TECHNOLOGY'S EFFECT ON THE FORTY-EIGHT-HOUR RULE AND THE ADMINISTRATIVE STEPS INCIDENT TO ARREST

*Michael A. Cedrone**

INTRODUCTION

While October 21, 2015 did not bring flying cars, hover-boards, or a World Series victory to the Chicago Cubs,[1] it did bring automated fingerprint identification systems and mobile computing devices. Marty McFly read aloud from a copy of *USA Today* in the classic 1989 film, *Back to the Future Part II*: "Within two hours of his arrest, Martin McFly, Jr. was tried, convicted, and sentenced to fifteen years in the state penitentiary."[2] "Within two hours?" he remarked.[3] His friend, Doctor Emmet Brown, sarcastically replied, "The justice system works swiftly in the future now that they've abolished all lawyers."[4] Two years following the release of the film, the Supreme Court of the United States established the Forty-Eight-Hour Rule (the "Rule") in *County of Riverside v. McLaughlin*.[5]

In *McLaughlin*, the Supreme Court defined "prompt" as it relates to a judicial determination of probable cause following a warrantless arrest.[6] In doing so, the Court created a bright-line, burden-shifting rule in which a judicial determination of probable cause provided within forty-eight hours of a warrantless arrest is presumptively prompt.[7] The majority left much to be desired as to how they arrived at forty-eight hours, and established this boundary without the benefit of today's advanced technology.

---

* J.D. candidate, Rutgers Law School, May 2017. The author also served as an Articles Editor for the *Rutgers University Law Review* during the 2016–2017 academic year.

1. Adam W. Kepler, *It's 'Back to the Future' Day. How Does the Present Stack up?*, N.Y. TIMES (Oct. 16, 2015), http://www.nytimes.com/2015/10/18/movies/2015-when-the-future-was-bright-in-back-to-the-future.html.
2. BACK TO THE FUTURE PART II (Universal Pictures 1989).
3. *Id.*
4. *Id.*
5. 500 U.S. 44, 47 (1991).
6. *Id.*
7. *Id.*

This Note argues that the Supreme Court should revisit the Forty-Eight-Hour Rule in light of numerous advancements in technology over the past twenty-five years which reduce the time necessary to complete the administrative steps that are incident to an arrest. This issue has largely gone un-argued. In fact, the academic literature that *does* reference the Forty-Eight-Hour Rule simply discusses abuses of the Rule to gather additional information and conduct extended investigations.[8] However, this Note will focus on how technology has accelerated the booking process and reduced the time needed to complete the administrative steps incident to a warrantless arrest.

I. HISTORY OF THE LAW

A. Gerstein v. Pugh

In 1975, the U.S. Supreme Court addressed the issue of whether arrestees were entitled to an independent judicial determination of probable cause following a warrantless arrest and prior to continued pretrial detention.[9] Florida, at the time, had no law requiring such a probable cause hearing; instead, a person could be detained for a substantial period of time solely on the decision of a prosecutor.[10] The Court held that this practice was unconstitutional because the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to an extended restraint of liberty following arrests.[11]

The Court noted that a policeman's on-the-scene assessment of probable cause would still provide legal justification for arresting a person suspected of crime.[12] However, this determination of probable cause would exist only for a brief period of time to complete the administrative steps incident to arrest.[13] The Court concluded that once a suspect is in custody, any "reasons that justify dispensing with the

8. *See generally* Steven Daniel A. Horwitz, *The First 48: Ending the Use of Categorically Unconstitutional Investigative Holds in Violation of* County of Riverside v. McLaughlin, 45 U. MEM. L. REV. 519 (2015); Steven J. Mulroy, *"Hold" On: The Remarkably Resilient, Constitutionally Dubious 48-Hour Hold*, 63 CASE W. RES. L. REV. 815 (2013).

9. Gerstein v. Pugh, 420 U.S. 103, 105 (1975).

10. *Id.* at 105–06.

11. *Id.* at 114. This ruling did not deny law enforcement the support of usual inferences in making an arrest, but rather it required a neutral and detached magistrate, independent of police and prosecution, to draw those inferences. *Id.* at 113 (citing Johnson v. United States, 333 U.S. 10, 13–14 (1948)).

12. *Id.* at 113–14.

13. *Id.* at 114.

magistrate's neutral judgment evaporate."[14] The Court ultimately held that a judicial determination of probable cause could be made through a non-adversarial proceeding based upon a standard of proof akin to the probable cause determination used during an initial arrest.[15] The Court acknowledged that states vary in terms of how they structure their pretrial procedures, and that a certain level of flexibility and experimentation was desirable.[16] Still, the Court ultimately ruled that whichever method a state chooses, it would need to provide a fair and reliable judicial determination of probable cause prior to, or "promptly after," arrest as a condition for any significant pretrial restraint of liberty.[17]

B. County of Riverside v. McLaughlin

1. The Lower Courts

Nearly sixteen years later, the Supreme Court revisited the *Gerstein* Rule in the context of a county's pretrial policy that judicial determination of probable cause following a warrantless arrest with arraignment proceedings.[18] Donald Lee McLaughlin, then incarcerated in the Riverside County Jail, filed a complaint alleging that he had not yet received a judicial determination of probable cause.[19] The district court issued a preliminary injunction requiring the County to provide judicial determinations of probable cause within thirty-six hours of arrest for all persons arrested without a warrant.[20] The County appealed, and the U.S. Court of Appeals for the Ninth Circuit affirmed the preliminary injunction.[21] The Ninth Circuit relied upon their earlier decision in *Bernard v. City of Palo Alto* to require only a brief period

14. *Id.* The danger that the suspect might escape or commit further crimes does not exist, and the consequences of prolonged detention could seriously and negatively affect the suspect's job, source of income, or family relationships. *Id.*

15. *Id.* at 120. The sole issue is whether probable cause exists to further detain the arrestee pending further proceedings. *Id.* Unlike a preliminary hearing, used to determine whether evidence justifies charging a suspect with an offense, a determination of probable cause addresses only pretrial custody. *Id.* at 123. A magistrate may view hearsay or written testimony. *Id.* at 120.

16. *See id.* at 123.

17. *See id.* at 124.

18. County of Riverside v. McLaughlin, 500 U.S. 44, 47 (1991).

19. *Id.* at 48.

20. *Id.* at 49.

21. McLaughlin v. County of Riverside, 888 F.2d 1276, 1279 (9th Cir. 1989), *vacated*, 500 U.S. 44.

between arrest and a probable cause determination.[22] In *Bernard*, the court interpreted *Gerstein* to mandate that probable cause determinations be made as soon as the administrative steps incident to arrest were completed.[23] The court upheld an injunction requiring a probable cause determination within twenty-four hours after arrest, reasoning that more time was not required to complete the administrative steps incident to arrest.[24]

The County's policy, permitting as much as forty-eight hours, plus an intervening Sunday or holiday, to elapse before a judicial determination of probable cause occurred, was not in accord with *Gerstein*'s promptness requirement.[25] The Ninth Circuit concluded that thirty-six hours was ample time to complete the necessary administrative procedures, especially considering Riverside County Jail was a centralized location and the county magistrates' offices were located across the street.[26]

2. The Supreme Court of the United States

After granting certiorari, the U.S. Supreme Court vacated the judgment of the Ninth Circuit.[27] The Court held that jurisdictions providing judicial determinations of probable cause within forty-eight hours of a warrantless arrest generally comply with the promptness requirement of the Fourth Amendment.[28] The Court interpreted *Gerstein* as implicitly recognizing that the Fourth Amendment strikes a balance between the rights of individuals and the realities of law enforcement, rather than compelling an immediate determination of probable cause upon completion of the administrative steps incident to arrest.[29] The Court reasoned that *Gerstein* was an "inherent" invitation

22. *See id.* at 1278 (citing Bernard v. City of Palo Alto, 699 F.2d 1023, 1025 (9th Cir. 1983)).

23. *See id.* at 1278 (citing Gerstein v. Pugh, 420 U.S. 103, 114 (1975)).

24. *See Bernard*, 699 F.2d at 1025. The Fourth and Seventh Circuits agreed that *Gerstein* called for a probable cause determination immediately following completion of the administrative steps incident to arrest. *See* Llaguno v. Mingey, 763 F.2d 1560, 1567 (7th Cir. 1985), *abrogated by McLaughlin*, 500 U.S. 44; Fisher v. Wash. Metro. Area Transit Auth., 690 F.2d 1133, 1138 (4th Cir. 1982), *abrogated by McLaughlin*, 500 U.S. 44.

25. *See McLaughlin*, 888 F.2d at 1278. Riverside County itself claimed that it did not need more than thirty-six hours to complete the administrative steps incident to arrest. *See id.*

26. *See id.* at 1278–79.

27. *McLaughlin*, 500 U.S. at 46.

28. *See id.* at 56.

29. *See id.* at 53–54.

to the states to experiment, and that compelling an immediate determination of probable cause upon completing the administrative steps incident to arrest eliminated any room for "flexibility and experimentation by the States."[30] However, the Court opined, "[F]lexibility has its limits; *Gerstein* is not a blank check."[31] The Supreme Court's primary justification in arriving at forty-eight hours, rather than the thirty-six hours suggested by the lower courts, was that "delays are inevitable."[32] To the Court, there would naturally be delays caused by "paperwork and logistical problems" as police officers "cope with the everyday problems of processing suspects through an overly burdened criminal justice system."[33] In arriving at forty-eight hours, the Court created a bright-line rule for pretrial determinations of probable cause.[34] Jurisdictions providing judicial determinations of probable cause within forty-eight hours would be presumptively prompt, effectively rendering them immune from any systemic challenges for unnecessary delay.[35] A probable cause determination rendered within forty-eight hours could still be found to violate the Fourth Amendment for unreasonable delay.[36] However, the Court emphasized that in evaluating whether a delay is unreasonable, courts should allow a *substantial* degree of flexibility and understanding for the unavoidable delays associated with making an arrest.[37] When an arrestee does not receive a probable cause determination within forty-eight hours, the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance to justify the delay.[38]

---

30. *Id.* at 53 (quoting Gerstein v. Pugh, 420 U.S. 103, 123 (1975)).

31. *Id.* at 55.

32. *Id.* at 55.

33. *Id.* The Court added that records would need to be reviewed, charging documents drafted, appearance of counsel arranged, and appropriate bail determined. *Id.* On weekends, the number of arrests is often higher and available resources tend to be limited. *Id.*

34. *Id.* at 56.

