discontinued, significant misunderstanding of the law in this area can persist among law enforcement officials.[32] It suggests a broader problem of misunderstanding by local judges and police of the principles explained in *County of Riverside v. McLaughlin,* which held that warrantless arrestees "must promptly be brought before a neutral magistrate for a judicial determination of probable cause," with delays over 48 hours presumptively unreasonable.[33]

More broadly, significant issues lurk here about the principles underlying our rules governing pretrial detention. The issues are cast

29. Telephone Interview by Razvan Axente with Thomas J. Miner, Assistant Dist. Attorney, 31st Jud. Dist. (June 20, 2012).

30. *See, e.g.*, Buser et al., *supra* note 22 (relating remarks by Shelby County, Tennessee, District Attorney General Amy Weirich).

31. *See infra* Parts II and III.

32. *See* Rhodes v. Lauderdale Cnty., No. 2:10-cv-02068-JPM-dkv, 2012 WL 4434722, at *3 (W.D. Tenn. Sept. 24, 2012) (Lauderdale County officials erroneously believed the 48-hour hold gave them 48 hours to establish probable cause and file charges).

33. Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 53 (1991). The Court held that delays over 48 hours are presumptively unreasonable. *Id.* at 56.

into stark relief by the expansion in recent years of detention authority related to the war on terror.[34] Suspected "enemy combatants" have been detained without charge, but only in cases where there is a perceived grave threat to national security, and only with much controversy. Additionally, while "investigative detentions" are common in other countries,[35] they have long been outside the traditions of the American criminal justice system. The abuses occurring in other countries from the use of investigative holds remind us why.[36] The recent (and continuing) use of 48-hour holds in the United States in nonterrorism cases, with relatively muted (or at least delayed) public outcry, rebuts the complacent notion that "it can't happen here."

This Article examines the issues surrounding "48-hour holds." While it discusses their use generally around the country and analyzes their constitutionality under federal law, the Article focuses in detail on the practice in Tennessee, where it seems to be used most frequently, broadly, and recently. Part I describes the current (or recent) extent of the practice. Part II discusses the legal problems with "investigative detentions" and the role that the legal standard of "probable cause" plays in this analysis. It distinguishes 48-hour holds

34. *See, e.g.*, Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769 (2011) (providing a detailed overview of the current status of detention for enemy combatants); Stephanie Cooper Blum, *The Why and How of Preventive Detention in the War on Terror*, 26 T.M. COOLEY L. REV. 51, 57 (2009) (analyzing the reasoning and lawfulness of the preventive detention for enemy combatants and suggesting better alternatives).

35. *See, e.g.*, Matthew Law & Jeremy Opolsky, *The Year in Review: Developments in Canadian Law in 2009–2010*, 68 U. TORONTO FAC. L. REV. 99, 104 (2010) (discussing Canadian case law authorizing investigative detentions); Amanda L. Tyler, *The Counterfactual That Came To Pass: What If the Founders Had Not Constitutionalized the Privilege of the Writ of Habeas Corpus?*, 45 IND. L. REV. 3, 15, 18 (2011) (discussing U.K. statutes authorizing investigative detentions in terrorism cases); *cf.* Diane Webber, *Extreme Measures: Does the United States Need Preventive Detention To Combat Domestic Terrorism?*, 14 TOURO INT'L L. REV. 128, 128 (2010) (noting that France, Israel, and the U.K. allow "preventive detention," while the U.S. does not). As used here, "investigative detention" refers to something other than so-called "*Terry* stops" effected pursuant to *Terry v. Ohio*, 392 U.S. 1, 35 (1968).

36. Zemel v. Rusk, 381 U.S. 1, 15 (1965) ("It . . . cannot be forgotten that in the early days of the Castro regime [in Cuba], United States citizens were arrested and imprisoned without charges."); Amenu v. Holder, 434 Fed. App'x 276, 280 (4th Cir. 2011) (criticizing the Ethiopian government's "arbitrary arrest and detention . . . without charge" of members of the opposing political party); Haile v. Holder, 658 F.3d 1122, 1133 (9th Cir. 2011) (noting that Amnesty International had criticized Eritrea for indefinite detentions and for holding political and religious dissidents "without charge or trial").

from other types of limited detentions that can sometimes occur on less than probable cause. It argues that 48-hour holds constitutionally require probable cause but that in practice they often lack it. This Part also discusses the origin and history of the practice in Tennessee and its surprising persistence despite repeated (though sporadic) public criticism. Part III argues that even where 48-hour holds are supported by probable cause, they are still unconstitutional, both because the law forbids the detention of persons without charge, and because 48-hour holds impermissibly delay the determination of bail. This Part also discusses why law enforcement officials choose the practice rather than simply charging defendants in the traditional manner. It rejects the practical explanations for this choice proffered by the practice's defenders on the grounds that the practical ends cited could just as easily be achieved by use of a traditional arrest and charge. It suggests that the practice may serve as an "end-run" around traditional safeguards providing bail and preventing interrogation in violation of the right to counsel.

I. RECENT PRACTICE

A. Generally

Forty-eight-hour holds are by far the exception, not the rule. A 1999 media survey of 15 major American cities found no city that used extended holding periods before suspects are charged.[37] But both within the last few decades and fairly recently, similar pre-charge holding practices have been prevalent, not just in remote areas, but in major U.S. cities.

In Missouri, law enforcement used a state statute originally designed to protect defendants to justify such a practice. Missouri has a statute stating that persons arrested without the issuance of a warrant must either be charged or released within 24 hours.[38] In prior years, that statute specified a period of 20 hours.[39] The statute was intended to set an outer limit on how long police could hold a suspect without charging him and giving him a probable cause hearing, and it did not purport to provide law enforcement with any additional latitude regarding arrests and detentions.[40] It was not "a sword in the

37. Chris Conley, *Study Hits Police Holding Policy*, COM. APPEAL (Memphis), Jan. 30, 1999, at A1 [hereinafter Conley, *Study Hits*]. The cities surveyed were Atlanta, San Francisco, Indianapolis, Louisville, Birmingham, Charlotte, Houston, Austin, Los Angeles, Nashville, San Antonio, Dallas, Boston, El Paso, and San Diego. *Id.*

38. MO. REV. STAT. § 544.170 (2011).

39. *See* United States v. Roberts, 928 F. Supp. 910, 915, 932–33 (W.D. Mo. 1996) (discussing the 20-hour rule's application to the defendant and quoting the Missouri statute).

40. *Id.* at 933.

hands of the police, but rather a shield for the citizen."[41] Nonetheless, police seized on this statutory language to defend the Missouri practice of "a twenty hour hold"[42]—deliberately holding suspects without charge for 20 hours while police attempted to gain the suspect's cooperation.[43]

Moreover, some local jurisdictions in Missouri and Michigan have policies, either written or unwritten, of holding domestic violence suspects for at least 20 or 24 hours, regardless of whether a magistrate is available to make a probable cause finding.[44] The policy is apparently intended to ensure that victimized family members of the accused have sufficient time to relocate or take other protective measures before the defendant is released. Nonetheless, as a blanket policy applying to all persons accused of domestic assault, it seems overbroad. At any rate, to the extent police, pursuant to such policies, purposely detain defendants past the point at which it is practicable to bring in a magistrate, they violate the Constitution.[45]

In Chicago, police promulgated written General Orders that authorized investigative detentions. A 1978 General Order authorized police to detain suspects when "there is a necessity for the detention of an arrestee for a period of time longer than that which might routinely be expected, in order that they may continue the investigation."[46] This policy was even broader than the typical 48-hour hold policy, in that no definite time limit was set. On numerous occasions, federal courts have found that the purpose of this policy was to allow for investigative detentions, and thus the policy was unconstitutional.[47] Despite this, the City of Chicago continued to

41. *Id.*

42. *Id.* at 933 & n.14.

43. *See id.* at 915 (describing this as "the sole purpose of the pick-up"); *see also id.* at 932 (describing this position as "advanced unapologetically" by the prosecution in both its pleadings and witness testimony).

44. *See In re* Conard, 944 S.W.2d 191, 193–94 (Mo. 1997) ("It was the unwritten policy of the St. Charles police department to hold persons arrested for domestic violence for twenty hours . . . ."); Davis v. City of Detroit, No. 98-1254, 1999 WL 1111482, at *1 (6th Cir. Nov. 23, 1999) (holding that a Michigan defendant should have been allowed to proceed with his action against the city for the policy of holding domestic violence suspects for at least 20 hours (citing Brennan v. Twp. of Northville, 78 F.3d 1152, 1155–56 (6th Cir. 1996))).

45. *See infra* Part II.

46. Chicago Police, General Order 78-1, VI-C-2 (Jan. 1, 1978), *cited in* Robinson v. Chicago, 638 F. Supp. 186, 188 (N.D. Ill. 1986).

47. *See* Bullock v. Dioguardi, 847 F. Supp. 553, 563–64 (N.D. Ill. 1993) (denying the City's motion to dismiss the claim that police officers used coercive tactics in violation of the fourth amendment); Willis v. Bell,

defend the practice for years.[48] One federal district court decision had suggested that the practice had "apparently" been rescinded,[49] but a case as recent as 2006 addressed a complaint concerning a practice remarkably similar.[50]

In Austin, Texas, this practice continued for many decades, despite the absence of an express statute or police policy authorizing it.[51] It did so notwithstanding fairly aggressive criticism from the local judiciary.[52] Affected suspects were officially listed as being held "on suspicion of" a particular charge, even though not actually charged.[53]

Nor have the errors necessarily improved over time. As recently as 2009 and 2010, in New Orleans, Louisiana, the practice was arguably more constitutionally suspect. After a defendant was held for many hours, sitting "initial appearance" judges holding probable cause hearings would regularly find a lack of probable cause but, nevertheless, erroneously order the defendant held for an *additional* 48 hours, misapplying the reasoning from *McLaughlin*.[54] Furthermore, as recently

726 F. Supp. 1118, 1127 (N.D. Ill. 1989) (finding that the City violated Willis's due process rights by detaining him "beyond the time needed to perform the administrative steps incident to his arrest"); Robinson v. City of Chicago, 638 F. Supp. 186, 188 (N.D. Ill. 1986), *rev'd on standing grounds*, 868 F.2d 959 (7th Cir. 1989) ("The Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest, regardless of whether the original arrest was supported by an officer's on-the-scene determination of probable cause. Paragraph C-2 permits police officers to circumvent this requirement and for that reason is contrary to the Fourth Amendment rights of those being detained." (citation omitted)).

48. *See, e.g.*, *Willis*, 726 F. Supp. at 1127; Bostic v. City of Chicago, No. 86 C 5482, 1991 WL 96430, at *3 (N.D. Ill. May 23, 1991).

49. *Bullock*, 847 F. Supp. at 563. The indefinite hold policy of General Order 78-1, VI-C-2 was rescinded on July 1, 1986 by Teletype Order No. 05328. It was replaced by a policy that required a "Probable Cause to Detain Hearing" to be "held within 24 hours from the time of arrest." Chicago Police, Teletype Order No. 00415 (Jan. 15, 1986).

50. *See* Lopez v. City of Chicago, 464 F.3d 711, 714–15, 720–22 (7th Cir. 2006) (discussing complaint of alleged unconstitutional warrantless confinement for four days).

51. E-mail from Prof. Stephen Russell, *supra* note 4. Professor Russell observed this practice while a sitting judge and while serving on a Municipal Court Task Force on jail overcrowding. *Id.*

52. *Id.*

53. Correspondence with Judge David Phillips, *supra* note 4.

54. *See* State v. Wallace, 25 So. 3d 720, 724–25 (La. 2009) (criticizing the Orleans Parish Criminal District Court for consistently having problems "adhering to the constitutional guidelines" for determining probable cause as interpreted by the Supreme Court in *McLaughlin* and codified by state law).

as last year, Cleveland Police were routinely holding suspects without charge for up to 72 hours.[55] Not only is the period of constitutionally suspect detention longer in this case, the fact that it exceeds 48 hours disqualifies even the (ultimately unconvincing) argument that it is faithful to the Supreme Court ruling in *McLaughlin*.

The frequency of 48-hour holds varies by jurisdiction, but the practice is by no means freakishly rare. Tennessee provides a good example of the range. In Lauderdale County, the practice occurred approximately 10 times a month.[56] In Shelby County, it occurs approximately 1,000 times per year.[57] A sample review of arrest records in Tipton County suggests an average of about nine instances a month (at least 95 instances during an 11-month period between August 2009 and June 2010.)[58] Nonetheless, this represents a relatively small fraction of all arrests in these jurisdictions.[59] In the Judicial District covering Van Buren and Warren Counties, the District Attorney's Office acknowledged use of the practice, but indicated that it is used less than once per year.[60]

B. In Tennessee

Although there are thousands of examples in recent years in Tennessee, it is localized even within the state. Surveys of criminal justice officials from around Tennessee confirmed the practice's use in only 4 of 31 Judicial Districts.[61]

A majority of Tennessee District Attorney Offices surveyed stated that they considered the practice unlawful.[62] This comports with the

55. E-mail from Prof. Yuri Linetsky, *supra* note 12.

56. *See* Plaintiffs' Memorandum in Support of Partial Summary Judgment at 5, Rhodes v. Lauderdale Cnty. (W.D. Tenn. Aug. 9, 2010) (No. 2:10-cv-02068-JPM-dkv) [hereinafter Plaintiffs' Memorandum] (citing deposition testimony of Lauderdale County Sheriff Steve Sanders referencing approximately 115 such detentions in a 13-month period).

57. Judicial Commissioners Annual Report, Jan. 2011–Dec. 2011, submitted by Hon. Loyce Lambert Ryan, Supervising Judge for the Judicial Comm'rs, General Sessions Court, Shelby Cnty., Tenn. (Mar. 8, 2012) [hereinafter Judicial Commissioners Report].

58. Tipton County List of Arrests, *supra* note 27.

59. *See, e.g.*, Memorandum from General Sessions Criminal Court Judicial Comm'rs (Shelby County) to General Sessions Judge Larry Potter (n.d.) [hereinafter Potter Memorandum] (on file with author) (noting that 48-hour holds represent less than one percent of arrests in Shelby County).

