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A Presumptive Constitutional Time Limit for Administrative Overdetention of Inmates Entitled to Release

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A PRESUMPTIVE CONSTITUTIONAL TIME LIMIT FOR ADMINISTRATIVE OVERDETENTION OF INMATES ENTITLED TO RELEASE

*Patricia E. Simone**

> The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country. A calm and dispassionate recognition of the rights of the accused against the State, and even of convicted criminals against the State, a constant heart-searching by all charged with the duty of punishment . . . , and an unfaltering faith that there is a treasure, if you can only find it, in the heart of every man—these are the symbols which in the treatment of crime and criminals mark and measure the stored-up strength of a nation, and are the sign and proof of the living virtue in it.
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> —Winston Churchill[1]

INTRODUCTION

On April 6, 2004, police stopped fifty-seven-year-old David Kilgore for speeding and arrested him for driving with a suspended license. Three days later, a court in Fulton County, Georgia, found Kilgore guilty as charged and ordered him released because of the time he already had spent in jail. Officials at the county jail, however, did not release Kilgore until April 15, 2004—six days after the judge had declared him a free man. During that time, Kilgore went four days without medication for high blood pressure, diabetes, and

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1 Winston S. Churchill, Address to the House of Commons (July 20, 1910), *in* 2 WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES, 1897–1963, at 1589, 1598 (Robert Rhodes James ed., 1974).

seizures. He suffered three seizures, fainted twice, and was rushed to the hospital once.[2]

On September 20, 2002, authorities arrested Hiram Fuentes for domestic battery. Three weeks later, a circuit court in Cook County, Illinois, dismissed the charges. Instead of being released, however, Fuentes says he was held by the Cook County Department of Corrections for five more days and then inexplicably transferred into the custody of the Illinois Department of Corrections. On December 10, 2002, two months after a judge ordered his release, the state corrections department finally freed Fuentes after receiving documents confirming that the charges against him had been dropped.[3]

These incidents are not unique to Atlanta or Chicago. Similar tales of overdetention come out of facilities on both the East and West Coasts. In 2003, the U.S. District Court in Washington, D.C., certified a class of inmates kept in custody beyond their release dates as plaintiffs in a class action suit against the District of Columbia.[4] In 2001, Los Angeles County settled five class action suits brought on behalf of inmates also held beyond their release dates.[5] In the end, the county agreed to pay $27 million to a class of approximately 400,000 people detained in Los Angeles jails over a five-year period.[6]

Whether acquitted, the charges dismissed, or a full sentence served, a person whose legal basis for detention has ended is not "free" until jailers actually effectuate his or her release. Bureaucratic delays often keep people in jail anywhere from a few hours to a few days beyond their scheduled release.[7] With the cost of housing inmates in our nation's prisons and jails reaching astronomical figures,[8]

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2 Rhonda Cook, *Fulton Jailers Accused of Holding Inmates Too Long*, ATLANTA J.-CONST., Jan. 28, 2005, at A1.

3 James G. Sotos, *Holding Pattern: Detainee States Claim*, CHI. DAILY L. BULL., July 22, 2004, at 6.

4 Bynum v. District of Columbia, 214 F.R.D. 27, 42 (D.D.C. 2003).

5 Steven H. Pollak, *Georgia County Faces Class Action over Jail Procedures*, RECORDER (S.F.), Apr. 30, 2004, at 3.

6 *Id.*

7 For example, out-processing for released inmates in Los Angeles County regularly lasts one to two days. *See* Streit v. County of L.A., 236 F.3d 552, 556 (9th Cir. 2001). In the past two years, there have been reports of correctional facilities across the United States holding inmates after they were entitled to release. *See, e.g.*, Cook, *supra* note 2; Matt Krasnowski, *Court Reinstates Lawsuit that Claims County Unduly Delays Release of Inmates*, DAILY BREEZE (Torrance, Cal.), Aug. 14, 2004, at A4; Rob Olmstead, *Jailed in Red Tape: Cook County Jail Won't Let Go of Inmates—Even when It Should, Several Prisoners Contend*, DAILY HERALD (Arlington Heights, Ill.), Sept. 9, 2004, at 1; Pollak, *supra* note 5; Sotos, *supra* note 3.

8 The average annual operating cost per state inmate in 2001 was $22,650, or $62.05 per day. JAMES J. STEPHAN, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: STATE

it is surprising that facility administrators would detain inmates any longer than necessary. Economics aside, overdetention implicates fundamental liberty interests protected by the U.S. Constitution,[9] as well as serious secondary side effects like loss of employment, lost business opportunities, strain on family relationships, and exposure to inadequate health care and violent assault.[10]

The current legal standard governing administrative overdetention is vague at best. Officials have a "reasonable time" to complete administrative tasks necessary to effectuate an inmate's release,[11] but there is no consensus among the circuits as to what amount of time is reasonable[12] or even which tasks are properly considered "administrative."[13] In order to provide proper guidance for corrections facility administrators and policymakers, a clear legal standard is essential. A twenty-four-hour presumptive constitutional time limit would offer adequate guidance for government officials while balancing individual liberty interests with public safety concerns.

This Note analyzes the phenomenon of overdetention due to administrative delays. Part I defines the problem of administrative overdetention, looks at its causes, and describes its consequences. Part II compares the current state of the law in the area of overdetention to the legal climate relating to probable cause determinations before the Supreme Court decided *County of Riverside v. McLaughlin*.[14] Finally, Part III proposes a twenty-four-hour presumptive constitutional time limit for administrative overdetention and analyzes the costs and benefits of this burden-shifting framework.

PRISON EXPENDITURES, 2001, at 1 (2004), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/spe01.pdf. Among facilities operated by the Federal Bureau of Prisons, the average annual operating cost was $22,632 per inmate, or $62.01 per day. *Id.*

9 *See infra* Part I.A.

10 *See infra* Part I.B.

11 Lewis v. O'Grady, 853 F.2d 1366, 1370 (7th Cir. 1988).

12 Berry v. Baca, 379 F.3d 764, 771 (9th Cir. 2004) ("Courts have not settled on any concrete number of permissible hours of delay in the context of post-release detentions."). *Compare* Brass v. County of L.A., 328 F.3d 1192, 1202 (9th Cir. 2003) ("One might conclude that when a court orders a prisoner released—or when, for example, a prisoner's sentence has been completed—the outer bounds for releasing the prisoner should be less than 48 hours."), *with Lewis*, 853 F.2d at 1370 ("It is virtually impossible to establish an absolute minimum time to meet all potential circumstances which might exist.").

13 *See infra* note 66 and accompanying text (describing the inconsistency among some federal courts about which tasks are labeled "administrative").

14 500 U.S. 44 (1991).

I. OVERDETENTION: "A CIVIL RIGHTS ISSUE FROM HELL"[15]

A. Defining the Problem

Freedom from physical detention by one's government is the most elemental liberty interest.[16] As such, "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause."[17] Consequently, when the basis for a person's detention has ended, that person is entitled to release.[18] If jail or prison officials continue to hold someone in custody without a valid court order, they could deprive that person of liberty without due process of law in violation of the Fourteenth Amendment.[19] Subjecting a prisoner to detention beyond the termination of his or her sentence without penological justification has also been held to violate the Eighth Amendment's proscription against cruel and unusual punishment.[20]

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15 Alan Powell, who was not released from Fulton County Jail until three days after his bond was paid because there was no record of him having been booked into the jail, said: "'It's a civil rights issue from hell . . . . If a judge says I'm free, I'm supposed to go free.'" Cook, *supra* note 2.

16 Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (plurality opinion).

17 Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (citing Youngberg v. Romeo, 457 U.S. 307, 316 (1982)).