35. *Id.*

36. *Id.* Examples of unreasonable delay include delays for the purpose of gathering additional evidence to justify the arrest, delays motivated by ill will against the arrestee, or delays for delay's sake. *Id.*

37. *Id.* Examples of unavoidable delays include transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining an arresting officer who may be busy processing other suspects, and other practical realities. *Id.* at 57.

38. *Id.* The fact that in a particular case it may take longer than forty-eight hours to consolidate pretrial proceedings and there may be intervening weekends does not qualify as an extraordinary circumstance. *Id.*

3. The Dissent

Justice Scalia dissented. He fervently argued that *twenty-four* hours was a more appropriate outer boundary for providing a judicial determination of probable cause.[39] He adopted the appellate court's view that any delay in probable cause hearings beyond the completion of the administrative steps incident to arrest and arranging for a magistrate was unconstitutional.[40] Justice Scalia based his conclusion on common law protections against unlawful arrest in the Fourth Amendment.[41] He determined that any delay beyond the completion of the administrative steps incident to arrest for reasons unrelated to the arrangement of a probable cause hearing, or beyond twenty-four hours after the arrest, was unnecessary and constituted an unreasonable seizure within the meaning of the Fourth Amendment.[42] Justice Scalia argued that combining a probable cause determination with other proceedings did not justify delay.[43] He highlighted the text from *Gerstein* that a police officer's determination of probable cause provided for a brief period of detention "to take the administrative steps incident to arrest," but once in custody, "the reasons that justify dispensing with the magistrate's neutral judgment evaporate."[44] Justice Scalia was astonished that the majority would equate "a brief period of detention to take the administrative steps incident to arrest" with "two full days."[45] Justice Scalia further substantiated his conclusion with the interpretation of "prompt" by other courts.[46] At the time, many of the federal courts attempting to define "prompt" held that anything beyond twenty-four hours was an unreasonable amount of time to allocate for

39. *Id.* at 68 (Scalia, J., dissenting). Justice Marshall also dissented, joined by Justices Blackmun and Stevens. *Id.* at 59 (Marshal, J., dissenting). Justice Marshall wrote that a probable cause hearing is sufficiently prompt under *Gerstein* only when provided immediately following the completion of the administrative steps incident to arrest. *Id.* He would have affirmed the judgment providing for a judicial determination of probable cause within thirty-six hours. *Id.*

40. *Id.* at 63–64 (Scalia, J., dissenting).

41. *Id.* at 60. The law required an officer to deliver an arrestee to a magistrate "as soon as he reasonably can," with the only element bearing on the reasonableness of delay being "the arresting officer's ability . . . to reach a magistrate" who could issue the needed warrant for further detention. *Id.* at 61 (emphasis omitted).

42. *Id.* at 70.

43. *Id.* at 64.

44. *Id.* at 62–63 (emphasis omitted) (quoting Gerstein v. Pugh, 420 U.S. 103, 113–14 (1975)).

45. *Id.* at 64. Justice Scalia believed an arrestee was entitled to a prompt impartial determination as soon as his arrest was completed and the magistrate could be procured, not one that "suits the State's convenience in piggybacking various proceedings." *Id.* at 66.

46. *Id.* at 68.

the completion of arrest procedures.[47] Eight states explicitly required presentment or arraignment within twenty-four hours.[48] Twenty-four hours was consistent with the American Law Institute's Model Code,[49] and the American Bar Association concluded that no more than six hours should be required, except at night.[50]

C. Bailey v. City of Chicago

On September 24th, 2009, a fight broke out among rival students at a Chicago high school resulting in the death of a student.[51] Detectives obtained video footage of the brawl, and a fellow classmate and police officer familiar with the school identified Eugene Bailey as an attacker.[52] Based on these identifications, detectives arrested Bailey and brought him in for questioning at 9:00 PM on September 26th.[53] It was not until 7:40 PM on September 28th—almost forty-seven hours after his arrest—that Bailey received a judicial determination of probable cause.[54]

During the time between Bailey's arrest and the probable cause hearing, the detectives interviewed several witnesses, high school staff, and Bailey himself.[55] Bailey denied involvement.[56] He remained

47. *See id.* at 68–69; Gramenos v. Jewel Cos., 797 F.2d 432, 437 (7th Cir. 1986) (holding that twenty-four hours requires an explanation); Bernard v. City of Palo Alto, 699 F.2d 1023, 1025 (9th Cir. 1983) (finding that a probable cause hearing within twenty-four hours of arrest was reasonable); McGill v. Parsons, 532 F.2d 484, 485 (5th Cir. 1976) (holding that a "probable cause hearing must occur within a reasonable time after arrest, and in all events . . . not to exceed twenty-four (24) hours"); Lively v. Cullinane, 451 F. Supp. 1000, 1003 (D.D.C. 1978) (finding that the average time to process an arrestee should normally take no longer than an hour and a half); Sanders v. City of Houston, 543 F. Supp. 694, 702 (S.D. Tex. 1982), *aff'd*, 741 F.2d 1379 (5th Cir. 1984) (holding that a person arrested based upon a police officer's assessment of probable cause must be brought before a judicial officer no later than twenty-four hours after arrest).

48. *McLaughlin*, 500 U.S. at 69 (Scalia, J., dissenting).

49. *Id.* (citing MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 310.1 (AM. LAW INST. 1975)).

50. *McLaughlin*, 500 U.S. at 70 (Scalia, J., dissenting); STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE 10-4-1 (AM. BAR ASS'N 1992). The American Bar Association has since updated their Standards for Criminal Justice, including the Pretrial Release section, most recently in 2007. STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE (AM. BAR ASS'N 3d ed. 2007), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf.

51. Bailey v. City of Chicago, 779 F.3d 689, 691 (7th Cir. 2015), *cert. denied* 136 S. Ct. 200 (2015).

52. *Id.* at 692.

53. *Id.*

54. *Id.* at 693. Bailey remained in custody for the entirety of the forty-seven hours. *Id.*

55. *Id.* at 691–93.

56. *Id.* at 692.

detained while six members of the high school staff were interviewed.[57] The detectives resumed questioning shortly after midnight, and Bailey again denied that he was in the video.[58]

On September 27th, the detectives sent the video to the U.S. Secret Service for enhancement and to obtain still photographs of the individuals involved in the fight.[59] On the morning of September 28th, the detectives met with a supervisor in the Felony Review unit of the Cook County State's Attorney's Office (SAO).[60] The supervisor approved of first-degree murder charges against three other suspects, but she did not approve charges against Bailey because she wanted to continue to investigate his role in the attack.[61] The detectives placed a "detective hold" on Bailey until the following afternoon.[62] However, after Bailey requested an attorney during an interview at 5:00 PM on September 28th, the SAO approved first-degree and felony murder charges against Bailey at 5:40 PM.[63] Later that day, at 7:40 PM—two days after entering custody—a state judge held a hearing at the station where he entered a probable cause finding against Bailey.[64]

Despite that finding, on October 19th, the SAO dismissed all charges against Bailey.[65] Bailey then filed suit against the detectives and the city alleging, among other things, that his detention was excessive and unreasonable.[66] On appeal, Bailey argued that developments in technology "cry out for a reconsideration of the 48 hour period."[67] The court found that the evidence supporting Bailey's involvement in the brawl was stronger than the evidence for his non-involvement.[68] The initial statements by the student and police officer provided probable cause to arrest him; subsequent identifications of Bailey obtained through interviews "merely confirmed" the existence of

57. *Id.* at 691. Two staffers identified Bailey in the video. *Id.* The other four did not recognize the individual. *Id.*

58. *Id.* Bailey remained in custody. *Id.*

59. *Id.* The detectives spoke with several witnesses again. *Id.* at 693.

60. *Id.* According to an SAO policy, it reviews every violent crime before felony charges are approved. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 694–95. The district court granted the defendants' motion for summary judgment and dismissed Bailey's complaint. Bailey v. City of Chicago, No. 10 C 5735, 2013 WL 5835851, at *25 (N.D. Ill. Oct. 30, 2013), *aff'd*, 779 F.3d 689.

67. *Bailey*, 779 F.3d at 695 (citing Brief and Short Appendix of Plaintiff-Appellant, *Bailey*, at *18, 779 F.3d 689 (No. 13-3670)).

68. *Id.*

probable cause.[69] The court held that because Bailey was detained for fewer than forty-eight hours prior to his probable cause hearing, his detention was presumed to be reasonable.[70]

Bailey petitioned for writ of certiorari to the U.S. Supreme Court, arguing that the Court should revisit the Forty-Eight-Hour Rule "in light of technological advances in computer networks and automatic fingerprint identification systems" (AFIS).[71] He explained that "[q]uantum leaps in technology in the almost 25 years since . . . *County of Riverside* warrant revisiting that 48-hour period . . . [and] render the [Rule] a relic of a horse and buggy era."[72] Moreover, "[a] 48-hour period may have been appropriate in 1991, but it can hardly be justified in 2015."[73] Nonetheless, the Supreme Court denied certiorari on October 5th, 2015.[74]

II. CURRENT STATE OF THE LAW

Several states explicitly call for a judicial determination of probable cause within a time period of less than forty-eight hours. For instance, Arizona requires that a person arrested be taken before a magistrate "without unnecessary delay," or "within 24 hours after arrest."[75] Similarly, Massachusetts mandates that where a judicial determination of probable cause is required, it must be done as soon as reasonably

---

69. *Id.*

70. *Id.* The court refused to reexamine the Forty-Eight-Hour Rule as

> [t]he balance of the detectives' efforts were spent interviewing suspects and witnesses—activities that technology has yet to render appreciably more efficient. The principal cause of the delay in conducting a probable cause hearing was the City's policy that required all violent felonies to be reviewed by the SAO before charges are approved.

Id.

71. Petition for Writ of Certiorari at (i), Bailey v. City of Chicago, 136 S. Ct. 200 (2015) (No. 15–79). AFIS is a system of electronic fingerprint databases. *See infra* Section IV(D)(1)(a)(ii).

72. Petition for Writ of Certiorari, *supra* note 71, at 9a–12a.

> Police departments are now linked to law enforcement databases by high-speed computer networks; fingerprints can be compared with lightning speed by automatic fingerprint identification systems ("AFIS"), police reports are prepared by direct input into a computer workstation, and police officers have access to all of this technology through in-car computer systems.

Id. at 12a.

73. *Id.*

74. *Bailey*, 136 S. Ct. at 200.