60. Telephone Interview by Razvan Axente with Thomas J. Miner, Assistant Dist. Att'y, 31st Jud. Dist. (June 20, 2012).

61. Survey conducted by Razvan Axente from May 7, 2012 to May 25, 2012 (on file with author).

62. *Id.*; *see also* e-mail from Razvan Axente to Steven J. Mulroy (May 22, 2012, 8:05 PM) (on file with author). One e-mail from a District

view of state law enforcement, as Tennessee Bureau of Investigation agents are apparently trained that investigative holds are impermissible.[63] During a previous controversy over an antecedent to the 48-hour hold, a Memphis Police Department representative had publicly acknowledged that arresting someone for investigative purposes was "misconduct."[64] Nonetheless, the Director of the Memphis Police Department recently defended his department's use of 48-hour holds.[65]

The mechanics of the procedure vary by county. The common theme is the detention of a suspect without charge for investigative purposes for up to 48 hours. At the end of the 48 hours, the suspect is either charged or released.

In Lauderdale County, the Sheriff's Department would typically bring in a suspect to the jail and fill out a form indicating that the person is to be held for 48 hours "for investigation."[66] The form is not reviewed by a magistrate prior to the beginning of the "48-hour hold." The form calls for the category of crime for which the person is to be investigated, but that is not an actual charge. Indeed, the form indicates this hold "for investigation" to be an alternative to the part of the form where an actual charge would be identified.[67] These detentions occur when the officers do not have sufficient evidence to charge a detainee with a criminal offense.[68] If the person is not charged within 48 hours, he is released.[69] Jail officials take the

---

Attorney surveyed stated: "No, I do not have anything like that. It is wrong." *See* e-mail from Jimmy Dunn, Attorney Gen., 4th Jud. Dist., to Razvan Axente (Apr. 23, 2012, 1:22 PM) (on file with author).

63. *See* Memorandum Opinion and Order Granting Motion to Cite Defendant for Contempt of Court at 42, 48–49, Rhodes v. Lauderdale Cnty., No. 2:10-cv-02068-JPM-dkv (W.D. Tenn. Mar. 21, 2012), ECF No. 63 [hereinafter Lauderdale Contempt Order] (containing testimony of TBI Agent Mark Lane Reynolds regarding his training about the improperness of investigative holds). The defendants stipulated to liability, and the court awarded damages to plaintiffs. *Rhodes*, 2012 WL 4434722, at *1.

64. Chris Conley, *On the Hook: Many Suspects Dangle in Limbo,* COM. APPEAL (Memphis), Nov. 3, 1998, at A1 [hereinafter Conley, *On the Hook*] (quoting Memphis Police Deputy Chief Walter Crews).

65. *48-Hour Holds Defended; Will Continue*, *supra* note 21.

66. *See* Plaintiffs' Memorandum, *supra* note 56, at 4–5 & n.10 (discussing detention booking procedure at the Lauderdale County Jail); *id.* at Exhibit 6 (Lauderdale County Sheriff's Department Detention Request Form).

67. *Id.* at 5.

68. *Id.* at 4 & n.7 (citing deposition testimony of Lauderdale County Sheriff Steve Sanders).

69. *Id.* at 4.

detainee's personal property, issue jail clothing and bedding, and generate a mug shot.[70] Such persons are not eligible for bond.[71]

In Shelby County, law enforcement will apply to a magistrate, or "Judicial Commissioner," for a 48-hour hold determination.[72] The Judicial Commissioner will sign a form stating that there is probable cause to believe that the defendant has committed a crime and authorizing the suspect to be detained for up to 48 hours for further investigation.[73] At that time, the defendant is not yet charged,[74] meaning both that the prosecution has not yet filed an indictment, information, or presentment, and also that law enforcement has not filed an affidavit of complaint.[75] Law enforcement has that long to either charge the defendant or to release him.[76] Such suspects are also held at the jail, and are also ineligible for bond during this period.[77]

In Tipton County, there do not appear to be standardized, written rules concerning the practice. Nonetheless, Tipton County arrest records show that suspects who are taken into custody are either listed by the offense for which they are charged or, on some occasions, listed simply as "Hold for Investigation."[78] Because the decision to "hold for investigation" has already been made and recorded at the time the

70. *Id.* at 5.

71. *Id.*

72. *See* Judicial Commissioners Report, *supra* note 57, at 7–8.

73. *See* Order Granting 48 Hour Detention for Probable Cause (form used in Shelby County General Sessions Courts) [hereinafter 48-hour hold Form], *in* Memorandum from Debra L. Fessenden, Assistant Cnty. Att'y, on 48 Hour Detention Orders, to Steve Mulroy, Cnty. Comm'r (Nov. 19, 2010), *available at* http://media.commercialappeal.com/media/static/Mulroy_Memo.pdf.

There is some reason to doubt that the procedure really does require, in all instances, probable cause to charge a defendant with a crime. *See infra* Part II.A.2.

74. *See* 48-hour hold Form, *supra* note 73 ("The defendant may be held in the Shelby County Jail pending the presentment of a formal charging instrument to the appropriate magistrate.").

75. Judicial Commissioners Report, *supra* note 57, at 7 (noting that 48-hour hold orders were used in Shelby County when there is not yet probable cause to fill out an affidavit of complaint).

76. *See* 48-hour hold Form, *supra* note 73 ("[T]he defendant shall be released . . . [within 48 hours] unless a formal charging instrument has been presented within that time.").

77. *See* Conley, *On the Hook, supra* note 64 ("Police don't want a suspect charged and released on bond on one crime only to find he likely committed other crimes. . . . A person can get a bond only if he is charged."); Conley, *Study Hits*, *supra* note 37.

78. *See, e.g.*, Tipton County List of Arrests, *supra* note 27 (listing the "charge" for a number of arrestees as "hold for investigation").

arrestee is first brought to the police station, it seems to be made by law enforcement alone, without prior judicial authorization. This would be consistent with the procedure used by Lauderdale County, which also lies within the 25th Judicial District.[79] The procedure used in the other counties (Fayette, Hardeman, and McNairy) in the same Judicial District appears to be similar.[80]

Some, but not all, participants in the procedure characterize this detention as an "arrest."[81] On the one hand, the defendant clearly is not free to leave, and the detention is in a holding facility, so it seems clearly to be an arrest. On the other hand, unlike an arrest, bond is not available, nor does the detention seem to start the clock for a prompt bail determination. Nor does confinement continue, as with an arrest, until either trial or a judicial decision to release pending trial. Instead, with a 48-hour hold, the confinement lasts only 48 hours, at which point the defendant is either charged or released.

II. INVESTIGATIVE DETENTIONS

It is precisely the temporary, contingent, pre-charge nature of the detention—the notion that the detention will only last up to 48 hours, unless the defendant is charged—that raises significant constitutional issues with the practice of 48-hour holds. These characteristics make the practice seem indistinguishable from an overly long and unconstitutional "investigative detention."

Under our scheme of constitutional criminal procedure, "investigative detentions" are unconstitutional.[82] The United States

79. Tennessee Judicial District Map, TENN. STATE COURTS, https://www.tncourts.gov/administration/judicial-resources/judicial-district-map (last visited Mar. 1, 2013).

80. Telephone Interview by Razvan Axente with Gary Antrican, Pub. Defender for the 25th Jud. Dist. (May 25, 2012). *But see* Telephone Interview by Razvan Axente with Mike Dunavant, Dist. Att'y for Fayette Cnty. (June 2012) (stating that the practice is not used in Fayette County).

81. *Compare* Shelby County Commission Transcript, *supra* note 17, at 9 (testimony of Shelby County General Sessions Court Judge Loyce Lambert Ryan) (characterizing a 48-hour hold as an arrest), *with* State v. Bishop, No. W2010–01207–CCA–R3–CD, 2012 WL 938969, at *6 (Tenn. Crim. App. Mar. 14, 2012) (rejecting law enforcement agents' apparent belief that hold was not an arrest, although the defendant was not free to leave), *appeal granted*, Aug. 15, 2012.

82. As used here, the term "investigative detentions" refers to a practice where law enforcement removes a suspect from where he is found to another location and then forcibly holds him there for a significant period of time—more than a few hours—while law enforcement attempts to develop evidence sufficient to meet the "probable cause" standard for an arrest. The term does not refer to so-called "*Terry* stops," which allow law enforcement to briefly detain a suspect at or near where he is

Supreme Court has so stated on multiple occasions.[83] So have courts in Tennessee.[84] Lower federal courts have also said so specifically in the context of "hold" procedures.[85]

---

found for a far shorter period of time—typically less than an hour—based on the legal standard of "reasonable suspicion." *See infra* Part II.A.1. However, some commentators use the term "investigative detention" to refer to *Terry* stops. *See, e.g.*, George Coppolo, *Investigative Detention*, CONN. OFFICE LEGIS. RES. (Report No. 2007-R-0036) (Dec. 28, 2006), http://www.cga.ct.gov/2007/rpt/2007-R-0036.htm (using "*Terry* Stop" and "investigative stop" interchangeably).

Nor should the term be confused with "preventive detentions," which refers to the practice of holding someone pending trial based on a finding that they present a danger of committing further crimes. Although the Supreme Court has upheld "preventive detentions," it has done so in the limited context of a judicial hearing with due process protections, such as the right to counsel and cross-examination, and requires the prosecution to prove with "clear and convincing evidence"—a standard higher than probable cause—that detention pending trial is necessary to prevent a danger to the community. *See* United States v. Salerno, 481 U.S. 739, 743–44 (1987) (granting detention motion because no condition of release would ensure the safety of the community). This situation is analytically distinct from 48-hour holds, and it provides no support for the legality of 48-hour holds.

83. *See, e.g.*, Dunaway v. New York, 442 U.S. 200, 216 (1979) (holding detention for custodial interrogation unconstitutional); Brown v. Illinois, 422 U.S. 590, 605 (1975) (finding an arrest that was "both in design and execution . . . investigatory" unconstitutional); Davis v. Mississippi, 394 U.S. 721, 726–27 (1969) (same); *see also* Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) (explaining that delay after warrantless arrest before being brought to magistrate is unreasonable if "for the purpose of gathering additional evidence to justify the arrest"); United States v. Lefkowitz, 285 U.S. 452, 467 (1932) ("An arrest may not be used as a pretext to search for evidence.").

84. *See* State v. Huddleston, 924 S.W.2d 666, 676 (Tenn. 1996) (holding that a confession obtained during an illegal detention violated the Fourth Amendment (citing *McLaughlin*, 500 U.S. at 56)); State v. Bishop, No. W2010-01207-CCA-R3-CD, 2012 WL 938969, at *11 (Tenn. Crim. App. Mar. 24, 2012) ("The rankly unconstitutional 48-hour hold utilized in this case is the product of a police department policy, a policy condemned by this court repeatedly in the past. . . ."), *appeal granted*, Aug. 15, 2012); State v. Delashmitt, No. E2007-00399-CCA-R9-CD, 2008 WL 3245513, at *17 (Tenn. Crim. App. Aug. 7, 2008) (holding that a defendant's Fourth Amendment rights were violated when he was held for more than 48 hours while officers continued to investigate and build a case against him).

85. *See, e.g.*, United States v. Roberts, 928 F. Supp. 910, 915 (W.D. Mo. 1996) (citing scholarship that criticizes the practice of investigatory detention); Robinson v. City of Chicago, 638 F. Supp. 186, 192 (N.D. Ill. 1986) (criticizing policy of detaining suspects "so that police officers may continue the investigation" or to "build a case against a defendant while he is in jail").

This approach contrasts the United States with many other countries. The United Kingdom currently provides by statute for investigative detentions in terrorism cases.[86] If a police officer "reasonably suspects" someone of terrorism, the officer can place that person in detention for up to 48 hours without charge.[87] At that point, the officer must bring the suspect before a magistrate, who is empowered, based on a finding of need for continued evidence gathering, to continue to detain the suspect for an additional seven days, at the end of which the magistrate may extend the detention for one final seven-day period.[88] Canada also provides for investigative detentions and does not limit them to terrorism cases.[89] Similarly, investigative detentions for significant periods of time without charge are common in other countries.[90]

In recent years, there has been discussion about whether United States law was evolving to allow investigative detentions in the limited context of terrorism cases.[91] Given that the Court and Congress have given at least partial blessing to the detention of suspected "enemy combatants" without formal charges, there may be something to that.[92] Indeed, one scholar has argued that United States law has become even more permissive on this front than the

86. *See* Terrorism Act, 2000, c. 11 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/2000/11/contents.

87. *Id.* § 41.

88. *Id.* sch. 8, pt. III, para. 36.

89. *See* Law & Opolsky, *supra* note 35, at 104 ("[O]n a proper interpretation of the law, investigative detentions can be lawfully used for suspected offenses." (citing R. v. Yeh, 2009 SKCA 112 (Can.))).

90. *See, e.g.*, Zemel v. Rusk, 381 U.S. 1, 15 (1965) (Cuba); Amenu v. Holder, 434 Fed. App'x 276, 280 (4th Cir. 2011) (Ethiopia); Haile v. Holder, 658 F.3d 1122, 1133 (9th Cir. 2011) (Eritrea).

91. *See, e.g.*, Tyler, *supra* note 35, at 10–11 (discussing prior use of preventive national security detentions in the absence of suspension legislation and the current legislative proposals seeking to revive the procedure when dealing with suspected terrorists).

92. *See* Authorization for Use of Military Force (AUMF), Pub. L. No. 107–40, 115 Stat. 224 (2001) (granting the President the authority to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001"); Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004) (holding that pursuant to the AUMF, a citizen of the United States, at least where apprehended on the battlefield of a theater of war abroad, may be held as an "enemy combatant" without criminal charges for the duration of a war, after being given certain minimal due process protections).

United Kingdom, despite the latter's lack of any *constitutional* rules guaranteeing habeas corpus review.[93]

Whatever the exact contours of the authority to detain without charge in the unique context of the war on terror, existing Supreme Court case law makes clear that investigative detentions are not permissible in ordinary criminal cases. In *County of Riverside v. McLaughlin*, the Court listed examples where a judicial probable cause determination would be said to be delayed unreasonably, even if conducted *within* 48 hours.[94] Crucially, one example of unreasonable delay provided was delay "for the purpose of gathering additional evidence to justify the arrest."[95] Similarly, in *Brown v. Illinois*, the Court invalidated an arrest that it found "investigatory."[96]

More specifically, the "48-hour hold" practice is troublesome in at least two fundamental ways. First, it seems to allow for detentions on less than probable cause. Second, it allows for detentions without charge. The probable cause defect will be discussed first, followed by a discussion of how this practice came to be.

