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

By Steven J. Mulroy[1]

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, the practice has occurred in a number of large local 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, the article argues, it is constitutionally problematic to deliberately detain a person for 48 hours without charge. The 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.

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I. INTRODUCTION

For the past several decades, a number of local jurisdictions around the country have had a publicly acknowledged, routinized procedure where a suspect would be held against his will for up to 48 hours without being charged 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. [2] 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. Examples include written police policies in Chicago, Illinois which continued through the 1980s and 1990s,[3] with a recorded complaint as late as November 2002;[4] standard practice in Austin, Texas throughout the 1970s and 1980s[5] which has never formally been discontinued; and unofficial policy in Missouri at least throughout the 1990s.[6] 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.[7] This practice occurred within the last few years.[8]

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 have deliberately detained persons without charge on "20-

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[2] *See infra*, Section II. 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* notes 73 through 78 and accompanying text (discussing Memphis' uses of an early version of the 48-hour hold). At any rate, this Article argues that even where the suspect is ultimately charged, the 48-hour hold procedure raises constitutional and policy concerns.

[3] *See* Bullock v. Dioguardi, 847 F.Supp. 553, 563 (N.D. Ill. 1993); Willis v. Bell, 726 F.Supp. 1118 (N.D. Ill. 1989); Robinson v. City of Chicago, 638 F.Supp. 186, 188 (N.D. Ill. 1986), *rev'd on standing grounds*, 868 F.2d 959 (7thCir. 1989), *reh'g & reh'g en banc denied*, No. 87-1778 (1989), *cert. denied*, 493 U.S. 1035 (1990).

[4] Notice of Filing, Joseph v. City of Chicago, 464 F.3d 711, (N. D. Ill. Nov. 12, 2002) (01 C 1823).

[5] July 2012 Correspondence with Prof. Stephen Summers, Indiana University-Bloomington School of Law, former Municipal Court Judge, Austin, Texas (on file with author). Prof. Summers observed this practice while a sitting judge and while serving on a Municipal Court Task Force on jail overcrowding. Judge Davis 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 2012 (on file with author). Judge Philips observed the procedure while serving as a Magistrate Judge in Travis County between 1979 and 1988.

[6] *See, e.g.,* United States v. Roberts, 928 F.Supp. 910, 915 (W.D. Mo. 1996). It is unclear whether the practice continues today to any extent.

[7] State v. Charles, 2009-KK-0877 (La. 4/22/09). *See also* Original Writ Application of the Defendant at 6-7 State v. Charles, 2009-K-477 (La. Ct. App. 2009) (on file with author).

[8] State v. Meredith, 2009-K-1119 (La. Ct. App. 2009) (the defendant was arrested on August 13, 2009 without probable cause, and though he was brought before a commissioner on August 16, 2009, he was detained without a probable cause determination until October 15, 2009).

hour holds."[9] In some Missouri jurisdictions, there was an "unwritten policy" of holding all domestic violence suspects for the full statutory 20-hour period.[10] In at least one case, police adhered to this policy even after a judge ordered such a suspect released.[11] Litigants in Michigan have alleged a similar unofficial policy regarding domestic violence suspects. 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.[12]

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.[13] An administrative law judge discontinued the practice just this year.[14]

But, by far, the broadest practice is in Tennessee, where several jurisdictions have had internal policies of placing certain suspects "on 48-hour hold,"[15] did so fairly frequently, and in some cases, still continue. 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

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[9] *Roberts*, 928 F.Supp. at 915 (opinion of district court), 932-933 & n.14 (appended report and recommendation of magistrate judge), *citing* MO. ANN. STAT. §544.170 (West 2012).

[10] *See* In Re Conard, 944 S.W.2d 191, 193-194 (Mo. 1997). A statute had required all types of criminal suspects to be released within 20 hours if the suspect had not yet been charged, *id.* at 194 n.1, and police decided to hold all domestic violence suspects for the full statutory period. That statute now authorizes pre-charge detention for up to 24 hours before charges must be filed. Mo. Ann. Stat. § 544.170 (West 2012).

[11] *In Re Conard*, 944 S.W.2d at 192-193.

[12] Davis v. City of Detroit, No. 98-1254, 1999 WL 1111482, *1 (6th Cir. Nov. 23, 1999) (citing Brennan v. Township of Northville, 78 F.3d 1152, 1155-1156 (6th Cir. 1996)).

The Sixth Circuit has distinguished (i) a practice of deliberately holding such suspects for the full statutory period despite the availability of a magistrate, which is constitutionally suspect, from (ii) 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 (6th Cir. 2005). The latter, constitutional approach is an official policy in some Michigan jurisdictions, relying on state statutes which 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.*, *citing* MICH. COMP. LAWS §780.581(1). 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.

[13] Correspondence with Professor Yuri Linetsky, Case Western Reserve University School of Law, Cleveland, Ohio, July 2012 (on file with author). Professor Linetsky learned about this practice while taking courses at the local police academy.

[14] *Id.*

[15] See Section II, *infra*.

opinion criticizing the use of "48-hour holds" by the Memphis Police Department.[16] This was the third time this court had issued an opinion criticizing the practice.[17]

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 approving such holds in Shelby County defended the practice.[18] Two days later, a federal district court issued an opinion holding the sheriff of nearby Lauderdale County, Tennessee in contempt for continuing the practice despite a 2010 court order enjoining it.[19]

This confluence of events triggered sustained media attention and controversy,[20] including editorials questioning the practice[21] and statements from the police and prosecutors' offices defending it.[22] Within a week, the uproar resulted in a decision to discontinue the practice in Shelby County.[23] However, both the chief judge overseeing the practice in that county[24] and the District Attorney helping to implement it[25] continued thereafter to defend the holds, and the District Attorney announced that the State would appeal the appellate case finding the practice unconstitutional.[26] Additionally, the practice continued until this year in Lauderdale County,[27] and apparently still continues in Tipton County,[28] as well as Hardeman and McNairy Counties, the other counties in the state's 25th Judicial District.[29] Although apparently rare, the

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[16] State v. Bishop, No. W2010-01207-CCA-R3-CD (Tenn. Crim. App. Mar. 14, 2012).

[17] *See* State v. Rush, No. W2005-02809-CCA-R3-CD (Tenn. Ct. Crim. App. Oct. 11, 2006), slip op. at 2 n.2; State v. Ficklin, No. W2000-01534-CCA-R3-CD, 2001 WL 1011470 (Tenn. Ct. Crim. Appl. Aug. 27, 2001), at *7.

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

[19] Memorandum Opinion and Order, Rhodes et al. v. Lauderdale County et al., No. 2:10-cv-02068-JPM-dkv (Mar. 21, 2012) (2012 Lauderdale County Order).

[20] *See, e.g.*, Daniel Connolly, "Court Rejects 48-Hour Holds By Memphis Police; 3rd Strike for Detention Policy," *Memphis Commercial Appeal*, Mar. 23, 2012.

[21] Editorial, *48-Hour Detentions*, MEMPHIS COMMERCIAL APPEAL, Mar. 26, 2012.

[22] *48-Hour Holds Defended; Will Continue*, MEMPHIS COMMERCIAL APPEAL, Mar. 24, 2012.

[23] Lawrence Buser, Daniel Connolly, and Kevin McKenzie, "Sheriff Will No Longer Hold Prisoners for 48-Hour Detention," *Memphis Commercial Appeal*, Mar. 30, 2012.

[24] Transcript of Shelby County Commission Committee #4 Proceedings, Apr. 4, 2012, at 1 (testimony of Shelby County General Sessions Court Judge Joyce Lambert Ryan) (Shelby County April Transcript) (on file with author).

[25] Lawrence Buser et al., *Sheriff Will No Longer Hold Prisoners for 48-Hour Detentions*, *supra* note 23.

[26] *Id*. *See also 48-Hour Holds Defended; Will Continue*, MEMPHIS COMMERCIAL APPEAL, Mar. 24, 2012 (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 related challenges 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 holds' overall validity. *See* Application Of State Of Tennessee For Permission To Appeal, State v. Bishop, No. W2010-01207-SC-R11-CD (Supreme Court of Tennessee, Apr. 12, 2010), at 2, 7-10. However, the State does criticize as "flawed analysis" the intermediate appellate court's discussion of the police department's use of 48-hour holds. *Id*. at 12.

[27] 2012 Lauderdale County Order, *supra* at 19 (discussing continued use in 2011 despite the 2010 consent decree prohibiting it).