18 Cannon v. Macon County, 1 F.3d 1558, 1563 (11th Cir. 1993) (finding a recognized constitutional right to be free from continued detention after it was or should have been known that the detainee was entitled to release), *modified*, 15 F.3d 1022 (11th Cir. 1994); Whirl v. Kern, 407 F.2d 781, 791 (5th Cir. 1969) ("There is no privilege in a jailer to keep a prisoner in jail beyond the period of his lawful sentence."); McCurry v. Moore, 242 F. Supp. 2d 1167, 1178 (N.D. Fla. 2002) ("The underlying constitutional right is well established. When a prisoner's sentence has expired, he is entitled to release.").

19 *See* Douthit v. Jones, 619 F.2d 527, 532 (5th Cir. 1980) ("Detention of a prisoner thirty days beyond the expiration of his sentence in the absence of a facially valid court order or warrant constitutes a deprivation of due process."). This Note focuses on the Fourteenth Amendment because the problem of overdetention seems to be unique to county correctional facilities and local jails located in or near large metropolitan areas—e.g., Atlanta, Chicago, D.C., and Los Angeles. *See* sources cited *supra* note 7. It logically follows that overdetention by federal officials could violate the Fifth Amendment. No instances of overdetention in federal prisons have been reported, however.

20 Moore v. Tartler, 986 F.2d 682, 686 (3d Cir. 1993); Sample v. Diecks, 885 F.2d 1099, 1107–08 (3d Cir. 1989); Haygood v. Younger, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc) (citing Bell v. Wolfish, 441 U.S. 520, 535–40 (1979)). There is some debate as to whether the constitutional right not to be imprisoned beyond a mandated release date is rooted in due process or the Eighth Amendment. As several courts have noted, however, the threshold for liability is the same. *See McCurry*, 242 F. Supp. 2d at 1178–79 (noting the confusion and distinguishing claims in a jail setting versus claims brought by sentenced prisoners); Allen v. Guerrero, 688 N.W.2d 673, 680 (Wis. Ct. App. 2004) (acknowledging the debate stating: "The proper question is

The courts have recognized correctly that unreasonable overdetention violates fundamental personal liberty interests because "[n]ext to bodily security, freedom of choice and movement has the highest place in the spectrum of values recognized by our Constitution."[21]

So why are people who have been declared judicially "free" staying behind bars? The attorney for the former Sheriff of Fulton County, Georgia, said that no one intended to hold inmates longer than necessary and any delays were the consequence of having too few resources to process inmates into and out of the jail.[22] A Fulton County Superior Court Judge also pointed out several reasons for the delayed releases—an increase in the number of people passing through the jail, a tightening of the procedures for out-processing inmates due to prior accidental releases, and poor communication systems.[23]

1. Poor Communication Systems

As of 2004, the jail and the courts in Fulton County transmitted data back and forth via e-mail and then manually entered information into the respective agencies' computer systems.[24] The sheriff's department admitted that "the release backlog [wa]s . . . exacerbated by a 'sluggish and outdated computer system.'"[25] According to the attorney for the former Sheriff of Fulton County, "'Because of the lack of funding, the department did the best it could.'"[26]

These "administrative glitches and bad practices" are not unique to Fulton County.[27] In Washington, D.C., the courts and the jail also use separate computer systems.[28] Therefore, upon returning from the

'not whether the defendants could have cited the exact article, section, and clause of the Constitution that they were offending. It is instead the more practical question of whether they would have understood that what they were doing violated the plaintiff's rights.'" (quoting Markham v. White, 172 F.3d 486, 492 (7th Cir. 1999))).

21 *Sample*, 885 F.2d at 1109.

22 Cook, *supra* note 2.

23 Pollak, *supra* note 5. Admissions to the Fulton County Jail increased by twenty-nine percent between 2003 and 2004. Steven H. Pollak, *Legal Woes Mounting for Fulton Jail*, DAILY REP. (Fulton County, Ga.), May 17, 2004, at 1. This translates into an increase in the average number of releases per day. As of May 2004, jail workers were releasing an average of 112 inmates per day. *Id.* In 2002, the average number of releases per day was eighty. Pollak, *supra* note 5.

24 Pollak, *supra* note 5.

25 Pollak, *supra* note 23.

26 Cook, *supra* note 2.

27 Pollak, *supra* note 5 (quoting an attorney representing overdetained plaintiffs from both Fulton County and D.C.).

28 *Id.*

courthouse, an inmate's data has to be entered manually into the jail's computer system—that is, assuming the inmate returns with paperwork.[29]

2. Post-Release Checks for Wants and Holds

In addition to communication backlogs, post-release checks for wants and holds also result in delays. For example, the D.C. Department of Corrections has a policy of checking for outstanding warrants after a judge orders an inmate's release, prolonging an inmate's detention further.[30] The Los Angeles Sheriff's Department (LASD) also has a policy of delaying inmate releases until checks for outstanding warrants are completed:

> Before an inmate is released from prison, the LASD conducts a check of the Automated Justice Information System ("AJIS"), a computerized law enforcement database, to confirm that the prisoner is not wanted by any other law enforcement agency. It is the LASD's policy, however, to run the AJIS check only after all wants and holds that arrive on the day a prisoner is scheduled for release are inputted into the database. Due to the high volume of wants and holds received each day, the inputting process can, and often does, take between one to two days to complete. It is only after the inputting process is complete and the computer check run, that the LASD begins the administrative steps toward a prisoner's release. Although no longer required to serve time, these prisoners must remain in jail during the inputting period, extending their incarceration beyond their release date.[31]

This check is "both time consuming and laborious" due to the fact that "there [a]re several information sources to investigate and the Sheriff's Department [i]s not endowed with an efficient or very effective computer system."[32]

A spokesperson for the Cook County Sheriff admitted that logistical considerations delay the release of inmates in Chicago as well.[33] In line with policies in D.C. and Los Angeles, he noted that certain procedures must be followed so an inmate wanted on another charge or case is not accidentally released[34]:

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29 *Id.* (noting that "the paperwork in Washington did not always come back from the courthouse with the inmate").

30 *Id.*

31 Streit v. County of L.A., 236 F.3d 552, 556 (9th Cir. 2001).

32 Fowler v. Block, 2 F. Supp. 2d 1268, 1277 (C.D. Cal. 1998), *rev'd on other grounds*, 185 F.3d 866 (9th Cir. 1999).

33 Olmstead, *supra* note 7.

34 *Id.*

> If a defendant is released by a judge in [another] courthouse, . . . he must wait for the bus back to Cook County jail. There, he and about 250 other released inmates must have their paperwork reviewed. Then, a computer check must be run to make sure there are no other court cases pending or that no other jurisdictions have added a warrant for the inmate since he was admitted.
>
> Each defendant's index fingerprint is taken, and it must match the print they gave when they entered the jail. Comparing prints also takes time.[35]

Cook County jail officials said that, "given the massive number of inmates they deal with daily, the system in place is the only realistic way to manage inmates."[36]

Whether or not the policies and procedures in Atlanta, D.C., Los Angeles, and Chicago are the most efficient, the delays in release do not seem ill intentioned.[37] Jail officials cite the need to protect the community from accidental releases as one of the main reasons underlying their policies.[38] Due to a general lack of resources and manpower,[39] however, persons entitled to their freedom are being kept in jail after a judge has ordered their release from custody.

B. Consequences of Overdetention

No matter what good intentions lie behind delays in releasing inmates, overdetention results in serious tangible consequences. Prolonged detention "may imperil [one]'s job, interrupt [one']s source of income, and impair [one']s family relationships."[40] The negative side effects of overdetention are real and felt by more than just the person who remains in custody.