A. Probable Cause

1. The Requirement and Its (Limited) Exceptions

Law enforcement can certainly interact with an individual found in a public place on less than probable cause. But police may only take an individual from where they find him and forcibly remove him to another location upon a finding of probable cause. This requirement certainly applies to any situation where police remove a

93. *See* Tyler, *supra* note 35, at 19 ("[T]hose held without charges in the U.K. under its Terrorism Act . . . appear to enjoy greater liberty protections than their American citizen counterparts."). It should be noted, however, that while the Supreme Court has held that Congress has authority to provide for less stringent protections for suspected terrorists than for ordinary criminal suspects, *see* Hamdan v. Rumsfeld, 548 U.S. 557, 590–93 (2006), it has drawn the line at congressional removal of habeas corpus protection for such suspects. *See* Boumedienne v. Bush, 553 U.S. 723, 771 (2008) ("If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause.").

94. Cnty. of Riverside v. McLaughlin, 500 U.S. 44 (1991).

95. *Id.* at 56. The *Bishop* court emphasized this language from *McLaughlin* in explaining why the 48-hour hold policy, which contemplates investigative detentions, is unconstitutional. State v. Bishop, No. W2010-01207-CCA-R3-CD, 2012 WL 938969, at *8 (Tenn. Crim. App. Mar. 24, 2012) ("It appears that the MPD has created a procedure to do that very thing prohibited by the state and federal constitutions: detain a suspect as an investigative tool specifically designed to acquire additional evidence to support the detention."), *appeal granted*, Aug. 15, 2012.

96. Brown v. Illinois, 422 U.S. 590, 605 (1975).

suspect to police headquarters, whether for custodial interrogation,[97] to be fingerprinted,[98] or to be photographed.[99] It also extends to any other forced removal of a suspect from his current location to any other location. In *Florida v. Royer*, for example, the Supreme Court held that police could not remove a suspect found in an airport to a separate airport interrogation room on less than probable cause.[100] In *Hayes v. Florida,* the Court held that the Fourth Amendment is violated where, without probable cause, the police "forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is *detained, although briefly, for investigative purposes.*"[101] Thus, it is clear that the law generally forbids detaining a suspect for a crime on anything less than probable cause.

Nonetheless, there are a few discrete situations in which the law allows a detention of a suspect based on less than probable cause. These situations are distinct from 48-hour holds.

Terry *Stops.* One narrow exception, that of a brief "*Terry* stop" under the authority of *Terry v. Ohio*,[102] clearly does not apply to the 48-hour hold situation. In *Terry*, the Supreme Court held that a law enforcement agent could briefly detain a person found in public based on "reasonable suspicion" that the person was involved in criminal activity.[103] This "reasonable suspicion" standard is lower than probable cause, but more than a hunch.[104] It requires that the police officer be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant

97. *See* Dunaway v. New York, 442 U.S. 200, 216 (1979) (noting that detention for custodial interrogation intrudes severely on interests protected by the Fourth Amendment).

98. *See* Davis v. Mississippi, 394 U.S. 721, 727 (1969) ("Detentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment.").

99. *See* People v. Farley, 90 Cal. App. 3d 851, 862–63 (Ct. App. 1979) (noting that there is no "relevant distinction" between detention for the sole purpose of obtaining photographs and detention for the sole purpose of obtaining fingerprints, as condemned in *Davis*).

100. Florida v. Royer, 460 U.S. 491, 507–08 (1983); *see also* United States v. Glover, 957 F.2d 1004, 1009 (2d Cir. 1992) (failure to return suspect's identification and request to accompany officers to private office amounted to a seizure).

101. Hayes v. Florida, 470 U.S. 811, 816 (1985) (emphasis added).

102. Terry v. Ohio, 392 U.S. 1 (1968).

103. *See id.* at 23–24 (discussing how the criminal "tradition of armed violence" would make it unreasonable to deny officers the ability to see if a suspicious individual was carrying a weapon).

104. *Id.* at 27.

that intrusion."[105] This investigative stop must last no longer than is reasonably necessary to confirm or dispel the police officer's suspicions.[106] Typically, *Terry* stops should not last much longer than 20 minutes.[107] Detentions of more than a few hours are clearly beyond the scope of what the Court contemplated in *Terry*.[108] More importantly, as noted above,[109] *Terry* stops generally do not empower a police officer to remove a suspect to another location.[110] For this reason, 48-hour holds are not justifiable as *Terry* stops.

Nontestimonial Identification Orders. One related issue involves "nontestimonial identification orders." These orders derive from dicta in *Davis v. Mississippi,* where the Supreme Court held that probable cause was required to bring an unwilling suspect down to the police station for the purpose of taking fingerprints.[111] Despite holding that probable cause was required where the police brought a suspect to the station without a warrant, the Court nonetheless suggested that, because of the relative lower level of intrusion involved in fingerprint sampling, "narrowly circumscribed procedures" might be developed

105. *Id.* at 21.

106. *Id.* at 26; *see also* United States v. Sharpe, 470 U.S. 675, 686 (1985) (examining "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant").

107. *See* Model Code of Pre-Arraignment Procedure § 110.2(1) (1975) (recommending a maximum of 20 minutes for a *Terry* stop); *Sharpe*, 470 U.S. at 683 (declining to provide a set time limit, but ruling on the facts that a detention lasting 20 minutes was valid).

108. *See* United States v. Place, 462 U.S. 696, 709–10 (1983) (holding a 90-minute detention unreasonable based on the facts of the case); United States v. Puglisi, 723 F.2d 779, 790 (11th Cir. 1984) (holding that an investigatory detention lasting approximately 140 minutes was unreasonable); Moya v. United States, 761 F.2d 322, 327 (7th Cir. 1984) (three-hour seizure unreasonable); United States v. Sanders, 719 F.2d 882, 886–87 (6th Cir. 1983) (detaining luggage for 90 minutes was unreasonable).

109. *See supra* note 100 and accompanying text (discussing Florida v. Royer, 460 U.S. 491 (1983)).

110. The Court in Royer did acknowledge that there could be circumstances where, for reasons of "safety or security," it might be necessary to remove a suspect to a nearby location during a *Terry* stop, despite the absence of probable cause. *Royer*, 460 U.S. at 504–05. But the Court indicated those would be exceptions to the general rule and that police would need probable cause to convert a brief detention in place to one where the suspect was forcibly moved to a different location. *See id.* at 505 (noting that the record did not reflect any "legitimate law enforcement purposes which justified the detention in the first instance" that would justify a switch of locations).

111. Davis v. Mississippi, 394 U.S. 721 (1969).

that could constitutionally provide for it under less than probable cause.[112] The Court later suggested that a judicial order might constitutionally authorize, on less than probable cause, such a brief seizure and removal of an individual to a police station for the limited purpose of fingerprinting.[113] More recently, the Court has acknowledged that this is still an open issue.[114]

A number of states have seized on this dicta and enacted statutes and rules authorizing police, based on *Terry*-style "reasonable suspicion," to bring a suspect to the police station for the purpose of taking samples of fingerprints, palm prints, hair, blood, urine, and other "nontestimonial" identifying information.[115] The statutes specify only "nontestimonial" information to avoid Fifth Amendment problems. The Supreme Court has held that the privilege against self-incrimination is not violated where the information extracted from a suspect is "neither . . . testimony nor evidence relating to some communicative act."[116] Most of these statutes either explicitly authorize such limited detentions based on the lower standard of "reasonable grounds"[117] or have been interpreted by state courts to do so.[118]

The constitutionality of these statutes is an open question. A number of state courts have upheld these provisions.[119] But at least

112. *Id.* at 728.

113. *See* Hayes v. Florida, 470 U.S. 811, 814 (1985) ("[P]erhaps under narrowly confined circumstances, a detention for fingerprinting on less than probable cause might comply with the Fourth Amendment.").

114. Kaupp v. Texas, 538 U.S. 626, 630 n.2 (2003).

115. *See* ARIZ. REV. STAT. ANN. § 13-3905(A)(1) (2012) (requiring "reasonable cause"); COLO. R. CRIM. P. 41.1(c)(2) (2011) (requiring "reasonable grounds, not amounting to probable cause"); IDAHO CODE ANN. §19-625(1)(B) (2004) (requiring "[r]easonable grounds . . . which may or may not amount to probable cause"); N.C. GEN. STAT. § 15A-273(2) (2012) (requiring "reasonable grounds to suspect"); VT. R. CRIM. P. 41.1(c)(2) (2012) (requiring "reasonable grounds to suspect").

116. Schmerber v. California, 384 U.S. 757, 765 (1966) (extraction of blood); *see also* Pennsylvania v. Muniz, 496 U.S. 582, 603–04 (1990) (voluntary, incriminating "utterances" during field sobriety tests); United States v. Dionisio, 410 U.S. 1, 7 (1973) (voice exemplar); United States v. Wade, 388 U.S. 218, 222 (1967) (in-person lineup); Gilbert v. California, 388 U.S. 263, 266–67 (1967) (handwriting exemplar).

117. *See* COLO. R. CRIM. P. 41.1(c)(2) (2011); IDAHO CODE ANN. § 19-625(1)(B) (2004); N.C. GEN. STAT. ANN. § 15A-273(2) (2012); VT. R. CRIM. P. 41.1(c)(2) (2012).

118. *See* State v. Jones, 49 P.3d 273, 280–81 (Ariz. 2002) (requiring probable cause only when a "bodily invasion" is implicated).

119. *See* Williams v. Zavaras, No: 09–cv–02067–REB–CBS, 2011 WL 2432959, at *8–9 (D. Colo. Apr. 27, 2011) (upholding under the deferential AEDPA standard as not "contrary to" or an "unreasonable application" of "clearly established law"); Bousman v. Iowa Dist. Court

one state court has invalidated a similar provision on Fourth Amendment grounds, requiring a minimum of probable cause.[120] In response, the state legislature amended the statute to make the probable cause requirement explicit.[121] A federal version of the rule was proposed but never adopted, in part because of concerns over its constitutionality.[122] Another state court has held that while the statute only requires a *Terry*-style "reasonable suspicion" standard, a probable cause showing would be required for the most intrusive kinds of samples, such as taking a blood sample.[123] This is in accord with some Supreme Court case law stating that searches invading the body are more intrusive and require heightened justification under the Fourth Amendment.[124] Similarly, at least one scholar has argued for a probable cause standard for such intrusive procedures (like sampling blood, saliva, and urine), while allowing a reasonable suspicion standard for samples of information normally visible to the public (like fingerprinting, hair and voice samples, and physical measurements) for which there is a lesser expectation of privacy.[125]

Because such statutes authorize police to take a suspect from where they find him and forcibly remove him to a police station or hospital for procedures that will most likely take a few hours, they far

---

for Clinton Cnty, 630 N.W.2d 789, 798 (Iowa 2001) (upholding as applied to saliva swab); People v. Madson, 638 P.2d 18, 32 (Colo. 1981) (en banc) (upholding COLO. R. CRIM. P. 41.1, which permits detention of criminal suspect on "reasonable grounds, not amounting to probable cause" for purpose of obtaining "nontestimonial identification evidence"). For further discussion, see Paul C. Giannelli, *ABA Standards on DNA Evidence: Nontestimonial Identification Orders*, 24 CRIM. JUST. 24 (2009).

120. State v. Evans, 338 N.W.2d 788, 794 (Neb. 1983) ("We read the identifying physical characteristics act to require a showing of probable cause. . . . As so interpreted, the act is constitutional.").

121. L.B. 361, 99th Leg., 1st Sess. (Neb. 2005) (adding subsection to NEB. REV. STAT. § 29-3303 requiring "probable cause to believe that the person subject to the order has committed the offense").

122. United States v. Holland, 552 F.2d 667, 673–74 (5th Cir. 1977) (noting that in 1972 the Judicial Conference considered, but did not approve, such an amendment), *mandate aff'd, opinion withdrawn*, 565 F.2d 383 (1978).

123. *Jones*, 49 P.3d at 281.

124. *See, e.g.*, Winston v. Lee, 470 U.S. 753, 760 (1985) (requiring a case-by-case balancing approach for searches penetrating the skin in a case involving surgery to remove a bullet from a suspect for ballistic analysis).

125. Jennifer M. DiLalla, *Beyond the* Davis *Dictum: Reforming Nontestimonial Evidence Rules and Statutes*, 79 U. COLO. L. REV. 189, 225–26 (2008) (proposing a Model Rule distinguishing between intrusive and nonintrusive searches).

exceed the level of intrusion involved in a *Terry* stop. Thus, the better reading of the Fourth Amendment case law, and the better result overall, would be to require probable cause. That probable cause requirement should apply regardless of how physically intrusive or connected to a reasonable expectation of privacy the particular sampling or test is. But the Supreme Court may ultimately decide to the contrary—either by upholding such statutes' application in all cases or requiring probable cause based only on the physical intrusion of the sampling and not on the deprivation of liberty involved in forced removal to a police station or hospital.

Even if the Supreme Court upholds statutes requiring less than probable cause, it would still not support 48-hour holds. Courts upholding these statutes emphasize the limited nature of the deprivation of liberty, the fact that the detention is a relatively brief one, and the narrow purpose of obtaining discrete identifying information. That is a far cry from allowing a person to be detained for 20, 24, 48, or 72 hours while an open-ended investigation continues.

Material Witness Statutes. Another potential exception to the rule requiring probable cause to detain an individual involves holding an individual as a "material witness."[126] The federal material witness statute authorizes the detention of an individual based on a judicial finding that the individual's testimony "is material in a criminal proceeding" and that securing the witness's presence via subpoena "may become impracticable."[127] Although the detainee would normally be given the same freedoms as any defendant subject to bail and pretrial release procedures, a material witness can be delayed "for a reasonable period of time" to allow for the deposition of the witness to be taken.[128]

State material witness statutes follow a similar pattern. Tennessee, for example, has such a statute, which also requires a finding of material testimony.[129] Instead of requiring merely that the

126. *See* 18 U.S.C. § 3144 (2006) ("If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 [regarding bail and pretrial release]. . . . Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.").

127. *Id.*

128. *Id.*

129. *See* TENN. CODE ANN. § 40-11-110 (2012) ("If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that the witness has refused or will refuse to respond to process, the court may require the witness to give bail under § 40-11-

subpoena process may be "impracticable," the Tennessee statute requires a showing that the witness "has refused or will refuse to respond to process."[130] Further, rather than ordering detention, the judge is empowered to set bail to guarantee the witness's later appearance. Only after the person fails to give bail will the court be empowered to detain the witness.[131] Tennessee courts have not yet ruled on the constitutionality of material witness detentions.