75. ARIZ. R. CRIM. P. 4.1(a). The rule also mandates steps necessary to "assure that a magistrate is available every day of the week to hold initial appearances." *Id.* at 4.1(d).

possible, but no later than twenty-four hours after arrest absent exigent circumstances.[76]

Delaware requires that every arrestee be brought before a magistrate without unreasonable delay, and in any event within twenty-four hours, unless the court, for good cause, orders that person be held for a further period not to exceed forty-eight hours.[77] New Hampshire requires that an arrestee be taken before a district court without unreasonable delay, but not exceeding twenty-four hours, to answer for an offense.[78] In Missouri, all arrestees must be discharged from custody within twenty-four hours from the time of arrest, unless they are charged with a criminal offense and held by warrant.[79] In Iowa, unnecessary delay is defined as "any unexcused delay longer than 24 hours."[80] Under Rule 7 of the Utah Rules of Criminal Procedure, a determination of probable cause must be made "as soon as is reasonably feasible but in no event longer than 24 hours after the arrest."[81] The Rule was amended in 2014, replacing the preexisting "48 hours after the arrest" with the current "24 hours."[82]

Idaho's codification of the Forty-Eight-Hour Rule is somewhat peculiar. An "initial appearance" is defined as "the first appearance of the defendant before any magistrate."[83] Further, a defendant arrested with or without a warrant must be taken before a magistrate in that

---

76. MASS. R. CRIM. P. 3.1(a). Exigent circumstances include communication failures and natural disasters, not exigencies that relate solely to the investigative needs of police. *Id.*; *see also* Jenkins v. Chief Justice of the Dist. Court Dep't, 619 N.E.2d 324, 334–35 (Mass. 1993) (holding that the sole element bearing on the delay between a processed arrest and a judicial determination of probable cause is the time reasonably needed to reach a magistrate, which requires no more than twenty-four hours).

77. DEL. CODE ANN. tit. 11, § 1909(a) (West 2010).

78. *See* N.H. REV. STAT. ANN. § 594:20-a (2016); State v. Hughes, 605 A.2d 1062, 1066 (N.H. 1992) (holding that a determination of probable cause is required at the time of arraignment).

79. MO. ANN. STAT. § 544.170(1) (West 2005).

80. IOWA R. CRIM. P. 2.1(2)(d). The acceptible period is shorter whenever a magistrate is accessible and available. *Id.*; *see also* IOWA CODE ANN. § 804.22(1) (West 2013) ("[A] person arrested shall, without unnecessary delay, be taken before the nearest or most accessible magistrate in the judicial district in which such arrest was made or before a magistrate in an approved judicial district."); State v. Penn-Kennedy, 862 N.W.2d 384, 388 (Iowa 2015) (holding that the period of time between the arrest and the initial appearance normally must not exceed twenty-four hours).

81. UTAH R. CRIM. P. 7(c)(1).

82. *Utah State Court Rules – Approved: Nov. 1, 2014*, UTAH COURTS, http://www.utcourts.gov/resources/rules/approved/urcrp007 (last visited Nov. 20, 2016). In Utah, the arrestee need not be present at the probable cause determination and the written probable cause statement may be presented to the magistrate through verbal communication by telephone or electronic transmission. UTAH R. CRIM. P. 7(c)(1)–(2).

83. IDAHO CRIM. R. 5(a).

judicial district without "unreasonable delay," defined as some time no more than twenty-four hours following the arrest.[84] At the initial appearance following a warrantless arrest, the magistrate must also make a determination of probable cause.[85] However, under the statute, a judicial determination of probable cause need only be made within forty-eight hours of arrest.[86]

Initially, Alaska held that an arrestee must be taken before a magistrate within twenty-four hours after arrest, including Sundays and holidays.[87] However, in 2011 the Alaska legislature curiously amended the rule from twenty-four hours to forty-eight hours.[88]

III. REDUCING THE FORTY-EIGHT-HOUR RULE

A. *Introduction*

The Forty-Eight-Hour Rule is in need of reevaluation in light of several significant technological advancements that have affected police enforcement and police departments in the twenty-five years following *McLaughlin*. It was only seven months *after* the holding in *McLaughlin* that the first web browser was released.[89] By 1994, many people were still struggling with the question, "What is Internet[,] anyway?"[90]

The majority in *McLaughlin* addressed what it saw as a "practical compromise" between the rights of individuals and the realities of law enforcement: the rights of individuals being the entitlement to prompt judicial determination of probable cause and the realities of law enforcement being the varying nature of pretrial procedures among jurisdictions.[91] However, the majority failed to provide a sufficiently detailed explanation as to how they arrived at forty-eight hours,

84. *Id.* R. 5(b).

85. *Id.* R. 5(c).

86. *Id.* It is unclear why the State would allow for a longer time frame for the judicial determination of probable cause, which does not require the presence of the defendant, and a shorter time frame for the initial appearance, which requires the presence of the defendant.

87. An Act of July 1, 2011, ch. 19, §§ 23, 24, 2010 Alaska Sess. Laws (amending Alaska Rule of Criminal Procedure 5).

88. *Id.*

89. *The Birth of the World Wide Web: 10/01/1991 - The Web Extends to the High-Energy-Physics Community,* CERN, http://timeline.web.cern.ch/timelines/The-birth-of-the-World-Wide-Web/overlay (last visited Nov. 20, 2016).

90. Victor Luckerson, *Katie Couric and Bryant Gumbel Grapple with Newfangled 'Internet' in BMW Ad,* TIME (Jan. 29, 2015), http://time.com/3687933/katie-couric-bryant-gumbel-internet-bmw.

91. County of Riverside v. McLaughlin, 500 U.S. 44, 52–53 (1991) (quoting Gerstein v. Pugh, 420 U.S. 103, 113 (1975)); *see also id.* at 60 (Scalia, J., dissenting).

considering case law at the time indicated twenty-four or thirty-six hours as more appropriate.[92]

B. The Forty-Eight-Hour Formula

In its crudest form, the formula the majority used in arriving at forty-eight hours was the time needed to complete the administrative steps incident to arrest and arrange for a magistrate's judicial determination of probable cause, plus time allotted for flexibility to combine pretrial procedures.[93] It is readily apparent that the biggest discord between the majority and Justice Scalia was the second factor, flexibility.[94] Justice Scalia believed a judicial determination of probable cause should immediately follow the administrative steps incident to arrest; the majority believed that additional time for flexibility was needed.

Justice Scalia certainly believed that twenty-four hours served as a sufficient amount of time to complete the administrative steps incident to arrest and arrange for a magistrate.[95] The majority may have also considered twenty-four hours to be sufficient. Again, their primary disagreement centered on "flexibility and experimentation by the States," not the time needed to complete the administrative steps incident to arrest.[96]

92. *See* McLaughlin v. County of Riverside, 888 F.2d 1276, 1276 (9th Cir. 1989), *vacated*, 500 U.S. 44 (1991); Gramenos v. Jewel Cos., 797 F.2d 432, 437 (7th Cir. 1986); Bernard v. City of Palo Alto, 699 F.2d 1023, 1025 (9th Cir. 1983); McGill v. Parsons, 532 F.2d 484, 486 n.2 (5th Cir. 1976); Sanders v. City of Houston, 543 F. Supp. 694, 701–03 (S.D. Tex. 1982), *aff'd*, 741 F.2d 1379 (5th Cir. 1984); Lively v. Cullinane, 451 F. Supp. 1000, 1003 (D.D.C. 1978).

93. For the purposes of this Note, completion of the administrative steps incident to arrest and arranging for a magistrate will be considered one factor.

94. *McLaughlin*, 500 U.S. at 66–67 (Scalia, J., dissenting) ("The Court and I both accept two . . . factors, completion of the administrative steps incident to arrest and arranging for a magistrate's probable-cause determination . . . . [W]e disagree, however, upon a third factor—the Court believing, as I do not, that 'combining' the determination with other proceedings justifies a delay . . . .").

95. *Id.* at 70.

96. *Id.* at 54 (majority opinion) (quoting *Gerstein*, 420 U.S. at 123).

Thus, the majority's formula in determining forty-eight hours as an outer limit for prompt judicial determination of probable cause might look as follows:

Administrative Steps Incident to Arrest & Arranging for a Magistrate (24 Hours)	+	Flexibility in Conjunction with Pretrial Procedures (24 Hours)	=	Prompt Judicial Determination of Probable Cause (48 Hours)

If, in light of technological advancements, the time needed to complete the administrative steps incident to arrest has been reduced over time, how would that affect the formula? If, on average, the time needed to complete the administrative steps incident to arrest had been decreased to twelve hours, instead of twenty-four, would the time allotted for flexibility remain stagnant? Would the rationale in leaving the Forty-Eight-Hour Rule unchanged be that flexibility is now allotted thirty-six hours? Or would the total sum be reduced? If administrative steps incident to arrest have been reduced by half, it follows that time allotted for flexibility would be reduced by half.

As the time needed to complete a task evolves, the time allotted for flexibility should evolve. For example, the standard delivery time for a letter sent using the U.S. Postal Service is anywhere from two to three business days.[97] Certainly the sender of a letter cannot expect a response that same day. Flexibility time must be allotted for the recipient to receive the letter, read the letter, draft the response, and mail the response letter back. Realistically, it could take upwards of a week for the sender to receive a response. Using email, however, the time allotted for flexibility is much shorter. The content is the same, but in most instances, the sender would likely expect a response within several hours, as the message is sent and received instantaneously. It would be impractical to allot the same amount of flexibility time for a letter to the recipient of email.

97. Earl Rinehart, *Mailing a Letter Across Town Today? Don't Expect It to Arrive Tomorrow*, COLUMBUS DISPATCH (Jan. 14, 2015), http://www.dispatch.com/content/stories/local/2015/01/13/local-overnight-mail-to-take-longer.html.

It is apparent that the time needed to complete the administrative steps incident to arrest have been reduced to an extent that warrants a reevaluation of the Forty-Eight-Hour Rule.

C. The Administrative Steps Incident to Arrest

In *Gerstein*, the phrase "administrative steps incident to arrest" only appears once, and the opinion does not offer any examples of what those steps entail.[98] In *McLaughlin*, the majority offered several examples, reasoning that there would be natural "delays caused by paperwork and logistical problems."[99] The Court further expanded that the steps include the booking, photographing, and fingerprinting of the suspect and cataloging of his personal effects.[100]

In 2000, CONSAD Research Corporation conducted a comparative assessment on the conventional and automated booking process utilized by police officers in Pennsylvania.[101] Under the conventional approach, after making an arrest, the arresting officer would transport the suspect to his respective department, where he would book the suspect.[102] At the police station, the officer would complete a field report or incident report containing the officer's notes describing events and

98. *Gerstein*, 420 U.S. at 113–14 ("[A] policeman's on-the-scene assessment of probable cause provides . . . for a brief period of detention to take the administrative steps incident to arrest.").

99. *McLaughlin*, 500 U.S. at 55.

