CRIMINAL PROCEDURE—PRELIMINARY HEARING REQUIRED TO SATISFY DUE PROCESS FOR PRETRIAL INCARCERATION—*Gerstein v. Pugh*, 420 U.S. 103 (1975).

I. INTRODUCTION

A. *The Factual Background*

In March 1971 respondents Robert Pugh and Nathaniel Henderson were arrested without a warrant in Dade County, Florida, and charged with various offenses by the prosecutor's information.[1] Both respondents were incarcerated.[2] A judicial determination of probable cause under Florida law by way of a preliminary hearing was available only by request and only after a thirty day waiting period.[3] Moreover, the defendants' arraignment could be delayed, and the defendants might thereby be detained for an extensive period of time as a result of the prosecutor's information.[4]

The incarcerated respondents filed a class action suit against various Dade County officials claiming that they had been denied their constitutional rights to a judicial hearing prior to incarceration. The federal district court ordered that a preliminary hearing be afforded respondents in order to determine the existence of probable cause.[5]

The district court held that in the absence of a preliminary hearing, Florida's procedure violated the fourth and fourteenth amendments. The district court therefore ordered that the defendant Florida officials submit a plan outlining the procedures that would be adopted by the state to remedy this constitutional defect. The "Purdy Plan"[6] was then submitted and, after modification, was accepted.[7]

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[1] FLA. RULE CRIM. PROC. § 3.140(a) (1975). All crimes except capital offenses in Florida may be charged by information and without affording the defendant a preliminary hearing.

[2] Pugh was denied bail due to the specific charges against him, and Henderson was unable to post bond. Gerstein v. Pugh, 420 U.S. 103, 105 (1975).

[3] FLA. STAT. ANN. § 907.045 (1973).

[4] Gerstein v. Pugh, 420 U.S. 103, 106 (1975).

[5] Pugh v. Rainwater, 332 F. Supp. 1107 (S.D. Fla. 1971).

[6] Named after its creator, Sheriff E. Wilson Purdy. The Purdy Plan called for immediate access to a committing magistrate for a first appearance in order that a defendant could be advised of his rights and the charges against him. A time and date for the preliminary hearing was also to be set, Pugh v. Rainwater, 336 F. Supp. 490, 491 (S.D. Fla. 1972). The preliminary hearing would then be a full hearing, as opposed to an ex parte judicial determination of probable cause, requiring that all witnesses would be examined in the presence of the defendant—and could then also be cross-examined. The defendant could testify on his own behalf and call his own witnesses. The defendant by request could also have a transcript of the proceedings prepared, 336 F. Supp. at 492.

[7] Pugh v. Rainwater, 336 F. Supp. 490 (S.D. Fla. 1972).

The Flordia supreme court on December 6, 1972, amended its procedural rules in an attempt to preempt the Purdy Plan. The court did not merely adopt the Purdy Plan, however, and these amended rules were rejected by the district court.[8] The primary problem was that the amended rules did not cure the constitutional defect of the court's prior rules by still failing to provide an accused with a preliminary hearing if charged by information or indictment.[9] The federal court of appeals affirmed the district court's determination with slight modifications,[10] and the United States Supreme Court granted certiorari.[11]

B. *The Constitutional Framework*

The Court in *Gerstein v. Pugh*[12] specifically held that the fourth amendment as incorporated into the fourteenth amendment[13] "requires a timely judicial determination of probable cause as a prerequisite to detention,"[14] but that the fourth amendment does not require a full adversary hearing as outlined in the Purdy Plan.[15]

This note will demonstrate that due process does require a full preliminary hearing before or immediately after an accused is incarcerated, whether for a felony or a misdemeanor. The Court in *Gerstein*, by only focusing upon the fourth amendment as incorporated into the fourteenth amendment, analyzed only one narrow segment of due process. The Court dealt only with the procedural safeguards necessary to sustain the seizure and initial incarceration as opposed to those needed to prevent the accused's unjust incarceration while subsequently awaiting trial.[16]

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[8] Pugh v. Rainwater, 355 F. Supp. 1286 (S.D. Fla. 1973).

