CRIMINAL (DIS)APPEARANCE

Pamela R. Metzger*

Janet C. Hoeffel[Σ]

ABSTRACT

Across the United States, thousands of newly-arrested people disappear. They languish behind bars for days, weeks—or even months—without ever seeing a judge or an attorney. Yet, the Supreme Court requires more constitutional process for the seizure "of a refrigerator, . . . temporary suspension of a public school student, or . . . suspension of a driver's license," than it does for a person who has just been arrested and detained.[1] A new arrestee has no clearly-established constitutional right to a prompt initial appearance procedure. As a result, there is no constitutional doctrine that guarantees her the right to appear promptly before a judge, to challenge the evidence that supports her arrest, to receive the prompt assistance of counsel, or to participate in an adversarial bail hearing.

* Professor of Law, SMU Dedman Law School and Director, Deason Criminal Justice Reform Center. Professor Metzger gratefully acknowledges the generous support of Lasater Faculty Research Grant to the SMU Dedman School of Law and the faculty writing stipends of the Tulane Law School (her former employer).

[Σ] Catherine D. Pierson Professor of Law, Tulane Law School. The author thanks Dean David Meyer for a generous summer writing grant.

[1] Gerstein v. Pugh, 420 U.S. 103, 127 (1974) (Stewart, J., concurring).

Amidst our national conversation about the need for criminal justice reform, this Article is the first scholarly work to address the initial appearance crisis. Part I of the Article describes the epidemic of detention-without-process that plagues our criminal justice system. Part II explores the legal landscape that produced this crisis. It describes the Supreme Court's commitment to a narrow Fourth Amendment jurisprudence and critiques the Court's rejection of early-stage criminal due process rights. Part III marshals substantive and procedural due process doctrines that can vindicate the constitutional right to a prompt and thorough initial appearance procedure. Part IV proposes an agenda for research and reform of early-stage criminal proceedings.

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INTRODUCTION

Based on the testimony of a confidential informant, a grand jury in Choctaw County, Mississippi indicted Jessica Jauch on felony drug charges. On January 24, 2012, based on that indictment, the Choctaw County Circuit Clerk issued a warrant for Ms. Jauch's arrest. Ms. Jauch was not notified of the warrant or of the underlying charges.

On April 26, 2012, police stopped Ms. Jauch for a traffic violation. The officers ran a standard criminal records check, discovered the arrest warrant, and took Ms. Jauch to the Choctaw County Jail. Ms. Jauch repeatedly insisted that she knew nothing about felony drug charges. She begged to see a judge or to be allowed to post bail. However, in rural Choctaw County, the Circuit Court was only intermittently in session. The jailers told Ms. Jauch that she would not see a judge until August when the next term of the Circuit Court began.

On July 31, 2012, after 90 days in jail, Ms. Jauch had her first court appearance. The judge explained the charges to Ms. Jauch, set her bond (at $15,000), and appointed an attorney to

represent her. Six days later, and ninety-six days after her arrest, Jessica Jauch posted bond and was released from jail.

On August 20, 2012, Ms. Jauch's attorney reviewed the evidence, including a surveillance video of the alleged drug sale. That video showed nothing more than Ms. Jauch borrowing $40 from a "friend" who was acting as the State's confidential informant. Her attorney immediately contacted the prosecutor and, on August 27, 2012, the prosecutor moved to dismiss all charges against Ms. Jauch.

It is undisputed that Ms. Jauch was innocent all along. [2]

Across the United States, thousands of newly-arrested people disappear. They languish behind bars for days, weeks, or months, without ever seeing a judge or an attorney. Yet, a detained arrestee has no clearly-established constitutional right to appear promptly before a judge, to challenge the evidence that supports her arrest, to have the prompt post-arrest assistance of counsel, or to participate in an adversarial bail hearing.[4] Indeed, the Supreme Court requires more constitutional process for the seizure "of a refrigerator, . . . temporary suspension of a

[2] This account of Ms. Jauch's case is taken from *Jauch v. Choctaw Cty.,* 874 F.3d 425, 428 (5th Cir. 2017), *cert. denied sub nom. Choctaw Cty., Miss. v. Jauch*, 139 S. Ct. 638 (2018) and from the Brief for Appellant, *Jauch v. Choctaw County*, 2016 WL 7386084 (5th Cir.), 6.

[4] *See* infra notes 55, 58, 98, and 202–204 and accompanying text.

public school student, or . . . suspension of a driver's license," than it does for a presumptively innocent person who has just been arrested and detained.[5]

In his jail cell, a new arrestee has been seized, searched, processed, and detained in a system that neither defines nor guarantees his immediate post-arrest rights. He is at the mercy of "the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."[6] Arrest has launched him into an ill-defined, post-arrest, "criminal process" that lacks the structural protections ordinarily associated with our adversary system.

The Constitution promises that a criminal defendant will receive elaborate substantive and procedural protections: access to the courts, notice of the charges and an opportunity to defend against them, a speedy trial, and the assistance of counsel to investigate the case, advocate for dismissal, negotiate a plea bargain, or prepare for trial.[7] Yet, the Constitution is silent as to when, or how, those rights will be effectuated.[8] So, an informal and underregulated post-arrest process

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[5] Gerstein v. Pugh, 420 U.S. 103, 127 (1974) (Stewart, J., concurring). *See also* Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 22 (2006) ("It is not an exaggeration to say that defendants constitutionally may be arrested, charged, prosecuted, and detained in prison pending trial with fewer meaningful review procedures—that is to say, procedures to test the legitimacy of the underlying charges—than due process would require in the preliminary stages of a private civil case seeking the return of household goods.").

[6] Rothgery v. Gillespie Cty., Tex., 554 U.S. 191, 198 (2008) (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion)).

[7] *See*, *e.g.,* U.S. Const. Amend. V, VI.

[8] *Id.*

continues until (and sometimes after) the defendant's first initial appearance, when a judge finally stands between the defendant and the State.[9]

Lengthy detentions between arrest and first appearance, such as Ms. Jauch's, mimic the police "disappearances" so common under authoritarian regimes.[10] The Supreme Court's constitutional silence about the initial appearance procedure allows those disappearances to continue. Why has the Supreme Court failed to guarantee a prompt, substantive, and counseled initial appearance? The answer lies in the Supreme Court's misguided reliance on the Fourth Amendment to regulate post-arrest detentions, its limited understanding of day-to-day state criminal practice, and its unwarranted reluctance to regulate state criminal procedure.

Part I of this Article describes the crisis of arrest and detention without judicial process. It exposes common legal fictions about post-arrest criminal procedure and chronicles the draconian consequences of arrest and detention without a prompt initial appearance. Part II describes the Supreme Court's allegiance to a Fourth Amendment jurisprudence for early post-arrest proceedings and explains how this jurisprudence is both inapposite and insufficient to fill the procedural void between arrest and initial appearance. Part III argues that only a clearly mandated due process right to a prompt post-arrest initial appearance can vindicate the important

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[9] *See infra* Part I. This Article uses the term "initial appearance" to refer, collectively, to the first post-arrest judicial appearance and the procedures that accompany it.

[10] *See generally* Tom Clark, *Anguish of 'Disappearance' Continues Across the World, Say Campaigners*, REUTERS (Aug 29, 2015) (available at https://www.reuters.com/article/us-rights-disappeared/anguish-of-disappearance-continues-across-the-world-say-campaigners-idUSKCN0QY08420150829) (last visited Oct. 30, 2019) (discussing the continuing phenomena that has resulted in over 100,000 disappearances in the past decade)

constitutional rights at stake. Finally, Part IV proposes interim steps for procedural reform of early-stage criminal procedure through state legislation and remedial measures.

I. THE INITIAL APPEARANCE CRISIS

How common is Ms. Jauch's plight? A dearth of data about our criminal justice system precludes a thorough assessment of the average delay in initial appearance or the appointment of counsel. However, the problem is common enough to produce "form" pleadings for lawsuits based on prolonged detention without appearance before a judge.[11] News reports and lawsuits tell, and retell, nightmarish stories of incarcerated criminal defendants who wait weeks, or months, after arrest to see a judge or an attorney.[12] After their arrests, no judge has advised them

[11] *See e.g.,* John W. Witt, Edward J. Hanlon and Stephen M. Ryals, "Unreasonable Delay in Bringing Pretrial Detainee Before Judge," Section 1983 Litigation Forms, §1.187. *See also* Moya v. Garcia, 895 F.3d 1229, 1240 (10th Cir. 2018) (McHugh, J., concurring and dissenting) (quoting Dodds v. Richardson, 614 F.3d 1185, 1192 (10th Cir. 2010)) (stating that plaintiff's claim of "overdetention," falls "into a category of claims which unfortunately have become so common that they have acquired their own term of art").