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35 *Id.*

36 *Id.*; *see also* Wright v. Sheahan, No. 96 C 6737, 1997 WL 89135, at *3 n.4 (N.D. Ill. Feb. 26, 1997) (noting that "tens of thousands of people (approximately 87,000 in 1995) are processed through the Cook County Jail each year"). The former Cook County Sheriff said that it "'takes some time to sort out' the approximate 600–800 prisoners who are returned from court each day." Lewis v. O'Grady, 853 F.2d 1366, 1370 (7th Cir. 1988).

37 *See supra* text accompanying note 22.

38 *See supra* text accompanying note 34.

39 *See supra* text accompanying note 26 (discussing the lack of funding). The attorney for the former Sheriff of Fulton County also said that "[a] lack of staffing made the problem worse." Cook, *supra* note 2.

40 Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (discussing pretrial detention).

1. Economic Interests

Overdetention can severely affect individual economic interests. For instance, Dwight Mallory's wrecker service almost went under after his four-day overdetention in Fulton County Jail.[41] Jail officials told Mallory that his release was delayed due to an inmate processing backlog. The one-time Coast Guardsman and former Air Force Reservist said, "'I've seen military prisoners treated a lot better.'"[42] Mallory lost thirty-one of the forty-four clients that regularly used his towing service when they could not reach him for several days.[43]

For those who have not been convicted of any crime, overdetention not only affects one's earning capacity, but one's reputation in the community and familial responsibilities.

> The agonies associated with prolonged . . . detention are visited upon the families of those detained and eventually will be felt by the entire society. Extended . . . confinement is likely to destroy whatever family unit existed prior to the defendant's arrest. If the defendant was previously employed, it is almost certain that his pay will stop and that he will not have a job to return to. If his family is affected in no other way, they will suffer at least from the loss of income during this period. They are likely to be forced to seek public assistance and to become added statistics on the welfare rolls. The response of moralists that the defendant should have considered the cost to his family before he got himself into trouble is irrelevant to this consideration, because . . . defendants who have yet to be convicted of a crime . . . are still presumed innocent.[44]

The phrase "innocent until proven guilty" does not always reflect the thinking of society when it comes to people who have been arrested. After all, if a person does not deserve to be in jail, it is logical to think that the authorities should immediately let that person go. As the news reports indicate,[45] however, immediate release is usually not the case.

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41 A customs officer stopped Mallory at the Atlanta airport upon his return from visiting relatives in South America. A computer error mistakenly showed that Mallory owed $7,000 in child support payments, when in fact the payments had been automatically deducted from his paychecks. Despite Mallory's explanations, he was arrested and incarcerated. The following day, a judge ordered Mallory's release after the private company responsible for collecting the payments confirmed the mistake. Mallory sat in jail for four more days, however. Cook, *supra* note 2.

42 *Id.*

43 *Id.*

44 LEWIS KATZ ET AL., JUSTICE IS THE CRIME: PRETRIAL DELAY IN FELONY CASES 59–60 (1972).

45 *See supra* note 7.

2. Personal Safety

Overdetention can also have serious personal safety consequences. Consider the situation of David Kilgore, with whom this discussion began.[46] Because of his medical condition, his six-day overdetention could have cost him his life. In response to the ordeal, Kilgore stated that he had "'never been through anything like that.'"[47]

An overlooked medical condition is only one personal safety issue implicated by overdetention. The disturbing story of Herman McMurry illustrates further dangers of overdetention in graphic detail.[48] "While in the sheriff's custody, [McMurry], who was guilty of nothing and never even charged with a crime, was placed in the general prison population at Cook County Jail, where he was raped and sexually assaulted by other unknown inmates."[49] McMurry's overdetention lasted between ten and eleven hours, but the trauma he endured will likely stay with him forever.

Part I established that overdetention implicates fundamental liberty interests, as well as produces negative side effects of economic loss, family strain, damaged reputation, and personal safety concerns. Part I also explored the various reasons behind repeated overdetentions, which can be summarized as a lack of financial resources, understaffing, and inefficient administrative practices. In Part II, the discussion turns to an explanation of how the current legal standard

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46 *See supra* text accompanying note 2.

47 Cook, *supra* note 2.

48 On July 1, 1994, a Chicago police officer stopped McMurry for a routine traffic violation. Following procedure, the officer ran a check on his computer system and came across an outstanding warrant in McMurry's name. What was not indicated in the system was that McMurry had already appeared in court and the warrant had been quashed. Despite McMurry's protests that the computer system was incorrect, the police officer arrested and incarcerated him. After spending the weekend in jail, McMurry finally appeared before a judge on July 5, 1994. The judge then determined that the warrant had in fact been quashed. Consequently, the judge ordered McMurry's release. But officials did not release McMurry immediately, and instead transported him back to Cook County Jail to await processing. McMurry v. Sheahan, 927 F. Supp. 1082, 1086–87 (N.D. Ill. 1996).

The Illinois statewide law enforcement computer network, known by the acronym LEADS, has been the subject of other lawsuits. *See* Ruehman v. Village of Palos Park, No. 91 C 8355, 1992 WL 170565 (N.D. Ill. July 16, 1992) (mem.). In *Ruehman*, the plaintiffs alleged that they were named in arrest warrants that had been quashed or recalled but not removed from municipal and state computer data banks. *Id.* at *1. Some were arrested and detained on the quashed or invalid warrants because the arrest warrants continued to be listed in the LEADS system as valid. *Id.*

49 *McMurry*, 927 F. Supp. at 1087.

governing administrative overdetention creates confusion and has the potential to stall systemic reforms.

II. WHAT IS A "REASONABLE" AMOUNT OF TIME WHEN YOU ARE IN JAIL FOR NO REASON?

As a result of various administrative details, officials may not be able to free a prisoner or detainee the instant custodial authority expires. Consequently, jail and prison officials are granted a "reasonable time" for tasks such as processing, transportation, and identity verification.[50] This reasonableness standard stems from the "wide-ranging deference" accorded to administrators in dealing with the "day-to-day operation of a corrections facility."[51]

Prison administrators are expected to exercise their professional judgment "in the adoption and execution of policies and practices that . . . are needed to preserve internal order and discipline and to maintain institutional security."[52] Courts have held that the policies and procedures governing the release of inmates fall "within the scope of maintaining institutional security."[53] For this reason, sheriffs and other prison administrators are "generally free to exercise discretion in processing prisoners for release [and] judges do not normally direct [administrators] when and where to effectuate release."[54] With this discretion, the critical issue becomes the amount of time that can be considered a constitutionally *reasonable* administrative delay in the release of inmates whose basis for detention has expired.

A. *The* McLaughlin *Comparison*

The legal climate with regard to administrative delays in the release of prisoners mirrors the uncertainty that surrounded administrative delays for pretrial detention probable cause hearings before the

50 Lewis v. O'Grady, 853 F.2d 1366, 1370 (7th Cir. 1988); *see also* Brass v. County of L.A., 328 F.3d 1192, 1200 (9th Cir. 2003) (stating that the plaintiff "may have had a due process right to be released within a reasonable time after the reason for his detention ended"); Whirl v. Kern, 407 F.2d 781, 792 (5th Cir. 1969) (explaining that a jailer's duty to effect a prisoner's timely release "is not breached until the expiration of a reasonable time").

51 Bell v. Wolfish, 441 U.S. 520, 547 (1979).

52 *Id.*

53 Wright v. Sheahan, No. 96 C 6737, 1997 WL 89135, at *3 (N.D. Ill. Feb. 26, 1997) (citing *Lewis*, 853 F.2d at 1369).

54 Thompson v. Sheahan, No. 00 C 3772, 2001 WL 204774, at *2 (N.D. Ill. Mar. 1, 2001) (citing *Lewis*, 853 F.2d at 1369); *see also Brass*, 328 F.3d at 1200 ("The order in which the Sheriff's Department handles prisoner releases is an administrative matter primarily within the Department's discretion.").

Supreme Court decided *County of Riverside v. McLaughlin*.[55] To understand this comparison, one must first understand the legal context of the *McLaughlin* decision.