100. *Id.* at 58; *id.* at 65 n.2 (Scalia, J., dissenting); *see also* Maryland v. King, 133 S. Ct. 1958, 1977 (2013) (confirming the administrative steps incident to arrest as booking, photographing, and fingerprinting); Patrick v. Jasper Cty., 901 F.2d 561, 567 (7th Cir. 1990) (explaining circumstances accompanying a detainee's arrest, including transportation, booking, filing, photographing, fingerprinting, identity verification, and criminal record checks); Kanekoa v. City of Honolulu, 879 F.2d 607, 611 (9th Cir. 1989) (concluding that administrative steps included completing paperwork, searching the suspect, inventorying property, fingerprinting, photographing, checking for prior record, laboratory testing, interrogating the suspect, verifying alibis, ascertaining similarities to other related crimes, and conducting line-ups); Williams v. Ward, 845 F.2d 374, 377 (2d Cir. 1988) (elaborating on police photographing the arrestee, taking the arrestee's fingerprints, searching and securing the arrestee, and conducting further supervisory review of the charges); Sanders v. City of Houston, 543 F. Supp. 694, 700 (S.D. Tex. 1982), *aff'd*, 741 F.2d 1379 (5th Cir. 1984) (holding that the administrative steps incident to arrest include completing paperwork, fingerprinting, photographing, and checking prior records).

101. CONSAD RESEARCH CORP., FINAL REPORT: COMPARATIVE ASSESSMENT OF THREE POLICE BOOKING CENTER PROJECTS 1 (2000), http://pacrimestats.info/PCCDReports/EvaluationResearch/Completed%20Research/Technology%20and%20Automation/Central%20Booking%20Centers/Central%20Booking%20Eval%20Report%20Apr2000.pdf.

102. *Id.* at 8.

information pertinent to the crime committed.[103] Using these notes, the officer would generate a criminal complaint form, an affidavit of probable cause, and an arrest report.[104]

From there, the suspect would be fingerprinted and photographed.[105] For each arrest, the police department would send two fingerprint cards to a central repository (one state card and one FBI card).[106] Upon receipt of the fingerprint cards, staff at the repository would sort and scan the cards into the computerized AFIS.[107] From all of this, it can be gathered that the two major steps incident to arrest are (1) identification and (2) information processing.[108]

D. Technological Advancements Affecting the Administrative Steps Incident to Arrest

1. Identification

One of the first administrative steps incident to an arrest is the need for law enforcement officers to identify the persons they are taking into custody "in a safe and accurate way."[109] In many instances this is easier said than done.[110] The task of identification entails "searching public and police records based on the identifying information provided by the arrestee to see what is already known about him."[111] Police may compare the suspect's booking photograph to sketch artists' depictions of persons of interest, show the mug shot to potential witnesses, and use biometric identification technology to make computerized

103. *Id.* at 8–9.

104. *Id.* at 9. The criminal complaint form would contain the suspect's identifying information and describe the charges in legal terms. *Id.* The affidavit of probable cause would contain a narrative version of the incident that occurred. *Id.* The arrest report would contain much of the same information. *Id.*

105. *Id.* at 7–10.

106. *Id.* at 9.

107. *Id.* at 9–10.

108. Identification includes fingerprinting, photographing, and checking a suspect's prior record. Information processing includes data transmission, paperwork, reviewing records, and drafting charging documents.

109. Maryland v. King, 133 S. Ct. 1958, 1970 (2013).

110. "It is a well recognized aspect of criminal conduct that the perpetrator will take unusual steps to conceal not only his conduct, but also his identity." Jones v. Murray, 962 F.2d 302, 307 (4th Cir. 1992). An "arrestee . . . may be carrying a false ID or lie about his identity," and "criminal history records . . . can be inaccurate or incomplete." Florence v. Bd. of Chosen Freeholders of Burlington, 132 S. Ct. 1510, 1512 (2012).

111. *King*, 133 S. Ct. at 1972.

comparisons of an arrestee's features against electronic databases.[112] More recently, DNA has gravitated toward the forefront of reliable means of identification.[113]

a. Fingerprinting

"From the advent of this technique, courts had no trouble determining that fingerprinting was a natural part of 'the administrative steps incident to arrest.'"[114] However, prior to the introduction of the FBI's Integrated Automated Fingerprint Identification System (IAFIS) in 1999, the processing of fingerprint submissions was largely a manual, labor-intensive, and time-consuming process.[115] Increased computing power and carefully crafted algorithms have made it possible to automate the quick and accurate identification of various biometrics.[116]

i. Traditional Inking

At the onset of the 1990s, the fingerprinting process could take anywhere from four to twelve hours to complete.[117] The process began with inking.[118] The police officer would use a special roller to spread black ink evenly across a glass or metal slab.[119] The officer would then place ink on the suspect's right thumb by manually rolling the thumb over the slab and subsequently roll the thumb from side-to-side onto a

112. *Id.* at 1971–72. Biometric identification refers to anatomical, physiological, or behavioral characteristics that can be used for automated recognition. Jeffrey A. Rose, *The Future of Corrections: How Can Mobile Biometric Technology Revolutionize the Arrest and Booking Process?*, POLICECHIEF (Dec. 2014), http://www.policechiefmagazine.org/the-future-of-corrections-how-can-mobile-biometric-technology-revolutionize-the-arrest-and-booking-process. Behavioral characteristics consist of signatures and voice. *Id.* Physiological characteristics consist of blood and DNA. *Id.* Anatomical characteristics consist of fingerprints, irises, and faces. *Id.*

113. *King*, 133 S. Ct. at 1971.

114. *Id.* at 1976 (quoting County of Riverside v. McLaughlin, 500 U.S. 44, 58 (1991)). Routine fingerprinting fits within the accepted means of processing an arrestee into custody. *Id.* (citing United States v. Kelly, 55 F.2d 67, 69–70 (2d Cir. 1932)).

115. *Id.*

116. *Id.*

117. Williams v. Ward, 845 F.2d 374, 376–77 (2d Cir. 1988); Pat Raburn-Remfry, *Expediting Arrest Processing*, 2 CORNELL J.L. & PUB. POL'Y 121, 155 (1992); *see also* Mustfov v. Superintendent of Chi. Police Dep't, 733 F. Supp. 283, 298 (N.D. Ill. 1990) (finding that it could take anywhere from four to twelve hours, or more, for fingerprint clearance).

118. Raburn-Remfry, *supra* note 117, at 154.

119. CONSAD RESEARCH CORP., *supra* note 101, at 9.

white fingerprint card, creating a fingerprint impression.[120] The officer would repeat this process with each of the other fingers.[121] The officer would then manually record any additional information, such as the suspect's name, date of birth, other identifying and demographic information, and the charges against the suspect, on each card.[122]

There were several shortcomings with the inking method.[123] There was "an art to manual fingerprinting."[124] The quality of a fingerprint was "entirely dependent upon the skill and patience of the processing officer."[125] Various forms of human error, including the amount of ink placed on the suspect's fingers, the amount of pressure applied in placing the suspect's finger on the fingerprint card, and the motion of rolling the finger could lead to a fingerprint impression that was too light, too dark, smudged, or smeared.[126] If the impression for one finger was unreadable, the entire fingerprint card needed to be discarded and all of the fingerprints recaptured.[127]

The entire fingerprinting process would typically be repeated three times to produce a card for the state police, a card for the police department, and a card for the FBI.[128] The fingerprints would either be mailed or transported by automobile to an appropriate central booking facility for electronic transmission.[129] Counties with access transmitted fingerprints using laser facsimile equipment.[130] The fingerprints were usually received within thirty seconds of transmission.[131] However, with the increased transmission speed of fax equipment came a weaker resolution of the image.[132] Thus, delays were likely to occur as a result of poor image quality.[133]

The central facility would then use the fingerprints to retrieve an arrestee's rap sheet, which included any criminal record, outstanding

120. *Id.*; Raburn-Remfry, *supra* note 117, at 154.
121. CONSAD RESEARCH CORP., *supra* note 101, at 9.
122. *Id.*; Raburn-Remfry, *supra* note 117 at 154.
123. CONSAD RESEARCH CORP., *supra* note 101, at 11.
124. *Id.*
125. *Id.* at 12.
126. *Id.*
127. *Id.*
128. *Id.* at 9.
129. *Id.*; Williams v. Ward, 845 F.2d 374, 376 (2d Cir. 1988).
130. *Williams*, 845 F.2d at 377.
131. *Id.*
132. *Id.*
133. *Id.* In 1990, nearly twenty-five percent of the fingerprint cards faxed for classification and identification were unreadable. Raburn-Remfry, *supra* note 117, at 155. In some cases, reissuing the original card resolved the problem. *Id.* In many other cases, however, the detainee had to be reprinted before the computer could properly classify the fingerprints. *Id.*

warrants, or alleged aliases.[134] A staff member would input the identification information into the mainframe computer, which would then produce possible fingerprint matches.[135] The staff member would then visually compare the fingerprint results with the fingerprints on the fax.[136] If the staff member discovered a match, he or she would then generate the arrestee's rap sheet and fax it to the central booking unit.[137] This process could take on average three hours to complete.[138]

However, if the information received from the central facility contained incomplete or outdated information, the police would need to confirm and compare the information with other records, a process that could take an additional hour.[139] Furthermore, regardless of the method of transmission used, the pace at which transmissions were made was dependent upon the number of police personnel available to take fingerprints, the number of machines available to transmit and to receive fingerprints and rap sheets, and the number of persons available to operate such machines.[140] The entire process, from the first faxing of the prints to the receipt of the rap sheets, could take nine hours to complete.[141]

ii. Automated Fingerprint Identification System

As a solution to the growing problems inherent with the inking process and the manual system used for searching and matching fingerprints, the Automated Fingerprint Identification System (AFIS) technology was developed.[142] AFIS technology is composed of two interdependent subsystems, the ten-print subsystem and the latent

134. *Williams*, 845 F.2d at 377.
135. Raburn-Remfry, *supra* note 117, at 154.
136. *Id.* at 155–56.
137. *Id.*
138. *Williams*, 845 F.2d at 377; *see also* Raburn-Remfry, *supra* note 117, at 154–55 (estimating that faxing and analyzing fingerprints took roughly forty-five minutes and another two to three hours to prepare a correct criminal history for transmission).
139. *Williams*, 845 F.2d at 377.
140. *Id.*
141. Raburn-Remfry, *supra* note 117, at 155 ("[I]n May of 1990, one of the most significant delays in the arrest to arraignment process resulted from DCJS rejection of fingerprints.").
142. Kenneth R. Moses et al., *Automated Fingerprint Identification System (AFIS)*, *in* THE FINGERPRINT SOURCEBOOK 6-1, 6-3 (Alan McRoberts & Debbie McRoberts eds., 2011), https://www.ncjrs.gov/pdffiles1/nij/225320.pdf ("Complete classification and searching against the massive files could only be accomplished at an average rate of 3.3 cards per employee per hour."). As the number of fingerprint records grew, the amount of human resources necessary to process search requests increased significantly. *Id.* at 6-4.