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

[29] Telephone interview by Razvan Axente with Gary Antrican, Public Defender for Tennessee's 25th Judicial District (May 25, 2012). Mr. Antrican stated that the 48-hour hold is used in the 25th Judicial District, except for Fayette County. District Attorney Mark Davidson confirmed that the procedure is not used in Fayette County.

practice survives in Tennessee's 31st Judicial District as well.[30] Moreover, as indicated above, a milder version of the practice continues in parts of Michigan and Missouri regarding 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 any controversy is misplaced concern over formalities.[31] However, there is reason to believe that many detentions took 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.[32]

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.[33] 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 be brought before a neutral magistrate for a probable cause determination as promptly as practicable, with delays over 48 hours presumptively unreasonable.[34]

More broadly, significant issues lurk here about the principles underlying our rules governing pretrial detention. The issues are cast into stark relief by the recent years' expansion of detention authority related to the war on terror.[35] Suspected "enemy combatants" have been

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Telephone interview by Razvan Axente with Mark Davidson, District Attorney, Fayette County, 25th Judicial District (May 23, 2012).

[30] Telephone Interview by Razvan Axente with Tom Miner, District Attorney, 31st Judicial District (June 20, 2012).

[31] *See, e.g.*, Buser et al., *supra*, *Memphis Commercial Appeal* (remarks by Shelby County, Tennessee District Attorney General Amy Weirich).

[32] *See infra*, Sections III and IV.

[33] *See* 2012 Lauderdale County Order, at 6 (Sheriff and TBI Agent express a lack of understanding of what detention procedures are allowed, despite prior federal court order banning the practice).

[34] County of Riverside v. McLaughlin, 500 U.S. 44, 53, 56 (1991). (warrantless arrestees must be brought before a magistrate for a probable cause determination "promptly"; delays over 48 hours are presumptively unreasonable).

[35] *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).

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,[36] 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.[37] The recent (and continuing) use of 48-hour holds in the United States in non-terrorism 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 involving the "48-hour holds." While it discusses its use generally around the country, and analyzes its 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 II describes the current (or recent) extent of the practice. Part III discusses the legal problems with "investigative detentions" and the role which the legal standard of "probable cause" plays in this analysis. It distinguishes 48-hour holds from other types of limited detentions which can sometimes occur on less than probable cause. It argues that 48-hour holds constitutionally require probable cause, and 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 IV 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.

II. 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 which used extended holding periods before suspects are

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[36] *See,e .g.,* Matthew Law & Jeremy Opolski, *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 Terrorism?*, 14 TOURO L. REV. 128, 128 (2010) (France, Israel and the U.K. allow "preventive detention," while 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 (1968). *See* note 102, *infra*.

[37] Zemek v. Risk, 381 U.S. 1, 15 (1965) (criticizing use in Cuba); Amenu v. Holder, 434 Fed.Appx. 276, 280 (4th Cir. 2011) (criticizing use in Ethiopia); Haile v. Holder, 658 F.3d 1122, 1133 (9th Cir. 2011) (criticizing use in Eritrea).

charged.[38] 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 warrant must be either charged or released within 24 hours.[39] In prior years, that statute had specified a period of 20 hours.[40] 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 did not purport to provide law enforcement with any additional latitude regarding arrests and detentions.[41] It was not "a sword in the hands of the police, but rather a shield for the citizen."[42] Nonetheless, police seized on this statutory language to defend the Missouri practice of "a 20-hour hold"[43]—i.e., deliberately holding suspects without charge for 20 hours while police attempted to gain the suspect's cooperation.[44]

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.[45] 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.[46]

In Chicago, police promulgated written General Orders which authorized investigative detentions. "Paragraph C-2"of one such General Order authorizes police to detain suspects when "there is a necessity for the detention … for a period of time longer than that which might routinely be expected, in order that they may continue the investigation."[47] 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 the policy is to allow for

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[38] Chris Conley, "Study Hits Police Holding Policy/Crime Commission Recommends Detention Changes," *Memphis Commercial Appeal*, Jan. 30, 1999 (available at http://infoweb.newsbank.com/iw-search/we/InfoWeb). 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.*

[39] Mo. Ann. Stat. § 544.170 (West 2012).

[40] *United States v. Roberts*, 928 F.Supp. at 915 (district court opinion); *see also id*. at 932-933 (appended Report and Recommendation of Magistrate Judge).

[41] *Id*. at 933.

[42] *Id*.

[43] *Id*. at n.14.

[44] *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).

[45] *See* In Re Conard, 944 S.W.2d 191, 193-194 (Mo. 1997); Davis v. City of Detroit, No. 98-1254, 1999 WL 1111482, *1 (6th Cir. Nov. 23, 1999) (citing Brennan v. Township of Northville, 78 F.3d 1152, 1155-1156 (6th Cir. 1996)) (Michigan).

[46] *See infra*, Sections III and IV.

[47] General Order 78-1 of the Chicago Police Dept., Para. C-2, *cited in* Robinson v. Chicago, 638 F.Supp. 186, 188 (N.D. Ill. 1986).

investigative detentions, and thus, was unconstitutional.[48] Despite this, the City of Chicago continued to defend the practice for years.[49] One federal district court decision had suggested that the practice had "apparently" been rescinded ,[50] but a case as recent as 2006 addressed a complaint concerning a practice remarkably similar.[51]

In Austin, Texas, this practice continued for many decades, despite the absence of an express statute or police policy authorizing it.[52] It did so despite fairly aggressive criticism from the local judiciary.[53] Affected suspects were officially listed as being held "on suspicion of" a particular charge, even though not actually charged.[54]

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 had been 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 for an *additional* 48 hours, misapplying the reasoning from *Riverside*.[55] And as recently as last year, Cleveland Police were routinely holding suspects without charge for up to 72 hours.[56] 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 being faithful to the Supreme Court ruling in *Riverside*.

The frequency of the 48-hour holds' use 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 ten times a month.[57] In Shelby County, it occurs approximately 1000 times per year.[58] A sample review of arrest records in Tipton County suggests an average of about 9 instances a month (at least 95 instances during an 11-month

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[48] *See* Bullock v. Dioguardi, 847 F.Supp. 553, 563 (N.D. Ill. 1993); Willis v. Bell, 726 F.Supp. 1118, 1127 (N.D. Ill. 1989); 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), *reh'g & reh'g en banc denied*, No. 87-1778 (1989), *cert. denied*, 493 U.S. 1035 (1990).

[49] *See Willis*, 726 F.Supp. at 1127; Bostic v. City of Chicago, 1991 WL 96430, *3 (N.D.Ill. 1991).

[50] *Bullock*, 847 F.Supp.at 563.

[51] *See* Lopez v. Chicago, 464 F.3d 711, 714-715, 720-722 (6th Cir. 2006) (discussing complaint of assertedly unconstitutional warrantless confinement for two and a half days).

[52] Correspondence with Prof. Stephen Summers, Indiana University-Bloomington School of Law, former Municipal Court Judge, Austin, Texas, July 2012 (on file with author). Prof. Summers observed this practice while a sitting judge and while serving on a Municipal Court Task Force on jail overcrowding. *Id.*

[53] *Id.*

[54] Correspondence with Judge David Phillips of Travis County, Austin, Texas, July 2012 (on file with author). Judge Philips observed the procedure while serving as a Magistrate Judge in Travis County between 1979 and 1988.

[55] State v. Charles, 2009-KK-0877 (La. 4/22/09), slip op. at 1.

[56] Correspondence with Prof. Yuri Linetsky, Case Western Reserve University School of Law, Cleveland, Ohio, July 2012 (on file with author).

[57] Plaintiff's Partial Motion For Summary Judgment, Rhodes et al. v. Lauderdale County et al., No. 2:10-cv-02068-JPM-dkv (filed Aug. 9, 2010), at 5 (citing deposition testimony of Lauderdale County Sheriff Steve Sanders referencing approximately 115 such detentions in a 13-month period).

[58] Judicial Commissioners' Annual Report, Jan. 2011—Dec. 2011, submitted by Hon. L. Lambert Ryan, Supervising Judge for the Judicial Commissioners, General Sessions Court, Shelby County, Tennessee, March 8, 2012, *available at* Shelby County, Tennessee website, http://agendapub.shelbycountytn.gov/sirepub/cache/2/55mki155sezx1puytiovgk55/28273004032012100508781.PDF (Judicial Commissioners' Report), at 7-8.

period between August 2009 and June 2010.)[59] Nonetheless, this represents a relatively small fraction of all arrests in these jurisdictions.[60] In the Judicial District covering Van Buren and Warren Counties, the District Attorney's Office acknowledges use of the practice, but indicates that it is used less than once per year.[61]

B. In Tennessee

Although there are thousands of examples in recent years in Tennessee, it is localized even within that state. Surveys of criminal justice officials from around Tennessee confirmed the practice's use in only 4 of 31 Judicial Districts.[62]

A majority of Tennessee District Attorney offices surveyed stated that they considered the practice unlawful.[63] This apparently comports with the view of state law enforcement, as Tennessee Bureau of Investigation agents are apparently trained that investigative holds are impermissible.[64] 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."[65] Nonetheless, the Director of the Memphis Police Department had recently defended his department's more recent use of 48-hour holds.[66]

The mechanics of the procedure vary by county. The common theme is the (i) detention of a suspect (ii) without charge (iii) for investigative purposes (iv) 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." [67] 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.[68] These detentions occur when the officers do not have sufficient evidence to charge a detainee with a criminal offense.[69] If the person is

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[59] *See* Tipton County List Of Arrests, *supra*.