[9] *Id.* at 1289. Additionally the amended rules authorized preliminary hearings only for felonies, set a different time limit as to when a preliminary hearing was required for capital offenses as opposed to noncapital offenses, and provided no sanctions for failure to provide a preliminary hearing.

[10] Pugh v. Rainwater, 483 F.2d 778 (5th Cir. 1973).

[11] Gerstein v. Pugh, 414 U.S. 1062 (1973). Respondents had been convicted before this issue reached the United States Supreme Court, but due to the nature of the class action the suit was not considered moot. 420 U.S. at 110 n.11.

[12] 420 U.S. 103 (1975).

[13] Mapp v. Ohio, 367 U.S. 643 (1961), made the fourth amendment applicable to the states via the fourteenth amendment.

[14] *Supra* note 12, at 126.

[15] *Id.*

[16] The due process clause of the fifth amendment is a direct restraint on the federal government. Federal statutes and federal court rules have long provided for preliminary hearings but can be avoided or mooted by having an indictment issued. KAMISAR, LAFAVE, & ISRAEL, MODERN CRIMINAL PROCEDURE 968 (4th ed. 1974).

C. *The Preliminary Hearing*

There is disagreement as to the exact purpose of the preliminary hearing,[17] but typically it is considered to be a judicial proceeding held shortly after arrest in order to determine if there is sufficient evidence that a crime has been committed by the accused.[18] The proceeding will result in a determination of whether such evidence justifies further detention or whether the individual should be screened out of the criminal justice system.[19] The procedures followed in order to reach such a determination also vary greatly. The term "preliminary hearing" as used in this note may be defined as a procedure that is adversary in nature, "accompanied by the full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses."[20]

The initial problem that must be confronted when calling for such a hearing is that a defendant may be afforded two complete trials. If the preliminary hearing, however, is held swiftly after the initial incarceration as envisioned, the proceedings will not duplicate each other. Defense counsel at a prelimary hearing will not yet have had time for intensive preparation. Therefore, the preliminary hearing need not be an elaborate proceeding but may nonetheless have the beneficial result that expense and time could be significantly reduced for the individual and the state when the accused is screened out of the system at this initial stage. The prosecutor would only have to make a showing of probable cause or likelihood of conviction[21] in order to have the accused bound over.[22] No jury would be empaneled. The stigma that attaches to a criminal trial does not attach to a preliminary hearing. Furthermore, since the charges may be dis-

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The due process clause of the fourteenth amendment is a direct restraint on the states. All states have provisions for preliminary hearings. *See* Brief for Respondent at Appendix Ia, Gerstein v. Pugh, 420 U.S. 103 (1974), for a collection of the state statutes. Arkansas, Connecticut, Florida, Iowa, Montana, Washington, and Wyoming permit the prosecutor by way of an information to moot the requirement of a prelimiminary hearing, Brief for Petitioner at 14-15, Gerstein v. Pugh, 420 U.S. 103 (1975).

[17] C. A. WRIGHT, 1 FEDERAL PRACTICE AND PROCEDURE § 80, at 135 (1969).

[18] Note, *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, 83 YALE L.J. 771, 772 (1973).

[19] *Id.*

[20] 420 U.S. at 119. This was the model used by the lower federal courts that dealt with *Pugh v. Rainwater.*

[21] *Supra* note 18, at 779.

[22] The standard of probable cause at the preliminary hearing will be more difficult to meet than at the fourth amendment ex parte probable cause determination since the accused has a chance to rebut some of the evidence at the preliminary hearing.

missed or the accused may plead guilty when confronted with the prosecutor's case at a preliminary hearing, the anticipated trial may never materialize. A trial, if it is to be fair, could not be held immediately after incarceration, since preparation and discovery would be lacking. Therefore a preliminary hearing is the only reasonable means to afford the accused his constitutional due process rights.