subsystem, each operating with considerable autonomy.[143] The ten-print subsystem, used for criminal identification, is a computerized scanner system that automatically identifies sets of inked, or "livescan," fingerprints incident to an arrest.[144] Livescan refers to a form of fingerprinting using fingerprint sensors and scanners to acquire a digital fingerprint image, or "on-line" image, directly from a finger without the intermediate use of ink and a paper card.[145]

The officer or agent places the suspect's fingers on a clear, glass plate and rolls them from side-to-side, similar to the conventional inking method, as the fingerprints are captured electronically.[146] Livescan booking stations run an algorithm that captures multiple images of the fingerprint during a single rolling of a finger on the scanner and produces a large rolled image.[147] The machine also provides real-time previews of the fingerprint images on a monitor to assist the operator in placing or aligning fingers correctly.[148] A fingerprint image quality-checking algorithm also runs to alert the operator of a poor quality fingerprint image.[149]

AFIS technology has the ability to search a set of known ten-print fingerprints against an existing ten-print database (TP–TP), match and pair minutiae, and return with highly accurate results.[150] Today, AFIS technology can yield results from the search of nearly one million records in under a minute.[151] The use of AFIS systems in local police departments drastically increased from twenty percent in 2000 to

143. *Id.* at 6-9. The latent subsystem, used for criminal investigation, is a more tedious and time-consuming process, identifying fragmentary fingerprints developed from crime scenes and physical evidence. *Id.* at 6-10.

144. *Id.* at 6-9.

145. *Id.* at 6-20. "Off-line" images are digital images of fingerprint impressions developed using the inking method that have been digitized by scanning the inked card. *Id.*

146. CONSAD RESEARCH CORP., *supra* note 101, at 9. While there are a number of livescan sensing mechanisms that can be used to detect the ridges and valleys present in the fingertip, optical scanners have the longest history and highest quality. Moses, *supra* note 142, at 6-21.

147. Moses et al., *supra* note 142, at 6-21.

148. *Id.*

149. *Id.* Some machines also contain special options for fingerprinting suspects with deformed, burned, amputated, or bandaged hands, and printers that produce fingerprint images on conventional fingerprint cards. CONSAD RESEARCH CORP., *supra* note 101, at 15.

150. Moses et al., *supra* note 142, at 6-10. The technology can also search a latent print from a crime scene against a ten-print database (LP–TP) or against latent prints on file from other crime scenes (LP–LP), and search a new ten-print addition to the database against all unsolved latent prints in file (TP–LP). *Id.*

151. *Id.*

seventy percent in 2007.[152] More than ninety percent of departments serving twenty-five thousand or more residents had access to an AFIS system; one hundred percent of departments serving two hundred-fifty thousand or more residents had access.[153]

iii. Integrated Automated Fingerprint Identification System

In 1999, the FBI introduced the IAFIS, a national fingerprint and criminal history system capable of responding to requests from local, state, and federal AFIS twenty-four hours a day, three hundred and sixty-five days a year.[154] "IAFIS provides automated fingerprint search capabilities, latent search capabilities, electronic image storage, and electronic exchange of fingerprints and responses."[155] In its first year, IAFIS processed "nearly 14.5 million fingerprint submissions."[156] Today, a similar number of fingerprint submissions take only three to four months to process.[157] Additionally, IAFIS has exceeded expectations in the response times required to conduct criminal searches, latent fingerprint searches, and electronic criminal fingerprint searches.[158] On average, IAFIS can process a criminal search request in twenty minutes and a latent fingerprint search in two hours, as opposed to the originally projected two hours, and twenty-four hours, respectively.[159] Electronic criminal fingerprint submission searches take roughly twenty-seven minutes.[160]

---

152. MATTHEW J. HICKMAN & BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 196002, LOCAL POLICE DEPARTMENTS 2000 (2003) [hereinafter LOCAL POLICE DEPARTMENTS 2000]; BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 231174, LOCAL POLICE DEPARTMENTS 2007 (2010) [hereinafter LOCAL POLICE DEPARTMENTS 2007].

153. LOCAL POLICE DEPARTMENTS 2007, *supra* note 152.

154. *The Integrated Automated Fingerprint Identification System*, FED. BUREAU INVESTIGATION, https://www.fbi.gov/file-repository/about-us-cjis-fingerprints_biometrics-biometric-center-of-excellences-iafis_0808_one-pager825 (last visited Nov. 20, 2016). The IAFIS houses more than 59 million criminal history records with nearly 9000 new records established and 104,000 fingerprints submitted per day. *Id.* IAFIS is maintained by the FBI's Criminal Justice Information Services (CJIS) Division in Clarksburg, West Virginia. Moses et al., *supra* note 142, at 6-12.

155. *The Integrated Automated Fingerprint Identification System*, *supra* note 154. Additionally, with each fingerprint came corresponding criminal histories, mug shots, scars, tattoo photos, aliases, and physical characteristics including height, weight, and hair and eye color. Maryland v. King, 133 S. Ct. 1958, 1987 (2013).

156. Moses et al., *supra* note 142, at 6-12.

157. *Id.*

158. *Id.*

159. *Id.*

160. *King*, 133 S. Ct. at 1987.

b. Next Generation Identification System

In September 2014, the FBI introduced the Next Generation Identification (NGI) system, a technological upgrade from, and effective replacement of, the IAFIS.[161] NGI is capable of accommodating increased information processing and sharing demands from more than 18,000 local, state, tribal, federal, and international law enforcement agencies using state-of-the-art biometric identification services.[162] The largest biometric database in the world,[163] NGI is available to both federal and state law enforcement bodies and accessible by the FBI and police around the country.[164] NGI allows police to quickly and easily identify individuals "from serious crimes to routine traffic stops."[165] Using NGI, the waiting time to identify a perpetrator during an arrest can be reduced from two hours using IAFIS to ten minutes.[166]

i. Advanced Fingerprint Identification Technology

The FBI began the six-increment process of building NGI in 2008.[167] Increment Zero was an overall "tech-refresh" of IAFIS workstations, replacing obsolete hardware with newer, more efficient technology.[168] Increment One, released in 2011, implemented a new fingerprint-matching algorithm using Advanced Fingerprint Identification Technology (AFIT).[169] AFIT enhanced the agency's ability to perform back-end processing of ten-print fingerprint data from IAFIS, increasing fingerprint matching accuracy with lower response times,

---

161. *Next Generation Identification (NGI)*, FBI, https://www.fbi.gov/about-us/cjis/fingerprints_biometrics/ngi (last visited Nov. 20, 2016).

162. *Improving Criminal Identification*, LEIDOS, https://www.leidos.com/it-modernization/mission-it/improving-criminal-identification?host=h (last visited Nov. 20, 2016). NGI currently operates in roughly seventy-five percent of the country's law enforcement agencies. Jessica Hughes, *FBI Facial Recognition System Gives Officers an Investigative Lead*, GOV'T TECH. (Oct. 20, 2014), http://www.govtech.com/public-safety/FBI-Facial-Recognition-System-Gives-Officers-an-Investigative-Lead.html.

163. Eric Markowitz, *The FBI Now Has the Largest Biometric Database in the World. Will It Lead to More Surveillance?*, INT'L BUS. TIMES (April 5, 2016), http://www.ibtimes.com/fbi-now-has-largest-biometric-database-world-will-it-lead-more-surveillance-2345062.

164. *Improving Criminal Identification*, *supra* note 162.

165. Robert Williams, *Introducing Big Brother's Secret Weapon*, WALL ST. DAILY (Sept. 29, 2014), http://www.wallstreetdaily.com/2014/09/29/fbi-next-generation-identification.

166. *Id.* For background checks, employers will have results in fifteen minutes. *Id.*

167. Adam Vrankulj, *NGI: A Closer Look at the FBI's Billion-Dollar Biometric Program*, BIOMETRICUPDATE.COM (Nov. 4, 2013), http://www.biometricupdate.com/201311/ngi-a-closer-look-at-the-fbis-billion-dollar-biometric-program.

168. *Id.*

169. *Id.*; *see also Improving Criminal Identification*, *supra* note 162.

increasing daily fingerprint processing capacity, and improving system availability.[170] AFIT improved matching accuracy from approximately 92% in 2000 to over 99.6%, and reduced the number of manual fingerprint reviews required by 90%.[171] NGI houses more than 230 million digital records and can process over half a million transactions a day.[172] Routine searches for identification can take as little as thirty minutes.[173]

ii. Mobile Biometric Technology

Historically, law enforcement officers were trained to make an arrest and then transport the suspect to a local or central facility for booking.[174] However, mobile identification technology "is becoming cheaper and more accessible."[175] Mobile identification devices are capable of scanning fingerprints in the field, allowing police officers to identify suspects and reveal aliases.[176] Mobile fingerprint scanners are essentially a handheld version of the fixed livescan fingerprint systems used at central booking facilities.[177] The scanners have a "postage stamp-size platen for the fingertip," equipped to capture fingerprints and electronically transmit them to computer and AFIS databases for comparison.[178] Comparisons of transmitted fingerprint data made with local computer databases usually take only a few seconds.[179] If a match is found, the information associated with that match is returned to the device that sent the inquiry.[180] The use of mobile identification devices not only enhances an officer's ability to identify a suspect in the field but it also accelerates the overall arrest process.[181] As opposed to taking a suspect's name on faith and needing to wait until arrival at the booking facility to record fingerprints and substantiate the individual's

170. Vrankulj, *supra* note 167.
171. *Next Generation Identification*, *supra* note 161; *Improving Criminal Identification*, *supra* note 162.
172. *Improving Criminal Identification*, *supra* note 162.
173. *Id.*
174. Rose, *supra* note 112.
175. Tim Dees, *Mobile Fingerprint Scanners Making Field IDs Easier*, POLICEONE.COM (Mar. 7, 2011), https://www.policeone.com/police-products/police-technology/biometrics-identification/articles/3395424-Mobile-fingerprint-scanners-making-field-IDs-easier/.
176. *Id.* Popular models include the Mobile Rapid ID hand-held scanner by Crossmatch Technologies and the Morpho RapID by Sagem Morpho. *Id.*
177. Rose, *supra* note 112.
178. Dees, *supra* note 175.
179. *Id.*; Rose, *supra* note 112.
180. Dees, *supra* note 175.
181. Rose, *supra* note 112.