[60] *See*, *e.g.*, Potter Memorandum, at 1 (48-hour holds represent less than one percent of arrests in Shelby County).

[61] Telephone Interview by Razvan Axente with Tom Miner, District Attorney, 31st Judicial District (June 20, 2012).

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

[63] *Id.*; *see also* Email From Razvan Axente to author, May 22, 2012 (on file with author). One email from a District Attorney surveyed stated "No, I do not have anything like that. It is wrong." *See* Email from 4th Judicial District Attorney General Jimmy Dunn to Razvan Axente, April 23, 2012 (on file with author).

[64] Memorandum Opinion and Order, Rhodes et al. v. Lauderdale County et al., No. 2:10-cv-02068-JPM-dkv (Mar. 21, 2012) (2012 Lauderdale County Order), at 42, 48-49 (testimony of TBI Agent Mark Lane Reynolds).

[65] Chris Conley, "On the Hook: Many Suspects Dangle in Limbo: What's the Charge?," *Memphis Commercial Appeal*, Nov. 3, 1998 (quoting Memphis Police Deputy Chief Walter Crews).

[66] *48-Hour Holds Defended; Will Continue*, MEMPHIS COMMERCIAL APPEAL, Mar. 24, 2012.

[67] Plaintiff's Partial Summary Judgment Order, Rhodes et al. v. Lauderdale County et al., No. 2:10-cv-02068-JPM-dkv (filed Aug. 9, 2010), Ex. 6 (Lauderdale County Sheriff Department "Detention Request Form").

[68] *Id.*

[69] *Id.* at 4-5 (citing deposition testimony of Lauderdale County Sheriff Steve Sanders).

not charged within 48 hours, he is released.[70] Jail officials take the detainee's personal property, issue jail clothing and bedding, and generate a mug shot.[71] Such persons are not eligible for bond.[72]

In Shelby County, law enforcement will apply to a magistrate, or "Judicial Commissioner," for a 48-hour-hold determination.[73] 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.[74] At that time, the defendant is not yet charged,[75] meaning both that the prosecution has not yet filed an indictment, information, or presentment, but also that law enforcement has not filed an affidavit of complaint.[76] Law enforcement has that long to either charge the defendant or to release him.[77] Such suspects are also held at the jail, and are also ineligible for bond during this period.[78]

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."[79] Because the decision to "hold for investigation" has already been made and recorded at the time the 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.[80] The procedure used in the other counties (Fayette, Hardeman, and McNairy) in the same Judicial District (25) appears to be similar.[81]

Some, but not all, participants in the procedure characterize this detention as an "arrest."[82] On the one hand, the defendant clearly is not free to leave, and the detention is in a

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[70] *Id*.

[71] *Id*.

[72] *Id*.

[73] Judicial Commissioners' Report, *supra* note 58, at 7-8.

[74] *See* "Order Granting 48 Hour Detention for Probable Cause," available at www.shelbycountytn.gov/index.aspx?NID=71 (also on file with author).

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* Section III.A.2 *infra*.

[75] *Id*. ("The defendant may be held in the Shelby County Jail *pending the presentment of a formal charging instrument* to the appropriate magistrate") (emphasis added).

[76] Judicial Commissioners Report, *supra* note 58, at 7-8 (48-hour hold orders used when there is not yet probable cause to fill out an affidavit of complaint);

[77] *Id*. ("[T]he defendant shall be released … [within 48 hours] unless a formal charging instrument has been presented within that time").

[78] Chris Conley, "On the Hook: Many Suspects Dangle in Limbo," *Memphis Commercial Appeal*, Nov. 3, 1998); Chris Conley, "Study Hits Police Holding Policy," *Memphis Commercial Appeal*, Jan. 30, 1999 (both available at http://infoweb.newsbank.com/iw-search/we/InfoWeb).

[79] *See* Tipton County List Of Arrests, *supra note, passim*.

[80] *See* Tennessee District Attorneys General Conference, District Map, *available at* http://www.tndagc.com.

[81] Telephone interview by Razvan Axente with Gary Antrican, Public Defender for the 25th Judicial District. *But see* Telephone interview by Razvan Axente of District Attorney for Carroll County (stating that the practice is not used in Fayette County).

[82] *Compare* Transcript of Shelby County Commission Committee #4 Proceedings, Mar. 21, 2012 (Shelby County Commission Transcript), at 9 (testimony of Shelby County General Sessions Court Judge Joyce Lambert

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.

III. 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.[83] The United States Supreme Court has so stated on multiple occasions.[84] So have courts in Tennessee.[85] Lower federal courts have also said so specifically in the context of "hold" procedures.[86]

Ryan) (on file with author) (characterizing a 48-hour hold as an arrest) *with Bishop*, slip op. at 6 (law enforcement agents insisting that hold was not an arrest, although the defendant was not free to leave).

[83] 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 found for a far shorter period of time (less than an hour, usually) based on the legal standard of "reasonable suspicion," which is less than probable cause. *See* Section III.A.1, *infra*. However, some commentators use the term "investigative detention" to refer to *Terry* stops. *See*, *e.g.*, George Coppolo, *Investigative Detention*, OLR Research Report (Connecticut Attorney General's Office), No. 2007-R-0036 (Dec. 28, 2006), *available at* http://www.cga.ct.gov/2007/rpt/2007-R-0036.htm.

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 (e.g., right to counsel, right to cross-examine, etc.) which require 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, 743-744 (1987). This situation is analytically distinct from 48-hour holds, and provides no support for the legality of 48-hour holds.

[84] *See, e.g.,* Dunaway v. New York, 442 U.S. 200, 216 (1979) (detention for custodial interrogation was unconstitutional); Brown v. Illinois, 422 U.S. 590, 605 (1975) (arrest which was "both in design and execution…investigatory" was unconstitutional); Davis v. Mississippi, 394 U.S. 721, 726-727 (1969) (same); *see also* County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) (delay after warrantless arrest before being brought to magistrate improper 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").

[85] *Huddleston*, 924 S.W.2d at 676 (citing *Riverside*, 500 U.S. at 56); *Bishop*, at 10; State v. Delashmitt, No. E2007-00399-CCA-R9-CD, slip op. at 18 (Tenn. Crim. Ct. App., Knoxville, Aug. 7, 2008).

[86] *See, e.g.*, United States v. Roberts, 928 F.Supp. 910, 915 (W.D. Mo. 1996) (quoting with approval scholarship criticizing a detention used as "an arrest for investigation" or "an investigatory tool"); 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.[87] A police officer needs only "reasonable grounds" to suspect someone of terrorism, and can place him in detention for up to 48 hours without charge. 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 7 days, at the end of which the magistrate may extend the detention for one final 7-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, [92] there may be something to that. Indeed, one scholar has argued that United States law has become even more permissive on this front than the 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 *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. Crucially, one example of unreasonable delay

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[87] *See* United Kingdom Terrorism Act 2000, c.11 (Eng.), *http://www.legislation.gov.uk/ukpga/2000/11/contents.*

[88] *Id*. at sch. 8, pt. III, § 36.

[89] Matthew Law & Jeremy Opolski, 68 U. TORONTO FAC. L. REV. 99, 104 (2010) (citing R. v. Yeh, 2009 SKCA 112, 248 C.C.C. (3d) 125, 198 C.R.R. (2d) 50 (holding that on a proper interpretation of the law, investigative detentions could be used for suspected offenses)).

[90] *See, e.g.*, Zemek v. Risk, 381 U.S. 1, 15 (1965) (Cuba); Amenu v. Holder, 434 Fed.Appx. 276, 280 (4th Cir. 2011) (Ethiopia); Haile v. Holder, 658 F.3d 1122, 1133 (9th Cir. 2011) (Eritrea).

[91] *See, e.g.,* 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, 11 (2011) (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* Pub. L. No. 107–40, 115 Stat. 224 (2001) (granting the executive 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 . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons"). *See Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (the constitutional promise of habeas corpus relief posed no barrier to the government holding a citizen without criminal charges for the duration of a war).

[93] Amanda L. Tyler, *supra* note 91, at 19. 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, *Hamdan v. Rumsfeld*, 548 U.S. 557, 592 (2006), it has drawn the line at congressional removal of *habeas corpus* protection for such suspects. *Boumedienne v. Bush*, 553 U.S. 723, 771, 800 (2008).

provided was delay "for the purpose of gathering additional evidence to justify the arrest."[94] Similarly, in *Brown v. Illinois*, the Court invalidated an arrest which it found "investigatory."[95]

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 where police take an individual from where they find him and forcibly remove him to another location, probable cause is required. This requirement certainly applies to any situation where police remove a suspect to police headquarters, whether for custodial interrogation,[96] to be fingerprinted,[97] or to be photographed.[98] It also extends to any other forced removal of a suspect from his then-current location to any other location. In *Florida v. Royer*,[99] 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 "remove a person and take 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

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[94] 500 U.S. 44, 56 (1991). *Id*. The *Bishop* court emphasized this language in *Riverside* in explaining why the 48-hour hold policy, which contemplates investigative detentions, is unconstitutional. *Bishop*, *supra* note 16, at 10.