Federal courts, however, have discussed, at least to a limited extent, the constitutional standards applicable to the federal material witness statute. The federal statute certainly provides "a significantly lighter burden" than probable cause for the detention of an individual.[132] The Supreme Court has not ruled directly on the constitutionality of this lighter burden for detention.[133] But lower courts have suggested that a warrant requirement of some type applies.[134] Some courts have concluded that, in order to satisfy the material witness statute's elements, law enforcement must show *probable cause* that the witness has material information and that a subpoena will not suffice to secure the witness's presence. Others have declined to apply a probable cause standard, but have nonetheless held that the general Fourth Amendment requirement of "reasonableness" governs.[135] Concurring in the recent Supreme Court case of *Ashcroft v. al-Kidd*, Justice Kennedy acknowledged the as-yet-

117 or § 40-11-122 for appearance as a witness, in an amount fixed by the court.").

130. *Id.* § 40-11-110(a).

131. *Id.* § 40-11-110(b).

132. *Leading Cases*, 125 HARV. L. REV. 172, 228 (2011) (citing Joseph M. Livermore, Carl P. Malmquist & Paul E. Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 78 (1968)).

133. Adams v. Hanson, 656 F.3d 397, 407 n.6 (6th Cir. 2011) ("[T]he Supreme Court has never comprehensively addressed the statutory and constitutional requirements for a valid material-witness warrant."); *see also* Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2085 (2011) (holding that courts should not inquire into subjective intent behind a material witness detention, and that defendants were entitled to qualified immunity regarding material witness detentions at issue, but failing to reach the general question of the constitutionality of material witness detentions); *id.* at 2085–86 (Kennedy, J., concurring) ("The scope of the statute's lawful authorization is uncertain.").

134. *See, e.g.*, Bacon v. United States, 449 F.2d 933, 942–43 (9th Cir. 1971).

135. Schneyder v. Smith, 653 F.3d 313, 324–25 (3d Cir. 2011) ("So while the Fourth Amendment applies here, the probable cause requirement cannot. The Amendment provides only one standard that could govern this situation: a seizure of an uncharged material witness is constitutionally prohibited if it is 'unreasonable.' ").

unresolved choice between these two standards.[136] Although earlier Sixth Circuit decisions required probable cause, the law in the Sixth Circuit is not clear.[137]

Regardless of the specific underlying constitutional standards, material witness detention authority does not apply to the use of 48-hour holds, nor does it provide authority for such holds under anything less than probable cause. First, neither the law enforcement agencies applying for such hold orders nor the courts granting them rely on any material witness statute or any material witness authority. For example, in the Tennessee appellate court opinions holding 48-hour holds unconstitutional, no party raised material witness authority as a justification for their use.[138] Nor was that raised as a defense in the federal litigation challenging the practice in Lauderdale County.[139] Court documents relating to the 48-hour holds do not rely on this authority either.[140] Neither the judicial order forms used in Shelby County nor 48-hour holds used in Lauderdale County characterized the order as one relating to material witness authority.[141]

Second, at least for now, the law in the Sixth Circuit—and thus throughout Tennessee, where the practice still continues and has in recent years seen its broadest use—requires probable cause for material witness detention orders.[142] Thus, for the time period in which we know of the practice being in use in Tennessee, probable cause would have been required regardless of whether the detentions were purported to be applications of material witness authority.

---

136. *al-Kidd,* 131 S. Ct. at 2086 (Kennedy, J., concurring).

137. *See Hanson*, 656 F.3d at 407 n.6 (acknowledging prior Sixth Circuit "probable cause" decisions in *Gerbitz* and *Stone*, but relying on Justice Kennedy's concurrence in *al-Kidd* to conclude that the issue was still an open one).

138. *See* State v. Bishop, No. W2010-01207-CCA-R3-CD, 2012 WL 938969 (Tenn. Crim. App. Mar. 14, 2012), *appeal granted*, Aug. 15, 2012; State v. Rush, No. W2005-02809-CCA-R3-CD, 2006 WL 2884457, at *1 n.2 (Tenn. Crim. App. Aug. 1, 2006) ("We know of no authority which would permit the police to book a person into jail on a 48-hour hold . . . ." (internal quotation marks omitted)); State v. Ficklin, No. W2000-01534-CCA-R3-CD, 2001 WL 1011470, at *7–8 (Tenn. Crim. App. Aug. 27, 2001).

139. *See* Plaintiffs' Memorandum, *supra* note 56.

140. *See, e.g.*, Judicial Commissioners Report, *supra* note 57, at 7–8.

141. *See* 48-hour hold Form, *supra* note 73; Plaintiffs' Memorandum, *supra* note 56, at Exhibit 6 (Lauderdale County Sheriff's Department Detention Request Form).

142. White by Swafford v. Gerbitz, 892 F.2d 457, 460–61 (6th Cir. 1989); Stone v. Holzberger, No. 92-3675, 1994 WL 175420, at *3 (6th Cir. Jan. 6, 1994).

Most importantly, material witness detentions are not supposed to be used to detain persons suspected of criminal activity, lest any lower standards be used as an end-run around the normal protections afforded the accused in our criminal justice system.[143] Because 48-hour holds are routinely used to detain persons themselves suspected of a crime who end up being charged with a crime, they are not properly characterized as material witness detentions, and attempts to justify them in that way would be improper.

"Immigration Holds." A related creature is the "immigration hold," authorized by the federal immigration code.[144] An "immigration hold," also called a "detainer," applies to a noncitizen suspect being held in federal, state, or local custody after arrest on narcotics charges whose release may be imminent.[145] A federal immigration officer may request such a person's detention be prolonged, since drug-related charges provide sufficient grounds for removability (deportation).[146] If the custodial law enforcement agency complies, the alien may be detained for up to 48 additional hours.[147] After 48 hours, the alien must either be released, or be arrested by United States Immigration and Customs Enforcement (ICE) officers for removal proceedings.[148]

143. *See* 27 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 646.23[3][b] (3d ed. 2012) (discussing standards for material custody warrant applications and the failure of a challenge which alleged that the "arresting authority had an improper motive"); *Leading Cases*, *supra* note 132, at 227–28 (citing multiple commentators' concerns over the abuse of the practice).

144. 8 U.S.C. § 1357(d) (2006).

145. The statute limits application of the detainer to controlled substance suspects. 8 U.S.C. § 1357(d). *But see* Comm. for Immigrant Rights v. Cnty. of Sonoma, 644 F. Supp. 2d 1177, 1198–99 (N.D. Cal. 2009) (stating that the court must "defer to the agency's reasonable interpretation of the statute so long as the interpretation is consistent with the purposes of the statute."). That court ultimately found that the statute "simply plac[es] special requirements on officials issuing detainers for a violation of any law relating to controlled substances, not as expressly limiting the issuance of immigration detainers solely to individuals violating laws relating to controlled substances." *Id.* at 1199.

146. 8 U.S.C. § 1357(d); *see also* 8 C.F.R. § 287.7(a) (2011) (describing detainers in general); Immigration & Nationality Act § 237(a)(2), 8 U.S.C. § 1227(a)(2) (2006) (listing categories of criminal offenses for which an alien may be deported).

147. 8 C.F.R. § 287.7(d).

148. 8 C.F.R. § 287.7(a). *But see* Ochoa v. Bass, 181 P.3d 727, 733 (Okla. Crim. App. 2008) (ordering the release of two men after they spent three months in prison pursuant to a detainer because ICE never obtained custody).

Unlike with a 48-hour hold, where (1) there is no statutory authorization, (2) it applies to all types of defendants, and (3) individualized suspicion is often lacking, an immigration hold is expressly authorized by federal statute, applies only to narcotics arrestees,[149] and is based on a preexisting conviction or probable-cause-based detention concerning a narcotics charge that is clearly grounds for deportation.[150] For that reason, immigration holds seem materially distinct from 48-hour holds. The existence of immigration holds (assuming their constitutionality) does not necessarily constitute support for the constitutionality of the typical "48-hour hold" practice.

Regardless of whether immigration holds are in fact distinct from 48-hour holds, the question naturally arises as to whether the former are constitutional. Noncitizens within the United States have due process protections against unreasonable seizure.[151] Therefore, one might argue that immigration holds violate the noncitizen suspect's constitutional rights by improperly extending their detention. But the Supreme Court has already held that noncitizens can be detained without bail during a removal proceeding.[152] This is so because Congress has an interest in assuring that noncitizens will comply with the requirements of the removal proceedings and that they will actually show up at their hearing.[153] As long as the "immigration

149. *But see* Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 179 (2008) (explaining that in practice, ICE uses the detainer "indiscriminately, regardless of the criminal charges an alien is facing"). Such expanded use of the immigration hold would be outside the statutory authority and thus illegal.

150. 8 U.S.C. § 1357(d); 8 C.F.R. § 287.7(a). The federal statute refers to federal immigration officers' "reason to believe" that the suspect is present in the United States illegally, 8 U.S.C. § 1357(d), which might suggest that this prolonged detention (up to 48 hours) is improperly taking place based on a *Terry*-style "reasonable suspicion" standard. But since the detainer is used only where the suspect is already being held (presumably constitutionally) on deportable charges, it contemplates a situation where there has already been at least a probable cause determination, or possibly an actual conviction, prior to ICE's involvement.

    An interesting question might arise as to situations where ICE issues the detainer request during the first 48 hours after a warrantless arrest and prior to any probable cause determination. In that situation, the suspect could theoretically be held for more than 48 hours (somewhere between 48 and 96 hours) without a probable cause determination. There are no reported cases of this precise situation, which would require remarkably speedy coordination between ICE and the other law enforcement agency.

151. Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

152. Demore v. Kim, 538 U.S. 510, 531 (2003).

153. *Id.* at 528.

hold" suspect's initial detention by the other law enforcement agency for a (deportation-eligible) narcotics charge was based on probable cause, there is necessarily probable cause to believe the suspect is deportable. Thus, the extended detention for the additional 48 hours is more in the nature of being denied bail and being detained as a flight risk—something that the Court has already approved.

However, there is evidence to suggest that ICE often exceeds the authority granted by Congress and uses the detainer procedure illegally.[154] The two most common abuses occur when ICE issues detainers without an initiating request from the local law enforcement officials, and when ICE is lodging detainers upon individuals who have not been arrested for controlled substance offences.[155] Thus, while the detainer procedure might not fail the constitutional test for the same reasons the "48-hour hold" does, the procedure seems to be abused, imposing unconstitutional restraints upon noncitizens.

2. Forty-Eight-Hour Holds' Violation of the Requirement

As practiced, 48-hour holds run contrary to the basic requirement of probable cause before a person can be arrested. Although some defenders of the practice have claimed that 48-hour hold orders are issued only upon probable cause[156]—for example, the forms used in Shelby County, Tennessee, contain a boilerplate recitation of "probable cause" being found[157]—there is good reason to believe that 48-hour holds, as practiced in Tennessee, have not, in fact, required probable cause.

First, official statements from the courts authorizing 48-hour holds in Shelby County acknowledge as much. One example is the 2012 report submitted by the Shelby County General Sessions Court to the Shelby County Commission, which states that "[t]he 48 [hour] hold does not quite have the probable cause needed for charging as in an Affidavit of Complaint."[158] Another example is a memorandum

154. Lasch, *supra* note 149, at 176–77 (noting that the ICE can detain any individual subject to exclusion or deportation proceedings).

155. *Id.*

156. *See* Shelby County Commission Transcript, *supra* note 17, at 4, 6–7 (testimony of Shelby County General Sessions Court Judge Loyce Lambert Ryan); Lawrence Buser, Daniel Connolly & Kevin McKenzie, *Officials Suspend 48-Hour Holds*, COM. APPEAL (Memphis), Mar. 31, 2012, at A1 (reporting comments of Shelby County District Attorney Amy Weirich).

157. *See* 48-hour hold Form, *supra* note 73 (sample form used in Shelby County General Sessions Court).

158. Judicial Commissioners Report, *supra* note 57, at 7; *see also* Shelby County Commission Transcript, *supra* note 17, at 3–4 (General Sessions Court Judge Ryan acknowledging this to be stated in the Judicial Commissioners Report).

from the Judicial Commissioners within that court, who actually issue the 48-hour hold orders.[159] This memorandum recited a standard of "reasonably, articulable [sic] suspicion" that "an offense has occurred."[160] This is clearly the "reasonable suspicion" standard of *Terry v. Ohio*—a standard which is lower than that of probable cause,[161] and undoubtedly insufficient to justify an arrest.[162]

Second, as a federal district court has found, in Lauderdale County, the policy itself "specifically authorized law enforcement officials to detain individuals in the Lauderdale County Jail for up to 48 hours, for the purpose of conducting further investigation, without probable cause to believe that the individuals being detained had committed an offense."[163] In a resulting federal civil rights action, Lauderdale County admitted that its 48-hour hold policy authorized detention on less than probable cause, and the court thus found that Lauderdale's policy violated the Constitution.[164] In proceedings related to this federal lawsuit, the Lauderdale County Sheriff admitted under oath that, until 2010, the Lauderdale policy had allowed for 48-hour detentions without charge or probable cause.[165]

Third, law enforcement agents in Shelby County made similar admissions under oath in other cases, including *Bishop*.[166] The appellate court in that case found that, despite boilerplate recitations that the defendant was being held "on probable cause," the record failed to establish that the magistrate's signing off on the 48-hour hold form was in fact "a true judicial determination of probable cause."[167]

159. Potter Memorandum, *supra* note 59.

160. *Id.*

161. *See* Terry v. Ohio, 392 U.S. 1, 27 (1968) (holding that the "reasonable suspicion" standard is lower than probable cause).

162. *Id.* at 26–27.

163. Rhodes v. Lauderdale Cnty., No. 2:10-cv-02068-JPM-dkv, 2012 WL 4434722, at *1 (W.D. Tenn. Sept. 24, 2012). *See also* Plaintiffs' Memorandum, *supra* note 56, at Exhibit 5 (November 1998 Lauderdale County Sheriff's Department memorandum authorizing 48-hour holds "on investigation" without charge).

164. *Rhodes*, 2012 WL 4434722, at *2 ("[Lauderdale County] admitted that the [defendants] were detained without probable cause because, due to an erroneous reading of *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), Lauderdale County law enforcement officials believed that they had 48 hours to establish probable cause and file charges against suspects.").

165. *See* Plaintiffs' Memorandum, *supra* note 56, at 4–5 (citing deposition testimony of Lauderdale County Sheriff Steve Sanders).

166. State v. Bishop, No. W2010–01207–CCA–R3–CD. 2012 WL 938969, at *7 (Tenn. Crim. App. Mar. 14, 2012), *appeal granted*, Aug. 15, 2012.

167. *Id.* at *6 n.1, *14.