In *Gerstein v. Pugh*,[56] the Supreme Court held that "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest."[57] The Court further held that "this determination must be made by a judicial officer either before *or promptly after arrest*."[58] Under *Gerstein*, if a criminal suspect is arrested without a warrant, only "a brief period of detention to take the administrative steps incident to arrest" may precede a probable cause hearing.[59]

The *Gerstein* Court did not articulate a specific time period within which a probable cause hearing must occur. It simply stated that the judicial determination should follow "promptly after arrest."[60] The Court allowed for flexibility in combining probable cause hearings with other pretrial proceedings, concluding that there was "no single preferred pretrial procedure."[61] This flexibility led to confusion as lower courts struggled to interpret the meaning of *Gerstein*'s "prompt" standard.

1. Confusion Post-*Gerstein*

The courts developed varying interpretations of the *Gerstein* standard. For some "prompt" meant immediately after the administrative steps incident to arrest had been completed.[62] For others it meant any time within seventy-two hours.[63]

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55 500 U.S. 44 (1991).

56 420 U.S. 103 (1975).

57 *Id.* at 114.

58 *Id.* at 125 (emphasis added). This decision spawned the now common *Gerstein* probable cause hearing that follows a warrantless arrest. *See Preliminary Proceedings*, 33 GEO. L.J. ANN. REV. CRIM. PROC. 193, 206–08 (2004).

59 420 U.S. at 114.

60 *Id.* at 125.

61 *Id.* at 123.

62 *See, e.g.*, Mabry v. County of Kalamazoo, 626 F. Supp. 912, 914 (W.D. Mich. 1986) (finding that warrantless detention beyond time needed to take administrative steps incident to arrest violates arrestee's constitutional rights); Lively v. Cullinane, 451 F. Supp. 1000, 1004 (D.D.C. 1978) (holding that the state may delay probable cause determination only for the time reasonably necessary for police to process arrestee).

63 For example, in *Bernard v. City of Palo Alto*, 699 F.2d 1023 (9th Cir. 1983), the Ninth Circuit held that, considering no more than ten hours was necessary to complete the administrative steps incident to arrest, twenty-four hours was the maximum length of detention permissible without a probable cause determination. *Id.* at 1025.

The current "reasonable time" standard for the release of inmates parallels the *Gerstein* "promptness" standard regarding post-arrest probable cause determinations. The Supreme Court has never addressed the specific issue of a constitutional time limit for the release of inmates whose legal justification for detention has expired, and even with an examination of lower court decisions, there is no clear answer as to what amount of time is a constitutionally reasonable administrative delay in releasing inmates.[64] Similarly, the *Gerstein*

In contrast with *Bernard*'s twenty-four-hour time limit, in *Williams v. Ward*, 845 F.2d 374 (2d Cir. 1988), the Second Circuit approved an arraignment system with a seventy-two-hour outer limit between a warrantless arrest and a probable cause determination. *Id.* at 387. The *Williams* court believed *Gerstein* allowed for experimentation with criminal pretrial procedures. *Id.* at 386. Because criminal suspects were afforded the right to counsel and to make a personal appearance, the court held that the procedural benefits provided by New York City's arraignment system constitutionally justified detention periods of up to seventy-two hours. *Id.* at 387.

Other post-*Gerstein* opinions concerning the reasonableness of delay between a warrantless arrest and a judicial probable cause determination include *Llaguno v. Mingey*, 763 F.2d 1560, 1568 (7th Cir. 1985) (forty-two hour detention without probable cause hearing found unreasonable under the circumstances), and *Fisher v. Washington Metropolitan Area Transit Authority*, 690 F.2d 1133, 1140 (4th Cir. 1982) (reasonableness of post-arrest detention preceding determination of probable cause by a judicial officer will vary with geographical factors and factual exigencies on a case-by-case basis).

64 Courts usually examine the specific circumstances under which the plaintiff's release was delayed in order to determine if there was any constitutional violation. Only two reported cases have held that overdetentions of a particular length of time are unreasonable as a matter of law. *See* Douthit v. Jones, 619 F.2d 527, 532 (5th Cir. 1980) ("Detention of a prisoner thirty days beyond the expiration of his sentence in the absence of a facially valid court order or warrant constitutes a deprivation of due process."); Whirl v. Kern, 407 F.2d 781, 792 (5th Cir. 1969) ("It may safely be said that Kern's ignorance for nine long months after the termination of all proceedings against Whirl was, as a matter of law, ignorance for an unreasonable time."). These cases are extreme—thirty days in one and nine months in the other—making it nearly impossible to argue that the delays in release were reasonable. Things become muddled, however, when the overdetention is shorter.

Most cases discussing overdetention assert that what is a "reasonable time" for out-processing "is a question best left open for juries to answer based on the facts presented in each case." Lewis v. O'Grady, 853 F.2d 1366, 1370 (7th Cir. 1988); *see also* Berry v. Baca, 379 F.3d 764, 771 (9th Cir. 2004) (concluding that what length of time is a reasonable delay "is a factual determination that is appropriately left to the jury to decide"); Green v. Baca, 306 F. Supp. 2d 903, 918 (C.D. Cal. 2004) (refusing to adopt a per se rule that a 12.5-hour delay was reasonable as a matter of law and stating instead that "the court must . . . look to the circumstances of the case" (citing Brass v. County of L.A., 328 F.3d 1192, 1202 (9th Cir. 2003))).

Operating under this theory, courts have declined to comment on the reasonableness of overdetentions ranging from fifty minutes to twenty-nine hours. *See Berry*, 379 F.3d at 773 (reversing the district court's grant of summary judgment for defend-

Court did not define a specific time limit for post-arrest probable cause hearings. The only gauge under *Gerstein* was "a brief period . . . to take the administrative steps incident to arrest."[65] Furthermore, the *Gerstein* Court did not articulate what exactly comprised "administrative steps incident to arrest," leading to varying interpretations of the *Gerstein* standard in the lower courts. Similarly, courts today struggle with deciding which administrative tasks are necessary to effectuate a prisoner's release.[66]

Uncertainty surrounding *Gerstein*'s promptness standard persisted until 1991 when the Supreme Court clarified the outer limits of a permissible administrative delay between a warrantless arrest and a probable cause determination in its *McLaughlin* decision.[67] In *McLaughlin*, the Court noted the lack of a clear constitutional standard under *Gerstein*:

> Unfortunately, as lower court decisions applying *Gerstein* have demonstrated, it is not enough to say that probable cause determinations must be "prompt." This vague standard simply has not provided sufficient guidance. Instead, it has led to a flurry of systemic challenges to city and county practices, putting federal judges in the role of making legislative judgments and overseeing local jailhouse operations.[68]

The same can be said of the "reasonable time" standard for overdetention. This vague standard has proved ineffective in aiding jail officials to establish clearly constitutional policies. As a result, inmates continue to challenge policies which lead to overdetention, and

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ants on twenty-six- to twenty-nine-hour overdetentions and stating "[w]e find that this question of reasonableness is properly conceived of as a jury determination"); *Lewis*, 853 F.2d at 1372 (reversing the district court's directed verdict for defendants on an eleven-hour overdetention and concluding "based on the facts in this case, it is a question for the jury to determine whether the time involved in processing the release of Sandy Lewis was reasonable"); *Green*, 306 F. Supp. 2d at 919 (denying defendant's motion for summary judgment on plaintiff's claim of excessive detention in violation of Fourteenth Amendment for a 12.5-hour overdetention); Muick v. Jasso, No. 3:02-CV-1089-L, 2003 WL 22054226, at *1 (N.D. Tex. Apr. 3, 2003) (labeling plaintiff's claim for fifty-minute overdetention as nonfrivolous).

65 420 U.S. at 114.