[95] 522 U.S. 590, 605 (1975).

[96] Dunaway v. New York, 442 U.S. 200, 216 (1979).

[97] Davis v. Mississippi, 394 U.S. 721, 721 (1969).

[98] People v. Farley, 90 Cal. App. 3d 851, 862–63 (Cal. Ct. App. 1979).

[99] 460 U.S. 491, 501-505 (1983).

[100] *Id*. at 501-502. *See also* Hayes v. Florida, 470 U.S. 811, 813-817 (1985) (forcibly removing suspect from home to police station for fingerprinting was improper investigative detention); 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] 470 U.S. 811, 816 (1985) (emphasis added).

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

[103] *Terry*, 392 U.S. at 21–22.

[104] *Id*. at 27.

police officer be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the 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 or so.[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 from where the police officer finds him, and to take him 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,* [111] 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. 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, there might be developed "narrowly circumscribed procedures" which 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 of an individual and removal to a police station for the limited purpose of fingerprinting.[113] More recently, it has acknowledged that this is still an open issue.[114]

A number of states have seized on this *dicta* and passed 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"

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[105] *Id*. at 21.

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

[107] *See* Model Code of Pre-Arraignment Procedure §110.2(1) (recommending a maximum of 20 minutes for a *Terry* stop); United States v. Sharpe, 470 U.S. 675, 683 (1985) (declining to provide a set time limit, but ruling on the facts that a detention lasting 20 minutes was valid).

[108] United States v. Place, 462 U.S. 696, 709-10 (1983) (even a 90 minute detention can be unreasonable); United States v. Puglisi, 723 F.2d 779, 790 (11th Cir. 1984) (investigatory detention for 140 minutes was unreasonable); United States v. Moya, 761 F.2d 322, 327 (7th Cir. 1983) (three hour detention and delay were unreasonable); United States v. Sanders, 719 F.2d 882, 886-87 (6th Cir. 1983)(three hour detention and delay were unreasonable).

[109] *Florida v. Royer*, *supra* note 99, 460 U.S. at 501-505 (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. *Id*. at 504. But the Court indicated those would be exceptions to the general rule 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.

[111] 394 U.S. 721 (1969).

[112] *Id*. at 782.

[113] Hayes v. Florida, 470 U.S. 811, 813-816 (1985).

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

[115] *See* ARIZ. REV. STAT. ANN. §13-3905(G) (2012); COLO. R. CRIM. P. 41.1 (2011); IDAHO CODE ANN.§19-625(1)(B) (2012); N.C. GEN. STAT. ANN. §15A-273(2) (2012); VT. R. CRIM. P. 41.1 (2012).

information to avoid Fifth Amendment problems: the Supreme Court has held that there is no violation of the prohibition of the privilege against self-incrimination where the information extracted from a suspect is not verbal information from the suspect which is relevant because of the semantic content of the suspect's statement.[116] Most of these statutes either explicitly authorize such limited detentions based on "reasonable grounds" which are lower than probable cause,[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] However, at least one state court has invalidated a similar provision on Fourth Amendment grounds, requiring a minimum of probable cause.[120] In response, the state legislature later 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 which invade 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 reasonable 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 which will most likely take a few hours, they far 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 how connected to a reasonable expectation of privacy, is the particular type of

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[116] Schmerber v. California, 384 U.S. 757, 764-765 (1966) (extraction of blood); United States v. Wade, 388 U.S. 218, 222 (1967) (in-person lineup); Gilbert v. California, 388 U.S. 263, 266-267 (1967) (handwriting exemplar); United States v. Dionisio, 410 U.S. 1, 7 (1973) (voice exemplar); Pennsylvania v. Muniz, 496 U.S. 582, 603-04 (1990) (field sobriety tests, and slurring of speech, as opposed to verbal content of speech).

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

[118] *See* State v. Jones, 49 P.3d 273, 280-281 (Ariz. 2002).

[119] *See* People v. Madson, 38 P.2d 18 (Colo. 1981) (*en banc)*; Bousman v. Iowa Dist. Court for Clinton County, 630 N.W.2d 789, 797-800 (Iowa 2001) (upholding as applied to saliva swab); Williams v. Zavaras, 2011 WL 2432959 (D. Colo. April 27, 2011), *8-9 (upholding under the deferential AEDPA standard as not "contrary to" or an "unreasonable application" of "clearly established law"). For further discussion, see Paul C. Giannelli, *ABA Standards on DNA Evidence: Nontestimonial Identification Orders*, 24 CRIM. JUST. 24 (Spring 2009).

[120] State v. Evans, 338 N.W.2d 788, 792 (Neb. 1983).

[121] 2005 NEB. LAWS, L.B. 361 (Apr. 28, 2005).

[122] United States v. Holland, 552 F.2d 667, 674 (5th Cir. 1977) (quoting Report of Proceedings of Judicial Conference), *mandate aff'd, opinion withdrawn*, 565 F.2d 383 (5th Cir. 1978).

[123] State v. Jones, 49 P.3d 273, 280-281 (Ariz. 2002).

[124] *See, e.g.,* Winston v. Lee, 470 U.S. 753 (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 (2008).

sampling or test involved. However, the Supreme Court may ultimately decide to the contrary—either by upholding such statutes' application in all cases, or requiring probable cause only, based on the physical intrusion of the type of sample as opposed to the deprivation of liberty involved in forced removal to a police station or hospital.

Even if it does so, and the cases upholding these statutes turn out to be correct, that would still not support 48-hour holds. The courts upholding these statutes emphasize the limited nature of the deprivation of liberty, the fact that the detention is a relatively brief one, and limited to 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' presence via subpoena "may become impracticable."[127] The subject of this judicial order would normally be given the same freedoms as any defendant subject to bail and pretrial release procedures; however, release of the 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 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' later appearance. Only after the person fails to give bail will the court be empowered to detain the witness.[131] Tennessee courts have not had occasion to pass on the constitutionality of material witness detentions.

However, federal courts have discussed, to a limited extent, 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

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[126] *See* 18 U.S.C. § 3144 (2000) ("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 ("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 § 40-11-117 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] Note, *Leading Cases*, 125 HARV. L. REV. 222, 228 (2011).

detention.[133] However, lower courts have suggested that a warrant requirement of some type applies.[134] Some have concluded that law enforcement must show *probable cause* that the material witness statute elements (the witness has material information, and a subpoena will not suffice to secure the witness' presence) are met.[135] Others have declined to apply a probable cause standard, but have nonetheless held that the general Fourth Amendment requirement of "reasonableness" governs.[136] Concurring in the recent Supreme Court case of *Ashcroft v. al-Kidd*, Justice Kennedy acknowledged the as-yet-unresolved choice between these two standards.[137] Although earlier Sixth Circuit decisions require probable cause, the law in the Sixth Circuit is not clear.[138]

Regardless of the specific underlying constitutional standards applicable, material witness detention authority does not apply to the use of 48-hour holds, nor 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.[139] Nor was that raised as a defense in the federal litigation challenging the practice in Lauderdale County.[140] Court documents relating to the 48-hour holds do not rely on this authority either.[141] 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.[142]

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—applies a

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[133] Adams v. Hanson, 656 F.3d 397, 408 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 2086 (Kennedy, J., concurring) ("The scope of the statute's authorization is uncertain").

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

[135] United States v. Awadallah, 349 F.3d 42, 64 (2d Cir. 2003); White by Swafford v. Gerbitz (II), 892 F.2d 457, 460-461 (6th Cir. 1989); Stone v. Holzberger, 1994 WL 175420, at *3 (6th Cir. Jan. 6, 1994).

[136] Schneyder v. Smith, 653 F.3d 313, 324-325 (3d Cir. 2011).

[137] *al-Kidd*, *supra*, 131 S.Ct. at 2086 (Kennedy, J., concurring).

[138] *See* Adams v. Hanson, *supra*, 656 F.3d at 408 (acknowledging prior Sixth Circuit "probable cause" decisions in *Gerbitz* and *Stone*, but relying on the Kennedy concurrence in *al-Kidd* to conclude that the issue was still an open one).

[139] *See* State v. Bishop, No. W2010-01207-CCA-R3-CD (Tenn. Crim. App. March 14, 2012), slip op. at 5-15; State v. Rush, No. W2005-02809-CCA-R3-CD (Tenn. Crim. App. August 1, 2006), slip op. at 2 n.2; State v. Ficklin, No. W2000-015340-CCA-R3-CD (Tenn. Crim. App. August 27, 2001), 2001 WL 1011470 at *7-8.