[12] *See*, *e.g.,* Brooke Adams, *Truck driver files lawsuit, says he was falsely imprisoned at northern Utah jail*, The Salt Lake City Tribune (June 10, 2013) (Seventeen days in detention without initial appearance or access to counsel); Daves v. Dallas County, Texas, Complaint, Case No. 3:18-cv-154 at 3 (N.D. Texas, filed 1/21/18) (alleging unlawful detention of plaintiff-arrestees who cannot afford money bail and wait days or weeks for a first appearance), available at https://faithintx.org/wp-content/uploads/2018/10/CaseNo.3.18-ev-154.pdf; Dayton v. Lisenbee, 2019 WL 1160816 at *2 (E.D. Missouri March 13, 2019) (Fifty-three days in detention before first appearance); Barnes v. Cullman Cty. Dist. Court, 2017 WL 1508239 at *1 (N.D. Ala. Apr. 27, 2017). (Fourteen days in detention without

of their rights. No attorney has been appointed to represent them. No one has argued for their release, investigated their cases, prepared for trial, or negotiated a plea bargain.

Reviews of case law suggest that these problems are severe, widespread, and marked by a shocking indifference to the arrest and detention of presumptively innocent people. This Part

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appointment of counsel); Hale v. City of Warren, 2007 WL 4454734 at 3 (W.D. Ark. 2007) (Seventy days in detention without initial appearance or appointment of counsel); Pledger v. Reece, 2005 WL 3783428 at *1 (W.D. Ark. Nov. 10, 2005) (Fifteen days in detention without initial appearance); Jackson v. Hamm, 78 F. Supp. 2d 1233, 1241 (M.D. Ala. 1999) (Twenty-eight days in detention without initial appearance or appointment of counsel); Coleman v. Frantz, 754 F.2d 719, 721–22 (7th Cir. 1985), *abrogated in part on other grounds* by Benson v. Allphin, 786 F.2d 268 (7th Cir. 1986) (Eighteen days in detention without initial appearance); Hayes v. Faulkner County, Ark., 388 F.3d 669, 673 (8th Cir. 2004) (Thirty-eight days in detention without initial appearance); Scott v. Denzer, 2008 WL 2945584 at *7 (W.D. Ark. July 28, 2008) (Thirty-one days in detention without initial appearance or appointment of counsel); Scott v. Belin, 2008 WL 350628 at *1 (W.D. Ark. Feb. 7, 2008) (Seventy-eight days in detention without initial appearance or appointment of counsel); Moya v. Garcia, 895 F.3d 1229, 1231 (10th Cir. 2018) (over thirty days in detention without an initial appearance); Hoffman v. Knoebel, 2017 WL 1128534 at *1 (S.D. Ind. Mar. 24, 2017) (Sixty days in detention without initial appearance or appointment of counsel); Martinez v. Sun, 896 F. Supp. 2d 710, 720 (N.D. Ill. 2012) (Eighteen day delay between arrest and initial appearance); Oviatt By & Through Waugh v. Pearce, 954 F.2d 1470, 1473 (9th Cir. 1992) (One-hundred-and-fourteen days in detention without court appearance); State v. Strong, 236 P.3d 580, 581 (Mont. 2010) (Forty-two day delay between arrest and initial appearance and thirty-one day delay between arrest and appointment of counsel); State v. Gribble, 415 P.3d 481 (Mont. 2018) (Twenty-four days between arrest and initial appearance).

describes the lackluster process that an arrestee receives, the dire practical consequences, and the lack of meaningful remedies.

A. Initial Appearance Fictions

A pervasive fiction among lawyers, judges, and scholars promises extensive protection for new arrestees. In the fairy tale land of textbooks and treatises, every new arrestee has prompt access to the courts and counsel. In the real world of overcrowded and under-resourced criminal justice systems, an appalling lack of early-stage criminal procedure defines the landscape.

Our criminal justice system relies upon the "initial appearance" procedure to mediate the State's (otherwise unrestricted) power over a defendant and to effectuate a panoply of constitutional rights. Although the terminology may vary, all states have enacted statutes that specify the requirements of a defendant's first post-arrest appearance in court.[13] And, since

[13] *See generally*, John P. Gross, *The Right to Counsel but Not the Presence of Counsel: A Survey of State Criminal Procedures for Pre-Trial Release*, 69 FLA. L. REV. 831, 841 (2017) (describing state initial appearance procedures). Terms such as "first appearance," "48-hour hearing," "magistration," "arraignment" or "presentment" are also used to refer to the initial court appearance. *See* WAYNE R. LAFAVE & DAVID C. BAUM, SEARCH& SEIZURE § 5.1(g) (5th ed., October 2017 update) at nn. 306, 328 (noting that some jurisdictions combine probable cause hearings and first appearance and that different jurisdictions use different vocabulary to refer to roughly equivalent proceedings). At common law, the historical term for this procedure was "presentment" and it required police to effectuate an arrestee's prompt "presentment" before a magistrate. Corley v. United States, 556 U.S. 303, 306 (2009).

colonial times, custom and procedure have established a clear expectation about the content and function of the initial appearance.[14]

The initial appearance should "enforce or give meaning to important individual rights that are either expressly granted in the Constitution or are set forth in Supreme Court precedent."[15] Accordingly, a judge should advise the defendant of his right to remain silent, thereby effectuating the Fifth Amendment privilege against self-incrimination.[16] The judge should - inform the suspect of the charges against him as well, thereby implementing the Sixth

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[14] *See Corley*, 556 U.S. at 306. *See also* WAYNE R. LAFAVE ET. AL, 3 CRIM. PROC. § 11.2(b) (4th ed.) (Right to appointed counsel: stages of the proceeding); ABA STANDARDS FOR CRIMINAL JUSTICE 10-4.1 (Prompt first appearance); Gross, *supra* note 13, at 841.

[15] Coleman v. Frantz, 754 F.2d 719, 724 (7th Cir. 1985), *abrogated in part on other grounds by* Benson v. Allphin*,* 786 F.2d 268 (7th Cir. 1986); Hayes v. Faulkner County, Ark., 388 F.3d 669, 673 (8th Cir. 2004) (internal quotation marks and citations omitted).

[16] *See Coleman*, 754 F.2d at 724 (*citing* Miranda v. Arizona, 384 U.S. 436 (1966)). *See also* Rogers v. Albert, 541 S.E. 2d 563, 567 (W. Va. 2000) (explaining presentment "ensure[s] that the police do not use the delay to extract a confession from a defendant through prolonged interrogation"); Mallory v. United States, 354 U.S. 449, 452–53 (1957) (stating initial appearance procedure prevents "those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime"); McNabb v. United States*,* 318 U.S. 332, 344, (1943) (finding presentment "outlaws easy but self-defeating ways in which brutality is substituted for brains as an instrument of crime detection"); Corley v. United States, 556 U.S. 303, 308, (2009) ("requirement that prisoners should promptly be taken before committing magistrates was to check resort by officers to secret interrogation of persons accused

Amendment right "to be informed of the nature and the cause of the accusation."[17] Thus many aspects of the initial appearance procedure "involve the delivery of information—information that allows an arrestee to take appropriate legal action."[23] The initial appearance procedure also "ensures an arrestee receives this information from a neutral source."[25]

The Sixth Amendment right to counsel arises at initial appearance.[27] Accordingly, in many jurisdictions, the initial appearance includes a determination of the defendant's eligibility for public defense services.[28] In addiition, at initial appearance a judge "determine[s] the conditions

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of crime").

[17] *See* Armstrong v. Squadrito, 152 F.3d 564, 572–3 (7th Cir. 1998).

[23] *Armstrong,* 152 F.3d at 573.