66 For example, the district court in *Fowler v. Block*, 2 F. Supp. 2d 1268 (C.D. Cal. 1998), *rev'd on other grounds*, 185 F.3d 866 (9th Cir. 1999), distinguished administrative activities incident to discharge, such as returning personal belongings and processing paperwork, from checks for wants and holds. *Id.* at 1277. Other courts analyzing out-processing procedures in Los Angeles county jails have not differentiated these tasks. *See, e.g.*, *Berry*, 379 F.3d 764; *Brass*, 328 F.3d 1192; Streit v. County of L.A., 236 F.3d 552 (9th Cir. 2001).

67 County of Riverside v. McLaughlin, 500 U.S. 44 (1991).

68 *Id.* at 55–56.

federal judges are left to examine the reasonableness of those policies. Most of the time, however, these reasonableness determinations are left for juries because "reasonableness" is an inherently fact-specific inquiry. As the case law demonstrates,[69] it is difficult to glean a clear standard for evaluating what is a "reasonable" amount of time from jury verdicts based on particularized fact patterns. As a result of inconsistent interpretations of the *Gerstein* standard, the *McLaughlin* Court felt that it was "important to provide some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds."[70] Likewise, it is imperative that prison officials and policymakers have guidance to evaluate the constitutionality of their procedures for processing releases.

2. *McLaughlin*'s Presumptive Constitutional Time Limit

In response to the climate of uncertainty following *Gerstein*, the *McLaughlin* Court established a presumptive constitutional time limit for post-arrest probable cause hearings.[71] The Court recognized that some administrative delays caused by paperwork and logistical problems are "inevitable."[72] Consequently, the Court determined that "the Fourth Amendment permits a reasonable postponement of a probable cause determination while the police cope with the everyday problems of processing suspects through an overly burdened criminal justice system."[73] After balancing competing interests, the Court concluded that "a jurisdiction that provides judicial determination of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*."[74]

The *McLaughlin* forty-eight-hour framework is best understood as a burden-shifting scheme. Jurisdictions that allow for a probable cause determination within forty-eight hours of a warrantless arrest are immune from systemic challenges.[75] The Court explained that when an arrestee does not receive a probable cause determination within forty-eight hours, however, the burden of proof shifts to the government to demonstrate the existence of an emergency or other extraordinary circumstance justifying the delay.[76] The Court also took

69 *See supra* note 64.

70 500 U.S. at 56.

71 *Id.*

72 *Id.* at 55.

73 *Id.*

74 *Id.* at 56.

75 *Id.*

76 *Id.* at 57. The *McLaughlin* Court plainly stated that normal procedural considerations do not qualify as extraordinary circumstances. *Id.* ("The fact that in a partic-

care to clarify that a probable cause determination in a particular case does not pass "constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably."[77]

The *McLaughlin* burden-shifting framework follows logically from the "practical compromise" struck in *Gerstein*.[78] *Gerstein* properly balanced the interests of public safety and the harm to a potentially innocent person by holding that the Fourth Amendment requires a judicial determination of probable cause promptly after a warrantless arrest.[79]

> On the one hand, States have a strong interest in protecting public safety by taking into custody those persons who are reasonably suspected of having engaged in criminal activity, even where there has been no opportunity for a prior judicial determination of probable cause. On the other hand, prolonged detention based on incorrect or unfounded suspicion may unjustly "imperil [a] suspect's job, interrupt his source of income, and impair his family relationships."[80]

A prompt probable cause determination following a brief period of time for administrative tasks incident to arrest adequately protects the public and the individual. *Gerstein*'s flexible standard also respects federalism concerns by giving deference to the states to experiment with different combinations of pretrial procedures.[81] But, as the *McLaughlin* Court emphasized, "flexibility has its limits."[82] In the end, the Fourth Amendment is meant to protect individual rights. Therefore, a presumptive constitutional time limit is necessary to give guidance to policymaking officials.[83]

Similar interests are at stake in cases of administrative overdetention.[84] While it is obviously necessary to protect the community from

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ular case it may take longer than 48 hours to consolidate pretrial proceedings does not qualify as an extraordinary circumstance.").

77 *Id.* at 56. "Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake." *Id.*

78 *See* Gerstein v. Pugh, 420 U.S. 103, 113–14 (1975).

79 *See id.*

80 *McLaughlin*, 500 U.S. at 52 (quoting *Gerstein*, 420 U.S. at 112, 114) (alteration in original) (citations omitted).

81 *Id.* at 53.

82 *Id.* at 55.

83 *Id.* at 56.

84 The following discussion analogizes the *Gerstein-McLaughlin* analysis to cases of administrative overdetention. While it is true that *Gerstein* and *McLaughlin* are Fourth Amendment cases and most overdetention cases are analyzed under the Fourteenth

accidental releases, out-processing procedures that result in several days of overdetention conflict with the fundamental liberty interest in being free from undue restraint and may unjustly "imperil [one]'s job, interrupt [one']s source of income, and impair [one']s family relationships."[85] Principles of federalism counsel against direct interference with local control over release procedures. "But flexibility has its limits . . . ."[86] Just as "*Gerstein* [wa]s not a blank check" for states to detain individuals who have been arrested without probable cause for extended periods of time,[87] the current legal standard governing release procedures does not sanction policies that regularly result in the overdetention of persons entitled to their freedom. Local policymakers need a legal standard that provides guidance while taking into account practical considerations of jail administration.

The *McLaughlin* analysis of the practical realities of an overly burdened criminal justice system informed the Court's choice of a bright-line rule for post-arrest probable cause determinations.[88] This analy-

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Amendment, the pretrial/post-release comparison is nevertheless a valid one. First, the seminal case in the area of overdetention, *Lewis v. O'Grady*, 853 F.2d 1366, 1372 (7th Cir. 1988), analyzed the reasonableness of the plaintiff's overdetention under the Fourth Amendment. Second, even if post-release overdetentions are examined under the Fourteenth Amendment, the procedural due process analysis articulated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), is essentially a balancing test which comports in material respects with the weighing of interests discussed in *McLaughlin*.

To make the analogy more explicit, let us consider the three-factor *Mathews* test. The first factor is "the private interest that will be affected by the official action." *Id.* The second factor is "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Id.* The third factor in the *Mathews* analysis is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* While the *McLaughlin* analysis is fundamentally a reasonableness inquiry, one would evaluate whether an administrative detention is "reasonable" by considering the same kinds of factors that *Mathews* proposes. In other words, to decide whether an administrative detention was "reasonable," one would consider the private interest, the public interest, and the risk of erroneous deprivation of liberty. In the case of administrative overdetention, the reasonableness inquiry and the *Mathews* inquiry are one and the same. Finally, the pretrial/post-release comparison is legitimate because of the similar individual liberty interests at stake and the comparable government burdens in both contexts.

85 *See Gerstein*, 420 U.S. at 114; *see also supra* Part I.B.

86 *See McLaughlin*, 500 U.S. at 55.

87 *Id.*

88 *See supra* text accompanying note 73.

> Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer

sis is particularly relevant to similar administrative delays which result from the out-processing of large numbers of inmates passing through a detention center.