[140] *See* Plaintiff's Partial Summary Judgment Order, Rhodes et al. v. Lauderdale County et al., No. 2:10-cv-02068-JPM-dkv (filed Aug. 9, 2010).

[141] *See* Judicial Commissioners Annual Report, Jan. 2011—Dec. 2011, submitted by Hon. L. Lambert Ryan, Supervising Judge for the Judicial Commissioners, General Sessions Court, Shelby County, Tennessee, March 8, 2012, *available at* Shelby County, Tennessee website, http:/agendapub.shelbycountytn.gov/sirepub/cache/2/55mki155sezx1puytiovgk55/28273004032012100508781.PDF (Judicial Commissioners' Report), at 8-9.

[142] *See* "Order Granting 48 Hour Detention for Probable Cause," (sample form used in Shelby County General Sessions Court), *supra* note 74; Lauderdale County Sheriff Department "Detention Request Form," *supra* note 67.

probable cause requirement for material witness detention orders.[143] 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.

Most importantly, material witness detentions are not supposed to be used to detain persons themselves suspected to be guilty 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.[144] 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.[145] 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,[146] but whose release may be imminent. A federal immigration officer may request such a person's detention be prolonged, since drug-related charges provide sufficient grounds for removability (deportation).[147] If the other law enforcement agency complies, the alien may be detained for up to 48 additional hours.[148] After 48 hours, the alien must either be released, or be arrested by United States Immigration and Customs Enforcement officers (ICE) for removal proceedings.[149]

Unlike with a 48-hour hold, where (i) there is no statutory authorization, (ii) it applies to all types of defendants, and (iii) individualized suspicion is often lacking, an immigration hold is expressly authorized by federal statute, applies only to narcotics arrestees,[150] and is based on a preexisting conviction or probable-cause based detention concerning a narcotics charge which is clearly grounds for deportation.[151] . For that reason, immigration holds seem materially distinct

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[143] White by Swafford v. Gerbitz (II), *supra*, 892 F.2d at 460-461; Stone v. Holzberger, *supra*, 1994 WL 175420 at *3.

[144] *See* 8B James W. Moore et al., Moore's Federal Practice §46.11 (2d ed. 1978); Note, *Leading Cases*, 125 Harv. L. Rev. at 228 (citing concerns of numerous commentators about the perceived abuse of the practice).

[145] *See* 8 USC §1357(d).

[146] The statute limits application of the detainer to controlled substance suspects. 8 U.S.C. §1357(d). *But see* Committee for Immigrant Rights v. County of Sonoma, 644 F.Supp.2d 1177, 1197–99 (N.D. Cal. 2009) (statute is ambiguous, and under step two of *Chevron* agency's decision to expand the detainer to additional crimes is not unreasonable).

[147] *Id*; *see also* 8 C.F.R. § 287.7(a); I.N.A. 237(a)(2)(iii).

[148] 8 C.F.R. §287.7(d).

[149] 8 C.F.R. § 287.7(a). *But see* Ochoa v. Bass, 181 P.3d 727 (Okla. Crim. App. 2008) (two men were ordered released after they spent three months in prison pursuant to a detainer because ICE never obtained custody).

[150] *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 use 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 clearly illegal.

[151] 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"

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.[152] 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.[153] This is so because Congress has an interest in assuring that noncitizens will comply with the requirements of the removal proceedings, and they will actually show up at their hearing.[154] As long as the "immigration 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 which 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.[155] 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 substances offences.[156] 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. 48-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-

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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.

[152] Zadvydas v. Davis, 533 U.S. 678, 679 (2001).

[153] Demore v. Kim, 538 U.S. 510, 511 (2003).

[154] *Id.*

[155] Lasch, *supra* note 150, at 182-83 (ICE can detain any individual subject to exclusion or deportation proceedings)(citing Enhancing the Enforcement Authority of Immigration Officers, 59 Fed. Reg. 42406-01 (Aug. 17, 1994)).

[156] *Id.*

hour-hold orders are issued only upon probable cause[157]—for example, the forms used in Shelby County, Tennessee contain a boilerplate recitation of "probable cause" being found[158]—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 "The 48 hour hold does not quite have the probable cause needed for charging as in an Affidavit of Complaint."[159] Another example is a memorandum from the Judicial Commissioners within that court, who actually issue the 48-hour-hold orders.[160] This memorandum recited a standard of "reasonably, articulable [sic] suspicion" that "an offense has occurred."[161] This is clearly the "reasonable suspicion" standard of *Terry v. Ohio*—a standard which is lower than that of probable cause,[162] and undoubtedly insufficient to justify an arrest.[163]

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 individual being detained had committed an offense."[164] In a resulting federal civil rights action, Lauderdale County admitted that its 48-hour-hold policy authorized detention on less than probable cause and thus, violated the Constitution.[165] In proceedings related to this federal lawsuit, the Lauderdale County Sheriff admitted under oath that the Lauderdale policy, up to 2010, had allowed for 48-hour detentions without charge or probable cause.[166]

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[157] *See* Transcript of Shelby County Commission Committee #4 Proceedings, Mar. 21, 2012, at 4, 6, 7 (testimony of Shelby County General Sessions Court Judge Joyce Lambert Ryan) (on file with author) (Shelby County Commission Transcript); Lawrence Buser, Daniel Connolly, and Kevin McKenzie, "Officials Suspend 48-Hour Holds/Practice Violates Constitution, Court Finds," *Memphis Commercial Appeal*, Mar. 31, 2012 (comments by Shelby County District Attorney Amy Weirich).

[158] *See* "Order Granting 48 Hour Detention for Probable Cause," (sample form used in Shelby County General Sessions Court), *supra* note 74.

[159] Judicial Commissioners' Annual Report, Jan. 2011—Dec. 2011, submitted by Hon. L. Lambert Ryan, Supervising Judge for the Judicial Commissioners, General Sessions Court, Shelby County, Tennessee, March 8, 2012, *available at* Shelby County, Tennessee website, http://agendapub.shelbycountytn.gov/sirepub/cache/2/55mki155sezx1puytiovgk55/28273004032012100508781.PDF (Judicial Commissioners' Report), at 7-8. *See also* Shelby County Commission Transcript, *supra* note 82, at 4 (General Sessions Court Judge Ryan acknowledging this to be the statement: stated in the Judicial Commissioners' Report).

[160] Undated memorandum from General Sessions Criminal Court Judicial Commissioners (Shelby County) to General Sessions Judge Larry Potter (Potter Memorandum), submitted to author in late 2011 (on file with author).

[161] Potter Memorandum, at 1.

[162] *See Terry*, 392 U.S. at 27 ("reasonable suspicion" standard is lower than probable cause).

[163] *Id.* at *26–27.*

[164] Memorandum Opinion and Order, Rhodes et al. v. Lauderdale County et al., No. 2:10-cv-02068-JPM-dkv (Mar. 21, 2012) (2012 Lauderdale County Order), at 2. *See also* Plaintiff's Motion For Partial Summary Judgment (filed Aug. 9, 2010), Ex. 5 (November 1998 Lauderdale County Sheriff's Department memorandum authorizing 48-hour holds "on investigation" without charge).

[165] *Id*. at 4.

[166] *Id*. at 33.

Third, law enforcement agents in Shelby County made similar admissions under oath in other cases, including *Bishop*.[167] 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."[168]

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 the detention"; this is the only place on the form where any basis for the detention is provided.[169] 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 recites 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."[170] In another, the form merely states 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."[171] In both cases, the form continues that "The 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 which the Supreme Court has warned against because they do not provide probable cause.[172]

The *Bishop* case itself, the one 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 "During the investigation the defendant was named as the shooter."[173] Here, at least, law enforcement expressly asserts that there is evidence linking the defendant to the crime, which is more than the two instances discussed immediately above. But no information is provided about who it was who named the defendant, let alone information about his or her basis of knowledge or reliability.[174] It is therefore difficult to say that a showing of probable cause has been made.

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[167] *Bishop*, *supra*, at 7.

[168] *Id*. at 7.

[169] *See*, *e.g.,* Order Granting Detention for Probable Cause, In Re Michael Edwards, Defendant, Booking No. 10126758 (General Sessions Court, Shelby County, Tennessee, July 5, 2010) (on file with author).

[170] *See id*.

[171] *See* Order Granting Detention For Probable Cause, In Re Tracy L. Campbell, Defendant, Booking No. 09203972 (General Sessions Court, Shelby County, Tennessee, May 9, 2009).

[172] *See* Illinois v. Gates, 462 U.S. 213, 239 (1983) (*citing* Nathanson v. United States, 290 U.S. 41 (1933) *and* Aguilar v. Texas, 378 U.S. 108 (1964)).

[173] *See* Order Granting Detention For Probable Cause, In Re Courtney Bishop, Defendant, Booking No. 081288990 (General Sessions Court, Shelby County, Tennessee, Aug. 22, 2008).