II. THE FOURTH AMENDMENT

The Court in *Gerstein* specifically held that the "fourth amendment requires a timely judicial determination of probable cause as a prerequisite to detention,"[23] but explained that no adversary hearing was required.[24] The decision in *Gerstein* indicated that the Court was concerned with the determination of whether there was probable cause to make a seizure of the person, *i.e.* an arrest. The probable cause element addressed in *Gerstein* is that which must be established before a magistrate will issue a warrant. A hearing that will determine probable cause for a seizure must ascertain whether a police officer has reasonable grounds to believe that an offense has been committed by the person to be arrested.[25] This has traditionally been an ex parte proceeding with a police officer setting forth in an affidavit the facts which he feels establish probable cause.[26] Under the procedure commanded by *Gerstein* the arrested person will be brought before a "judicial officer as quickly as possible so that he may be advised of his rights and so that the issue of probable cause may be promptly determined."[27] Since the Court in *Gerstein* requires a judicial determination it can be assumed that the determination will be conducted by a neutral and detached magistrate.[28] The inferences of probable cause will therefore not be drawn by an "officer engaged

[23] 420 U.S. at 126.

[24] *Id.* at 120.

[25] Beck v. Ohio, 379 U.S. 89, 91 (1964).

[26] The hearing to determine whether probable cause exists is quite informal. It is an ex parte proceeding. The magistrate may consider hearsay, Aguilar v. Texas, 378 U.S. 108 (1964), and even the suspect's reputation, United States v. Harris, 403 U.S. 573 (1971). The Court, in the context of a warrantless arrest, indicated that the magistrate is considered to be dealing with the probabilities as a reasonable person and not as a legal technician, Brinegar v. United States, 338 U.S. 160, 175 (1949).

[27] Mallory v. United States, 354 U.S. 449, 454 (1957).

[28] Coolidge v. New Hampshire, 403 U.S. 443, 453 (1971), held that probable cause to issue a warrant could not be determined by a state official who was the chief investigator and prosecutor of the case. Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972), concluded that an issuing magistrate must be neutral and detached, and be capable of determining probable cause.

in the often competitive enterprise of ferreting out crime."[29]

In determining the requirements of the fourth amendment, the Court was correct in concluding that respondents' constitutional rights had been violated as a result of the state's failure to afford the respondents a determination of probable cause prior to or immediately after the arrest. The Court's requirement of a judicial determination remedied that specific fourth amendment constitutional deprivation.[30]

III. DUE PROCESS

A. *Generally*

The fifth amendment states that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."[31] Due process in itself is a vague concept, and its exact constitutional dictate will probably never be spelled out precisely. It has, however, been defined as "the protection of the individual against arbitrary action."[32] The opportunity to be heard,[33] and even more importantly, the opportunity to be heard "at a meaningful time and in a meaningful manner"[34] are at the core of procedural due process. While it is true that all rights and privileges are not protected by due process of law,[35] it is well established that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[36]

Thus, it would appear inescapable that due process demands that an individual be afforded a preliminary hearing before or immediately after incarceration. The courts have consistently indicated, however, that due process does not require that an individual be afforded a preliminary hearing prior to or immediately after that individual's

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[29] Johnson v. United States, 333 U.S. 10, 13-14 (1947).

[30] The fourth amendment deals with unreasonable seizures and warrants. Respondents also could have attempted to attack the seizure by arguing that a warrant should have been obtained first. But, as the Court points out, most arrests are not invalidated for that reason. 420 U.S. at 113. *See* United States v. Watson, 44 U.S.L.W. 4112 (Jan. 26, 1976).

[31] U.S. CONST. amend. V. Amendment XIV indicates the same restraints but in reference to the states.

[32] Ohio Bell Telephone Co. v. Public Utilities Comm'n, 301 U.S. 292, 302 (1937).

[33] Grannis v. Ordean, 234 U.S. 385, 394 (1914).

[34] Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

[35] Goldberg v. Kelly, 397 U.S. 254, 262-63 (1969).

[36] Union Pacific Ry. v. Botsford, 141 U.S. 250, 251 (1891).

freedom is taken away.[37] The facts of *Gerstein* illustrate the typical problem. Respondents Pugh and Henderson were incarcerated after a prosecutor concluded that charges should be brought against them.[38] They were given no opportunity to respond for the purpose of preventing the deprivation of their personal freedom.