[25] *Id.*

[27] Rothgery v. Gillespie Cty., Tex., 554 U.S. 191, 211, 212, n.15-17 (2008) (holding right to counsel attaches at initial appearance but initial appearance is not, per se, a critical stage requiring counsel's assistance).

[28] In some systems, the initial appearance is a defendant's first chance to meet an attorney and to hear the charges against him. *See e.g.*, Ian Duncan, *Lost in jail, defendants wait weeks for chance at freedom*, The Baltimore Sun (March 15, 2014,), (Initial appearance may be a defendant's "first chance for release pending trial.") available at http://www.baltimoresun.com/news/maryland/sun-investigates/bs-md-forgotten-in-jail-20140315-story.html#. Initial appearance may "prevent abuses in the detention process and, more importantly, place the accused in early contact with a judicial officer, so that the right to counsel may not only be clearly explained but also be implemented upon the accused's request." People v. Roybal*,* 55 P.3d 144, 148 (Colo. App. 2001). *See also* ABA STANDARDS FOR CRIMINAL JUSTICE 10-4.1 (requiring prompt first appearance within 24 hours of arrest); Corley v. United States, 556 U.S. 303, 320

for pretrial release,"[29] or modifies preset conditions, thereby implementing the Eighth Amendment's prohibition on excessive bail[30] and the Constitution's promise that liberty shall not be restrained without due process of law.[31] Finally, at initial appearance a judge may set the date

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(2009).

[29] *Rothgery*, 554 U.S. at 199; *accord Corley*, 556 U.S. at 320. In some systems, the initial appearance also offers a crucial opportunity to review allegations and meet with public defenders for the first time. *See* ABA STANDARDS FOR CRIMINAL JUSTICE 10-4.1 ("In a great many criminal cases, the defendant's first court appearance after arrest is . . . the point at which the defendant is formally informed for the first time of the charges, and it is at this stage that the first (and often only) determination is made about the defendant's release or detention."); State v. Gatlin, 219 P.3d 874, 878 (Mont. 2009) (stating initial appearance procedure intended "to ensure the defendant is duly informed of his constitutional rights as soon as possible"); Chavez v. State, 832 So. 2d 730, 752 (Fla. 2002) (explaining conditions of release determined at initial appearance). However, not all defendants receive the assistance of counsel at the initial appearance. *See generally* Duncan, *supra* note 19 (noting expenses that would be incurred if assistance of counsel required). In some state and local criminal justice systems, bail may be determined through a post-arrest bail schedule or set by a judge via telephone shortly after arrest. *See generally* James A. Allen, Note, *"Making Bail": Limiting the use of Bail Schedules and Defining the Elusive Meaning of "Excessive Bail,"* 25 J.L. & POL'Y 637, 638-685 (2017) (discussing the variance in bail procedure in different jurisdictions).

[30] Armstrong v. Squadrito, 152 F.3d 564, 573 (7th Cir. 1998); Coleman v. Frantz, 754 F.2d 719, 724 (7th Cir. 1985) (*citing* Stack v. Boyle, 342 U.S. 1 (1951)).

[31] *See Coleman,* 754 F.2d at 724. It is another question entirely whether the ensuing bail proceedings actually provide due process.

for further legal proceedings and advise a defendant of his rights in regard to those future proceedings.[32]

The mere fact of initial appearance *in court* also does important procedural work. Requiring the state to produce an arrested defendant in open court alerts the judiciary to the defendant's arrest and safeguards the defendant against "secret detentions."[33] Through the Public Trial Clause of the Sixth Amendment, the initial appearance also provides public transparency about arrests and police practices.[34]

There is widespread consensus that promptness is essential to the efficacy of an initial appearance. A prompt initial appearance insures that "police do not use the delay to extract a

[32] *Rothgery*, 554 U.S. at 199 (2008); *accord Corley*, 556 U.S. at 320.

[33] *Corley*, 556 U.S. at 306, 320 ("No one with any smattering of the history of 20th-century dictatorships needs a lecture on the subject, and we understand the need even within our own system to take care against going too far."). *See also* State v. Gatlin, 219 P.3d 874, 878 (Mont. 2009) ("An important purpose behind requiring an initial appearance is to protect the defendant from . . . being held incommunicado for a protracted time.").

[34] *See Corley*, 556 U.S. at 319-21 (discussing the importance of presentment to combat abuses similar to those of "20th-Century dictatorships."). In reality, many courts conduct initial appearances under circumstances that preclude public access. *See e,g,. Schultz,* 330 F. Supp. 3d at 1354 (describing initial appearance held by video conference); State v. Hershberger*,* 5 P.3d 1004, 1006 (Kan. App. 2000) (describing video first appearance).

confession from a defendant through prolonged interrogation."[35] A prompt initial appearance facilitates the speedy pretrial release of a presumptively-innocent person. That, in turn, preserves a defendant's ability to work, maintain family connections, and avoid the significant physical and mental hazards associated with pretrial detention.[36] Perhaps most importantly, a prompt first appearance ensures that an indigent defendant promptly "receives counsel at the important post-arrest stages of a criminal prosecution."[37]

In theory then, a prompt initial appearance procedure mediates a defendant's adversarial engagement with the criminal justice system, minimizing unfair or unnecessary pretrial detentions, and maximizing processes that produce fair and accurate case dispositions. Alas, the Supreme Court has failed to require *any* prompt judicial appearance or court procedure.[38] As a result, too many defendants experience long delays or deficient processes that indelibly corrupt the integrity of criminal process and impair the fair disposition of their cases.

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[35] Rogers v. Albert, 541 S.E.2d 563, 567 (W. Va. 2000). *See also* Catledge v. State, 174 So. 3d 293, 298 (Miss. Ct. App. 2015) ("[I]nvestigators admitted that they intended to speak with [defendant] before his initial appearance (because he would not have a lawyer)."); People v. Suggs, 57 N.E.3d 1261, 1267–70, 1272 (Ill. App. 2d 2016), *reh'g denied* (July 20, 2016*), appeal denied,* 65 N.E.3d 846 (Ill. 2016) (describing that defendant experienced delay of more than nine days between arrest and initial appearance, and, on the fifth day of that detention, made inculpatory statements).

[36] *See infra* notes 82–90 and accompanying text.

[37] State v. Waddell, 655 N.W.2d 803, 812 (Minn. 2003).

[38] *See infra* Part II (outlining Court's failure to recognize right).

B. Initial Appearance Facts

There is no clearly-established constitutional right to an initial appearance before a judge.[39] Accordingly, there is also no right to a *prompt* initial appearance before a judge.[40] An uncharged defendant can spend weeks (or even months) in jail without ever seeing a judge or learning about his rights.[41]

[39] *See, e.g.,* Moya v. Garcia, 895 F.3d 1229, 1237 (10th Cir. 2018) (McHugh, J., concurring and dissenting) (finding no procedural due process right to timely bail hearings because "'an expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause'") (*quoting* Olim v. Wakinekona, 461 U.S. 238, 250 n.12 (1983)); Jackson v. Hamm, 78 F. Supp. 2d 1233, 1242 (M.D. Ala. 1999) (same); Diaz v. Wright, 2016 WL 10588098 (D. N.M. 2016) (holding no due process liberty interest created by New Mexico statute requiring initial appearance "without unnecessary delay"); Cartwright v. Dallas Cy. Sheriff's Office, 2015 WL 9582905 (N.D. Tex. 2015) (finding no constitutional right to arraignment or judicial appearance within set amount of time).

[40] *Id. See also infra* notes 205–210 and accompanying text.

[41] *See supra* note 12.