In *Brass v. County of Los Angeles*,[89] the Ninth Circuit compared the administrative delays for post-arrest probable cause hearings discussed in *McLaughlin* to processing delays which result in overdetention of inmates scheduled for release.[90] The plaintiff in *Brass*, who was released thirty-nine hours after his release order was entered, alleged that his overdetention was due to the administrative practice of the county to wait to process a particular day's releases until it received all information relating to the prisoners scheduled for release on that day, including wants and holds.[91] "In dismissing the case, the district court relied significantly on the fact that the 39-hour delay . . . was less than the 48-hour delay that the Supreme Court had sanctioned in *County of Riverside v. McLaughlin*."[92] The Ninth Circuit affirmed the district court's decision, concluding that the plaintiff did not have a constitutional right to have his release papers processed in any particular order and the thirty-nine-hour delay did not violate the plaintiff's constitutional right to due process under the circumstances.[93]

The *Brass* court stated that delays like those mentioned in *McLaughlin* are "inevitable."[94] Consequently, the Ninth Circuit concluded that, just as *McLaughlin* held that the Fourth Amendment does not compel an immediate determination of probable cause, the Fourteenth Amendment similarly permits a reasonable postponement of a prisoner's release while the county copes with the everyday problem of out-processing a large number of prisoners.[95]

The *Brass* court further analyzed the *McLaughlin* standard, stating:

> It is unclear . . . whether the 48-hour period applied to probable cause determinations is appropriate for effectuating the release of prisoners whose basis for confinement has ended. One might conclude that when a court orders a prisoner released—or when, for

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who may be busy processing other suspects or securing the premises of an arrest, and other practical realities.

McLaughlin, 500 U.S. at 56–57.

89 328 F.3d 1192 (9th Cir. 2003).

90 *Id.* at 1201–02.

91 *Id.* at 1198.

92 *Id.* at 1201.

93 *Id.* at 1202.

94 *Id.*

95 *Id.*

> example, a prisoner's sentence has been completed—the outer bounds for releasing the prisoner should be less than 48 hours.[96]

This dicta in *Brass* supports the following proposition: if forty-eight hours is the presumptive constitutional limit for someone to be held before a judicial officer determines whether a basis for detention exists, then a person for whom a judicial officer already has concluded that no basis for continued detention exists should be released within forty-eight hours, if not less.

Recently, in *Berry v. Baca*,[97] the Ninth Circuit commented on *Brass*'s discussion of the *McLaughlin* standard:

> In *Brass*, the panel discussed *McLaughlin* and concluded that, while the two contexts share the same concerns about the need for flexibility in the face of inevitable administrative and logistical delays, they may not share the same precise calculus. . . .
>
> We agree with *Brass* that there are reasons to question the applicability of the forty-eight hour rule in this context. Applying *McLaughlin*'s stringent proof requirement to post-release detentions of less than forty-eight hours would be difficult to reconcile with the fact that, for the plaintiffs at issue here, there has been a judicial determination that they are entitled to freedom from the criminal justice system. Thus, the societal interest in the processes that result in delay, while significant, may not be as weighty as in the probable cause context.[98]

The *Berry* court then went on to declare that "[a]dopting the forty-eight hour rule into the context of post-release detentions would also directly conflict with at least one other circuit, which has found no zone of presumptive reasonableness in this context."[99] The *Berry* court was referring to the Seventh Circuit's seminal overdetention decision, *Lewis v. O'Grady*.[100]

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96 *Id.*

97 379 F.3d 764 (9th Cir. 2004).

98 *Id.* at 771–72.

99 *Id.* at 772.

100 853 F.2d 1366 (7th Cir. 1988). In *Lewis*, the Seventh Circuit considered the reasonableness of an eleven-hour overdetention:

> We recognize that the administrative tasks incident to a release of a prisoner from custody may require some time to accomplish—in this case perhaps a number of hours. Reasonable time must be allowed for such matters as transportation, identity verification, and processing. It is virtually impossible to establish an absolute minimum time to meet all potential circumstances which might exist.

Id. at 1370. It should be noted that the Seventh Circuit decided *Lewis* three years *before* the Supreme Court handed down the *McLaughlin* standard.

In *Berry*, the Ninth Circuit relied on *Brass* and *Lewis* together to support its conclusion that there is no basis for a bright-line rule: "Like *Brass* and *Lewis*, we decline to determine a number of hours that is presumptively reasonable for post-release over-detentions."[101] This result, as the *Berry* court intended, is good for individual claimants because they are not held to a higher standard of proof if their overdetentions lasted less than two days. Therefore, it is more likely that their claims will not be dismissed at the summary judgment stage. On the other hand, if courts persist in leaving these reasonableness determinations to juries, there will never be a clear standard for policymakers because each decision will solely depend on a fact-specific inquiry.

B. The Need for a Definitive Time Limit

Continued lack of clarity in this context is detrimental to systemic reform. The *McLaughlin* Court "hesitate[d] to announce that the Constitution compels a specific time limit" for post-arrest probable cause determinations, but ultimately concluded that it was more "important to provide some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds."[102] Providing guidance for states and counties is similarly important in the context of administrative overdetentions.

A spokesperson for the Cook County Sheriff correctly stated that "jails have a 'reasonable' time frame to process detainees once they're ordered released," but he made a point to explain that "[t]here's no specifically prescribed time frame."[103] The prevalence of this mindset allows officials overseeing facilities where inmates are overdetained anywhere from a few hours to a few days to avoid responsibility. For example, the Fulton County Attorney defended the practices at the local jail saying: "The law allows a reasonable amount of time to process people and get them out. And our position is that is what was happening. The jail, at all times, has been constitutionally operated."[104] This statement causes one to query whether the current legal standard is a normatively good one if persons entitled to release remain in jail for days on end.

Another reason why there is a need for a clear rule for administrative overdetention is that people caught in such a situation are

101 379 F.3d at 772–73.

102 County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

103 Olmstead, *supra* note 7.

104 Cook, *supra* note 2.

often indigent.[105] If a person has the means to hire an attorney, that attorney will make sure that his or her client is not kept in jail any longer than absolutely necessary.[106] However, if an economically disadvantaged person is not released on schedule, that person probably will not have an attorney fighting for his or her individual liberty interests. If this scenario holds true, then no one can know the full extent of the overdetention crisis because there are not enough advocates to bring the problem to light.

Part II demonstrated how the current legal standard governing administrative overdetention creates confusion just as the *Gerstein* "promptness" standard created confusion for the required timing of probable cause determinations. *McLaughlin* attempted to resolve the uncertainty surrounding probable cause determinations, but the Court has yet to establish a bright-line rule for administrative overdetentions. Part III explores a possible solution to the problem—a presumptive constitutional time limit.

III. PROPOSAL FOR A TWENTY-FOUR-HOUR PRESUMPTIVE CONSTITUTIONAL TIME LIMIT

A. Burden-Shifting Framework

For reasons analogous to the ones articulated in *McLaughlin*, a presumptive constitutional time limit should be established for the administrative overdetention of inmates entitled to release.[107] A burden-shifting framework, similar to the *McLaughlin* standard but with a presumptive constitutional time limit of twenty-four hours, would

105 *See, e.g.*, Whirl v. Kern, 407 F.2d 781 (5th Cir. 1969). In *Whirl*, the plaintiff was overdetained by more than nine months. *Id.* at 785. The indictments against Whirl were dismissed but "[f]or some reason never adequately explained, the list of dismissals was not processed, and Whirl's freedom was lost in a shuffle of papers. Being too poor to raise bail, he was forced to remain in the courthhouse lockup." *Id.* at 786. For a discussion of how pretrial confinement inordinately affects the poor, see RONALD GOLDFARB, RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM 32–42 (1965).

106 *See, e.g.*, Armstrong v. Squadrito, 152 F.3d 564 (7th Cir. 1998). In *Armstrong*, the plaintiff was held on a body attachment warrant for fifty-seven days because of a record-keeping error. *Id.* at 567. Armstrong had no friends or relatives in town and his domestic relations attorney did not accept collect calls. *Id.* at 568. Armstrong's boss, who needed Armstrong back at work, eventually hired an attorney, who quickly achieved Armstrong's release. *Id.* *Armstrong* is a classic example of how the system is stacked against someone without an attorney.