B. Lem Woon, Hurtado, *and Their Progeny*

The Court in *Gerstein* explained that "we adhere to the Court's prior holding that a judicial hearing is not prerequisite to prosecution by information,"[39] and cited *Lem Woon v. Oregon*[40] for that proposition. Even assuming that *Lem Woon* is correctly decided, it can be demonstrated that *Lem Woon* is inapplicable to the facts of *Gerstein*. *Lem Woon* held that a preliminary hearing is not required prior to prosecution by information, but *Lem Woon* did not address the question of whether a preliminary hearing is required subsequent to the information and prior to incarceration.[41] Of course, there are good policy reasons for refraining from granting a preliminary hearing prior to bringing charges against a defendant. Rather than requiring a hearing prior to arrest it is, as the Court in *Gerstein* pointed out, a "practical compromise" to use the "policeman's on the scene assessment of probable cause,"[42] since a suspect may escape or commit other crimes. But once the suspect is in custody these policy considerations vanish.[43] It is true that the Court in *Gerstein* raised this pre- and post-charge distinction only in terms of the necessity of requiring a post arrest fourth amendment probable cause determination, but this distinction demonstrates that differences do exist between the pre- and post-charge situations. *Lem Woon* considered only the pre-charge situation and not the constitutionality of pretrial detention.

Furthermore, *Hurtado v. California*,[44] *Lem Woon*, and federal appellate court holdings[45] have all dealt with attempts on the part of

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[37] See *infra*, note 45.

[38] See *infra*, text accompanying notes 105-10.

[39] 420 U.S. at 119.

[40] 229 U.S. 586 (1913), usually cited for the proposition that there is no constitutional requirement for a preliminary hearing.

[41] *See* Brief for Respondents at 27-31, Gerstein v. Pugh, 420 U.S. 103 (1975), which extensively argued this point.

[42] 420 U.S. at 113-14.

[43] *Id.*

[44] 110 U.S. 516 (1884).

[45] United States v. Gross, 416 F.2d 1205 (8th Cir. 1969); Austin v. United States, 408 F.2d 808 (9th Cir. 1969); Swingle v. United States, 389 F.2d 220 (10th Cir. 1968); Kerr v. Dutton,

convicted defendants who received no preliminary hearing to overturn otherwise valid convictions.[46] A distinction should be drawn between an incarcerated individual who was denied a preliminary hearing but was thereafter accorded a full trial, the assistance of counsel and subsequently found guilty beyond a reasonable doubt, and an incarcerated individual who has had no opportunity to speak on his own behalf.

Conversely, if one assumes that *Lem Woon* is applicable to the facts of *Gerstein*, the case should nevertheless not be relied upon for such an important constitutional issue. The Court in *Lem Woon* went beyond the facts of the controversy immediately before it and even misapplied the previous holding in *Hurtado* upon which it purported to rely.

In 1884 the United States Supreme Court held in *Hurtado* that due process did not require a state prosecutor to obtain an indictment by grand jury proceedings. Instead, the prosecution could be constitutionally initiated by means of a prosecutor's information. However, the information that was challenged in *Hurtado* had been coupled with a preliminary hearing. The Court explained that

> we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witness produced for the prosecution, is not due process of law.[47]

The Court's exact holding in *Hurtado* was therefore that an information may be substituted for a grand jury indictment *if* a preliminary hearing is afforded the defendant. In 1913 when the United States Supreme Court decided *Lem Woon* it apparently misapplied the exact *Hurtado* holding. The Court stated that any question as to whether the due process clause was in conflict with Oregon's Information Law had been "sufficiently set at rest,"[48] and refused to address the fact that the Oregon system did not require a preliminary

393 F.2d 79 (5th Cir. 1968); Scarborough v. Dutton, 393 F.2d 6 (5th Cir. 1968); Rivera v. Gov't of the Virgin Islands, 375 F.2d 988 (3rd Cir. 1967); United States v. Luxenberg, 374 F.2d 241 (6th Cir. 1967); Sciortino v. Zampano, 385 F.2d 132 (2nd Cir. 1967); Weber v. Ragen, 176 F.2d 579 (7th Cir. 1949); Barber v. United States, 142 F.2d 805 (4th Cir. 1944); cited in Brief for Respondents at 30 n.18, Gerstein v. Pugh, 420 U.S. 103 (1975).