True, every state requires some type of initial appearance procedure.[42] However, that procedure may not apply to every type of arrest.[43] Ms. Jauch's travails were the direct result of a Mississippi statute that exempted post-indictment arrests from the initial appearance mandate.[44]

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[42] *See* Alaska, AS § 12.25.150 (within 48 hours of arrest, including Sundays and holidays); Arizona, 16A A.S.R. Crim. Proc., Rule 4.1 (after arrest "promptly;" if initial appearance occurs more than 24 hours after arrest, defendant shall "immediately" be released); California, West's Ann. Cal. Penal Code § 825 ("without unnecessary delay, and, in any event, within 48 hours after arrest, excluding Sundays and holidays"); Colorado, Crim. P. Rule 5 (without unnecessary delay); Connecticut, C.G.S.A. § 54-1g ("promptly" before the next regularly sitting court); Delaware, Super. Ct. Crim. R., Rule 5 ("without unreasonable delay"); DC, Superior Court Rules -- Criminal (SCR -- Criminal) Rule 5 ("without unnecessary delay"); Florida, Fla. R. Crim. P. Rule 3.130 (for defendant in custody, within 24 hours of arrest); Georgia, Ga. Code Ann., § 17-4-26 (within 72 hours of arrest); Guam 8 G.C.A. § 45.10 (within 48 hours after the arrest); HRS § 803-9 (within 48 hours of the arrest); Idaho, Idaho Criminal Rules (I.C.R.), Rule 5 (within 24 hours of arrest, excluding weekends and holidays); Illinois, 725 ILCS 5/109-1 ("without unnecessary delay"); Indiana, IC 35-33-7-1 and 4 ("promptly"); Iowa, I.C.A. Rule 2.2 ("without unnecessary delay"); Kansas, K.S.A. 22-2901 ("without unnecessary delay"); Kentucky, Kentucky R. Crim. Pro. (RCr) Rule 3.02 ("without unnecessary delay"); Louisiana, LSA-C.Cr.P. Art. 230.1 (within 72 hours of arrest, excluding weekends and holidays); Maine, Maine R. of Crim. P. Rule 5 (within 48 hours, excluding weekends and holidays); Maryland, MD Rules, Rule 4-212 (within 24 hours of arrest); Massachusetts, Mass.R.Crim.P. Rule 7 (at the first available court session following arrest); Michigan, M.C.L.A. 764.13 (without unnecessary delay); Minnesota, 49 MINN. STAT. ANN., R. CRIM. P. 4.02 (within 36 hours of arrest, excluding the day of arrest, weekends, and holidays); Mississippi, Miss. Code Ann. § 99-3-17 (2018) ("without unnecessary delay"); Missouri, MO. SUP. CT. R. 22.07 ("as soon as

practicable," often "no later than 48 hours"); Montana, MONT. CODE ANN. § 46-7-101 (2017) ("without unnecessary delay"); Nevada, NEV. REV. STAT. § 171.178 (2017) ("without unnecessary delay"); New Hampshire, N.H. REV. STAT. ANN. § 594:20-a (2001) (within 24 hours, excluding weekends and holidays); New Jersey, N.J. CT. R. 3:4--2 (within 48 hours of arrest); New Mexico, N. M. S. A. 1978, § 31-1-5 ("without unnecessary delay"); New York, McKinney's CPL §§ 120.90 and 140.20 (without unnecessary delay); North Carolina, N.C.G.S.A. § 15A-501 ("without unnecessary delay"); North Dakota, Rule 5, N.D.R.Crim.P. ("without unnecessary delay"); Ohio, R.C. § 2935.13 (upon arrest); Oklahoma, 22 Okl.St.Ann. § 181 ("without unnecessary delay"); Oregon, O.R.S. § 135.010 (during the first 36 hours of custody, excluding holidays, Saturdays and Sundays); Pennsylvania, Pa.R.Crim.P. Rule 516, Rule 519 (without unnecessary delay); Puerto Rico, T. 34 Ap. II, Rule 22 ("without unnecessary delay"); South Dakota, SDCL § 23A-4-1 ("without unnecessary delay"); Texas, Vernon's Ann. Texas C.C.P. Art. 15.17 (within 48 hours of arrest); Utah, U.C.A. 1953 § 77-7-23 ("without unnecessary delay"); Vermont, Vermont R. Crim. P. Rule 3 ("without unnecessary delay"); Virginia, VA Code Ann. § 19.2-80 ("without unnecessary delay"); Washington, Superior Court Criminal Rules, CrR 3.2.1 ("as soon as practicable after the detention . . . but in any event before the close of business on the next court day"); West Virginia, W. Va. Code, § 62-1-5 ("without unnecessary delay"); Wisconsin, W.S.A. 970.01 ("within a reasonable time"); accord Standard 10-4.1 Prompt first appearance, ABA Standards for Criminal Justice 10-4.1 ("Enforcement of the right to prompt presentment [in court] can be problematic in jurisdictions where the only guidance provided in the relevant statute or court rule is in ambiguous terms like 'promptly' or 'without unnecessary delay'").

[43] *See e.g., Jauch*, 874 F.3d at 429 (discussing Mississippi law that excludes indicted arrestees from protections of state initial appearance rule).

[44] Miss. Code Ann. § 99-3-17.

Every state considers its proscribed initial procedure to be "prompt," but promptness, like beauty, lies in the eye of the beholder.[45] While some states require initial appearance within 24 or 48 hours, many states permit lengthier detentions without judicial process. Georgia, Louisiana, and New Jersey permit three-day delays between arrest and first judicial appearance.[46] New Jersey excludes holidays from that calculation[47] and Louisiana excludes holidays and weekends.[48] So, in Louisiana, a person arrested on Wednesday, December 19th, could be detained for seven days (until Wednesday, December 26th).[49]

Connecticut and Massachusetts link a defendant's first court appearance to the next "available" date when a judge is sitting, regardless of when the next court session is scheduled to occur.[50] These "terms of court" requirements can work particular hardship in rural areas, where the next term of court may not occur for weeks, or even months.[51] Twenty-two states simply

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[45] *See* John P. Gross, *The Right to Counsel but Not the Presence of Counsel: A Survey of State Criminal Procedures for Pre-Trial Release*, 69 FLA. L. REV. 831, 840–41 (2017) ("[L]ocal custom and practice often trumps [sic] statewide rules of criminal procedure").

[46] Ga. Code Ann., § 17-4-26 (within 72 hours of arrest); LSA-C. Cr. P. Art. 230.1 (within 72 hours of arrest, excluding weekends and holidays); N.J. R. 3:4--2 (within 72 hours of arrest, excluding holidays).

[47] N.J. R. 3:4--2 (within 72 hours of arrest, excluding holidays).

[48] LSA-C. Cr. P. Art. 230.1 (within 72 hours of arrest, excluding weekends and holidays)

[49] *See id.*

[50] *See* Conn. G.S.A. § 54-1g ("promptly" before the next regularly sitting court); Mass. R. Crim.P. Rule 7 (at the first available court session following arrest).

[51] *See* Jacob Kang-Brown & Ram Subramanian, *Out of Sight: The Growth of Jails in Rural America*,

require that the initial appearance occur "without unnecessary delay,"[52] "as soon as practicable,"[53] or "within a reasonable time."[54]

Lacking Supreme Court guidance about the constitutional prerequisites of a pretrial bail determination,[55] states have developed diverse practices for the initial bail determination.[56] In some jurisdictions, judges impose cash bail requirements as part of the arrest warrant or follow a

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VERA INSTITUTE OF JUSTICE, 19 (June 2017) (noting how some rural areas rely on judges who convene court as rarely as a few times per *year*) http://www.safetyandjusticechallenge.org/wp-content/uploads/2017/06/Out_of_sight_report.pdf

[52] Colorado, Crim. P. Rule 5; Iowa, I.C.A. Rule 2.2; Kansas, K.S.A. 22-2901; Kentucky R. Crim. Pro. Rule 3.02; Michigan, M.C.L.A. 764.13; Miss. Code Ann. § 99-3-17; Montana, MCA 46-7-101; Nevada, N.R.S. 171.178; New Mexico, N. M. S. A. 1978, § 31-1-5; New York, McKinney's CPL §§ 120.90 and 140.20; North Carolina, N.C.G.S.A. § 15A-501; North Dakota, Rule 5, N.D.R.Crim.P.; 22 Okl.St.Ann. § 181; Pa.R.Crim.P. Rule 516, Rule 519; Puerto Rico, T. 34 .Ap. II, Rule 22; South Dakota, SDCL § 23A-4-1; Utah, U.C.A. 1953 § 77-7-23; Vermont R. Crim. P. Rule 3; Va. Code Ann. § 19.2-80; W. Va. Code, § 62-1-5.

[53] Missouri, Supreme Court Rule 22.07.

[54] Wisconsin, W.S.A. 970.01

[55] While the Eighth Amendment's prohibition on excessive bail is applicable to the states, *Schilb v. Kuebel*, 404 U.S. 357, 357 (1971), the Court has not required that the bail decision be timely or adversarial.