identification, mobile identification technology allows the officer to positively identify a suspect at the beginning of the entire process.[182]

"By expanding the mobile identification platform, officers could actually arrest and properly book a suspect in a patrol setting."[183] "Mobile identification software can be configured to accept fingerprints, photographs, and the necessary demographic information to complete a 'mobile booking' process, which would eliminate the need to transport a subject to a [central booking facility]."[184] As the use of mobile biometric technology increases, the booking process and administrative processes associated with it could be significantly reduced, and the overall efficiency of the arrest would increase.[185]

iii. Repository for Individuals of Special Concern

Six months following the introduction of Increment One, Increment Two introduced the Repository for Individuals of Special Concern (RISC): a database containing the "biometric data of known or suspected terrorists, sex offenders, wanted persons, and other persons of special interest."[186] Accessed primarily using mobile identification devices, RISC supports rapid mobile identification searches, enabling officers and agents in the field to screen detainees and criminal suspects against a more limited repository of fingerprint records.[187] In a matter of seconds, "officers receive a response and are able to quickly assess the threat level of any subject encountered during their normal law enforcement activities."[188] RISC has the ability to process over

182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.* "The San Bernardino County, California Sheriff's Department has one of the largest deployments of mobile identification devices in the United States." *Id.* The Los Angeles County Sheriff's Department, the Riverside County Sheriff's Department, and the Los Angeles Police Department have all purchased mobile identification devices as well. *Id.*
186. Vrankulj, *supra* note 167.
187. *Id.*
188. *Repository for Individuals of Special Concern (2015)*, FED. BUREAU INVESTIGATION, https://www.fbi.gov/file-repository/repository-for-individuals-of-special-concern-brochure.pdf/view (last visited Nov. 20, 2016). RISC responses include a red, yellow, or green flag indicating threat level. *Id.* After making a routine traffic stop, a Florida State Trooper, using a rapid mobile ID device, submitted a transaction to the RISC system. *Id.* It returned a "red" response within forty-six seconds, notifying the trooper of an eight-year outstanding warrant in connection with a murder and aggravated assault for the subject. *Id.*

650,000 digital records per day and yield a response, on average, in less than ten seconds at a 99.6% accuracy rate.[189]

iv. National Palm Print System

Increment Three was introduced in 2013 as an improvement of latent processing services and established the National Palm Print System (NPPS).[190] The new latent processing system allows investigators to register and file latent prints, and the system cascades new prints coming in against that latent print.[191] The NPPS "contains millions of palm prints that are now searchable on a nationwide basis."[192] Both of these features allow investigators to perform a single search of the entire repository rather than the multiple searches required under the IAFIS.[193]

v. Interstate Photo System and Rap Back Service

In September 2014, the FBI announced, in conjunction with Increment Four's introduction of the Interstate Photo System (IPS) and Rap Back Service, that NGI was fully operational.[194] IPS is a face recognition service that allows law enforcement agencies to search a compilation of front-facing photographs received by the FBI with corresponding ten-print transactions and arrest information to assist

189. *Improving Criminal Identification*, *supra* note 162. In the 1980s, searches of the fingerprint repository by hand had a response time of twenty-seven days with a capacity of 22,000 fingerprints per day. *Id.* In the 2000s, IAFIS was capable of returning a response in two hours with a capacity of 160,000 fingerprints per day. *Id.* Today, the NGI is capable of returning a response in ten seconds with a capacity of 650,000 fingerprints per day. *Id.*

190. Vrankulj, *supra* note 167.

191. *Id.* If there is a match, latent examiners can then conduct side-by-side comparisons for identification. *Id.*

192. *Next Generation Identification*, *supra* note 161.

193. Vrankulj, *supra* note 167.

194. *Next Generation Identification: FBI Announces Biometrics Suite's Full Operational Capability*, FED. BUREAU INVESTIGATION (Sept. 23, 2014), https://www.fbi.gov/news/stories/2014/september/fbi-announces-biometrics-suites-full-operational-capability/fbi-announces-biometrics-suites-full-operational-capability. Increment Five, which has yet to take full form, is a test of Iris Recognition (IR). Vrankulj, *supra* note 167. The FBI sees high utility in future use—as the iris of the eye gains momentum as a strong biometric tool, IR is poised to offer law enforcement a new tool to quickly and accurately determine identity. *Id.* Increment Six, which also has yet to take form, is another "tech refresh" to ensure that all software and hardware used in the program is up to date. *Id.*

with identifications.[195] The photograph repository consists of both criminal and non-criminal photographs, including post-arrest mug shots, digital photos taken from surveillance camera footage, and photographs obtained from background checks.[196]

In the past, a suspect was photographed using Polaroid or thirty-five millimeter film.[197] Typically, mug shot photographs were not sent to central repositories but were kept on file at the arresting police department.[198] The police would glue the photographs onto a special card, which they would then file with the fingerprint card and other records.[199] "[O]lder cameras often produce[d] poor images and the equipment necessary for their operation and maintenance [was] difficult to obtain."[200] The digital mug shot system has since replaced the Polaroid mug shot camera.[201]

When an authorized law enforcement agency submits a photo image, or "probe photo," for face recognition, IPS automatically processes the image through its repository.[202] The automated face recognition software compares the probe photo against the repository and produces a ranked list of likely matches, or "candidate photos."[203] At that point, the law enforcement officer will need to conduct additional evaluation and investigation to determine if the candidate photos and the probe photo are the same subject.[204]

---

195. Ernest J. Babcock, *Privacy Impact Assessment for the Next Generation Identification (NGI) Interstate Photo System*, FED. BUREAU INVESTIGATION (2015), https://www.fbi.gov/services/records-management/foipa/privacy-impact-assessments/interstate-photo-system (last visited Nov. 20, 2016); *Next Generation Identification*, *supra* note 161. "NGI and IPS are expected to significantly enhance the speed and accuracy of law enforcement identifications . . . ." Babcock, *supra*; *see also* John Rivera, *Facial Recognition Technology: Staring down the Future*, POLICEONE.COM (Dec. 17, 2013), https://www.policeone.com/police-products/police-technology/articles/6678210-Facial-recognition-technology-Staring-down-the-future/.

196. Babcock, *supra* note 195; Williams, *supra* note 165.

197. CONSAD RESEARCH CORP., *supra* note 101, at 10.

198. *Id.*

199. *Id.*

200. *Id.* at 11.

201. *Id.* at 15. Systems typically consist of a digital camera, a monitor for viewing photographs, a color or black-and-white printer, and a personal computer that operates special software for electronically capturing, storing, and searching a database of suspect photographs. *Id.* Booking agents use the camera to take frontal and profile photographs, as well as photographs of scars, tattoos, and other distinguishing marks, which are stored in electronic files. *Id.*

202. Babcock, *supra* note 195.

203. *Id.* Candidate photos are so named because the information returned is provided only as an investigative lead and is not considered to be a positive identification. *Id.*

204. *Id.*

"The FBI offers a free facial recognition toolbox to law enforcement agencies [for cross-referencing] mugshot material . . . ."[205] At the time of its release, IPS contained over twenty-three million front-facing photos.[206] By the end of 2015, the system was expected to house over fifty-one million photographs.[207]

Rap Back Service provides authorized agencies with continuous monitoring of criminal activity for individuals in "positions of trust."[208] The NGI can cascade ten-print background checks against inbound arrest records.[209] If an individual in a position of trust commits a crime in another state, within twenty-four hours the FBI can notify the state.[210] Prior to Rap Back Service, out-of-state infractions could be missed for five years until a subsequent background check was performed.[211]

vi. DNA Identification and the Future

In *Maryland v. King*,[212] the Supreme Court ruled that the taking and analyzing of a cheek swab of an arrestee's DNA, like fingerprinting and photographing, is a legitimate police booking procedure under the Fourth Amendment.[213] At present, the processing of DNA for identification is not as rapid as that of ten-print processing through the NGI; however, it is "markedly more accurate."[214] In a matter of only several years, the processing of DNA for identification could effectively replace fingerprint identification altogether. The processing time for DNA has been reduced from a year or more in 2009, to one hundred and twenty-five days in 2010, to twenty days in 2012.[215]

---

205. Vrankulj, *supra* note 167.

206. *Next Generation Identification*, *supra* note 161.

207. Williams, *supra* note 165. In 2016, the U.S. Government Accountability Office reported that the FBI's facial-recognition systems have access to nearly 412 million photographs, 29.7 million of which are accessible through the IPS. Henry T. Casey, *FBI Using 400 Million Photos for Facial Recognition*, FOX NEWS TECH (June 16, 2016), www.foxnews.com/tech/2016/06/16/fbi-using-400-million-photos-for-facial-recognition.html. There are currently sixteen states participating in the IPS, with another half-dozen expected to join by the end of 2016. Markowitz, *supra* note 163.

208. Vrankulj, *supra* note 167. Positions of trust include bank tellers, teachers, and people that work with the elderly. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. 133 S. Ct. 1958, 1972 (2013).

213. *Id.* The use of DNA for identification is no different than matching fingerprints; it uses a different form of identification, but its function is the same. *Id.*

214. *Id.* at 1972–76.

215. *Id.* at 1977. This is a decrease of roughly 94.5 percent in three years.

The FBI has continued to research "rapid DNA" technology, and in 2014 began testing the RapidHIT 200, a DNA scanner capable of generating a DNA profile in as little as ninety minutes.[216] The RapidHIT 200 checks the DNA profile against its database and reports on whether a match exists.[217] Police in Arizona, Florida, and South Carolina have started to use rapid DNA technology and the RapidHIT 200.[218] The FBI is currently working with Congress on a bill that would give "tens of thousands" of police stations rapid-DNA machines that could search the FBI's system and add arrestees' profiles to it.[219] This bill, coupled with the continued advancement of new technology, will likely further improve DNA identification's speed and effectiveness.[220]

2. Information Processing

At the time of *McLaughlin*, an arresting officer, upon making a warrantless arrest and transporting the arrestee to the central booking facility, would generally prepare a handwritten arrest report.[221] The officer would then enter the information from the handwritten report into a computer and electronically transmit fingerprints and other identification data to a central facility to obtain the arrestee's rap sheet.[222] In 1981, fewer than 300 computers were linked to the Internet, and by 1989, the number stood at fewer than 90,000 computers.[223] Today, there are likely somewhere between eight and ten billion traditional computer and mobile devices connected to the Internet.[224]

---

216. Shane Bauer, *The FBI is Very Excited About This Machine That Can Scan Your DNA in 90 Minutes*, MOTHERJONES (Nov. 20, 2014), www.motherjones.com/politics/2014/11/rapid-dna-profiles-database-fbi-police.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*; *King*, 133 S. Ct. at 1977.