[46] Brief, *supra* note 41, at 30-31.

[47] 110 U.S. at 538.

[48] 229 U.S. at 589.

hearing.[49] Furthermore, just as disturbing as the misapplication of *Hurtado* is the fact that the Court in *Lem Woon* refused to limit its holding to the facts of the case.[50] Lem Woon, accused of murder, had been offered the opportunity for a form of preliminary hearing but had waived that opportunity.[51] The *Lem Woon* Court should have only extended the holding of *Hurtado* by concluding that a prosecutor's information can be used as a substitute for a grand jury indictment even if the preliminary hearing so afforded is waived.

C. *Recent Developments*

The proposition that one may be incarcerated without being afforded a preliminary hearing cannot be reconciled with recent decisions of the United States Supreme Court.

(1) Civil Area

The United States Supreme Court in *Goldberg v. Kelly*[52] held that a full evidentiary hearing is required before a state can terminate public assistance payments to a welfare recipient. Prior to *Goldberg*, a caseworker in New York who doubted the eligibility of a welfare recipient could recommend termination to a supervisor. If the supervisor concurred, he would send the recipient a letter explaining the termination. The supervisor would also explain that a higher official would review the welfare recipient's record if requested. The welfare recipient could support the request and contest the termination with a written statement. If the reviewing official affirmed the supervisor's determination, aid was stopped immediately. After termination a full trial-type hearing was then afforded the welfare recipient.[53] The New York procedure, even though offering an informal pretermination review *and* a post-termination "fair hearing"[54] was held insufficient to satisfy the requirements of procedural due process. The *Goldberg* decision is indicative of the view that the Court is taking in the area of due process.[55]

The Court in *Goldberg* pointed out that "the extent to which

[49] *Id.* at 590.
[50] *Id.*
[51] *Id.* at 587 and 590.
[52] 397 U.S. 254 (1970).
[53] *Id.* at 258-60.
[54] *Id.* at 258-59.
[55] See *infra* notes 65-72.

procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grevious loss.' "[56] The Court concluded that a welfare recipient could, by wrongful public assistance termination, be subjected to a "grievous loss."[57] The Court noted that a post-termination hearing was no remedy since the welfare recipient would be deprived of the welfare benefits for a specific period of time.[58] While acknowledging the state's fiscal needs as a factor in determining the nature of termination hearings, the Court noted that such needs had to be weighed against an individual's needs in such a situation.[59]

The potential for "grievous loss" to one wrongfully incarcerated is unlimited.[60] Fiscal considerations cannot outweigh the overpowering need of an incarcerated individual. A preliminary hearing or final trial that is available to an accused days after the initial incarceration helps an individual only after that individual has been deprived of his freedom.

The Court in *Goldberg* concluded that a recipient must be afforded "adequate notice detailing the reasons for proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally."[61] The Court emphasized that the recipient must be given an opportunity to present his side of the controversy.[62]

As previously indicated, one could use similar arguments to support the proposition that these safeguards must also be afforded the accused prior to or immediately after incarceration. Moreover, an incarcerated individual is subjected to additional deprivations beyond those suffered by the welfare recipient.[63] Arguably, however, the critical factor upon which the *Goldberg* decision turned, *i.e.* the "depriv[ation] . . . of the very means by which to live,"[64] may not be present in the case of the incarcerated individual. An individual incarcerated prior to trial will probably not be deprived of the minimum necessities by which to live, even though his family may. Even so, other decisions in the civil area have required procedural safe-

[56] 397 U.S. at 262-63.
[57] *Id.* at 264.
[58] *Id.* at 261.
[59] *Id.*
[60] See *infra*, text accompanying notes 86-91.
[61] 397 U.S. at 267-68.
[62] *Id.* at 269.
[63] See *infra*, text accompanying notes 86-91.
[64] 397 U.S. at 264.