[56] *See* Sandra Guerra Thompson, Do Prosecutors Really Matter A Proposal to Ban One-Sided Bail Hearings, 44 Hofstra L. Rev. 1161, 1170 (2016) (discussing divergence between use of individualized hearings versus bail schedules in state courts).

rigid bail schedule that applies to all defendants.[57] Elsewhere, an initial appearance is a prerequisite to any bail determination. In other words, until the initial appearance occurs, most defendants cannot be released.

Substantively, it is unclear whether, and to what extent, local initial appearance practices fulfill their "advice-of-rights" function.[58] Sometimes, a judge makes a single announcement of rights, to a room full of defendants, each of whom is making his or her own initial appearance.[59]

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[57] *See e.g.,* O'Donnell v. Harris Cty., 892 F.3d 147, 152, 163 (5th Cir. 2018) (describing "mechanical application of [a] secured bail schedule without regard for the individual arrestee's personal circumstances" and holding that, absent a prompt subsequent procedure that considered each person's individual circumstances, application of a bail schedule violates due process). Proponents of the one-sided bond schedule argue that they are a boon to defendants: those who can satisfy the bond requirement can obtain a prompt release, and those who cannot can litigate their bond at initial appearance—whenever that may occur. The significant equal protection concerns raised by bail schedules are beyond the scope of this Article but, for one such discussion, *see* Colin Starger & Michael Bullock, *Legitimacy, Authority, and the Right to Affordable Bail*, 26 WM. & MARY BILL RTS. J. 589 (2018); *see also* Daves v. Dallas County, Texas, Case No. 3:18-cv-154, Complaint filed 1/21/18 (alleging unlawful detention of plaintiff-arrestees who cannot pay money bail pursuant to set schedule and wait days or weeks for a first appearance, at which most, facing the prospect of lengthy pretrial detention, plead guilty), available at https://faithintx.org/wp-content/uploads/2018/10/CaseNo.3.18-ev-154.pdf.

[58] *See e.g.* Schultz v. State*,* 330 F. Supp. 3d 1344, 1370 (N.D. Ala. 2018) (showing "no evidence" that arrestees are "inform[ed] of what is at stake at an initial appearance").

[59] Gideon's Broken Promise America's Continuing Quest for Equal Justice, A.B.A. Standing Committee on Legal Aid and Indigent Defendants (2004).

In other jurisdictions, a pre-recorded "advice-of-rights" plays on a continuous loop in the jail or courthouse, and no one asks whether each defendant heard – much less understood – that recitation of rights.[60] Elsewhere, judges conduct initial appearances via video links and have little-to-no meaningful capacity to determine whether a defendant comprehends his or her rights.[61]

Without a constitutional mandate about the content of the initial appearance procedure, courts provide incomplete or misleading information.[63] A judge may provide only a partial advice-of-

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[60] *Compare* State v. Diroll, 2007 WL 4481430 (Ohio App. Dec. 21, 2007) ("[A]s a general matter . . . a trial court is permitted to use a videotape to inform defendants of their rights.") *with* State v. Gearig, 2010 WL 877575 (Ohio App. March 12, 2010) (finding state initial appearance warnings not provided when state played "an audio CD that contains a recitation of the appellant's rights" and defendant alleged that "broadcast was ineffectual inside the cell due to noise by other inmates and the fact that the door was closed"). *See also* Actual Denial of Counsel in Misdemeanor Courts, Testimony to the United States Senate Judiciary Committee Sixth Amendment Center, May 20, 2015, available at http://sixthamendment.org/wp-content/uploads/2015/05/Actual-Denial-of-Counsel-in-Misdemeanor-Courts.pdf (last visited February 25, 2018) ("It is not uncommon . . . for court personnel to start the video once a critical mass of defendants has arrived in advance of the court hearing's official start time. But none of those who arrive late see the whole video. In [other jurisdictions] . . . defendants arrive in waiting rooms mid-way through the video, and few defendants sit through its entirety.")

[61] *See e.g. Schultz,* 330 F. Supp. 3d at 1354 (describing initial appearance held by video conference, even if defendant is illiterate or learning disabled); State v. Hershberger*,* 5 P.3d 1004, 1006 (Kan. App. 2000) (describing video first appearance).

[63] *See Schultz*, 330 F. Supp. 3d at 1370 (finding that detainees are provided with "vague and

rights, omitting information about expensive, time-consuming, and "inconvenient" rights, such as the right to the assistance of counsel.[64] Worse still, some judges use the initial appearance to actively discourage defendants from seeking counsel, warning that the appointment of counsel will "delay setting bail" and "hence [the defendant's] release from jail."[65]

Even if a defendant receives a prompt and complete advice-of-rights, he must proceed alone through the treacherous waters of initial appearance ,where important statutory and constitutional rights are at stake without the guarantee of counsel. The Supreme Court promises that an indictment or an initial appearance *triggers* the right to counsel—it does not promise when counsel will be appointed or what assistance will be provided.[69] The Court requires only that the

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substantively inadequate" questionnaire that omits crucial information about initial proceedings).

[64] In a five-county study "[m]ore than half of defendants (50.9%) were not advised of their right to counsel when speaking to the judge." Robert C. Boruchowitz, *Judges Need to Exercise Their Responsibility to Require That Eligible Defendants Have Lawyers*, 46 HOFSTRA L. REV. 35, 46–48 (2017). "In many courts, the judge speed reads from a book to the court full of people." *Id.* at 46–47. *See also* Cty. of Price v. Kraus, 627 N.W.2d 549 (Wis. App. 2001) ("At the initial appearance, the court did not individually inform Kraus of either his right to a continuance or his right to a jury trial. However, the court did make a general announcement at the beginning of the initial appearances for the day that those persons appearing were entitled to a jury trial if they posted the required fee within ten days of entering their plea. Absent from this announcement was any reference to the fact that those appearing were entitled to a continuance of their initial appearance.").

[65] *Rothgery*, 554 U.S. at 196, n.5. While *Rothgery* did not enter a guilty plea, many similarly situated defendants do.

[69] Rothgery v. Gillespie Cty., Tex., 554 U.S. 191, 216 (2008) (Alito J., concurring).

appointment occur within a "reasonable" time after the right arises, and that counsel assist in all "critical stages" of the proceeding.[70] What constitutes a "reasonable" time? No one knows.[71] Perhaps as a result, courts have held that delays of several weeks between an arrest and the appointment of counsel do not violate the Constitution.[72]

There are serious consequences to the Court's decision that not to require counsel at initial appearance. The amount and conditions of bail are determined (or modified) at initial appearance.[73] If the bond amount is too high, or the bail conditions are too onerous, a defendant

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[70] *Id.* at 218.

[71] *Seeid.*. at 216 ("I do not understand the Court to hold, that the county had an obligation to appoint an attorney to represent petitioner within some specified period" after initial appearance).

[72] *See e.g.,* Com. v. Padilla, 80 A.3d 1238, 1254–55 (Pa. 2013) (holding forty-seven day delay in appointment of counsel for defendant arrested on murder charges did not violate defendant's constitutional rights); Grogen v. Gautreaux, 2012 WL 12947995, at *3 (M.D. La. July 11, 2012) (finding forty day delay in appointment of counsel did not violate the defendant's constitutional rights); Hawkins v. Montague County, Texas, 2010 WL 4514641, at *12 (N.D. Tex., Nov. 21, 2010) ("[A]pproximate two-month delay in receiving court-appointed counsel fails to rise to the level of a constitutional violation based on the Sixth Amendment"); Clark v. State, 2011 WL 2651902, at 4 (Tex. App. July 8, 2011) (holding no *per se* Sixth Amendment violation when counsel was appointed five weeks after initial appearance).

[73] *See e.g.,* "Dane County District Attorney's Office Steps in a Criminal Case," https://da.countyofdane.com/case_steps.aspx (last visited February 26, 2018); People v. Whitaker, 12 N.Y.S.3d 505, 511 (N.Y. Co. Ct. 2015) (describing that, at initial appearance, defendant was ordered to participate in substance abuse treatment).

will be detained. A*fter* the initial appearance, when counsel is finally appointed, much of the damage associated with pretrial detention is already done.[74] ~~Yet, where states allow appointment of at a point after the initial appearance a defendant is unlikely to have counsel's assistance at that proceeding.~~.