[174] *See Gates*, 462 U.S. at 237-238 (requiring analysis of the reliability 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 "reliability/credibility" prong, with a slight insufficiency of either fatal to the probable cause showing. State v. Jacumin, 778 S.W.2d 430, 431-436 (Tenn. 1989) (*citing* Aguilar v. Texas, 378 U.S. 108 (1964) *and* Spinelli v. United States, 393 U.S. 410 (1969)). By

That is not to say that there have 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."[175] Or, stated differently, that a lower level of probable cause than the normal level of probable cause needed for an arrest would apply, because a 48-hour hold was "less than an arrest."[176] 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"[177] – 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 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 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.[178] In Shelby County, official reports acknowledged that they were used with less than probable cause.[179] 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 which, 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.[180]

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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. 462 U.S. at 237-239.

175 *Bishop*, *supra*, slip op. at 9 (characterizing prosecution's assertion in this way).

176 *Id*.

177 Judicial Commissioners' Report, *supra*, at 7-8.

178 2012 Lauderdale County Opinion, *supra*, at 2.

179 Judicial Commissioners' Report, *supra*, at 7-8; Potter Memorandum, *supra note* at 161.

180 *See* Memorandum Opinion, Rhodes et al. v. Lauderdale County et a (2012 Lauderdale County Opinion), *supra*, at 4 (Lauderdale County, TN defendants admitted 48-hour hold policy based on erroneous reading of

In 1975, the Supreme Court held that after a warrantless arrest, a defendant is entitled to "prompt" determination of probable cause by a judicial officer in order for any "extended restraint of liberty" to continue.[181] This led to the use of so-called "*Gerstein* hearings" after warrantless arrests. Such hearings can be *ex parte*, and use hearsay evidence; but an Article III judicial officer, independent of the prosecution and law enforcement, must hear the evidence and make an official finding of probable cause.[182] If the magistrate fails to find probable cause, the defendant must be released.[183] If the arrest was pursuant to an arrest warrant, no *Gerstein* hearing would be necessary: the warrant itself would constitute a prior finding of probable cause by a magistrate.[184] The *Gerstein* Court provided no guidance as to how "prompt" after the warrantless arrest the *Gerstein* hearing must be.

The Court provided that guidance sixteen years later in *County of Riverside v. McLaughlin*.[185] The Court held that a *Gerstein* hearing held within 48 hours of arrest will enjoy 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."[186] 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*.[187]

From *Riverside* came a general understanding of a "48-hour rule" regarding judicial determinations of probable cause. But *Riverside* 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 *Riverside* rule to Tennessee cases in *State v. Huddleston*.[188] In *Huddleston*, the Court dealt with a warrantless arrest followed by a period of more than 72 hours before the defendant was brought before a magistrate for a probable cause determination. 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

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McLaughlin); Potter Memorandum, *supra*, 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*").

[181] Gerstein v. Pugh, 420 U.S. 103, 114, 125 (1975).

[182] *Id*. at 114, 120.

[183] *Id.* at 115 (analogizing modern practice with common law practice requiring release from custody where no probable cause exists).

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

[185] 500 U.S. 44 (1991).

[186] *Id*. at 57.

[187] *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*, Section IV.C.

[188] 924 S.W.2d 666 (Tenn. 1996).

[189] *Id*. at 675.

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] Significantly, the Tennessee Supreme Court made clear that it would consider invalid all arrests based on anything less than probable cause, and that one could not justify a 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% of all arrestees "on the hook" without charging them.[194] The percentage was even greater regarding felony arrests.[195] This often meant detention of those suspects without charge for up to 72 hours without a probable cause review by a magistrate.[196] One media study showed that up to 40% of people held "on the hook" were eventually released without charge.[197]

Even back at that time, the procedure was subject to criticism as improper detention.[198] The local defense bar protested that the "on the hook" practice amounted to unlawful investigative detentions, inasmuch as people were in effect 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 abolition.[200] It recommended such reforms as mobile booking and 24-hour access to magistrates to speed the booking process, and eliminating the potential abuse represented by "on the hook" arrests.[201]

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190 422 U.S. 590, 603-604 (1975) ((1) the presence or absence of Miranda warning; (2) the temporal proximity of the arrest and the confession; (3) the presence of intervening circumstances ; and (4) the purpose and flagrancy of the official conduct).

191 *Id*.

192 *Huddleston*, 924 S.W.2d at 676 (citing *Riverside*, 500 U.S. at 56).

193 Chris Conley, "On the Hook: Many Suspects Dangle in Limbo," *Memphis Commercial Appeal*, Nov. 3, 1998); Chris Conley, "Study Hits Police Holding Policy," *Memphis Commercial Appeal*, Jan. 30, 1999 (both available at http://infoweb.newsbank.com/iw-search/we/InfoWeb).

194 Chris Conley, "On the Hook," *supra*, at 1 (review of 500 arrest records over a sample three-day period showed 46 designated as "on the hook").

195 Chris Conley, "County Jail to Refuse Detainees Not Charged," *Memphis Commercial Appeal,* Nov. 20, 2000, at 1 (until 1998, Memphis police put most felony prisoners "on the hook").

196 *Id*.

197 Chris Conley, "County Jail to Refuse Detainees Not Charged," *supra* note 195, at 1 (review of 46 "on the hook" arrests over a sample three-day period showed 19 resulted in release without charges).

198 Editorial, "Do It Right," *Memphis Commercial Appeal*, Feb. 5, 1999 (calling for an end to this practice); Editorial, "The Hook," *Memphis Commercial Appeal*, Nov. 4, 1998 (same).

199 *Id*. (comments by, *inter alia*, attorney Robert Hutton).

200 Chris Conley, "Study Hits Police Holding Policy," *Memphis Commercial Appeal*, Jan. 30, 1999.

201 *Id*.

Shelby County responded by adding "Judicial Commissioners" to its General Sessions Court system. These commissioners were tasked with, *inter alia*, providing timely probable cause determinations to persons arrested without a warrant.[202] However, law enforcement there 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 regarding 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 "The 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]

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 "This 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 in other Tennessee counties were also conducting it, including Tipton County[214] and

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202 Chris Conley, "County Jail to Refuse Detainees Not Charged," *supra* note 195, at 1.
203 *Id*. at 2.
204 Chris Conley, "County Jail to Refuse Detainees Not Charged," *supra* note 195, at 1.
205 *Id*.
206 *Id*.
207 State v. Ficklin, No. W2000-01534-CCA-R3-CD, 2001 WL 1011470 (Tenn. Ct. Crim. Appl. Aug. 27, 2001), at *7.
208 *Id*., 2001 WL 1011470 at *2.
209 *Id*. at 8.
210 *Id*. at *9.
211 *Id*.
212 State v. Rush, No. W2005-02809-CCA-R3-CD (Tenn. Ct. Crim. App. Oct. 11, 2006), slip op. at 2 n.2.
213 *Id*. (citing *Ficklin*).
214 Tipton County's List of Arrests, *supra* (on file with author).

Lauderdale County, and, far more rarely, in Warren and Van Buren counties.[215] In 2010, private plaintiffs filed a civil rights lawsuit against Lauderdale County seeking to enjoin the practice. In a July consent order, a federal district court held that the practice violated the Constitution and permanently enjoined it.[216] 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."[217] The court criticized the Memphis Police Department for using this as a regular practice, to the point that special forms had been generated for it.[218] It also criticized the magistrates signing those 48-hour hold order forms for giving "an air of legitimacy to the procedure."[219] 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.[220]

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 "The '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."[221]

The *Bishop* opinion led to another round of critical media stories and official condemnations.[222] It was only after this lengthy history of media and court criticism that the practice was suspended in Shelby County.[223]

IV. ARRESTS WITHOUT CHARGE

As noted above, defenders of the practice had insisted that such 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 real probable cause. But this change, while ameliorative, would still not suffice to render the practice acceptable, for a number of reasons.

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215 Consent Order, Rhodes et al. v. Lauderdale County et al., No. 2:10-cv-02068-JPM-dkv (July 2, 2010), at 3.
216 *Id*.
217 *Bishop*, slip op. at 9.
218 *Id*.
219 *Id*.
220 *Id*.
221 *Id*. at 11 (emphasis added).
222 Daniel Connolly, "Court Rejects 48-Hour Holds/3rd Strike For MPD Detention Policy," *Memphis Commercial Appeal*, Mar. 23, 2012.
223 Lawrence Buser, "Officials Suspend 48-Hour Holds/Practice Violates Tenn. Constitution, Court Finds," *Memphis Commercial Appeal*, Mar. 31, 2012.