guards though no necessity was at stake. Due process procedural safeguards are required prior to the garnishment of a commercial bank account,[65] the suspension of a driver's license,[66] the taking away of one's refrigerator,[67] the temporary suspension of a public school student,[68] the prohibition of the sale of liquor to an individual for one year,[69] the garnishment of wages,[70] the refusal of admission to a public hospital staff,[71] and termination of employment of college faculty.[72] It does indeed appear that the Court in *Gerstein* concluded "that the Constitution extends less procedural protection to an imprisoned human being than is required to test the propriety of . . . [one's] custody of a refrigerator."[73]

(2) Parole and Probation Revocation

The United States Supreme Court held in *Morrissey v. Brewer*[74] and in *Gagnon v. Scarpelli*[75] that a parolee or probationer is entitled to two hearings before parole or probation is revoked, while recognizing that such revocations were not a part of the criminal prosecution.[76] The Court in *Morrissey* concluded that before parole could be revoked due process required "some minimal inquiry conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest."[77] This minimal inquiry is to be similar to a preliminary hearing conducted by a disinterested party.[78] The Court went even further and additionally required, after the minimal hearing, another hearing that the Court termed the "revocation hearing."[79] At this final hearing the parolee "must have an opportunity to be heard and to show . . . he did not violate the conditions, or, . . . that the violation did not warrant revocation."[80]

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[65] North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).
[66] Bell v. Burson, 402 U.S. 535 (1971).
[67] Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974).
[68] Goss v. Lopez, 419 U.S. 565 (1975).
[69] Wisconsin v. Constantineau, 400 U.S. 433 (1971).
[70] Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).
[71] Sosa v. Board of Managers, 437 F.2d 173 (5th Cir. 1971).
[72] Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970).
[73] 420 U.S. at 127 (Stewart, J. concurring).
[74] 408 U.S. 471 (1972).
[75] 411 U.S. 778 (1973).
[76] 408 U.S. at 480 and 411 U.S. at 782.
[77] 408 U.S. at 485.
[78] *Id.*
[79] *Id.* at 477, 488.
[80] *Id.* at 488. The first hearing is similar to a fourth amendment probable cause

The Court also stated that there must be an "opportunity to be heard in person and to present witnesses and documentary evidence" as well as the opportunity "to confront and cross-examine adverse witnesses" in order to meet the "minimum requirements of due process."[81] The "preliminary hearing" and the "final revocation hearing" were also held to be required in the revocation of probation proceedings in *Gagnon*.[82]

One of the points dealt with in *Morrissey* and *Gagnon* is that revocation of parole[83] and probation[84] results in a deprivation of personal liberty. Every time an individual is incarcerated, however, a deprivation of personal liberty results. An individual who has been denied bail and not afforded a preliminary hearing can be incarcerated, even though ideally "presumed innocent," while an individual on parole or probation, already subject to substantial continuing restraints due to an earlier conviction, is entitled to a two tier proceeding before parole or probation revocation will result. An individual on parole or probation, already convicted beyond a reasonable doubt for an earlier offense, is entitled to more substantial due process rights than an individual who has been merely accused of an offense by a local prosecutor.[85]

IV. POLICY CONSIDERATIONS

A. *Consequences of Incarceration*

In considering the necessity of affording an incarcerated individual a preliminary hearing, one cannot ignore the devastating effects incarceration may have upon the individual. First, if the nature of the crime permits bail, the poor are immediately disadvantaged. Since many systems of bail are based upon a fixed schedule[86] and not upon

determination, and the second is similar to a preliminary hearing as the terms have been used in this note.

[81] *Id.* at 489. In addition to these two due process requirements the Court also explained that there must be written notice of the claimed violations, disclosures to the parolee of the evidence against him, a neutral and detached decision making body, and a statement as to the evidence relied on and reasons for revoking parole.

[82] 411 U.S. at 782.

[83] 408 U.S. at 482.

[84] 411 U.S. at 782.