But local rules may authorize lengthy delays in the determination of a defendant's right to public defender services, and local law may impose significant barriers to a defendant's invocation of the right to counsel. Some jurisdictions require a defendant to submit a written application for counsel, thereby delaying counsel's appointment several days, while the defendant completes the application and the court reviews it.[75] Others require indigent defendants to pay an "application fee" for public defender services; the fee deters a defendant from invoking the right to counsel.[76]

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[74] *See* Gross, *supra* note 13, at 842, 846, 850, 885 (collecting statutes, including Ga. Code Ann. § 17-12-23(b) (2016) ("[E]ntitlement to the services of counsel begins not more than three business days after the indigent person is taken into custody or service is made upon him or her of the charge, petition, notice, or other initiating process and such person makes an application for counsel to be appointed."); Va. Code Ann. § 19.2-158 (2016) (same); Tex. Crim. Proc. Code Ann. § 1.051 (West) (Court must appoint counsel for indigent defendant "not later than: the end of the third working day after the date on which the court or the courts' designee receives the defendant's request for appointment of counsel, if the defendant is arrested in a county with a population of less than 250,000").

[75] *See e.g.* Church v. Missouri, 268 F. Supp. 3d 992, 1002–03 (W.D. Mo. 2017), *rev'd on other grounds*,913 F.3d 736 (8th Cir. 2019).

[76] *See* Jack King, *NACDL News*, Champion, at 12, 13 (November/December 2008) (citing 18-month

Even if a defendant successfully invokes the right to counsel and is promptly provided with an attorney, it is unclear what assistance – if any - that attorney must provide. In many states, until the prosecution formally commits to going forward (by way of an indictment or information), there is no right to counsel's actual assistance, nor is there an independent right entitling the defendant to gather evidence or demand that the prosecution provide discovery.[77] The harsh reality of the uncounseled initial appearance procedure is that it is woefully inadequate to preserve or protect a defendant's rights.

study in seven cities revealing that "[c]ourt systems use excessive application fees . . . to discourage requests for counsel in misdemeanor cases").

[77] *See e.g.,* People v. Sawyer, 2002 WL 655273 (N.Y. Sup. Ct. Mar. 21, 2002) (rejecting defendant's claim of "a constitutional 'due process right' to preindictment discovery separate and apart from the statutory discovery scheme."); People v. Reese, 803 N.Y.S.2d 852 (N.Y. App. 2005) ("it is well settled that defendants, including those who potentially face capital charges, have 'no right to discovery prior to indictment,' statutory or otherwise."); In re Possible Violations of 18 U.S.C. §§ 201, 371, 491 F. Supp. 211, 215 (D.D.C. 1980) ("the due process clause does not provide a constitutional basis for pre-indictment discovery"); State v. Dabas, 71 A.3d 814, 824 (N.J. 2013) (defendant's automatic right to discovery only begins when "an indictment has issued"). *See generally* Ion Meyn, *Discovery and Darkness the Information Deficit in Criminal Disputes*, 79 BROOK. L. REV. 1091, 1102 (2014); Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1128 (2004).

C. Practical Consequences of Delayed or Defective Initial Appearance

Delay in initial appearance is immediately harmful and, over the long term, has devastating consequences. Prolonged pretrial detention is the most immediate result of a delay in initial appearance. A defendant's liberty depends, in the first instance, upon a pretrial determination about his bail status. Typically, a judge sets bail at, or after, an initial appearance. So pretrial release depends upon a judge or clerk making that initial appearance occur.

In some jurisdictions, initial bail amounts are set before arrest, either by a judicial warrant or by a local bail schedule.[78] In theory, this allows a defendant with financial resources to post bail without appearing before a judge. Yet, case law is replete with stories of newly arrested defendants whose jailers never told them of their bond status. [79] If local law requires that a *judge* advise the defendant about the preset bond, this defendant too must await an initial appearance for an opportunity to regain his liberty.[80] Even if a defendant knows about this bond and offers the requisite surety, a jailer may still refuse to accept it without an initial appearance.[81] In other words, every day of delay in initial appearance means another day of pretrial detention.

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[78] *See*, *e.g.,* Mont. Code Ann. 46-6-214 (West) (stating arrest warrant may contain bail amount)

[79] *See*, *e.g.,* Gaylor v. Does, 105 F.3d 572, 573 (10th Cir. 1997).

[80] *See*, *e.g,* Mont. Code Ann. 46-7-101 (West) (arrested person must be taken before a judge for initial appearance); Mont. Code Ann. 46-7-102 (West) (At initial appearance the judge will discuss bail).

[81] *See* Dodds v. Richardson, 614 F.3d 1185, 1206 (10th Cir. 2010) (describing how local practice "*prevented* felony arrestees whose bail had been set from posting bail" before initial judicial appearance). As discussed *infra* notes 115–117, a jailer who is aware of undue delay in initial appearance, is often under no obligation to notify the court or otherwise cure the delay. *See e.g.,* Moya v. Garcia, 895 F.3d

Even brief periods of such pretrial detention may cause irreparable harms to the defendant, to her family, and to her defense against the charges. Pretrial detention creates a risk of unimaginable violence, trauma, injury, and illness.[82] Pretrial detainees are at particular risk for suicide,[83] and adverse health outcomes, even if they are otherwise healthy people.[84] Jails are

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1229, 1236 (10th Cir. 2018) (finding that, absent a scheduled court appearance, New Mexico does not impose any duties on a sheriff or warden to bring an arrestee to court).

[82] Douglas L. Colbert et. al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail,* 23 CARDOZO L. REV. 1719, 1720 (2002) (hereinafter *Do Attorneys Really Matter*); Ion Meyn, *The Unbearable Lightness of Criminal Procedure*, 42 AM. J. CRIM. L. 39, 53-54 (2014) ("[D]etention collaterally provides a prosecutor with leverage. Pretrial detention demoralizes defendants. Jails are miserable, the food is horrid, the smell can be alarmingly bad, there is no view to the sky, and one is deprived of support when it is most needed—all conditions that encourage submission" to the prosecution's demands."). The assistance of counsel at later bail hearings does not cure the substantial injury inflicted by an uncounseled initial bail determination. Since counsel's advocacy follows the court's initial bail determination or the fixing of bond according to a legislative schedule, counsel is in the "disadvantageous position of trying 'to change a decision which was formulated without his presence'." LAFAVE, ET. AL, 4 CRIM. PROC. § 12.1(c) (3d ed.).

[83] Margaret Noonan, et al., Bureau of Justice Statistics, "Mortality in Local Jails and State Prisons, 2000-2013 - Statistical Tables," at 3, 12, 21 (Aug. 2015).

[84] *See* Amanda Petteruti & Nastassia Walsh, "Jailing Communities: The Impact of Jail Expansion and Effective Public Safety Strategies," at 15, available at http://www.justicepolicy.org/images/upload/08-04_REP_JailingCommunities_AC.pdf.

often neglected environments, rife with "mold, poor ventilation, lead pipes, and asbestos."[85] The jail population itself—a churning population of the poor, the disenfranchised, jail personnel, and family visitors—creates "vector[s] of contagious diseases."[86] Jails are ill-equipped to prevent—much less treat—serious mental and physical illnesses.

The external world does not readily accommodate a defendant's abrupt, unanticipated, and indefinite disappearance. Defendants may "lose jobs and face eviction from their homes."[87] Without employment, a defendant can fall behind on rent payments, car payments, and bills for utilities, food, and medication,[88] and their "families suffer the absence of an economic provider or child caretaker."[89] The indefinite nature of detention-without-initial appearance increases the emotional strain on a detainee's loved ones. Children, in particular, suffer when there is uncertainty about case status and release.[90] Jail rules may prohibit family visits before initial

[85] Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment,* 69 WASH. & LEE L. REV. 1297, 1318 (2012).

[86] *Id.*

[87] Colbert, *Do Attorneys Really Matter*, *supra* note 82 at 1720

[88] Appleman *supra* note 85 at 1320.

[89] Colbert, *Do Attorneys Really Matter*, *supra* note 82 at 1720.