221. Williams v. Ward, 845 F.2d 374, 376–77 (2d Cir. 1988) (detailing the procedure for an individual following a warrantless arrest and the length of detention prior to a determination of probable cause).

222. *Id.*

223. ACLU v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1996).

224. Rob Soderbery, Op-Ed, *How Many Things Are Currently Connected to the "Internet of Things" (IoT)?*, FORBES (Jan. 7, 2013), www.forbes.com/sites/quora/2013/01/07/how-many-things-are-currently-connected-to-the-internet-of-things-iot/#387e0f0a6379. The percentage of local police departments using computers for internet access increased from twenty-four percent in 1997 to seventy-seven percent in 2003. *Compare* BRIAN A. REAVES & ANDREW L. GOLDBERG, BUREAU OF JUSTICE STATISTICS, LOCAL POLICE DEPARTMENTS 1997, at 24 (2000) [hereinafter LOCAL POLICE DEPARTMENTS 1997], https://www.bjs.gov/content/pub/pdf/lpd97.pdf, *with* MATTHEW J. HICKMAN & BRIAN A.

a. Computer Databases

One of the most important technological tools for police officers today is the computer database.[225] Computer technology not only allows law enforcement to store and retrieve vast amounts of data, but it also provides an invaluable tool for communication between individuals, departments, and law enforcement agencies.[226] At the time of *McLaughlin*, a majority of information was written down in hardcopy files and stored in filing cabinets, making it very difficult to exchange information between different counties and states.[227] In 1997, eighty-six percent of local police departments used paper reports as the primary method to transmit criminal incident reports from the field to the agency's central information system.[228] By 2013, that number had drastically dropped to twenty-five percent.[229] Additionally, just as the percentage of departments using paper reports decreased, the percentage of departments using computer and data devices increased.[230]

Today, most police units have universal access to vast computer databases, allowing documents, photographs, and other materials to be sent almost instantaneously from one location to another.[231] The percentage of local police departments using computers for interagency information sharing increased from twenty-eight percent in 2000 to roughly fifty percent in 2007; seventy percent for departments serving a

---

REAVES, BUREAU OF JUSTICE STATISTICS, LOCAL POLICE DEPARTMENTS 2003, at 30 (2006) [hereinafter LOCAL POLICE DEPARTMENTS 2003], https://www.bjs.gov/content/pub/pdf/lpd03.pdf. That percentage likely reached one hundred percent by 2007, as thirty percent of in-field computers in 2007 had access to the internet. LOCAL POLICE DEPARTMENTS 2007, *supra* note 152.

225. *Technologies in Criminal Justice*, ST. JOSEPH'S U., http://online.sju.edu/resource/justice-studies/new-technologies-criminal-justice (last visited Nov. 20, 2016).

226. Clare Edwards, *How Is Computer Technology Used in Law Enforcement?*, TECH IN OUR EVERYDAY LIFE, http://techin.oureverydaylife.com/computer-technology-used-law-enforcement-1233.html (last visited Nov. 20, 2016).

227. *See Technologies in Criminal Justice*, *supra* note 225.

228. LOCAL POLICE DEPARTMENTS 1997, *supra* note 224, at 27.

229. BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, LOCAL POLICE DEPARTMENTS 2013: EQUIPMENT AND TECHNOLOGY, at 6 (2015) [hereinafter LOCAL POLICE DEPARTMENTS 2013: EQUIPMENT AND TECHNOLOGY], https://www.bjs.gov/content/pub/pdf/lpd13et.pdf.

230. The percentage of local police departments using computers for records management increased from fifty-three percent in 1993 to seventy-nine percent in 2007. BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, LOCAL POLICE DEPARTMENTS, 1993, at 19 (rev. 1996), https://www.bjs.gov/content/pub/pdf/Lpd93.pdf; LOCAL POLICE DEPARTMENTS 2007, *supra* note 152, at 22.

231. Edwards, *supra* note 226.

population of 25,000 or more.[232] This has allowed law enforcement to find and exchange information quickly, easily, and more affordably.[233] Encrypted emails can be used to send important data securely and instantaneously, "while mitigating the risk that the information they contain will fall into the wrong hands."[234]

b. Mobile Computing Devices

Mobile computing devices[235] have allowed police officers in the field to expedite many of their duties without leaving the comfort of their squad car.[236] Officers can use their in-car computers to perform many functions that formerly required a handwritten report; arrest reports are increasingly being typed, and traffic citations are produced electronically with an in-car printer to produce and provide a copy for the violator.[237] Reports are transmitted electronically, reducing paper and increasing efficiency.[238] In 2007, thirty-seven percent of in-field computers were used for interagency information sharing.[239]

Officers can instantly access driver information and history on traffic stops.[240] Between 1999 and 2013, the percentage of local police departments using in-field computers for accessing criminal history information increased from eleven to fifty-three percent.[241] Additionally,

232. LOCAL POLICE DEPARTMENTS 2000, *supra* note 152, at 23; LOCAL POLICE DEPARTMENTS 2007, *supra* note 152, at 22.

233. *Technologies in Criminal Justice*, *supra* note 225.

234. Edwards, *supra* note 226.

235. Laptops, Notebook Computers, and Tablet PCs. *Id.*

236. *Id.*

237. Timothy Roufa, *Use of Technology in Criminal Justice*, THE BALANCE, https://www.thebalance.com/use-of-technology-in-criminal-justice-974552 (last updated Dec. 21, 2014). The use of in-field computers or terminals for writing field reports increased from twenty-six percent in 1997 to fifty-two percent in 2007. LOCAL POLICE DEPARTMENTS 1997, *supra* note 224, at 27; LOCAL POLICE DEPARTMENTS 2007, *supra* note 152, at 23. Departments using computers for communications in 2007 employed seventy-two percent of all officers, compared to forty-nine percent in 2003. LOCAL POLICE DEPARTMENTS 2007, *supra* note 152, at 23.

238. Roufa, *supra* note 237. The use of in-field computers or terminals for communications increased from fourteen percent in 1997 to thirty-five percent in 2007. LOCAL POLICE DEPARTMENTS 1997, *supra* note 224, at 32; LOCAL POLICE DEPARTMENTS 2007, *supra* note 152, at 23. A majority of the departments serving ten thousand or more residents used in-field computers to produce field reports, employing sixty-five percent of all officers in 2007, compared to thirty-three percent in 2003. LOCAL POLICE DEPARTMENTS 2007, *supra* note 152, at 33; LOCAL POLICE DEPARTMENTS 2003, *supra* note 224, at 33.

239. LOCAL POLICE DEPARTMENTS 2007, *supra* note 152, at 23.

240. Roufa, *supra* note 237, at 5.

241. LOCAL POLICE DEPARTMENTS 2013: EQUIPMENT AND TECHNOLOGY, *supra* note 229.

iPads and other mobile tablets are increasingly being used in law enforcement in light of the utility and agility they provide police departments.[242] iPads allow officers to take notes, tape statements, file accident and incident reports, access database information, check identifications and credentials of individuals, and perform a wide variety of tasks they would normally need to do while sitting at their desks.[243] The officer has instant access to the station's records management system.[244]

3. The Full Picture

In 1997, the Lower Allen Central Processing Center in Cumberland County, Pennsylvania began operating as a central booking facility.[245] The center purchased and installed a Livescan TENPRINTER Electronic Fingerprint System (Series 1133S),[246] a METRO computerized management information system,[247] and a digital mug shot system.[248]

Following an arrest, a police officer would transport the suspect to the central booking facility where he would complete an incident report, a criminal complaint form, and an affidavit of probable cause.[249] The booking agent would enter the information into a METRO computer terminal.[250] A second agent would take the suspect into another room for fingerprinting and mug shots.[251] The TENPRINTER machine electronically recorded the suspect's fingerprints, and the digital mug shot system produced digital, front-facing photographs.[252]

The METRO terminal and records system was fully integrated with the TENPRINTER and digital mug shot system, with suspect and incident report information automatically transferring between machines.[253] The agent would then transmit the fingerprint images,

242. Todd R. Weiss, *Cool Cop Tech: 5 New Technologies Helping Police Fight Crime*, COMPUTERWORLD (Feb. 16, 2012), www.computerworld.com/article/2501178/government-it/cool-cop-tech—5-new-technologies-helping-police-fight-crime.html.

243. *Id.*

244. *Id.* No "three-to-four-minute boot." *Id.*

245. CONSAD RESEARCH CORP., *supra* note 101, at 12.

246. *Id.* at 14.

247. *Id.* METRO was a regional computer records information system of criminal data on arrested suspects. *Id.* at 15.

248. *Id.* at 14.

249. *Id.* at 15–16.

250. *Id.* at 16.

251. *Id.*

252. *Id.* at 16–17.

253. *Id.*

photographic images, and the suspect and incident report electronically to the state central repository "with the press of a button."[254] The data was then routed to the Pennsylvania Network Automated Transaction Management System (NATMS), which would search the AFIS databases for potential matches.[255] NATMS then retrieved any associated demographic and criminal history information on the suspect and a rap sheet containing criminal history information and a positive identification of the suspect that was transmitted to the arresting agency or booking center.[256] Repository staff "estimate[d] that in about 65 percent of all cases, the name search produce[d] an exact match[,]" and "that in these cases the arresting agency or booking center often receive[d] a rap sheet within 10 minutes."[257] "Staff estimated that in those cases in which a technical search must be conducted, the arresting agency or booking center receives a rap sheet usually within an hour."[258]

Automated booking technology had a significant impact on the time required by police officers to process criminal suspects, which, "in turn, [was] a key factor in affecting the cost-effectiveness of the booking centers."[259] In Cumberland County, the technology saved municipal police officers an estimated total of 2008 hours per year.[260] The average time to book a typical suspect at a police station was approximately eighty-eight minutes using the conventional method and forty-seven minutes using automated booking technologies.[261] On average, booking agents using automated booking technologies could process a suspect in nearly half the time required by police officers using conventional booking methods.[262]

254. *Id.* At the time, "[t]he Pennsylvania State Police Central Repository maintain[ed] databases of fingerprint records and criminal history information on all suspects ever booked in the Commonwealth." *Id.* at 28. This repository was integrated with the AFIS. *Id.* at 29. Repository staff would search its databases for matching demographic information and fingerprints. *Id.* at 28. "According to Repository staff, 60-65 percent of all fingerprint records they receive[d] [were] from a Livescan system, while the remainder [were] inked fingerprint cards." *Id.* at 29. Inked fingerprint cards would be manually scanned into the system, creating an electronic record. *Id.*

255. *Id.* at 29–30.