[85] Similarly, an individual who was merely accused of a crime and denied bail can be incarcerated for a lengthy period of time having had no trial and no preliminary hearing; however, a defendant tried and convicted, even if only for a misdemeanor, cannot constitutionally be incarcerated for any period of time if the assistance of counsel was denied. Argersinger v. Hamlin, 407 U.S. 25 (1972).

[86] D.J. FREED & P.M. WALD, BAIL IN THE UNITED STATES: 1964 at 18-21 (1964).

individual consideration, the poor will often have no realistic alternative to confinement. The poor who cannot meet bail and the individuals who are not permitted to post bond may find their employment in jeopardy. As a result, the individuals incarcerated may be unable to support themselves once out of jail and, of course, unable to support their families while in jail. Along with the cost to society for the actual incarceration, such loss of employment may cause the welfare lines to lengthen.[87] Such incarceration could also have indeterminable adverse psychological effects upon an individual and his family. Furthermore, pretrial incarceration may actually affect the integrity of the guilt determining process itself. The incarcerated individual will be handicapped in the preparation of his defense since he cannot search for witnesses or even consult under favorable circumstances with his attorney.[88] The United States Supreme Court has recognized the effect such pretrial incarceration has upon the criminal justice system. The Court acknowledged the serious consequences of imposing pretrial detention "on anyone who has not yet been convicted,"[89] since statistical evidence supports the proposition "that persons who are detained between arrest and trial are more likely to receive prison sentences than those who obtain pretrial release."[90] Though an individual may in fact be innocent, the system initially tilts the scales against an incarcerated accused. Even if the accused is ultimately adjudged innocent, no state allows the wrongfully accused individual damages for the time of incarceration.[91] The stigma of incarceration may continue to tarnish the individual's reputation for many years.

B. *The Preliminary Hearing*

A preliminary hearing[92] offers an accused the opportunity to make statements on his own behalf, the opportunity to produce witnesses, and to confront and cross-examine the prosecution's witnesses.[93] Since the accused can offer evidence on his own behalf, he

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[87] *See* R. GOLDFARB, RANSOM 32-91 (1965).

[88] Leahy and Pound, *Bail Reform—The Search for Constitutional Realism*, 11 DUQUESNE L. REV. 14, 16 (1972).

[89] Barker v. Wingo, 407 U.S. 514, 533 (1972).

[90] *Id.* at 533 n.35.

[91] J.N. Hazard & W.J. Wagner, Law in the United States of America in Social and Technological Revolution 615, 616 (1974).

[92] This is referring to the type of preliminary hearing discussed *infra* at text accompanying note 20.

[93] Anderson, *The Preliminary Hearing—Better Alternatives or More of the Same?*, 35 MO. L. REV. 281, 285-86 (1970).

stands a much better chance of getting favorable bail arrangements.[94] The prosecutor is also benefited since he gets a chance to test his own case and to induce early guilty pleas.[95] Some commentators have pointed out that the preliminary hearing fails to perform well in actual practice,[96] but this may simply be a result of the purpose attributed by a particular jurisdiction to its preliminary hearing procedure. If the preliminary hearing is treated as a procedure to determine the probability of conviction at the final trial[97] as opposed to the validity of the arrest, the preliminary hearing would fare much better as a screening device. The rules of evidence might apply, the exclusionary rule might be used and the defendant might have defense opportunities similar to those that would be available at trial, *e.g.*, opportunity to establish an affirmative defense. Furthermore, statistics indicate that the screening function is useful in some jurisdictions.[98] The more a jurisdiction increases the rights of an accused at a preliminary hearing, the greater the usefulness of the screening function. Additionally, when an accused is given the opportunity to testify and confront witnesses, the process will tend to produce fewer errors.[99] The burdens placed upon a state by requiring a preliminary hearing are probably quite minimal.[100]

The United States Supreme Court in *Coleman v. Alabama*[101] has recognized the preliminary hearing as a "critical stage" due to the advantages a defendant may realize if provided with counsel at that proceeding. The Court explained that examination and cross examination by counsel could expose fatal weaknesses in a state's case that would lead the magistrate to refuse to bind the accused over. A

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[94] *Id.* at 287.

[95] *Id.* at 288-89.

[96] *Id.* at 289.