Fourth, individual examples of 48-hour hold orders in other cases from Shelby County, Tennessee reflect instances where such orders were issued based on recitations of facts supporting less than probable cause. The forms used in such orders contain a blank for law enforcement to recite the "reason(s) for requesting detention"; this is the only place on the form where any basis for the detention is provided.[168] In a number of instances, that part of the form contained nothing more than mere conclusory assertions of suspected criminal activity. In one case, for example, the form merely recited that a named victim was assaulted at a particular time and place by the defendant, without reciting any basis for believing the defendant was the culprit. It then simply adds that "[a]dditional time is needed to review the sexual assault kit, review the evidence, conduct interviews and show photo line ups."[169] In another, the form merely stated that the defendant "has been implicated as being responsible" for an identified homicide and adds that "[a] '48 Hour Hold' is hereby requested for investigation by the MPD Homicide Bureau."[170] In both cases, the form continues that "[t]he Court has reviewed the above listed facts" and "has determined there is probable cause." These conclusory allegations are textbook examples of the kinds of "bare bones" affidavits that the Supreme Court has held do not provide probable cause.[171]

The *Bishop* case, which finally triggered a suspension of the holds in Shelby County, provides another good example. In that case, the 48-hour hold form recites simply that the victim was shot and that "[d]uring the investigation the defendant was named as the shooter."[172] Here, at least, law enforcement expressly asserted that there was evidence linking the defendant to the crime, which is more than the two instances discussed above. But no information was provided about who named the defendant, let alone his or her basis of

168. *See, e.g.*, Order Granting Detention for Probable Cause, *In re* Michael Edwards, Booking No. 10126758 (Gen. Sessions Court, Shelby Cnty., Tenn., July 5, 2010) (on file with author).

169. *Id.*

170. *See* Order Granting Detention for Probable Cause, *In re* Tracy L. Campbell, Booking No. 09203972 (Gen. Sessions Court, Shelby Cnty., Tenn., May 9, 2009) (on file with author).

171. *See* Illinois v. Gates, 462 U.S. 213, 239 (1983) (citing Aguilar v. Texas, 378 U.S. 108, 115–16 (1964); Nathanson v. United States, 290 U.S. 41, 46–47 (1933)).

172. *See* Order Granting Detention for Probable Cause, *In re* Courtney Bishop, Booking No. 08128890 (Gen. Sessions Court, Shelby Cnty., Tenn., Aug. 22, 2008) (on file with author).

knowledge or reliability.[173] It is therefore difficult to say that a showing of probable cause was made.

That is not to say that there have not been instances, even many instances, in which a 48-hour hold was obtained where there was indeed probable cause to suspect the detainee was guilty of the particular crime referenced in the 48-hour hold order. But as practiced in Tennessee, the procedure has allowed numerous, if not routine, non-*Terry* detentions without probable cause.

3. Defenses of the Departure from the Requirement

Some defenders of the practice have suggested probable cause to hold a suspect for 48 hours for investigation is different from, and less demanding than, probable cause to "get charged."[174] Or, stated differently, that a lower level of probable cause than the normal level needed for an arrest would apply because a 48-hour hold is "less than an arrest."[175] Indeed, the Shelby County Judicial Commissioners Report implies this kind of regime of multiple layers of probable cause when it reports that the hold "does not quite have the probable cause needed for charging"[176]—suggesting, perhaps, that there is a lower level of probable cause adequate for the more limited detention involved in 48-hour holds. This suggestion reflects a more general misunderstanding of the requirement of probable cause among local law enforcement officers and judges.

This defense of 48-hour holds will not hold (so to speak). There is only one level of "probable cause." It is either present or it is not. If present, the proper course is to arrest and charge the defendant. If it is not present, the defendant may not be brought into custody, and

173. *See Gates*, 462 U.S. at 237–38 (requiring analysis of the "veracity" and "basis of knowledge" of an unnamed source before ruling on probable cause). Indeed, in Tennessee, the corroboration needed for unnamed sources in this situation is even greater. The Tennessee Supreme Court has retained the prior, stricter *Aguilar-Spinelli* test requiring separate minimum showings of the "basis of knowledge" prong and the "veracity" prong; a slight insufficiency of either is fatal to the probable cause showing. State v. Jacumin, 778 S.W.2d 430, 431–36 (Tenn. 1989) (citing Spinelli v. United States, 393 U.S. 410, 412–13 (1969); Aguilar v. Texas, 378 U.S. 108, 114 (1964)). By contrast, the United States Supreme Court in *Gates* abandoned the stricter *Aguilar-Spinelli* two-prong test for a more flexible "totality of the circumstances" approach: a sliding-scale analysis in which strength in one prong can overcome weakness in another. *Gates*, 462 U.S. at 237–39.

174. State v. Bishop, No. W2010–01207–CCA–R3–CD, 2012 WL 938969, at *7 (Tenn. Crim. App. Mar. 14, 2012) (characterizing the prosecution's assertion in this way), *appeal granted*, Aug. 15, 2012.

175. *Id.*

176. Judicial Commissioners Report, *supra* note 57, at 7–8.

may not be detained at all (except for a brief, on-the-spot *Terry* stop based on "reasonable suspicion").

In Lauderdale County, the policy expressly authorized 48-hour detentions when there was less than probable cause.[177] In Shelby County, official reports acknowledged that they were used with less than probable cause.[178] In Tipton County, a lack of documentation on the practice makes it hard to know how officials characterized the practice, but there certainly appears to be no documentation claiming any level of probable cause. Thus, in Tennessee, there has been an acknowledged, widespread procedure that, for years, systematically violated the Fourth Amendment.

B. Origins of the Practice

How did this problematic procedure come to be? It appears that it developed largely based on a misunderstanding of Supreme Court case law on detention requirements.[179]

In 1975, the Supreme Court held that after a warrantless arrest, a defendant is entitled to a "prompt[]" determination of probable cause by a judicial officer in order for any "extended restraint of liberty" to continue.[180] This led to the use of so-called "*Gerstein* hearings" after warrantless arrests. Such hearings can be ex parte, and use hearsay evidence; but a judicial officer, independent of the prosecution and law enforcement, must hear the evidence and make an official finding of probable cause.[181] If the magistrate fails to find probable cause, the defendant must be released.[182] If the arrest is pursuant to an arrest warrant, no *Gerstein* hearing is necessary: the warrant itself constitutes a prior finding of probable cause by a magistrate.[183] The *Gerstein* Court provided no guidance as to how "promptly" after the warrantless arrest the *Gerstein* hearing must be.

177. Rhodes v. Lauderdale Cnty., No. 2:10-cv-02068-JPM-dkv, 2012 WL 4434722, at *1–2 (W.D. Tenn. Sept. 24, 2012).

178. Judicial Commissioners Report, *supra* note 57, at 7–8; Potter Memorandum, *supra* note 59, at 1.

179. *Rhodes*, 2012 WL 4434722, at *2 (relating that Lauderdale County, Tennessee, defendants admitted 48-hour hold policy based on erroneous reading of *McLaughlin*); Potter Memorandum, *supra* note 59, at 1 ("The 48 Hour Hold Order form was in response to U.S. Supreme Court cases of *Gerstein v. Pugh* and *County of Riverside v. McLaughlin* . . . .").

180. Gerstein v. Pugh, 420 U.S. 103, 114, 125 (1975).

181. *Id.* at 114, 120.

182. *Id.* at 114–16 (analogizing modern practice with common law practice, which required release from custody if no probable cause existed).

183. *E.g.*, Garcia v. City of Chicago, 24 F.3d 966, 973 n.2 (7th Cir. 1994) (citing *Gerstein*, 420 U.S. at 120).

The Court provided that guidance sixteen years later in *County of Riverside v. McLaughlin*.[184] The Court held that a *Gerstein* hearing held within 48 hours of arrest enjoys a presumption of constitutionality; after 48 hours, the burden shifts to the prosecution to justify the delay by showing "a bona fide emergency or other extraordinary circumstance."[185] Crucially, even if the judicial determination of probable cause takes place *within* 48 hours, a defendant can *still* establish a violation if she can prove that *the hearing was delayed unreasonably*.[186]

From *McLaughlin* came a general understanding of a "48-hour rule" regarding judicial determinations of probable cause. But *McLaughlin* did not alter the general requirement that arrests must be supported by probable cause. It simply prescribed how quickly a judicial officer must ratify the police's assertion (via a warrantless arrest) that probable cause did indeed exist at the time of arrest.

State and local jurisdictions applied this requirement to their own rules and procedures as faithfully as they could. Again, Tennessee provides a good example. The Tennessee Supreme Court applied the *McLaughlin* rule to Tennessee cases in *State v. Huddleston*.[187] In *Huddleston*, the Court dealt with a warrantless arrest followed by a period of more than seventy-two hours before the defendant was brought before a magistrate for a probable cause determination.[188] The court held that such unreasonable delay would trigger application of the "exclusionary rule," and could thus lead to suppression of statements obtained as a product of the illegal detention.[189] The court adopted and applied the four-part test of *Brown v. Illinois*[190] for determining when an admission would be considered "fruit of the poisonous tree" of the illegal detention and thus suppressed.[191]

184. Cnty. of Riverside v. McLaughlin, 500 U.S. 44 (1991).

185. *Id.* at 57.

186. *Id.* at 56. Where the hearing is delayed for a minimum of 48 hours so that the police can continue their investigation before they decide how to charge, this would seem to be an "unreasonable" delay. *See infra* Part II.C.

187. State v. Huddleston, 924 S.W.2d 666 (Tenn. 1996).

188. *Id.* at 668.

189. *Id.* at 676.

190. The *Brown* test considers: (1) the presence or absence of a *Miranda* warning, (2) "[t]he temporal proximity of the arrest and the confession," (3) "the presence of intervening circumstances," and (4) "the purpose and flagrancy of the official conduct." Brown v. Illinois, 422 U.S. 590, 603–04 (1975).

191. *Huddleston*, 924 S.W.2d at 674–75 (applying the *Brown* test); *see also Brown*, 422 U.S. at 599 (quoting Wong Sun v. United States, 371 U.S. 471, 487–88 (1963)).

Significantly, the Tennessee Supreme Court made clear that it would hold as invalid all arrests based on anything less than probable cause, and that one could not justify a delay in detention "for the purpose of gathering additional evidence to justify the arrest."[192]

In some Tennessee jurisdictions, this "48-hour rule" somehow morphed into an (incorrect) understanding that police could hold someone for up to 48 hours, *even if they did not have probable cause*. Concurrent with this misunderstanding was the related misapprehension that a lower quantum of evidence was necessary to hold someone than to charge them as well as the mistaken belief that one could routinely arrest persons *without charge* for up to 48 hours. At least as far back as the 1990s, some jurisdictions were using a precursor to the 48-hour hold procedure known as placing a defendant "on the hook."[193] For example, the Memphis Police Department put roughly 10 percent of all arrestees "on the hook" without charging them.[194] The percentage was even greater for felony arrests.[195] This practice often meant detention of those suspects without charge for up to seventy-two hours without a probable cause review by a magistrate.[196] One media study showed that up to 40 percent of people held "on the hook" were eventually released without charge.[197]

Even back at that time, the procedure was criticized as improper detention.[198] The local defense bar protested that the "on the hook" practice amounted to unlawful investigative detentions, inasmuch as people were being arrested without charge or in many cases even probable cause.[199]

In 1999, the Memphis/Shelby County Crime Commission issued a report criticizing the practice in Shelby County and calling for its

192. *Huddleston*, 924 S.W.2d at 676 (citing Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991)).

193. Conley, *On the Hook*, *supra* note 64; Conley, *Study Hits*, *supra* note 37.

194. Conley, *On the Hook*, *supra* note 64 (reviewing 500 arrest records over a three-day period and finding 46 designated as "on the hook").

195. Chris Conley, *County Jail to Refuse Detainees Not Charged*, COM. APPEAL (Memphis), Nov. 20, 2000, at A1 [hereinafter Conley, *Not Charged*] (reporting that until 1998, Memphis police put most felony prisoners "on the hook").

196. *Id.*

197. *Id.* (reviewing forty-six "on the hook" arrests over a sample three-day period and finding nineteen resulting in release without charges).

198. *See* Editorial, *Do It Right*, COM. APPEAL (Memphis), Feb. 5, 1999, at A6 (calling for an end to this practice); Editorial, *The Hook: Police Policy Toward Suspects Merits Review*, COM. APPEAL (Memphis), Nov. 4, 1998, at A10 (advocating for a critical evaluation of the practice).

199. *Do It Right*, *supra* note 198 (relating comments by, among others, attorney Robert Hutton).

abolition.[200] It recommended such reforms as mobile booking, 24-hour access to magistrates to speed the booking process, and the elimination of the potential abuse represented by "on the hook" arrests.[201]

Shelby County responded by adding "Judicial Commissioners" to its General Sessions Court system. These commissioners were tasked with, among other things, providing timely probable cause determinations to persons arrested without a warrant.[202] But this did not end the practice of arresting suspected felons without charge and holding them preliminarily for up to 48 hours before charging them.[203] Indeed, the Memphis Police Department did not substantially reduce the practice until the 2000 decision by the Shelby County Sheriff's Department to stop accepting detainees unless they were charged.[204] The policy change was motivated by overcrowding concerns, since the local jail was the subject of then-pending federal litigation charging jail overcrowding.[205] Even then, law enforcement continued the practice for the more serious felony suspects.[206] The Sheriff Department's overcrowding-motivated policy change thus reduced the scope of the practice in that county but did not end it completely.

The Tennessee Criminal Court of Appeals added its own criticism of the practice in 2001. In *State v. Ficklin,* that court reversed a conviction and remanded for new trial based in part on the improper seizure of the defendant pursuant to this policy.[207] The defendant in that case had been "booked for further investigation,"[208] but without probable cause.[209] Referring to this practice, the court stated that "[t]he officers apparently, and mistakenly, believed it was permissible to take a person into custody without probable cause for questioning since there is no 'arrest.'"[210] The court held this unconstitutional, both because the defendant was seized without probable cause and because the defendant was detained "in order for the authorities to endeavor to establish probable cause for an arrest."[211]

200. Conley, *Study Hits*, *supra* note 37.

201. *Id.*

202. Conley, *Not Charged*, *supra* note 195.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. State v. Ficklin, No. W2000-01534-CCA-R3-CD, 2001 WL 1011470, at *10 (Tenn. Crim. App. Aug. 27, 2001).

208. *Id.* at *2 (internal quotation marks omitted).

209. *Id.* at *8.

210. *Id.* at *7.

211. *Id.* at *9.