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

The Supreme Court has recently made this point clear. Discussing the constitutional principles underlying the related issue of the right to counsel, the Court drew from basic principles of law at the time of the Framers, looking to Blackstone as "the preeminent authority on English law for the founding generation."[224] The Court 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 a crime."[225] The Court 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.[226] While the former must accompany an arrest, only the latter will trigger the Sixth Amendment right to counsel under federal law.[227]

The requirement that a charge accompany an arrest—or, conversely, the prohibition on arresting people without charge—is sufficiently 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.[228] It is, literally, "hornbook law."[229] 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.[230]

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 has taken into custody*, we have never held that to be constitutionally required."[231] 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," as warrantless arrestees, under *Riverside*, must be "promptly" brought before a magistrate.[232] Since under *Riverside* this must normally occur within 48 hours, and more quickly

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[224] Rothgery v. Gillespie County, 554 U.S. 191, 220 (2008) (quoting Alden v. Maine, 527 U.S. 706, 715 (1999)).

[225] *Rothgery*, 554 U.S. at 220 (citing 4 W. Blackstone, Commentaries 289).

[226] *Id*. at 220-221.

[227] *Id*. Note that the rule in Tennessee is different: under the Tennessee Constitution, even a simple arrest, if pursuant to a warrant, will suffice to trigger the types of protections guaranteed by the Sixth Amendment right to counsel. State v. Huddleston, 924 S.W.2d 666, 669 (Tenn. 1996); *see infra*, notes 293–95 and accompanying text.

[228] *See, e.g.*, Wayne R. LaFave et. al, Criminal Procedure 8 (5th ed. 2009) (defining an "arrest" as "the taking of a suspect into custody for the purpose of charging him with a crime") (emphasis added); 9 (describing "the initial decision to charge" as accompanying warrantless arrests); 8-11 (noting that the defendant will be charged by the arresting officer prior to the filing of the complaint).

[229] *See id*.

[230] *See, e.g.*, Schindelar v. Michaud, 411 F.2d 80, 83 (10th Cir. 1969); Montgomery v. U.S., 403 F.2d 605, 610 (9th Cir. 1968).

[231] Devenpeck v. Alford, 543 U.S. 146, 155 (2004) (emphasis added).

[232] *Id*. at 595 n.3.

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 reasonably promptly 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.[233]

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.[234] 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.[235] And even though there may be no "ironclad rule" that warrantless arrestees be charged with a crime "forthwith," the Constitution forbids a detention where "there was never any intention in presenting [the suspect] to a judge."[236] Similarly, a detention is not permissible where "the sole purpose of the pick-up" is to hold the suspect until she either cooperates or the statutory period expires.[237]

Since every variety of "hold" procedure described above in Section 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 in Tennessee to process and memorialize such holds makes 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."[238] The form used in Lauderdale County had separate and alternative blanks for *either* listing a charge, *or* indicating that the person was being held for investigation on a particular charge.[239] When a 48-hour hold is used, the former blanks are crossed out, and the latter blanks filled in,

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[233] *See* Zemek v. Risk, 381 U.S. 1, 15 (1965) (Cuba); Amenu v. Holder, 434 Fed.Appx. 276, 280 (4th Cir. 2011) (Ethiopia); Haile v. Holder, 658 F.3d 1122, 1133 (9th Cir. 2011) (Eritrea).

[234] *See* Judicial Commissioners' Report, *supra* note 58 (acknowledging that the holds are used in Shelby County when there is insufficient probable cause to charge a suspect with an Affidavit of Complaint); 2012 Lauderdale County Order, *supra*, at 2 (Lauderdale County 48-hour hold policy specifically authorized police to detain with less than probable cause, such that no charge was possible); *Bishop*, *supra*, slip op. at 9 (court describing law enforcement officials' mistaken belief that a 48-hour hold without probable cause was acceptable "because the defendant was not yet charged with any crime"); *Bishop*, slip op. at 6 (police testimony that procedure is used when defendant is not yet being charged); *cf. Ficklin*, *supra*, slip op. at 8 (describing officers' mistaken belief that 48-hour hold without probable cause was acceptable "since there was no 'arrest'").

[235] 726 F.Supp. at 1127 & n.20 (calling the prosecution's argument that probable cause was present "beside the point" and a "lame attempt" at defending the policy); *see also Robinson*, *supra*, 638 F.Supp. at 192-193.

[236] United States v. Roberts, 928 F.Supp. 910, 915 (W.D. Mo. 1996), *quoting* John Scurlock, *The Law Of Arrest In Missouri*, 29 UMKC L. Rev. 117, 127-129 (1961).

[237] *Id.*

[238] *See* Order Granting 48 Hour Detention for Probable Cause, *supra* note 74.

[239] *See* Lauderdale County Sheriff Department "Detention Request Form," *supra* note 67.

highlighting that the 48-hour hold is an alternative to charging.[240] 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, however, that column entry simply reads "Hold for Investigation," also indicating a lack of a charge.[241]

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 without warrant be brought before the court "without unnecessary delay." [242] 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 violated not only the Constitution, but Missouri's Rule of Criminal Procedure 5(a), which requires warrantless arrestees to be brought "promptly" before a magistrate.[243] A federal court in Illinois held that even if a detention-without-charge policy complied with the similar federal and Illinois versions of this rule that would not save it from constitutional infirmity.[244]

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."[245] Once the arrestee is brought before the magistrate, an Affidavit of Complaint—a charging instrument—must be filed "promptly."[246]

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,[247] but a delay of 72 hours would violate it.[248] 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 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

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240 *Id*.

241 Tipton County List of Arrests, *supra*. *See also Bishop*, *supra* note 16, slip op. at 6 (testimony from numerous police that the hold is used "until we can…come up with the appropriate charges," until defendant "is officially charged out," and that the affidavit accompanying the application for a 48-hour hold "states that he's being not charged, but he is being placed on a forty-eight hour hold").

242 Fed. R. Crim. P. 5(a).

243 United States v. Roberts, 928 F.Supp. at 915, *quoting* MO. R. CRIM. P. 5(a).

244 Robinson v. City of Chicago, 638 F.Supp. at 192.

245 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*.

246 Tenn. R. Crim. P. 5(a)(2).

247 *See* State v. Davis, 141 S.W.3d 600, 626 (Tenn. 2004) (delay of 12 to 13 hours was not "unnecessary delay" under the circumstances), *cert. denied*, 543 U.S. 1156 (2005); State v. Haynes, 720 S.W.2d 76, 83 (Tenn. Crim. App. 1986) (delay of 9 hours did not violate the Rule); State v. Johnson, 980 S.W.2d 414, 421 (Tenn. Crim. App. 1998) (being brought magistrate within one day satisfied the Rule).

248 State v. Carter, 16 S.W.3d 762, 766 (Tenn. 2000) (delay of 72 hours violated the Rule); *Huddleston*, *supra* note 188, at 670 (same).

admissible as long as they were not obtained under circumstances suggesting a violation of the "voluntariness" requirement of the Due Process Clause.[249] But there are other potential remedies for violations of the Fourth Amendment besides evidence exclusion, including civil tort liability.[250]

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 which 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.[251] 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.[252] 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.[253]

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 who had already been arrested but released pending trial within the first 48 hours, that does 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, *quaere* 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

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249 *Huddleston*, 924 S.W.2d. at 670-672.

250 *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).

251 Chris Conley, "County Jail to Refuse Detainees Not Charged," *supra* note 195, at 2.

252 Judicial Commissioners' Report, *supra*, at 7-8.

253 Shelby County Commission transcript, *supra* note 82, at 9.

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 continuous 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 seem to 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 which might otherwise not be legally obtainable.[254]

C. Bail

Persons detained under a 48-hour hold order cannot get bail, and thus, cannot obtain release by being "bonded out."[255] Thus, the 48-hour 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.

It certainly does seem that persons undergoing the 48-hour holds are eligible and entitled to bail, under either federal or state law. The Eighth Amendment to the United States Constitution provides that "Excessive bail shall not be required, nor excessive fines imposed."[256] 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.[257] While the Amendment does not provide an absolute right to bail, any bail set cannot be "excessive."[258] 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.[259]

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

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[254] *See United States v. Roberts*, 928 F.Supp. at 915 ("Here…the sole purpose of the pick-up was to hold Defendant until she either cooperated or twenty hours expired. This is not permissible.")

[255] *Lauderdale County:* Plaintiff's Motion For Partial Summary Judgment, Rhodes et al. v. Lauderdale County et al., No. 2:10-cv-02068-JPM-dkv (filed Aug. 9, 2010), at 5 & Ex. 3 (deposition testimony of Lauderdale County Sheriff Steve Sanders, p.56); *Shelby County*: Chris Conley, "County Jail to Refuse Detainees Not Charged," *supra* at 1; Chris Conley, "On the Hook," *supra* note 65.

[256] U.S. Const. Amen. 8.

[257] Baker v. McCollan, 443 U.S. 127, 144 n.3 (1979).

[258] United States v. Salerno, 481 U.S. 739, 750-751 (1987).

[259] *See, e.g.*, United States v. Salerno, 481 U.S. 739, 747 n. 4 (1987); United States v. Portes, 786 F.2d 758, 768 (7th Cir. 1985); *see also* Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (citing *Salerno* for this proposition).