256. *Id.* at 30.

257. *Id.* at 30–31.

258. *Id.* at 31.

259. *Id.* at 42.

260. *Id.* at 44.

261. *Id.* at 45, tbl.2.

262. *Id.* at 46.

Cumberland County police reported an average of 2.7 weeks before a rap sheet for a typical suspect was received.[263] In sharp contrast, Cumberland County booking agents reported that, on average, they would receive a rap sheet in approximately thirty-eight minutes.[264] This was seventeen years ago.

IV. A PROPOSED THIRTY-SIX-HOUR RULE

The Forty-Eight-Hour Rule spawned from an attempt to "reconcile important competing interests."[265] It was "a 'practical compromise' between the rights of individuals and the realities of law enforcement."[266] Arrestees have a right to a prompt judicial determination of probable cause, and booking a suspect into custody is not instantaneous.[267] However, it is clear that technological advancements have significantly decreased the time needed to complete the administrative steps incident to arrest, which in turn has decreased the overall duration of time needed to book an individual. It may be true that some additional procedures surrounding an arrest, such as interviewing suspects and witnesses, are "activities that technology has yet to render appreciably more efficient."[268] Yet, when the Supreme Court adopted the Forty-Eight-Hour Rule in *McLaughlin*, the majority considered interviewing suspects and witnesses *in addition* to a more time consuming booking process.[269] Thus, a reduction in the overall time allotted would have no significant effect on the ability and flexibility of police officers to interview suspects and witnesses, or combine any other portion of pretrial procedure they choose.

Thirty-six hours is a more appropriate outer boundary for a judicial determination of probable cause. Thirty-six hours is not a radical departure from forty-eight hours, but demonstrates enough of a change to acknowledge the decrease in time needed to process an arrestee. When the Supreme Court created the Forty-Eight-Hour Rule, fingerprinting was manual and time-consuming.[270] The process of merely reproducing an arrestee's fingerprints legibly onto a white

263. *Id.* at 62.
264. *Id.*
265. County of Riverside v. McLaughlin, 500 U.S. 44, 52 (1991).
266. *Id.* at 53.
267. *Id.* at 52.
268. Bailey v. City of Chicago, 779 F.3d 689, 695 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 200 (2015).
269. *McLaughlin*, 500 U.S. at 56–57.
270. Maryland v. King, 133 S. Ct. 1958, 1976 (2013).

arrest card could take a substantial amount of time to complete.[271] The slightest human error could result in smudged, illegible, or unusable fingerprints.[272] Beyond that, if a police department had access to a fax machine, they might expect a reply transmission containing the arrestee's rap sheet in several hours.[273] If the department needed to mail the fingerprints, it could potentially take several weeks for a response.[274] AFIS and AFIT show that the duration of the fingerprinting process has been drastically reduced. The process of capturing the fingerprint itself is now digital, automated, accurate, and instantaneous.[275] Today's AFIS is capable of returning a search of over one million fingerprint records in under a minute.[276] IAFIS and NGI have allowed for more interagency information sharing at a rapid pace.[277] A department can now run a fingerprint search, not only of a respective state repository, but also of other state and federal repositories, at a much more rapid pace.[278] Furthermore, mobile biometric technology has given many police officers the ability to perform these tasks in the field, prior to transporting the arrestee to the station.[279]

Even beyond fingerprinting, technology in general has increased the number of tasks that are no longer dependent on the number of human resources available. A reduction in the Forty-Eight-Hour Rule to thirty-six hours also helps to balance the rights of individuals and the realities of law enforcement, an area where the individual has no influence. Law enforcement controls the administrative steps incident to arrest and any other procedures completed during the flexibility time allotted to states. An individual's level of cooperativeness (relatively speaking) has no impact on the time it takes to complete booking procedures. The individual does not take his own fingerprints, or transmit them to a central repository. It is the Court's responsibility to recognize that the "realities of law enforcement" have changed and adjust accordingly.[280] It would be unfair to continue allowing states the benefit of the bright-line rule that judicial determinations of probable cause within forty-eight hours of arrest are presumptively prompt when the time necessary to

271. Raburn-Remfry, *supra* note 117, at 154.
272. CONSAD RESEARCH CORP., *supra* note 101, at 12.
273. Raburn-Remfry, *supra* note 117, at 154–55.
274. CONSAD RESEARCH CORP., *supra* note 101, at 62–63.
275. *The Integrated Automated Fingerprint Identification System*, *supra* note 154.
276. Moses et al., *supra* note 142, at 6–10.
277. LOCAL POLICE DEPARTMENTS 2000, *supra* note 152.
278. *Next Generation Identification*, *supra* note 161.
279. Dees, *supra* note 172.
280. County of Riverside v. McLaughlin, 500 U.S. 44, 53 (1991)

complete the administrative steps incident to arrest has been reduced. Justice Scalia argued for twenty-four hours in 1991 *only* to complete the administrative steps incident to arrest.[281] It is difficult to rationalize forty-eight hours in 2016, when the administrative steps can take as little as thirty minutes.

The City of Chicago, in *Bailey*, argued that it was the City's policy to require all violent felonies be reviewed by the SAO before charges were approved.[282] The detectives arrested Bailey and brought him in for questioning at 9:00 PM on September 26th.[283] When the detectives met with an SAO Felony Review Unit supervisor on the morning of September 28th, she approved first-degree murder charges against three other suspects but did not approve charges against Bailey because she wanted to continue to investigate his role in the attack.[284] At that point Bailey should have been given his judicial determination of probable cause to allow for further detention. The administrative steps incident to arrest had long since been completed, and the detectives had over twenty hours to interview multiple suspects and witnesses.[285] The Seventh Circuit in *Bailey* found that there was no evidence that the delay imposed by the detectives was for improper motivations, "such as punishing Bailey or drumming up evidence merely to justify his arrest."[286] While this may be true, at a certain point, "delay for delay's sake" is unreasonable.[287]

The Seventh Circuit was correct in ruling that the delay was not the result of gathering additional evidence to justify the arrest.[288] However, the detectives in *Bailey* already had probable cause to detain Bailey at 9:00 PM on September 26th.[289] The purpose of the probable cause hearing is to have a neutral magistrate substantiate a police officer's in-field determination of probable cause.[290] The evidence supporting Bailey's involvement in the brawl was clearly stronger than evidence of

281. *Id.* at 68.

282. Bailey v. City of Chicago, 779 F.3d 689, 695 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 200 (2015).

283. *Id.* at 692.

284. *Id.* at 693; *see* Horwitz, *supra* note 8 (arguing that "law enforcement may never intentionally delay a warrantless arrestee's constitutional right to a judicial determination of probable cause for investigative reasons under any circumstances").

285. *Bailey*, 779 F.3d at 692–94.

286. *Id.* at 696.

287. County of Riverside v. McLaughlin, 500 U.S. 44, 47, 56 (1991). The Supreme Court explained in *McLaughlin* that examples of unreasonable delay are, among others, "delay for delay's sake." *Id.* at 56.

288. *Bailey*, 779 F.3d at 695–96.

289. *Id.* at 695.

290. Gerstein v. Pugh, 420 U.S. 103, 112 (1975).

his non-involvement, and the initial statements made by Bailey's fellow classmate and the police officer were both credible and consistent.[291] The later identifications, obtained by interviewing additional witnesses, "merely confirmed the existence of probable cause," and went to producing evidence to submit to the SAO.[292]

The arresting and detaining of Bailey constituted the administrative steps incident to arrest, and the interviewing of additional witnesses and submitting evidence to the SAO constituted use of the flexibility time allotted to states. However, once the SAO declined to pursue charges against Bailey without further investigation, the detectives should have realized that Bailey would need to be further detained, entitling him to a judicial determination of probable cause. Furthermore, the SAO ultimately approved first-degree murder and felony charges against Bailey at 5:40 PM on September 28th, but Bailey was not given a probable cause hearing until 7:40 PM, two hours after everything (the administrative steps incident to arrest and flexibility time procedures) was completed, and nearly forty-seven hours after his arrest.[293]

"[F]lexibility has its limits; *Gerstein* is not a blank check."[294] "[D]efinitions change over time."[295] A state has no legitimate interest in detaining individuals for extended periods that have been arrested without probable cause, and a person arrested without a warrant is entitled to a fair and reliable determination of probable cause *promptly* made.[296] It is clear that the definition of prompt has changed since 1991, and the Forty-Eight-Hour Rule must be adjusted accordingly. The Thirty-Six-Hour Rule would recognize the effect of technological advancements on the administrative steps incident to arrest, still provide states the flexibility to combine probable cause determinations with other pretrial proceedings, and not force a substantial number of jurisdictions to speed up their criminal justice mechanisms. The Thirty-Six-Hour Rule would not take away any rights from the states. It would merely readjust the balance between the rights of individuals and the realities of law enforcement. If a state does not give an arrestee a judicial determination of probable cause within thirty-six hours of arrest, the delay is not automatically unreasonable.[297] The burden

291. *Bailey*, 779 F.3d at 695.
292. *Id.*
293. *Id.* at 693.
294. County of Riverside v. McLaughlin, 500 U.S. 44, 55 (1991).
295. Lorillard Tobacco Co. v. Am. Legacy Found., 903 A.2d 728, 738 (Del. 2006).
296. *McLaughlin*, 500 U.S. at 55.
297. *See id.* at 57.

shifts, and the state can still demonstrate that the delay was justified in light of a bona fide emergency or other exigent or extraordinary circumstance.[298] It could certainly be argued, in a case like *Bailey*, that the complexity of the case constitutes an exigent circumstance. However, "[t]he fact that in a particular case it may take longer . . . to consolidate pretrial proceedings *does not* qualify as an extraordinary circumstance."[299] The Thirty-Six-Hour Rule would encourage states to be consistent, succinct, and prompt with their pretrial procedures.

CONCLUSION

Equating forty-eight hours of delay with the word "prompt" in 2016 is a violation of the Fourth Amendment. The effect twenty-five years of technological advancement has had on police departments and the arrest process is evident. It is time to acknowledge that change. This Note does not call for a six-, twelve-, or even twenty-four-hour rule; it asks only that the Supreme Court acknowledge the technological changes that have occurred since *McLaughlin* in a mere reduction of twelve hours. The original purpose of the Forty-Eight-Hour Rule cannot be forgotten. The rule must balance the rights of individuals and the realities of law enforcement. The rights of individuals have not changed; the realities of law enforcement have.

298. *Id.*
299. *Id.* (emphasis added).