Five years later, the same court again criticized this practice, specifically noting with disapproval that it was part of a regular policy. The court in *State v. Rush* noted that it was aware of no authority "which would permit the police to book a person 'into jail on a 48-hour hold,' or . . . 'on the hook,' without preferring any criminal charges in order that the police could complete their investigation."[212] It added that "[t]his Memphis Police Department practice has been routinely condemned as it constitutes an unlawful detention and subjects any evidence obtained during this period of detention to suppression."[213]

Although the court opinions criticized the practice as it occurred in Shelby County, officials were also conducting it in other Tennessee counties, including Tipton County[214] and Lauderdale County,[215] and, far more rarely, in Warren and Van Buren counties.[216] In 2010, private plaintiffs filed a civil rights lawsuit against Lauderdale County seeking to enjoin the practice.[217] A federal district court held that the practice violated the Constitution and permanently enjoined it.[218] Despite all this, the practice continued in other counties, including Shelby and Tipton.

Six years after *Rush*, the Tennessee Court of Criminal Appeals criticized the practice yet again in *Bishop*. Citing *Rush* and *Ficklin*, the *Bishop* court noted that the continued practice was "troubling" because "this court has repeatedly noted the illegality of the procedure and warned the Memphis Police Department specifically against its use."[219] The court criticized the Memphis Police Department for regularly using this practice to the point that special forms had been generated for it.[220] It also criticized the magistrate

212. State v. Rush, No. W2005-02809-CCA-R3-CD, 2006 WL 2884457, at *1 n.2 (Tenn. Crim. App. Oct. 11, 2006).

213. *Id.* (citing *Ficklin*, 2001 WL 1011470).

214. Tipton County List of Arrests, *supra* note 27.

215. Consent Order Certifying Class Action and Granting Preliminary Injunctive Relief at 1, Rhodes v. Lauderdale Cnty., No. 2:10-cv-02068-JPM-dkv (W.D. Tenn. July 2, 2010), ECF No. 18.

216. Thomas Miner, an Assistant District Attorney for Tennessee's 31st Judicial District, admitted that the practice is used in Warren and Van Buren counties, but only about once per year. Telephone Interview by Razvan Axente with Thomas J. Miner, Assistant Dist. Att'y, 31st Jud. Dist. (June 20, 2012).

217. Lauderdale Contempt Order, *supra* note 63, at 2.

218. *See id.* at 3–4 (reviewing the district court's entry of a preliminary injunction and later grant of summary judgment for the plaintiffs).

219. State v. Bishop, No. W2010-01207-CAA-R3-CD, 2012 WL 938969, at *7 (Tenn. Crim. App. Mar. 14, 2012), *appeal granted*, Aug. 15, 2012.

220. *Id.*

reviewing the 48-hour hold order form for giving "an air of legitimacy to the procedure."[221] The court noted disapprovingly that the prosecutor had attempted to distinguish between a level of probable cause sufficient to hold a suspect and the (presumably higher) level of probable cause needed to charge him.[222]

The *Bishop* opinion was the most extensive, most emphatic condemnation of 48-hour holds in Tennessee. At one point in the opinion, the court stated that "[t]he '48-hour hold' *does not exist* in our constitutional pantheon of acceptable practices. The 48-hour hold procedure as described and utilized in this case is *patently unconstitutional* and subjects any evidence acquired to suppression."[223]

The *Bishop* opinion led to another round of critical media stories and official condemnations.[224] It was only after this lengthy history of media and court criticism that the practice was suspended in Shelby County.[225]

III. Arrests Without Charge

As noted above, defenders of the practice have insisted that 48-hour detentions are indeed based upon probable cause. And, going forward, one could conceive of reforming the practice to allow only those 48-hour holds that are based on true probable cause. But this change, while ameliorative, would still not suffice to render the practice acceptable, for a number of reasons.

For one thing, 48-hour holds, by their nature, contemplate arresting people without charge. A fundamental principle of law is that for police to arrest a suspect, they must *charge him with a crime.*

A. Generally

Justice Clarence Thomas made this point clear in a recent dissenting opinion. Justice Thomas discussed the constitutional principles underlying the right to counsel, drawing from basic principles of law at the time of the Framers and looking to Blackstone as "the preeminent authority on English law for the founding generation."[226] He noted with approval Blackstone's statement that "a person could not be arrested and detained without a 'charge' or 'accusation,' *i.e.*, an allegation, supported by probable cause, that the person had committed

221. *Id.*

222. *Id.*

223. *Id.* at *8 (emphasis added).

224. Connolly, *supra* note 19.

225. Buser, Connolly & McKenzie, *supra* note 156.

226. Rothgery v. Gillespie Cnty., 554 U.S. 191, 219 (2008) (Thomas, J., dissenting) (quoting Alden v. Maine, 527 U.S. 706, 715 (1999)).

a crime."[227] He was careful to distinguish between this sense of "charge"—the crime identified by the arresting officer at the point of arrest—and a "formal charge," which is the filing by the prosecutor of an indictment, presentment, or information.[228] While the former must accompany an arrest, only the latter will trigger the Sixth Amendment right to counsel under federal law.[229]

The requirement that a charge accompany an arrest—or, conversely, the prohibition on arresting people without charge—is so fundamental that it is taken for granted, and there are not many cases making this point explicit. It is generally contemplated that a charge accompanies an arrest.[230] It is, literally, hornbook law.[231] Federal courts have held that police are under a general obligation to inform arrestees of the charges against them at the time of arrest, although exigent circumstances like violent resistance or hot pursuit may excuse police from this requirement.[232]

The Supreme Court has stated that while it is "good police practice to inform a person of the reason for his arrest *at the time he is taken into custody*, we have never held that to be constitutionally required."[233] But even contemplating that police may omit informing the suspect of the charge at the point of arrest, the Court went on, a suspect should not "be left to wonder for long," because warrantless arrestees, under *McLaughlin*, must be "promptly" brought before a

227. *Id.* at 220 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *289–300).

228. *Id.* at 220–21.

229. *See* Moran v. Burbine, 475 U.S. 412, 431 (1986) (stating that "the Sixth Amendment right to counsel does not attach until after the initiation of formal charges," and distinguishing between indictment, which qualifies, and mere custodial arrest, which does not); *see also Rothgery*, 554 U.S. at 220–21 (Thomas, J., dissenting). The rule in Tennessee differs. Under Tennessee law, even a simple arrest, if pursuant to a warrant, will suffice to trigger the protections guaranteed by the Sixth Amendment right to counsel. State v. Huddleston, 924 S.W.2d 666, 669 (Tenn. 1996).

230. *See* YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS, QUESTIONS 8 (12th ed. 2008) (identifying the traditional definition of "arrest" as "the taking of a suspect into custody *for the purpose of charging him with a crime*") (emphasis added); WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 9 (5th ed. 2009) (describing "the initial decision to charge" as accompanying warrantless arrests in the vast majority of felony cases).

231. *See, e.g.*, LAFAVE ET AL., *supra* note 230.

232. *See, e.g.*, Schindelar v. Michaud, 411 F.2d 80, 83 (10th Cir. 1969) (excusing officer for not informing arrestee of charges after arrestee attacked the officer and destroyed his patrol car's windshield); Montgomery v. United States, 403 F.2d 605, 610 (8th Cir. 1968) (declining to require officers to inform arrestee of charges when the arrest is made during the commission of a crime).

233. Devenpeck v. Alford, 543 U.S. 146, 155 (2004) (emphasis added).

magistrate.[234] Since under *McLaughlin* this must normally occur within 48 hours, and more quickly if feasible, a blanket policy of waiting at least 48 hours before informing warrantless arrestees of the charge is inconsistent with Supreme Court doctrine.

Thus, the relatively narrow exceptions to the normal expectation that police inform arrestees of the charges *on the scene* do not regularly excuse police from charging a defendant upon arrival at the police station, or at least with reasonable promptness thereafter. Nor do they authorize law enforcement to hold a suspect for 48 hours without charge. Indeed, federal courts have criticized other countries for their rules allowing detention of persons for days without charge.[235]

The 48-hour hold procedure runs directly contrary to this principle. By design, the procedure involves arresting a person without charge and then detaining them for 48 hours without charge.[236] In *Willis v. Bell*, the Northern District of Illinois explained that even where probable cause exists, a policy of deliberately holding persons beyond the earliest practicable time where a probable cause hearing could be held was unconstitutional.[237] And even though there may be no "iron-clad rule" that warrantless arrestees be charged with

234. *Id.* at 155 n.3 (quoting Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 53 (1991)).

235. *See* Zemel v. Rusk, 381 U.S. 1, 15 (1965) (Cuba); Amenu v. Holder, 434 Fed. App'x 276, 280 (4th Cir. 2011) (Ethiopia); Haile v. Holder, 658 F.3d 1122, 1133 (9th Cir. 2011) (Eritrea).

236. *See* Judicial Commissioners Report, *supra* note 57, at 5, 7 (acknowledging that the holds are used in Shelby County when there is insufficient probable cause to charge a suspect with an affidavit of complaint); Lauderdale Contempt Order, *supra* note 63, at 2 (indicating that the Lauderdale County 48-hour hold policy "specifically authorized law enforcement law enforcement officials to detain individuals . . . for up to 48 hours, for the purpose of conducting further investigation, without probable cause to believe that the [detained] individual . . . had committed an offense"); State v. Bishop, No. W2010–01207–CCA–R3–CD, 2012 WL 938969, at *4–7 (Tenn. Crim. App. Mar. 14, 2012) (citing police testimony on use of a 48-hour hold, which officers mistakenly believed was "constitutionally permissible" because "the defendant was not yet charged with any crime"), *appeal granted*, Aug. 15, 2012; *cf.* State v. Ficklin, No. W2000-01534-CCA-R3CCAR3-CD, 2001 WL 1011470, at *7 (Tenn. Crim. App. Aug. 27, 2001) (describing officers' mistaken belief that 48-hour hold without probable cause was acceptable "since there [was] no 'arrest' ").

237. Willis v. Bell, 726 F. Supp. 1118, 1125, 1127 n.20 (N.D. Ill. 1989) (calling the prosecution's argument that probable cause was present "beside the point" and a "lame attempt" at defending the policy); *see also* Robinson v. City of Chicago, 638 F. Supp. 186, 192–93 (N.D. Ill. 1986) ("However, that the original arrest was with probable cause does not satisfy the Constitutional requirement of judicial determination of probable cause prior to extended detention." (citing Gerstein v. Pugh, 420 U.S. 103, 117–19 (1975))).

a crime "forthwith,"[238] the Constitution forbids a detention where "there was never any interest in presenting [the suspect] to a judge."[239] Similarly, a detention is "not permissible" where "the sole purpose of the pick-up [is] to hold [the suspect] until she either cooperate[s] or [the statutory period] expire[s]."[240]

Since every variety of "hold" procedure described above in Part II contemplates that the suspect be held until either charged or released, they all violate this fundamental rule against holding a person for long periods of time without any charge. In Tennessee, for example, the actual documents used to process and memorialize such holds make clear the "investigative detention" purposes underlying them. The form used in Shelby County, Tennessee, for granting a 48-hour hold provides that the defendant "be held in the Shelby County Jail pending the presentment of a formal charging instrument to the appropriate magistrate."[241] The form used in Lauderdale County includes separate blanks for *either* listing a charge *or* indicating that the person was being held for investigation on a particular charge.[242] When a 48-hour hold is used, the former blanks are crossed out, and the latter blanks filled in, highlighting that the 48-hour hold is an alternative to charging.[243] The arrest ledger in Tipton County has a column for the charge for which the person has been detained. In most cases, a particular crime is listed; for the 48-hour holds, that column entry simply reads "Hold for Investigation," also indicating a lack of a charge.[244]

The arrest of a person without charge for 48 hours also violates the federal rules of criminal procedure and many state rules of criminal procedure. The federal rule requires that persons arrested

238. United States v. Roberts, 928 F. Supp. 910, 915 (W.D. Mo. 1996) (quoting John Scurlock, *Arrest in Missouri*, 29 UMKC L. REV. 117, 128 (1961)).

239. *Id.* (characterizing officers' intent in the case at bar).

240. *Id.*

241. *See* 48-hour hold Form, *supra* note 73.

242. *See* Plaintiffs' Memorandum, *supra* note 56, at Exhibit 6 (Lauderdale County Sheriff's Department Detention Request Form).

243. *Id.*

244. Tipton County List of Arrests, *supra* note 27; *see also* State v. Bishop, No. W2010–01207–CCA–R3–CD, 2012 WL 938969, at *4–5 (Tenn. Crim. App. Mar. 14, 2012) (citing testimony from numerous police officers that (1) the 48-hour hold is used "until we can . . . come up with the appropriate charges" or until the defendant is "officially charged out," and (2) the affidavit accompanying the application for a 48-hour hold "states that [the suspect is not] being . . . charged, but [that] he is being placed on a forty-eight-hour hold"), *appeal granted*, Aug. 15, 2012.

without warrant be brought before the court "without unnecessary delay."[245] Many states have rules of criminal procedure modeled on this rule. In Missouri, for example, a federal court found Missouri's "20-hour hold" procedure,[246] when used as an "investigative tool," violated not only the Constitution, but, where federal officers are involved, Federal Rule of Criminal Procedure 5(a), which requires warrantless arrestees to be brought "promptly" before a magistrate.[247] A federal court in Illinois held that even if a detention-without-charge policy can be implemented in compliance with relevant federal and Illinois rules of criminal procedure, such compliance would not save the policy from constitutional infirmity.[248]

Tennessee's own Rule 5(a) is fairly typical. It applies to "[a]ny person arrested," and provides that such person "shall be taken without unnecessary delay before the nearest appropriate magistrate."[249] Once the arrestee is brought before the magistrate, an affidavit of complaint—a charging instrument—must be filed "promptly."[250]

Case law provides limited guidance on how much of a lag between being arrested and being brought before a magistrate constitutes "unnecessary delay" for purposes of Rule 5(a), suggesting that a delay of some number of hours would satisfy the requirement,[251] but a delay of seventy-two hours would violate it.[252] There is not much guidance on what constitutes "promptly" filing a charging instrument after being brought before the magistrate. Nonetheless, the clear import of Rule 5(a) is that arrestees must be charged as speedily as possible. A delay of 48 hours, due not to

245. FED. R. CRIM. P. 5(a).

246. MO. REV. STAT. § 544.170 (2011).

247. United States v. Roberts, 928 F. Supp. 910, 915, 937 (W.D. Mo. 1996).

248. Robinson v. City of Chicago, 638 F. Supp. 186, 192 (N.D. Ill. 1986) (finding Illinois policy unconstitutional on its face).