[97] *See* Note, *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, 83 YALE L.J. 771 (1974), which contrasts the "backward-looking" model, concerned with the legality of arrests, with the "forward-looking" model, concerned with the probability of conviction.

[98] *See* KAMISAR, LAFAVE, & ISRAEL, MODERN CRIMINAL PROCEDURE 958 (4th Ed. 1974) and *supra* note 91, at 617-18.

[99] Note, *Constitutional Right for a Preliminary Hearing for Detainment Pre-Trial*, 48 So. CAL. L. REV. 158, 167-68 (1975).

[100] The states will be faced with additional expenses in terms of time, personnel, and more trained magistrates, but this may be more than offset by guilty pleas, waivers, trial avoidances, and even consolidated motions. Furthermore the expenses should not outweigh the interests of the accused. Note, *Constitutional Right for a Preliminary Hearing for Detainment Pre-Trial*, 48 So. CAL. L. REV. 158, 179-81 (1975).

[101] 399 U.S. 1 (1970), requiring that the accused be afforded counsel at a preliminary hearing.

preliminary hearing could also result in a "vital impeachment tool" and perpetuation of favorable testimony.[102] Discovery would be promoted, and even the necessity of an early psychiatric examination or bail could be demonstated.[103] However, the Court in *Gerstein* attempted to distinguish *Coleman* by arguing that the fourth amendment was concerned only with pretrial custody and not the question of charging a defendant with an offense. The Court argued that perpetuation of testimony is not a consideration when there is no requirement to produce witnesses.[104] But the Court is again only looking to the fourth amendment and is ignoring the requirements of due process. Also, the Court is using circular reasoning by saying that there is no right to cross-examine prosecution witnesses and preserve testimony when the state does not require that the prosecution produce witnesses for cross-examination. Finally, the constitutional right to have counsel in order to preserve such critical factors as discovery at a preliminary hearing is meaningless when the preliminary hearing itself is not required.

C. *The Prosecutor's Discretion*

The prosecutor's power to prosecute in the United States is enormous. The prosecutor can discretionally select an individual for prosecution with little prospect of judicial review of his decision. Surely, a prosecutor could find at least one technical violation against almost everyone if he looked hard enough,[105] especially in light of the present overreach of the criminal law.[106] Injustice occurs where complete discretion rules.[107] Emotions, politics, and human imperfections may come into play.[108] An additional question to be confronted is whether the criminal justice system should permit one person[109] to

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[102] *Id.* at 9.

[103] *Id.*

[104] 420 U.S. at 122-23.

[105] K.C. DAVIS, DISCRETIONARY JUSTICE—A PRELIMINARY INQUIRY 188-214 (1969).

[106] *See* N. MORRIS & G. HAWKINS, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL 2-28 (1969).

[107] *Supra*, note 105 at v.

[108] *Id.*

[109] *Gerstein* dealt specifically with the question of a hearing after a prosecutor's information was filed, but the same reasoning also applies to a grand jury indictment since "the grand jury is very often a rubberstamp of the prosecutor." It is an ex parte proceeding which is totally nonadversarial being conducted by the prosecutor. Note, *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, 83 YALE L.J. 771, 802-03 (1974).

bring charges against an individual[110] and cause that individual to be incarcerated without an opportunity to speak on his own behalf.

V. CONCLUSION

The fourth amendment requires only a judicial determination of probable cause before or shortly after a seizure of an individual takes place. Due process, however, requires much more if the seized individual is to remain incarcerated. However, the courts have consistently refused to hold that there is a constitutional requirement to a preliminary hearing. In light of both the weak case law foundations upon which these holdings are based and the recent statements by the Court defining the requirements of due process it seemed that the time was right to put an incarcerated individual's freedom on at least equal status with property or a convicted individual's freedom. The time was not right. An individual therefore can still be incarcerated by way of a prosecutor's information to await trial without being afforded a preliminary hearing.

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[110] It is true that a magistrate will be required to assess the presence of probable cause but, as indicated, *supra* note 26 and accompanying text, such determination is an ex parte proceeding and usually quite perfunctory.