107 While it seems that legislation could similarly accomplish the desired ends of effectuating inmate releases within a reasonable amount of time, nevertheless one can assume the legitimacy of establishing a constitutional time limit in the context of overdetention because of the precedent that *McLaughlin* established in the analogous situation of pretrial detention. *See supra* text accompanying note 102.

serve the interests of public safety and individual liberty. If local authorities meet the presumptive constitutional time limit by establishing policies that successfully out-process inmates within twenty-four hours, they will be immune from systemic challenges. Under this framework, an inmate wishing to challenge a delay of less than twenty-four hours would have to prove why the delay was unreasonable under the particular circumstances. Conversely, if the delay was more than twenty-four hours from the time the release order was entered, surpassing the presumptive constitutional time limit, the burden would shift to jail administrators to prove why the delay was reasonable under the circumstances.

As with the *McLaughlin* standard,[108] usual administrative delays due to overcrowded facilities and a general lack of resources would not be satisfactory excuses for exceeding the presumptive constitutional time limit. Ironically, some administrators have blamed the *McLaughlin* requirements for an increased workload contributing to delays in out-processing inmates.[109] Of course the Court would not have intended the requirements for post-arrest probable cause hearings to justify overdetention of inmates entitled to release when the same liberty and public safety interests are at stake in both cases.[110] Therefore, such considerations would not suffice as excuses for release delays of more than twenty-four hours.

Several jail administrators have also explained that much of the time spent processing an inmate's release is consumed by a check for outstanding criminal charges.[111] The amount of time it takes to run a check for wants and holds should not extend the outer limit for overdetention beyond twenty-four hours any more than complying with the *McLaughlin* requirements should. As one district court explained, "there is no reason why a check for wants and holds needs to occur after a person is [ordered] released" because such "checks can occur at anytime between the original arrest and the case's ultimate disposition."[112]

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108 *See supra* note 74.

109 *See* Pollak, *supra* note 23.

110 Some would say that, although the same interests are implicated, once there has been a judicial determination that a person is entitled to release the calculus is somewhat different—the scale tips in favor of individual liberty interests because the public safety concerns are less weighty than in the case of a warrantless arrest. *See supra* text accompanying note 98.

111 *See supra* Part I.A and text accompanying note 31.

112 Fowler v. Block, 2 F. Supp. 2d 1268, 1279 (C.D. Cal. 1998), *rev'd on other grounds*, 185 F.3d 866 (9th Cir. 1999). The district court based its conclusion on the following: "It is usually no surprise to the courtroom deputies, or those responsible for a criminal defendant's custody between the courtroom and the holding cell, that a

Jail administrators would not be excused from the twenty-four-hour limit simply because there was a backlog in data processing. If the check takes more than twenty-four hours to complete, then jail officials must initiate the process sometime before the inmate is ordered released. Since jail administrators are expected to know the state of operations for the facility under their supervision, including population and logistical factors necessary to effectuate releases, they would have to prove the existence of a bona fide emergency or other extraordinary circumstance to justify a delay in release of more than twenty-four hours.

A twenty-four-hour presumptive constitutional time limit in cases of overdetention would act like a type of heightened pleading requirement, allowing more cases to be resolved before trial. It would be clear from the face of the plaintiff's complaint and the defendant's responsive pleading whether any extraordinary circumstances existed that would trump the twenty-four-hour presumption. Without evidence of any special factors, it would be assumed that delays of less than twenty-four hours were reasonable, whereas delays of more than twenty-four hours were unreasonable. In this way, both parties could make effective use of summary judgment.

Some criticize bright-line tests such as the one proposed as inflexible. While flexible constitutional tests are useful because they give deference to states to fashion procedures suited to local concerns, the Supreme Court itself has declared that when it comes to constitutional matters "flexibility has its limits."[113] The most effective way to ensure that states safeguard individual rights in the context of administrative overdetentions is to establish a bright-line test.[114] The proposed constitutional time limit for out-processing inmates would provide guidance to corrections administrators and government officials responsible for overseeing facility operations. It would allow them to create policies and implement procedures "with confidence that they

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verdict is about to come down, that the court is considering some motion to dismiss, or that a deal has been reached." *Id.*

113 County of Riverside v. McLaughlin, 500 U.S. 44, 55 (1991).

114 *Cf.* Alycia B. Olano, Note, *Determination of Probable Cause for Warrantless Arrest: A Casenote on* County of Riverside v. McLaughlin, 52 LA. L. REV. 1311, 1317 (1992) ("[T]he most efficient way to ensure the constitutionally demanded protection of individual liberty in the case of pretrial detention is with a bright line test regarding the timing of the determination of probable cause."). Olano explained that, as flexibility for constitutional guidelines increases, states may dilute individual rights by staying close to the "floor" of rights established by a flexible constitutional standard. *Id. See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (discussing the appropriateness of categorical rules versus balancing tests).

fall within constitutional bounds."[115] Clear constitutional boundaries should result in an overall decrease in overdetention claims. For claims that do arise, the presumptive constitutional time limit should reduce the number of suits that actually go to trial.

The Supreme Court recognized the need for a bright-line rule in cases of warrantless arrests and established a presumptive constitutional time limit of forty-eight hours for probable cause hearings that determine whether there is a basis for a suspect's detention. Then is it just for inmates to be held longer than forty-eight hours once there already has been a judicial determination that no legal justification for continued detention exists? If anything, the outer time limit should be less than forty-eight hours.[116]

Since the same fundamental liberty interests and similar public safety concerns are at stake in the context of warrantless arrests and administrative overdetentions, it is useful to compare the *McLaughlin* standard when choosing a specific constitutional time limit for administrative overdetention. Among the justices deciding *McLaughlin*, there was a debate as to whether forty-eight hours was too long of a delay for probable cause determinations. In dissent, Justice Marshall, joined by Justices Blackmun and Stevens, found *Gerstein*'s promptness requirement to mean that a probable cause determination must be made "immediately upon completion of the 'administrative steps incident to arrest.'"[117] Justice Marshall declined to accept a bright-line test, but based on the lower court's findings, it was clear that forty-eight hours was not necessary to complete the administrative tasks incident to a warrantless arrest.[118]

In his own dissent, Justice Scalia advocated a twenty-four-hour rule. In his view, absent extraordinary circumstances, it is constitutionally unreasonable for police to delay a determination of probable cause after a warrantless arrest "for reasons unrelated to arrangement of the probable cause determination or completion of the steps incident to arrest," *or* "beyond 24 hours after the arrest."[119] Like the ma-

115 *McLaughlin*, 500 U.S. at 56.

116 *See supra* text accompanying note 96.

117 500 U.S. at 59 (Marshall, J., dissenting) (quoting Gerstein v. Pugh, 420 U.S. 103, 114 (1975)).

118 *See id.* The Ninth Circuit found that "no more than 36 hours were needed 'to complete the administrative steps incident to arrest.'" *Id.* at 50 (majority opinion) (quoting McLaughlin v. County of Riverside, 888 F.2d 1276, 1278 (9th Cir. 1989)). In fact, the County acknowledged that close to ninety percent of all cases could be processed in twenty-four hours or less. *Id.* at 68 n.3 (Scalia, J., dissenting). The forty-eight hour time limit left room for states to combine probable cause determinations with other preliminary hearings. *Id.* at 55–56 (majority opinion).