249. TENN. R. CRIM. P. 5(a)(1). The only exception is where the arrestee has already been charged by the prosecutor through indictment or presentment. *Id.*

250. TENN. R. CRIM. P. 5(a)(2).

251. *See* State v. Davis, 141 S.W.3d 600, 622, 626 (Tenn. 2004) (affirming lower court's ruling that delay of twelve to thirteen hours was not "unnecessary delay" under the circumstances); State v. Johnson, 980 S.W.2d 414, 421 (Tenn. Crim. App. 1998) (finding that being brought before magistrate within one day satisfied the Rule); State v. Haynes, 720 S.W.2d 76, 83 (Tenn. Crim. App. 1986) (holding that where defendant alleged delay of over nine hours, but record revealed only a one-hour delay, arrest did not violate the Rule).

252. *See, e.g.*, State v. Carter, 16 S.W.3d 762, 764 (Tenn. 2000) (finding delay of seventy-two hours violated the Rule); State v. Huddleston, 924 S.W.2d 666, 670–71 (Tenn. 1996) (same).

pragmatic circumstances but by design as part of a deliberate policy not provided for by the Rules of Criminal Procedure, seems to violate this Rule, as well as the Constitution.

To be sure, Tennessee law does not provide, as a remedy for violations of this rule, for the automatic suppression of any resulting statements obtained. Such statements are still admissible as long as they were not obtained under circumstances suggesting a violation of the voluntariness requirement of the Due Process Clause.[253] But there are other potential remedies for violations of the Fourth Amendment besides evidence exclusion, including civil tort liability.[254]

B. Reasons for Desiring a Charge-Free Alternative

Indeed, for those 48-hour hold cases in the past with probable cause, or those cases going forward where probable cause exists, the pertinent question is, why not simply charge the defendant at the point of arrest? Why do certain law enforcement agencies prefer the charge-free 48-hour hold procedure?

Various answers are provided by law enforcement, courts, and skeptical defense lawyers. Some law enforcement officials cite convenience. They wish to make sure they have time to ascertain every potential charge that they can bring against a defendant. Officers wish to avoid charging the defendant on Crime X initially, only to find out after further investigation that Charge Y should be brought, either in addition to or instead of the initial charge. Similarly, if they charge Crime X and the defendant is released on bail, once the police later realize that other charges can be brought, they must go find the defendant again and bring him back in for the subsequent charges.[255] Others state generally that the holds provide the time for law enforcement to review surveillance videos, obtain statements from victims or witnesses in the hospital, or even check exculpatory information.[256] One judge overseeing such detentions adds that it may afford time for "an ongoing investigation to substantiate the allegations that were based on the initial probable cause" upon which the detention was allegedly based.[257]

253. *Huddleston*, 924 S.W.2d. at 670–71 ("[I]f the totality of the surrounding circumstances indicates that a confession was voluntarily given, it shall not be excluded from evidence solely because of a delay in carrying the confessor before a magistrate." (quoting State v. Readus, 764 S.W.2d 770, 774 (Tenn. Crim. App. 1988))).

254. *See, e.g.*, Wallace v. Kato, 549 U.S. 384 (2007) (discussing civil liability under 42 U.S.C. § 1983 for tortious actions similar to false arrest).

255. Conley, *Not Charged*, *supra* note 195.

256. Judicial Commissioners Report, *supra* note 57, at 7.

257. Shelby County Commission Transcript, *supra* note 17, at 9.

The problem with every one of these explanations is that each one of these ends can be achieved just as well if the police were to follow the conventional (and constitutional) procedure of charging the defendant. Regardless of whether the defendant is detained after charge or allowed to go home, the fact of a charge does not, in any way, hinder the ability of law enforcement to review surveillance videos, interview witnesses in hospitals, check out exculpatory information, or conduct any other aspect of an ongoing investigation. If such investigation reveals that different or additional charges should be made, the prosecution may always amend the charging document to add or substitute new charges.

If doing so requires that the police re-arrest a defendant previously arrested but released pending trial within the first 48 hours, it would involve additional effort on the part of law enforcement. Rather than simply going back to the 48-hour holding cell to confront or re-book the defendant, police would be required to find him again. However, query how much of a burden this actually is. Presumably, if the defendant has been released pending trial, either law enforcement or the court has determined that he is not a flight risk. Having already once tracked down the defendant and having presumably instructed him not to disappear pending trial, picking him back up again to book him on new charges will likely not be a terribly burdensome undertaking. At the very least, it does not seem to outweigh the substantial liberty interest that innocent individuals have in avoiding being detained for 48 hours without charge.

Critics of 48-hour holds suggest other reasons for preferring 48-hour holds over simply arresting and charging suspects: the holds allow law enforcement to do an end-run around procedural protections given defendants who are arrested and charged. And the holds do seem to avoid procedural protections in two interlocking ways. First, 48-hour holds afford police extra time to hold a suspect before the clock starts ticking on a prompt bail determination. Second, they avoid an otherwise applicable ban on interrogation of suspects outside the presence of defense counsel. These additional licenses could allow law enforcement to "sweat" a suspect to obtain waivers and confessions that might otherwise not be legally obtainable.[258]

C. Bail

Persons detained under a 48-hour hold order cannot get bail, and thus, cannot obtain release by being "bonded out."[259] Thus, the 48-hour

258. *See* United States v. Roberts, 928 F. Supp. 910, 915 (W.D. Mo. 1996) ("Here . . . the sole purpose of the pick-up was to hold Defendant until she either cooperated or twenty hours expired. This is not permissible.")

259. Plaintiffs' Memorandum, *supra* note 56, at 5 (citing deposition testimony of Lauderdale County Sheriff Steve Sanders); Conley, *Not Charged*, *supra* note 195; Conley, *On the Hook*, *supra* note 64, at A10.

hold could be used to deny a detained person whatever rights he may otherwise have to bail, or to a speedy determination of bail. This could constitute either an improper motive for preferring the 48-hour holds to a regular criminal charge, or an improper "windfall" to law enforcement in those cases where the 48-hour hold was used with the effect (if not the intent) of preventing the detainee from obtaining bail.

Even a person detained under a *legal* 48-hour hold is likely still eligible for, and entitled to, bail under either federal or state law. The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed."[260] The Supreme Court has not expressly held that this amendment applies to state prosecutions through the Fourteenth Amendment's Due Process Clause, but it has assumed that such incorporation applies.[261] While the Eighth Amendment does not provide an absolute right to bail, any bail set cannot be "excessive."[262] Further, while federal courts have provided no set time limit for a hearing, due process entitles a defendant to a bail hearing, and to have such a hearing without unnecessary delay.[263]

In all jurisdictions, of course, it is necessary to have a charge in order to set bail. That basic requirement suggests that, by delaying the imposition of a charge for a minimum of 48 hours while the police continue their investigation, 48-hour holds cause a significant delay in a bail determination.

In the federal system, the time limits for such determinations are set by statute. An arrestee is entitled to a prompt detention hearing,[264] and the maximum length of pretrial detention is limited by the deadlines imposed by the Speedy Trial Act.[265] Thus, federal law entitles a defendant to a prompt determination of bail.

260. U.S. CONST. amend. VIII.

261. Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979).

262. United States v. Salerno, 481 U.S. 739, 754–55 (1987).

263. *See, e.g.*, *id.* at 747 ("The arrestee is entitled to a prompt detention hearing and the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act." (internal citation omitted)); United States v. Portes, 786 F.2d 758, 768 (7th Cir. 1985) ("We recognize that, at some point, the length of delay may raise due process objections and we urge that district courts expedite the trials of those detained pending trial."); *see also* Foucha v. Louisiana, 504 U.S. 71, 83 (1992) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." (citing *Salerno*, 481 U.S. at 755)).

264. Bail Reform Act, 18 U.S.C. § 3142(f) (2006).

265. 18 U.S.C. § 3161 (2006).

A similar entitlement to bail in noncapital cases is set out in the Tennessee Constitution.[266] On this point, state constitutional and statutory provisions in Tennessee are generally similar to those in other states.[267] Tennessee statutes fleshing out the general entitlement specify that judges, magistrates, and court clerks may set bail,[268] how the amount is determined,[269] and what restrictions on release may accompany bail.[270] But the statutes do not explicitly guarantee a prompt bail determination or set out a definite time for such a determination to be made.

In most Tennessee counties, as is common throughout the country, the probable cause hearing contemplated by *Gerstein* is part of an "initial appearance" proceeding, which also involves the setting of bail.[271] Thus, if a court meets the time limits imposed by *Gerstein,* it will, as a practical matter, most likely be meeting any time limits which may apply to a judicial hearing on bail.

Indeed, both federal and state courts dealing with claims of unreasonable delay in access to bail and pretrial release have tended to analogize to the 48-hour presumption set out in *Gerstein* for probable cause determinations. They have held a bail hearing or bail disposition timely if it meets the 48-hour deadline for a *Gerstein* hearing.[272] On this basis, federal and state courts around the country have upheld delays of 9 hours,[273] 12 hours,[274] and 20 hours[275] between

266. TENN. CONST. art. I, § 15; *see also* TENN. CODE ANN. § 40-11-102 (2012) (recodifying the entitlement).

267. *See, e.g.*, WYO. CONST. art. I, § 14; WIS. CONST. art. I, § 8; ARIZ. CONST. art. II, § 22; NEV. CONST. art. I, § 7; OKLA. CONST. art II, § 8.

268. TENN. CODE ANN. § 40-11-105 (2012).

269. TENN. CODE ANN. § 40-11-118 (2012).

270. TENN. CODE ANN. § 40-11-116 (2012).

271. State v. Huddleston, 924 S.W.2d 666, 672 n.2 (Tenn. 1996) (citing DAVID RAYBIN, TENNESSEE CRIMINAL PRACTICE AND PROCEDURE § 3.2 (rev. ed. 2008); OFFICE OF THE ATTORNEY GEN. OF THE STATE OF TENN., OPINION No. 91-84, at 3 (Sept. 20, 1991)).

272. *See* Tate v. Hartsville/Trousdale Cnty., No. 3:09-0201, 2010 WL 4054141, at *8 (M.D. Tenn. Oct. 14, 2010) ("The clear import of *McLaughlin*, then, is that a bail hearing held within forty-eight hours of a warrantless arrest is also presumptively constitutional—if indeed the Constitution speaks to that issue."); Hopkins v. Bradley Cnty., 338 S.W.3d 529, 538–39 (Tenn. Ct. App. 2010) ("Given that a bail hearing may be delayed up to forty-eight hours absent some improper motive, the Court finds that a 12-hour delay in releasing Plaintiff in this case did not amount to a constitutional deprivation.").

273. Holder v. Town of Newton, No. CIV. 08-cvCVCV-197-JL, 2010 WL 432357, at *11 (D.N.H. Feb. 3, 2010), (finding a nine-hour delay between defendant's arrest and subsequent release on bail was "well within the 48-hour window and thus presumptively constitutional").

booking and ability to make bail. Indeed, the Fifth Circuit has stated flatly that "[t]here is no right to post bail within 24 hours of arrest."[276]

But these opinions allowing bail or pretrial release delays of 10 to 20 hours either referenced the local criminal justice system's administrative desire to wait to combine a bail hearing with another type of hearing[277]—flexibility recognized by the Supreme Court in *McLaughlin*[278]—or did not involve situations where a magistrate was available but simply failed, without reasonable excuse, to provide a hearing.[279] These pragmatic reasons for a short delay—the unavailability of a magistrate on short notice or the desire to achieve efficiency by combining a probable cause hearing with a bail hearing—are the kinds of things the Supreme Court has expressly accepted.

At the same time, where such pragmatic excuses for delay did not exist, the Court intended no bright-line safe harbor, no guarantee of constitutionality whenever the hearing clocked in at forty-seven hours and fifty-nine minutes. In *McLaughlin,* the Court emphasized that while a probable cause hearing occurring within 48 hours of arrest is presumptively constitutional, even that quick a hearing might violate the Constitution if the magistrate were available sooner and there was

274. Lund v. Hennepin Cnty., 427 F.3d 1123, 1126–28 (8th Cir. 2005) (finding no due process violation where defendant was held for twelve hours after judge ordered that defendant could be released with no bail); *Tate*, 2010 WL 4054141, at *8 (explaining that a policy of holding domestic violence arrestees for twelve hours before allowing release on bail did "not automatically constitute a constitutional violation").

275. Turner v. City of Taylor, 412 F.3d 629, 640 (6th Cir. 2005) (finding that city's policy of holding domestic violence arrestees for a minimum of 20 hours unless arraigned and released by the court did not violate the Constitution).

276. Collins v. Ainsworth, 382 F.3d 529, 545 (5th Cir. 2004). Regardless of the constitutional minimum, some states explicitly require by statute a period of time less than 48 hours by which an arrestee must either be charged or released. *See, e.g.*, MO. ANN. STAT. § 544.170 (West 2012).

277. *See, e.g.*, *Tate*, 2010 WL 4054141, at *8 ("The Supreme Court has recognized that probable cause decisions must be made promptly, but has also recognized that states should be given enough time to combine such hearings with other preliminary procedures, including bail determinations.").

278. Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) ("In evaluating whether the delay in a particular case is unreasonable, however, courts must allow a substantial degree of flexibility.").

279. *See, e.g.*, *Turner*, 412 F.3d at 640 (noting that the plaintiff could not argue the policy was unconstitutional because "the policy does not *prohibit* arraignment within the first 20 hours if a magistrate is available").

no adequate explanation for the delay.[280] For this reason, lower courts upholding delays of less than 48 hours in obtaining bail have nonetheless been mindful of the possibility that such delays might still be unconstitutional if there were no reason for them.[281]

The typical 48-hour hold seems to present precisely such a denial of bail review without reason. In Shelby County, for example, a Judicial Commissioner is available 24 hours a day to deal with such matters.[282] Indeed, during a typical arrest, a Judicial Commissioner routinely sets bail at the time an arrestee is booked. This prompt determination of bail, one which as a practical matter is available to all, is not available to those detained on a 48-hour hold.

So while the law in this area may not be clear, it appears that 48-hour hold detainees have some right to a prompt bail determination, and that their entitlement would be analyzed as analogous to the right of a prompt probable cause determination. If that is so, the 48-hour hold virtually doubles the time suspects can be held without getting the matter of pretrial detention and bail resolved. The "hold" procedure adds a preliminary 48-hour period before the clock even starts ticking on resolving the issue of pretrial detention and bail. In this respect, 48-hour holds give the state an advantage at the expense of defendants' rights.