[90] Nancy G. La Vigne, et al., Urban Institute Justice Policy Center, "Broken Bonds: Understanding and Addressing the Needs of Children with Incarcerated Parents," at 1 (Feb. 2008), http://goo.gl/54g9Eg (noting that pretrial detainees' children confront "significant uncertainty and instability").

appearance. And when families can visit, their visits are often "time consuming, expensive, and difficult to coordinate."[91]

Case outcomes are also damaged by a delay in initial appearance. As defendants wait for weeks, or months, for an initial appearance, their chances of defeating the charges dwindle. Delay in investigation "impedes preparation of a defense and is a sure-fire prescription for miscarriages of justice and convicting innocents at trial."[92] The days immediately after an arrest can be the most critical to the development of a defense. When an attorney finally does appear, the damage may be irreparable as "[d]elaying an accused's access to counsel [hinders] counsel's ability to find and talk to witnesses, gather physical evidence, and document [the defendant's] mental, physical, and emotional state[ ] near the time of the alleged crime."[93]

Since a detained and indigent defendant is unlikely to enjoy the assistance of counsel,[94] police may seek to capitalize on a defendant's isolation, hoping that a defendant who has not yet seen a

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[91] *Id.* at 4.

[92] Colbert, *Do Attorneys Really Matter*, *supra* note 82, at 1720.

[93] Brief of Amicus Curiae National Association of Criminal Defense Lawyers in Support of Petitioner, Rothgery v. Gillespie, 2008 WL 218874 (U.S.), at 4.

[94] *See Rothgery*, 554 U.S. at 216-17 (2008) (stating arrested defendant who has had probable cause determination but has not been formally charged does not have the right to "'preindictment private investigator'"); United States v. Gouveia, 467 U.S. 180, 191 (1984) ("[I]t may well be true that in some cases pre-indictment investigation could help a defendant prepare a better defense. But, as we have noted, our cases have never suggested that the purpose of the right to counsel is to provide a defendant with a pre-indictment private investigator."); People v. White, 917 N.E.2d 1018, 1039–40 (Ill. App. 2009)

judge or met with an attorney will be more willing to confess.[95] Indeed, "mounting empirical evidence" demonstrates that these circumstances can induce a “frighteningly high percentage of people to confess to crimes they never committed.”[96]

(finding no attachment of Sixth Amendment right to counsel in absence of formal judicial proceeding even when arraignment delayed by eight days).

[95] *See* Corley v. United States, 556 U.S. 303, 320 (2009) (describing that incarceration without judicial intervention "isolates and pressures the individual.")

[96] *Id.* at 321 (internal quotation marks omitted, and citing*, inter alia,* to Drizin & Leo, *The Problem of False Confessions in the Post–DNA World,* 82 N.C.L. REV. 891, 906–907 (2004). Indeed, pretrial detainees are “more likely to be convicted, to to receive a lengthy incarceration sentence, and to accrue more courtroom debt” than those who are released before trial. Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J. L. ECON. & ORG. 511, 511, 538 (showing pretrial detainees are more likely to be convicted because of “the likelihood that [these] defendants, who otherwise would have been acquitted or had their charges dropped” pleaded guilty instead). *See also* Charlie Gerstein, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513, 1523 (2013) (arguing that bail hearings “can prejudice plea bargains because of their ability to force a defendant to plead guilty”). They “are four times more likely to be sentenced to jail and three times more likely to be sentenced to prison than similar people released pretrial.” Sandra Guerra Thompson, *Do Prosecutors Really Matter?: A Proposal to Ban One-Sided Bail Hearings*, 44 HOFSTRA L. REV. 1161, 1170 (2016) (citing LAURA & JOHN ARNOLD FOUND., PRETRIAL CRIMINAL JUSTICE RESEARCH 4 (2013), available at http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief_FNL.pdf). Conversely, those who are arrested and promptly released have a sharply decreased likelihood of being found guilty. Will Dobbie, Jacob

Once a defendant finally has a first appearance in court, slipshod procedures and judicial neglect—or even abuse—may make that appearance almost worthless A judge may interrogate an uncounseled defendant, demanding that he decide at initial appearance whether he wishes to waive his right to a speedy trial,[97] a preliminary hearing,[98] or a grand jury indictment.[99] Before a defendant even has an attorney, a judge may set hearing or trial dates. Some defendants blurt out uncounseled confessions at their initial appearance or make other incriminating statements.[100] Others waive their right to counsel entirely.[101]

Goldin, and Crystal S. Yang*, The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108(2) AMERICAN ECONOMIC REVIEW 201, 202, 224–25 (2018).

[97] *See, e.g.*, State v. Kyser, No. 98 CA 144, 2000 WL 1159422, at *1 (Ohio Ct. App. Aug. 10, 2000)

[98] *See What Happens When You've Been Charged with a Misdemeanor*, SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM, http://ujs.sd.gov/Fourth_Circuit/Procedures/misdemeanor.aspx (last visited February 26, 2018).

[99] *See id.*

[100] *See, e.g.,* Fenner v. State, 846 A.2d 1020, 1024 (Md. 2004) (describing how uncounseled defendant, advocating for his own bail, stated "I'm not denying what happened" and the court admitted that statement into evidence at trial).

[101] *See* Iowa v. Tovar, 541 U.S. 77, 82 (2004) (describing defendant's waiver of counsel at initial appearance and plea). Arguably, the right to counsel at "critical stages" of criminal prosecution means that an uncounseled "waiver" of those rights violates the Sixth Amendment. However, constitutional remedies for these violations are rare. When the right to the appointment of counsel is delayed, there is little recourse unless a defendant can prove his innocence. *See, e.g.,* Barnes v. Cullman Cty. Dist. Court,

Facing indefinite detention without procedure and unsure when they will ever see an attorney, thousands of defendants simply give up. These defendants plead guilty at their initial appearance, even before they have ever spoken to an attorney.[102] Indeed, judges often encourage defendants to plead at initial appearance without counsel's assistance.[103]

Misdemeanor defendants are particularly impacted by delayed, irregular, and insufficient initial appearance procedures. Some jurisdictions require misdemeanor defendants to enter a plea

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No. 5:16-CV-1691-AKK, 2017 WL 1508239, at *1–2 (N.D. Ala. Apr. 27, 2017) (holding that, while trial court waited fourteen days to order appointment of counsel and defendant did not meet with his attorney until forty-four days after his arrest, defendant's plea of guilt vitiated his claim for civil damages, or prejudice to the outcome of his case).

[102] *See, e.g.*, Daves v. Dallas County, Texas, Case No. 3:18-cv-154, Complaint Filed 1/21/18, available at https://faithintx.org/wp-content/uploads/2018/10/CaseNo.3.18-ev-154.pdf (alleging majority of arrestees detained for days and weeks on money bail they cannot afford, facing indeterminate pretrial detention, plead guilty at eventual initial appearance); Kennedy v. United States, 756 F.3d 492, 493 (6th Cir. 2014) (holding that, until prosecution files formal charges, defendant has no right to the assistance of counsel in plea bargaining). These plea bargains are plagued by a "serious pre-plea informational imbalance." Erica Hashimoto, *Toward Ethical Plea Bargaining*, 30 CARDOZO L. REV. 949, 952 (2008). "[P]rosecutors generally have far more information about the strengths and weaknesses of cases than do defense counsel," or an unrepresented defendant. *Id.*

[103] *See, e.g.*, Kristen Senz, *Pilot Project Seeks to Eliminate Felony Case Delay*, NEW HAMPSHIRE BAR NEWS, April 16, 2014 (describing "an early, incentive plea offer to the defendant, which only remains on the table" after initial appearance and before the case is transferred for formal filing).

at the initial appearance.[104] Others either require that a defendant affirmatively invoke certain rights—such as the right to an adversary preliminary hearing[105] or to a trial by jury[106]—and strict procedural rules govern the form of invocation.[107] If an uncounseled defendant has an initial appearance and fails to fully comply with those rules, a court may hold that she has made a "complete waiver" of these important rights.[108] Meanwhile, the sheer numbers of misdemeanor cases create "assembly-line justice," in which unrepresented misdemeanants are pressured into pleading guilty at their first appearance in court.[109]

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[104] *See, e.g.,* State v. Eschrich, 2008 WL 2468572 at ¶ 21 (Ohio App., June 20, 2008).