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,[260] and the maximum length of pretrial detention is limited by the deadlines imposed by the Speedy Trial Act.[261] Thus, federal law entitles a defendant to a prompt determination of bail.

A similar entitlement to bail in non-capital cases is set out in the Tennessee Constitution.[262] On this point, state constitutional and statutory provisions in Tennessee are generally similar to those in other states.[263] Tennessee statutes fleshing out the general entitlement specify that judges, magistrates, and court clerks may set bail,[264] how the amount is determined,[265] what restrictions on release may accompany bail,[266] etc. However, 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.[267] 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.[268] On this basis, federal and state courts around the country have upheld delays of 9 hours,[269] 12 hours,[270] and 20 hours[271] between

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[260] Bail Reform Act, 18 U.S.C. § 3142(f).

[261] *See* 18 U.S.C. § 3161 *et seq*.

[262] Tenn. Const. Art. I, § 8; *see also* Tenn. Code Ann. § 40-11-102 (2012) (recodifying the entitlement).

[263] *See e.g.,* Wyo. Const. Art. I, §14; Wis. Const. art. I, § 8; Az. Const. art. II, § 22; Nv. Const. Art. I, § 7; Ok. Const. Art II, § 8.

[264] Tenn. Code Ann. § 40-11-105 (2012).

[265] Tenn. Code. Ann. § 40-11-118 (2012).

[266] Tenn. Code Ann. § 40-11-116 (2012).

[267] State v. Huddleston, 924 S.W.2d 666, 672 n. 2 (Tenn. 1996) (citing David Raybin, Tennessee Criminal Practice and Procedure, §3.2); Tenn. Atty. Gen. Op. No. 91-84, at 3 (Sept. 20, 1991).

[268] *See* Tate v. Hartsville/Trousdale County, No. 3:09-020, 2010 WL 4054141 (M.D. Tenn. Oct. 14, 2010), at *8 (reasoning that *Riverside v. McClaughlin*'s presumption of timeliness for probable cause hearings within 48 hours applies to bail hearings as well), *citing* Holder v. Town of Newton, No. CIV. 08-CV-197-JL, 2010 WL 432357 (D.N.H. Feb. 3, 2010), at *10-11 (same); Hopkins v. Bradley County, 338 S.W.3d 529, 538-539 (Tenn. Ct. App. 2010) (same, citing *Holder*).

[269] *Holder*, 2010 WL 432357 at *11 (9 hour delay between defendant's arrest and subsequent release on bail was "well within the 48-hour window and thus presumptively constitutional").

[270] Lund v. Hennepin County, 427 F.3d 1123, 1126-1128 (8th Cir. 2005) (no due process violation where defendant was held for 12 hours after judge ordered that defendant could be released with no bail); *Tate*, 2010 WL 4054141 at *8-9 (policy of holding domestic violence arrestees for 12 hours before allowing release on bail "does not automatically constitute a constitutional violation").

booking and ability to make bail. Indeed, the Fifth Circuit has stated flatly that "There is no right to post bail within 24 hours of arrest."[272]

However, these opinions allowing bail/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[273] – a flexibility recognized by the Supreme Court in *Riverside*[274] – or did not involve situations where a magistrate was available but simply failed, without reasonable excuse, to provide a hearing.[275] These pragmatic reasons for a short delay – the unavailability of a magistrate on short notice, 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 47 hours and 59 minutes. In *Riverside,* the Court emphasized that while a probable cause hearing occurring within 48 hours of arrest might be presumptively constitutional, even that quick a hearing might violate the Constitution if the magistrate were available sooner and there was no adequate explanation for the delay.[276] 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.[277]

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.[278] 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/bail resolved. The "hold" procedure adds a preliminary 48-hour period before the

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[271] Turner v. City of Taylor, 412 F.3d 629, 639 (6th Cir. 2005) (city's policy of holding domestic violence arrestees for a minimum of 20 hours unless arraigned and released by the court was not unconstitutional).

[272] 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).

[273] *See, e.g., Tate*, 2010 WL 4054141 at *8.

[274] *Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

[275] *See, e.g.*, *Turner*, 412 F.3d at 640.

[276] *Riverside*, 500 U.S. at 56.

[277] *See Turner*, 412 F.3d at 640 (making this point, and citing the Sixth Circuit opinion in *Davis v. City of Detroit*); Davis v. City of Detroit, No. 98-1254, 1999 WL 1111482, *1 (6th Cir. Nov. 23, 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).

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

clock even starts ticking on resolving the issue of pretrial detention/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 which 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, "[T]here are valid reasons for keeping an individual in jail for …24 hours…especially in instances of domestic abuse where continued violence is a threat."[279]

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 which is at least superficially valid—i.e., 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.[280] 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 or lover of the victim.[281] 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 in the 48-hour hold.

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[279] In re Conard, 944 S.W.2d 191, 201 (Mo. 1997).
[280] United States v. Salerno, 481 U.S. 739, 743-744 (1987).
[281] Mich. Comp. Laws § 764.15a (2012).

For example, this occurred in the *Bishop* case, and led to suppression of a statement obtained as a result.[282]

As noted above, the federal rule is that the Sixth Amendment right to counsel attaches once "the adversarial judicial process" has begun.[283] The Supreme Court has held that, at a minimum, this point occurs either, when the defendant has appeared before a magistrate, or once there has been a "formal charge"—i.e., the prosecutor has filed an indictment, presentment, or information.[284] 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.[285] This means, specifically, that police may not engage in interrogation of the defendant.[286]

This protection from interrogation is independent of the protections against custodial interrogation prior to being given the 4 *Miranda* warnings, which stem from the Fifth Amendment self-incrimination privilege.[287] 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 (a) after the Sixth Amendment right has been triggered and, (b) outside the presence of defense counsel.[288] 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."[289] Where the defendant is arrested pursuant to warrant, the protections against interrogation and other "deliberate elicitation of incriminating information" begin upon arrest.[290] Thus, in Tennessee, once police have arrested a defendant pursuant to warrant who has not waived his rights, 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.[291]

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282 *Bishop*, *supra* note 16, slip op. at 5-6, 15.

283 Michigan v. Jackson, 475 U.S. 625, 629 (1986).

284 Rothgery v. Gillespie County, 554 U.S. 191, 198 (2008); United States v. Gouveia, 467 U.S. 180, 188 (1984) (right attaches upon "formal charge, preliminary hearing, indictment, information, or arraignment").

285 Moran v. Burbine, 475 U.S. 412, 428-429, 431-432 (1986).

286 *Id*.

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

288 *Moran*, 475 U.S. at 428-429, 431-432.

289 *Huddleston*, 924 S.W.2d at 669.

290 *Id*. Similarly, an arrest warrant must issue after the police file an Affidavit of Complaint establishing probable cause. Tenn. R. Crim. P. 4(a).

291 *See, e.g.*, Buser et al., "Sheriff's Office Will No Longer Hold Prisoners For 48-Hour Detention," *supra* note 25 (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

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.[292] Indeed, such warrantless arrests account for the overwhelming majority of modern arrests.[293] 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 *County of Riverside* 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.[294] Indeed, federal and state rules of criminal procedure provide that once there is a warrantless arrest, police must bring the defendant to a magistrate "without unnecessary delay."[295] While this may simply be codifying *Gerstein* and 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.[296] 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 *Riverside* 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*.[297] 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.[298] Thus, defenders of 48-hour holds could argue, suspects are still afforded Fifth Amendment interrogation protections, even if Sixth Amendment protections are somehow skillfully avoided.

But this response also seems 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

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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.

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

[293] Yale Kamisar et al., Modern Criminal Procedure: Cases, Comments, Questions (12th ed.), at 8 & n. h.

[294] *See* County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) (warrantless arrestees must be brought before a magistrate without any unreasonable delay, even within the 48 hour period; delay can never be "for the purpose of gathering additional evidence to justify the arrest").

[295] Fed. R. Crim. P. 5(a); *see, e.g.*, Tenn. R. Crim. P. 5(a).

[296] *Moran v. Burbine*, 475 U.S. at 428-429, 431-432.

[297] 384 U.S. 436 (1966).

[298] *See Miranda*, 384 U.S. at 467 (*Miranda* protections apply where there is custody and interrogation).

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.[299] 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 rights.[300] 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."[301] By contrast, the Sixth Amendment protection is triggered automatically by a formal charge, and does not require the defendant to affirmatively invoke the right.[302] 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 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 whether the suspect is a truly culpable individual, and on the seriousness of the crime. From a constitutional perspective, it is somewhat troubling.

V. 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, and to what extent was it 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

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

[300] Moran v. Burbine, 475 U.S. 412, 423–24 (1986) (affirming the validity of a waiver despite police "trickery").

[301] *Berghuis v. Thompkins* , 130 S. Ct. 2250, 2262 (2010) *reh'g denied*, 131 S. Ct. 33 (2010).

[302] *See Moran*, 475 U.S. at 428.

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 were 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 to see a plaintiff detained under the procedure, willing to sue, and who lacks 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.