There is no recorded use of this 48-hour hold procedure in the federal system. Any such use would trigger similar constitutional concerns about detention without probable cause, without a charge, and without a prompt determination of bail.

In other states, another question that arises is whether the reasons behind the policies of extended detention of *domestic abuse* suspects justify holding a suspect beyond the point at which a magistrate is available. The reason behind such policies is clear: they are designed to protect victims of domestic violence by preventing their alleged abusers from obtaining release too soon. As one state court has put it, "In many instances there are valid reasons for keeping an individual in jail for the twenty hours . . . . This is so

280. *McLaughlin*, 500 U.S. at 56 (explaining that a hearing within 48 hours may nonetheless be unconstitutional if "the arrested individual can prove that his or her probable cause determination was delayed unreasonably").

281. Davis v. City of Detroit, No. 98-1254, 1999 WL 1111482, at *1 (6th Cir. Nov. 24, 1999) (holding that the plaintiff should have been allowed to proceed with his claim that defendants held domestic violence arrestees for a minimum of 20 hours even if a magistrate was available).

282. Mike Matthews, *City Attorney Orders Stop to 48 Hour Holds by Memphis Police*, ABC 24 (Mar. 23, 2012), http://www.abc24.com/news/local/story/City-Attorney-Orders-Stop-to-48-hour holds-by/MPb-YW8huUGdEgKqe2aWPA.cspx (quoting District Attorney Amy Weirich).

especially in instances of domestic abuse where continued violence is a threat."[283]

On the one hand, this is not extending a detention for no reason at all, and thus is arguably not as constitutionally suspect as a generic 48-hour hold policy. An articulable reason that is at least superficially valid—that is, protecting domestic abuse victims—does exist. On the other hand, such a domestic-violence-specific policy results in unnecessarily prolonging the pretrial detention of persons presumed innocent under the law, based on a categorical assumption that all persons accused of that crime represent a public safety threat. In upholding a federal statute providing for preventive detention based on future dangerousness, the Supreme Court emphasized that a court was required to make a case-specific finding, by clear and convincing evidence, that the defendant represented a danger of committing further crimes.[284] In this case, there is no requirement of a judicial finding that the defendant presents a danger to the alleged victim, or anyone else.

At least some laws designed to achieve heightened protection to domestic abuse victims set out some criteria beyond the initial accusation of domestic abuse. For example, Michigan has a statute providing for warrantless arrest in domestic violence cases if the suspect had a child in common with the victim, resides in the same household, or is a current or former spouse of the victim.[285] It is doubtful whether such a statute providing for extended warrantless detention of suspects meeting these criteria (even where a magistrate was available to make a probable cause determination) would pass constitutional muster, even with such criteria added. Without any such criteria, policies unnecessarily prolonging warrantless detention in an entire category of cases seem even more constitutionally vulnerable.

D. Right to Counsel

Additional concerns arise that the 48-hour holds may afford a "loophole" around the restrictions on interrogation created by the Sixth Amendment right to counsel. This is so because law enforcement agents commonly question suspects while they are detained under the 48-hour hold. For example, this occurred in the *Bishop* case, and led to suppression of a statement obtained as a result.[286]

283. *In re* Conard, 944 S.W.2d 191, 201 (Mo. 1997).

284. United States v. Salerno, 481 U.S. 739, 750–52 (1987) ("[T]he Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person.").

285. MICH. COMP. LAWS § 764.15a (2012).

286. State v. Bishop, No. W2010-01207-CCA-R3-CD, 2012 WL 938969, at *5–6 (Tenn. Crim. App. Mar. 14, 2012) ("Lieutenant Ragland

As noted above, the federal rule is that the Sixth Amendment right to counsel attaches once the "adversarial judicial proceedings" have begun.[287] The Supreme Court has held that, at a minimum, this point occurs when either the defendant has appeared before a magistrate or there has been a "formal charge"—that is, the prosecutor has filed an indictment, presentment, or information.[288] Once the right attaches, law enforcement agents may not "deliberately elicit" incriminating information from the defendant outside the presence of defense counsel absent a valid waiver.[289] This means, specifically, that police may not engage in interrogation of the defendant.[290]

This protection from interrogation is independent of the protections against custodial interrogation prior to being given *Miranda* warnings, which stem from the Fifth Amendment self-incrimination privilege.[291] So, absent a waiver of Sixth Amendment rights, even interrogation consistent with the principles of *Miranda* still violates the Constitution, wherever such interrogation takes place after the Sixth Amendment right has been triggered and outside the presence of defense counsel.[292] Thus, under federal constitutional principles, once a formal charge triggers the Sixth Amendment right, police may not interrogate a defendant without his lawyer.

Without more, 48-hour holds would not normally violate this constitutional right. They typically take place prior to the filing of a formal charge (such as an indictment, information, or presentment) by a prosecutor. In Tennessee, however, the Sixth Amendment right to counsel applies also upon the issuance of an arrest warrant, because Tennessee law considers an arrest warrant to be sufficient to initiate "the adversarial judicial process."[293] Where the defendant is arrested pursuant to warrant, the protections against interrogation and other intentional elicitation of incriminating information begin upon

---

maintained that the defendant was not under arrest but 'was put on a forty-eight-hour hold for investigation.' "), *appeal granted*, Aug. 15, 2012.

287. Michigan v. Jackson, 475 U.S. 625, 629 (1986) (citing United States v. Gouveia, 467 U.S. 180, 187–88 (1984)).

288. Rothgery v. Gillespie Cnty., 554 U.S. 191, 198 (2008); *see also* United States v. Gouveia, 467 U.S. 180, 188 (1984) (right attaches upon "formal charge, preliminary hearing, indictment, information, or arraignment" (quoting Kirby v. Illinois, 406 U.S. 682, 688–89 (1972))).

289. Moran v. Burbine, 475 U.S. 412, 431 (1986).

290. *Id.* at 432 ("[A]fter indictment, police may not elicit statements from suspect out of the presence of counsel.").

291. Miranda v. Arizona, 384 U.S. 436, 467 (1966).

292. *Moran*, 475 U.S. at 431.

293. *Huddleston*, 924 S.W.2d at 669 ("In Tennessee, the adversarial judicial process is initiated at the time of the filing of the formal charge, such as an arrest warrant.").

arrest.[294] Thus, in Tennessee, once police have arrested a defendant who has not waived his rights pursuant to warrant, they must refrain from interrogating him without a defense lawyer present. By allowing police to detain a suspect without getting an arrest warrant, 48-hour holds allow police to interrogate a suspect without having to abide by the right-to-counsel protections which would otherwise apply.[295]

However, defenders of the practice could argue that this is not a realistic objection. Police can usually choose to make a warrantless arrest once they have probable cause, using one of the many exceptions to the warrant requirement.[296] Indeed, such warrantless arrests account for the overwhelming majority of modern arrests.[297] Thus, they could argue, if the police truly wanted to avoid right-to-counsel restrictions on interrogating 48-hour hold detainees, they could simply effect warrantless arrests. This undercuts the characterization of 48-hour holds as sinister evasions of right-to-counsel protections.

This response has a certain merit, but is nonetheless questionable, because the *McLaughlin* doctrine suggests that sometimes—for example, where a magistrate is available and there is no administrative need to combine a *Gerstein* hearing with other types of hearings—an arrestee is entitled to appear before a magistrate in less than 48 hours.[298] Indeed, federal and state rules of criminal procedure

294. TENN. R. CRIM. P. 5(a). Similarly, an arrest warrant must issue after the police file an affidavit of complaint establishing probable cause. TENN. R. CRIM. P. 4(a).

295. *See, e.g.*, Buser et al., *supra* note 22 (quoting opponents making this criticism). There is little reason to think that 48-hour holds are themselves arrest warrants. In some cases, as in Lauderdale County, police effect them without judicial ratification. Even where magistrates are involved, as in Shelby County, 48-hour holds do not seem to be treated as warrants: interrogations after the issuance of the hold order occurred frequently without triggering Sixth Amendment–based exclusions (as would otherwise be required in Tennessee), and the holds were commonly followed by either an arrest warrant or a *Gerstein* probable cause hearing, which is designed as an alternative to an arrest warrant. Of course, if they were arrest warrants, then all interrogations (absent waiver) following them clearly would be improper, and all statements obtained therefrom would be subject to exclusion. *Id.*

296. *See, e.g.*, United States v. Watson, 423 U.S. 411, 415 (1976) (allowing warrantless arrests where suspect is found in public and there is probable cause to suspect him of a felony).

297. KAMISAR ET AL., *supra* note 230, at 8 n.h ("Arresting without first obtaining a warrant is the predominant practice for felony arrests throughout the nation.").

298. *See* Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) (holding that warrantless arrestees must be brought before a magistrate without any unreasonable delay, even within the 48 hour period; a delay "for the

provide that once there is a warrantless arrest, police must bring the defendant to a magistrate "without unnecessary delay."[299] While this may simply be codifying *Gerstein* and its progeny, it may also denote a decision by the state to guarantee prompt judicial determination of probable cause. Either way, it is the case that on many occasions, the warrantless arrestee will have to be brought before a magistrate in less than 48 hours. Once that occurs, the Sixth Amendment right to counsel is triggered and interrogation must cease.[300] So, by isolating the defendant in an interrogation room but not calling it an "arrest," the 48-hour hold guarantees the police a full 48 hours to interrogate the defendant, with less of an issue under *McLaughlin* or under Rule 5(a) of the federal and state rules of criminal procedure.

Another response to the argument that the holds are an evasion of Sixth Amendment protections is grounded in *Miranda v. Arizona*.[301] Since suspects in 48-hour holds are unquestionably in "custody," the Fifth Amendment restrictions on interrogation established in *Miranda* would still apply, even without a charge.[302] Thus, defenders of 48-hour holds could argue that suspects are still afforded Fifth Amendment interrogation protections, even if Sixth Amendment protections are somehow skillfully avoided.

But this response is also not fully persuasive because Fifth Amendment protections are different from Sixth Amendment protections in a crucial way. All the Fifth Amendment requires is that suspects in custody be informed of their *Miranda* rights prior to questioning. If they do not affirmatively invoke their rights by stating that they prefer not to answer questions, or that they want to have a lawyer present, interrogation may continue.[303] Thus, unless the suspect in a 48-hour hold is savvy enough to affirmatively invoke his rights, law enforcement may visit him in the holding cell and question him about the case. Indeed, they may try to elicit a waiver of his

purpose of gathering additional evidence to justify the arrest" is unreasonable).

299. FED. R. CRIM P. 5(a); *see also* TENN. R. CRIM. P. 5(a).

300. Moran v. Burbine, 475 U.S. 412, 428 (noting that the right to counsel arises "after the first formal charging proceeding").

301. Miranda v. Arizona, 384 U.S. 436, 444 (1966) (holding that statements by defendants may not be used in evidence "unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination").

302. *See id.* at 467 (*Miranda* protections apply where there is custody and interrogation).

303. *See* Davis v. United States, 512 U.S. 452, 459 (1994) (an ambiguous invocation does not require the cessation of interrogation).

rights.[304] And, even if they are unsuccessful in obtaining an explicit waiver (oral or written), the mere fact that the suspect was informed of his rights, appeared to understand them, and later made an admission could be enough by itself to constitute an "implied waiver."[305] By contrast, the Sixth Amendment protection is triggered automatically by a formal charge, and it does not require the defendant to affirmatively invoke the right.[306] Thus, once the Sixth Amendment right applies, police may not initiate any conversation with the suspect about the case or attempt to elicit any kind of waiver. The most they can do is respond if the defendant initiates discussion about the case. Thus, avoiding Sixth Amendment protections through the guise of the 48-hour hold effectuates a significant advantage to law enforcement.

In practice, this advantage can be a very helpful, very practical one. Use of the holds affords police an opportunity to "sweat" a suspect for 48 hours in an attempt to "soften him up" for questioning toward the end of the 48-hour period. This process continues for 48 hours, before the clock even starts ticking on a bail determination. In many cases, it continues without a solid case for probable cause. By the end of this period, a suspect may be more willing to waive both his Fifth Amendment and Sixth Amendment rights. From a pragmatic policy perspective, one might view this as either a good thing or a bad thing, depending on the seriousness of the crime and whether the suspect is truly culpable. From a constitutional perspective, it is troubling.

CONCLUSION

Forty-eight-hour holds represent a violation of fairly basic Fourth Amendment rights. They provide for detention without charge and without access to bail. Much of the time, they provide for detention without probable cause. In Tennessee, they also seem to circumvent right-to-counsel restrictions on interrogation.

Their sustained use in multiple jurisdictions around the country raises troubling questions. To what extent were the detentions the product of honest misunderstanding of the law by law enforcement,

304. Moran v. Burbine, 475 U.S. 412, 423–24 (1986) (affirming the validity of a waiver even though the "withholding of information [by police] is objectionable as a matter of ethics").

305. Berghuis v. Thompkins, 130 S. Ct. 2250, 2262 (2010) ("Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent.")

306. *See Moran*, 475 U.S. at 428 (affirming the "right to the presence of an attorney during any interrogation occurring after the first formal charging procedure").

and to what extent were they the product of cynical bending of rules? Either way, why has it persisted so long? Why didn't the courts put a stop to it sooner? Why does it apparently continue in at least some local jurisdictions?

In part, the answer lies in local courts who were themselves misinformed regarding this aspect of criminal procedure. Perhaps this is not surprising, given the byzantine complexity of current constitutional criminal procedure doctrine—a complexity borne of shifting ideological majorities on the Supreme Court and the Court's reluctance to honestly overrule precedents rather than distinguish them to death. At the same time, there are nontrivial limitations on ways to formally bring this matter to the attention of the courts. As a practical matter, to file a civil lawsuit challenging the practice and have a reasonable prospect of obtaining a significant money judgment, lawyers would want a plaintiff detained under the procedure, willing to sue, and lacking a criminal record, all of which could be a difficult find.

Another explanation may lie in sheer institutional inertia. There is a natural tendency for any institution to resist calls for change, especially when those calls come in the form of accusations that the institution is systematically violating the Constitution. Overcoming that inertia—successfully prodding the local courts, police, and prosecutors to change—requires sustained attention, perhaps more sustained attention than busy practicing lawyers and journalists could afford.

Whatever the explanation, the 48-hour holds should stop and not resume. To that end, attorneys need to do a better job of explaining basic constitutional principles to the lay public and to actors in the criminal justice system. If that happens, maybe the next time we discover a systematic constitutional violation in our criminal justice system—and there will be a next time—it will take less than two decades to remedy it.

SCHOOL OF LAW

CASE WESTERN RESERVE
UNIVERSITY