119 *Id.* at 70 (Scalia, J., dissenting).

jority, he would treat the time limit as a presumption: when the twenty-four-hour time limit is surpassed, the burden shifts to the police to prove unforeseeable circumstances justifying the additional delay.[120] For his chosen time limit, Justice Scalia relied heavily on the fact that out of all the federal courts to examine the issue only one concluded that twenty-four hours was inadequate to complete arrest procedures, and all courts actually setting a time limit for probable cause determinations selected twenty-four hours as the outer limit.[121] Justice Scalia also noted that state and federal commissions and judges, as well as commentators who had examined the question, all supported a twenty-four-hour time limit.[122]

In balancing the practical realities of processing inmate releases, it is settled that actual discharge may not be immediate.[123] At the same time, administrative overdetention of someone who is entitled to release should be as short as practicably possible. In the *McLaughlin* situation, most would agree that it is entirely feasible to conduct probable cause determinations within twenty-four hours of a warrantless arrest.[124] The administrative procedures incident to arrest—such as fingerprinting and paperwork processing—mirror those involved in the out-processing of inmates.[125] One major difference is that effectuating the release of an inmate does not depend on the availability of a magistrate. Not having to secure a judicial officer cuts in favor of a lesser outer time limit for administrative overdetentions as compared to post-arrest probable cause determinations. Considering the *McLaughlin* standard is forty-eight hours, twenty-four hours is a reasonable compromise as a presumptive constitutional time limit for administrative overdetention.

A bright-line test of twenty-four hours in the context of administrative overdetention is also justified because it does not offend the demands of federalism discussed by Justice O'Connor in the majority opinion of *McLaughlin*.[126] Justice O'Connor criticized Justice Scalia's

120 *Id.*

121 *Id.* at 68–69.

122 *Id.* at 69–70; *see, e.g.*, Wendy L. Brandes, *Post-Arrest Detention and the Fourth Amendment: Refining the Standard of* Gerstein v. Pugh, 22 COLUM. J.L. & SOC. PROBS. 445 (1989); Jane H. Settle, Note, Williams v. Ward*: Compromising the Constitutional Right to Prompt Determination of Probable Cause upon Arrest*, 74 MINN. L. REV. 196 (1989).

123 Lewis v. O'Grady, 853 F.2d 1366, 1370 (7th Cir. 1988) ("Reasonable time must be allowed for such matters as transportation, identity verification, and processing.").

124 *See supra* note 118 and text accompanying notes 121–22.

125 *See Lewis*, 853 F.2d at 1369–70 (comparing the administrative delay between an arrest and an appearance before a magistrate to an administrative delay in processing an inmate entitled to release).

126 *See* 500 U.S. at 53 (majority opinion).

choice of a twenty-four-hour outer limit, noting that the situation in *McLaughlin* did not compel such direct interference with local control.[127] Whether or not a twenty-four-hour rule for post-arrest probable cause determinations would result in direct interference with local control, a twenty-four-hour time limit for administrative overdetention does not disrespect local decisionmaking for two reasons: (1) a jailer has the duty to effect an inmate's timely release, and (2) a jailer's acts in discharging an inmate are "purely ministerial" in nature.[128]

"A jailer, unlike a policeman, acts at his leisure. He is not subject to the stresses and split second decisions of an arresting officer . . . ."[129] Therefore, the discretion that a jailer may lawfully exercise in effectuating an inmate's release is more limited in scope than the discretion a police officer may exercise in effectuating an arrest.[130] The discretion necessary for a jailer to effect an inmate's timely release is even less than that required for effective prison administration in general—e.g., riot protocol or segregation policies.[131] For these reasons, a window of twenty-four hours affords the proper deference to federalism, especially considering reports of repeated administrative overdetention occurring across the nation.[132]

B. Costs and Benefits

The major costs of this twenty-four-hour proposal would be the financial expenditures from the public treasury to update computer technology and hire more corrections officers. By closely examining policies and procedures already in place, particularly those which involve inter-departmental communication and data processing, local officials should be able to determine where backlogs occur. If officials focus on fixing these problem areas, they may be able to remedy the delays in release by simply tweaking current procedures and appointing as many new corrections officers as necessary to keep up with the demands of the increasing inmate population. This could most likely be done without a complete technological overhaul.

Although the initial investment of taxpayer dollars may be significant, this is a slight burden compared with the harm caused to those persons forced to remain in jail beyond their scheduled release

127 *Id.* at 57.

128 Whirl v. Kern, 407 F.2d 781, 792 (5th Cir. 1969).

129 *Id.*

130 *See* Douthit v. Jones, 619 F.2d 527, 535 (5th Cir. 1980).

131 *Cf.* Sample v. Diecks, 885 F.2d 1099, 1109 (3d Cir. 1989) (contrasting the level of deference that the judiciary affords prison officials to quell prison riots (high) with the level that is afforded to provide medical care to inmates (less deference)).

132 *See supra* Part I.A.

dates.[133] In the context of warrantless arrests, the *McLaughlin* Court recognized that the harm that would otherwise be caused to innocent arrestees outweighed the costs of a bright-line rule for probable cause determinations. Similarly, the harm to individual liberty interests in the case of administrative overdetention outweighs the costs of establishing a clear constitutional standard. Furthermore, as the Ninth Circuit noted, "the administrative burden of accelerating the release process . . . does not seem as weighty as the burden of establishing probable cause under a tight timeline."[134] If the Court felt compelled to hand down a bright-line test in *McLaughlin*, a similar standard is surely justified in this context.

Implementing policies and procedures that will satisfy the twenty-four-hour time limit may be difficult in the beginning, but there will be several lasting benefits. First, local officials will be assured that they are in compliance with constitutional requirements by simply meeting the clearly articulated standard. This will give peace of mind to corrections facility administrators and local officials open to liability. Second, officials will be held accountable for noncompliance under the twenty-four-hour time limit. They will not be able to avoid liability for noncompliance under a qualified immunity defense because the law will now be "clearly established."[135] Third, the bright-line rule will reduce the overall number of claims against jail administrators and local governments, as well as decrease the percentage of suits that actually go to trial. Less litigation means less taxpayer money spent, which may offset any expenditures necessary to come into compliance with the proposed rule in the first place.[136] Less litigation also allows local governments to focus their attention on more pressing issues of general concern while permitting local officials to concentrate on fulfilling the duties of their office. Finally, and most importantly, persons entitled to release will be set free as soon as practicably possible.

CONCLUSION

There are many popular misconceptions about the nation's jails and prisons. Some believe that inmates just watch television and exercise all day. Some would even endeavor to say that going to jail in the

133 *See supra* Part I.B (discussing the consequences of overdetention).

134 Berry v. Baca, 379 F.3d 764, 772 (9th Cir. 2004).

135 Harlow v. Fitzgerald, 457 U.S. 500, 518 (1982) ("[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate *clearly established* statutory or constitutional rights of which a reasonable person would have known." (emphasis added)).

136 *See supra* text accompanying note 6 (discussing a $27 million class action settlement).

United States is hardly punishment at all. One look at several recent Department of Justice investigations will quickly dispel these myths. The Civil Rights Division continually uncovers disturbing conditions in correctional facilities and detention centers across the nation, including inadequacies in fire safety, physical plant, inmate classification and segregation, staffing and training, medical care, and mental health care.[137] These deficiencies put inmates at risk of dangerously poor sanitation, inter-inmate violence, and excessive use of force by corrections officers.[138]

The incarcerated are a forgotten population. As a model of democracy, the United States proclaims that there is "liberty and justice for all." For this to hold true, the nation must pay attention to those easily forgotten and ensure that the fundamental constitutional rights of every person are protected. As Winston Churchill explained, the way a nation treats its accused and even the convicted criminal is proof of that nation's living virtue.[139] Unreasonable overdetention of persons entitled to their freedom does not comport with the virtues this nation proclaims. In order to properly defend individual rights, the nation needs a clear legal standard regarding administrative overdetention of inmates entitled to release. A presumptive constitutional time limit of twenty-four hours will safeguard private liberty interests as well as public safety concerns by giving guidance to corrections facility administrators and policymakers.

137 *See generally* Special Litig. Section, U.S. Dep't of Justice, Investigative Findings: Civil Rights of Institutionalized Persons Act Investigations, http://www.usdoj.gov/crt/split/findsettle.htm (last visited Sept. 25, 2005).

138 *See id.*

139 *See supra* text accompanying note 1.