[105] *See*, *e.g., Frequently Asked Questions (FAQs) in South Carolina Criminal Court*, SOUTH CAROLINA JUDICIAL DEPARTMENT 2 (2011) (requiring affirmative invocation to be provided a preliminary hearing) https://www.sccourts.org/selfHelp/FAQGeneralSessions.pdf (last visited February 26, 2018); *Criminal Processes*, UTAH COURTS (preliminary hearing only applies in felony cases) https://www.utcourts.gov/howto/courtprocess/criminal.html (last visited February 26, 2018); *What Happens When You've Been Charged with a Misdemeanor*, SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM (providing preliminary hearing only to Class 1 misdemeanors) http://ujs.sd.gov/Fourth_Circuit/Procedures/misdemeanor.aspx (last visited February 26, 2018)

[106] *See*, *e.g.,* OHIO CRIM. R. 23; *see also* State v. Hsu, 66 N.E.3d 1124, 1135 (Ohio App. 2016).

[107] *See, e.g.,* OHIO CRIM. R. 23 (Demand for jury trial must be "filed with the clerk of court not less than ten days prior to the date set for trial, or on or before the third day following receipt of notice of the date set for trial, whichever is later").

[108] *See id.*

[109] Argersinger v. Hamlin*,* 407 U.S. 25, 33-34 (1972)*. See also* John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel,* 48 HARV. C.R.-C.L. L. REV 1, 4-5 (2013) (describing how

In sum, a failure to provide prompt and meaningful initial appearance procedures coerces guilty pleas and damages case outcomes. A plea prompted by the prospect of continued detention-without-process is nevertheless a binding plea that may preclude any remedy for the prolonged detention without initial appearance.[110] A conviction at the beyond-a-reasonable-doubt standard can be irrevocably tainted by process failures that arose before formal charging.[111] An innocent person—like Ms. Jauch—may spend months in jail, only to have the charges dismissed.

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uncounseled minor offenders accept a fine or diversionary program, to their detriment, given collateral consequences).

[110] *See e.g.,* Barnes v. Cullman Cty. Dist. Court*,* 2017 WL 1508239, at *1 (N.D. Ala. Apr. 27, 2017) (holding defendant's plea of guilt vitiated his claim for civil damages where court waited fourteen days to order appointment of counsel and defendant did not meet with his attorney until forty-four days after his arrest).

[111] For example, the Fourth Amendment probable cause determination has a direct impact on a defendant's custodial status: if there is no probable cause for arrest, the defendant cannot be detained. In turn, the Sixth Amendment right to counsel has a direct impact on the defendant's ability to meaningfully challenge probable cause or litigate a motion for pretrial release. The procedural structures that implement and effectuate these constitutional rights are similarly intertwined: the Constitution guarantees that an indigent defendant will have the assistance of counsel, but the Court has never required the prompt appointment of that counsel. Failure to guarantee counsel's prompt assistance delays any adversarial testing of probable cause or litigation of bail. Failure to ensure a right to subpoena and preserve evidence precludes substantive bail argument about the strength of the case and may permanently impede an accurate disposition of the case. *See, e.g.,* Lissa Griffin, *Pretrial Procedures for Innocent People:*

D. Barriers to Effective Remedy

There are few effective legal remedies for delayed or defective initial appearance procedures. By definition, their access to court is blocked.[112]A detained person could ask jail officials to take him or her court.[113] However, civil suits tell the stories of detained persons who tried formal, and informal, complaints to their jailers, all to no avail.[114] While a state statute might compel release

Reforming Brady, 56 N.Y.L. SCH. L. REV. 969, 970–71 (2012) (noting that, although "we have learned much about what causes wrongful convictions . . . this knowledge has not yet resulted in reforms of the pretrial adjudicatory process. We persist in ignoring what we already know.").

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[113] If a detainee wanted to bring a legal action during the detention, she would seek relief in federal habeas corpus. *See* Wilkinson v. Dotson, 544 U.S. 74, 78 (2005) (holding that a prisoner in state custody must use federal habeas corpus and not 42 U.S.C. §1983 to challenge the fact or duration of confinement). A writ of habeas corpus is an extraordinary form of relief and is granted only to remedy constitutional error. Brecht v. Abrahamson, 507 U.S. 619, 633–34 (1993) (noting that habeas corpus has been regarded as an extraordinary remedy and that "[t]hose few who are ultimately successful [in obtaining habeas relief] are persons whom society has grievously wronged") (internal quotation marks and citation omitted). Hence, the barrier to relief is high. In any event, the ability of an arrestee detained without access to counsel or a judge to bring such an action is remote.

[114] *See* Hayes v. Faulkner Cy., Ark., 388 F.3d 669, 672 (8th Cir. 2004) (alleging that, during his 38-day detention without initial appearance, plaintiff sent four grievances to jail administrator who said, "I don't set people up for court"); Armstrong v. Squadrito, 152 F.3d 564, 567 (7th Cir. 1998) (describing 57-day detention without initial appearance despite repeated inquiries); Coleman v. Frantz, 754 F.2d 719, 721 (7th Cir. 1985) (describing 18-day detention with no relief despite Plaintiff's requests); Hoffman v.

if a person is not brought before the court in a timely manner, there are no reported cases of that actually happening and it is easy to understand why. Jail officials wait for the court or prosecutor to act. As a legal matter, the jailer may not have legal authority to release a prisoner without a court order. As a practical matter, it would be political suicide for a sheriff to release a detainee on his or her own accord.[115] Hence, disappeared detainees have little immediate recourse

Criminal remedies are almost non-existent. While there may be some post-hoc regulation of initial appearance rights via the suppression of statements, this pretrial remedy only benefits those who (1) make statements; and, (2) are among the small percentage of defendants whose cases proceed to motions or trial. [117]

The main avenue for relief for the person detained in excess of state statutory requirements – whether within defined limits or "without unnecessary delay" – is to bring a claim for damages

Knoebel, No. 4:14-cv-00012-SEB-TAB, 2017 WL 1128534 at *1 (S.D. Ind. 2017) (alleging 60-day detention without initial appearance despite repeated inquiries).

[115] *See* Grogen v. Gautreaux, No. 12-0039 BAJ-DLD, 2012 WL 12947995, at *3 (M.D. La. July 11, 2012) (holding that 40-day detention, in violation of state law requiring initial appearance within 72 hours or release from custody, does not create constitutional claim for relief and Plaintiff's only relief could have come from a court order for release).

[117] *See* State v. Strong, 236 P.3d 580, 583–84 (Mont. 2010) (holding suppression of evidence an insufficient remedy for 42-day detention between arrest and initial appearance, and mandating a dismissal without prejudice).

in federal court for violation of constitutional rights under 42 U.S.C. § 1983.[118] There are several fundamental barriers to success on such a claim. First and foremost, what is the constitutional violation? In most cases, there is no violation of the Fourth Amendment probable cause requirement as either the person was arrested on a valid warrant, or, if there was no warrant, there was a timely *ex parte* determination of probable cause by a judge.[119] The validity of the initial probable cause determination does not turn on whether police arrested the wrong person.[120] Instead, any claim must be that the lengthy pretrial detention between arrest and first

[118] 42 U.S.C. §1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." 41 U.S.C. § 1983.

[119] *See infra* notes 158–173 and accompanying text (explaining that probable cause is a low bar and is determined *ex parte*). *See, e.g.,* Jones v. City of Jackson, 203 F.3d 875, 880 (5th Cir. 2000) (holding that Fourth Amendment claim for unlawful pretrial detention fails because Plaintiff was seized on a facially valid bench warrant); Jackson v. Hamm, 78 F. Supp. 2d 1233, 1238 (M.D. Ala 1999) (holding valid warrant vitiated any Fourth Amendment claim for arrestee who was detained 28 days without initial appearance).

[120] *See infra* note 163 and accompanying text. The courts have also found that claims relating to lengthy pretrial detention do not trigger the Eighth Amendment's Cruel and Unusual Clause, as the

appearance violates the Due Process Clause of the Fourteenth Amendment. But, there is no explicit initial appearance right, and the Supreme Court has never held that prolonged post-arrest detention, without access to the courts or counsel, violates the Due Process Clause.[121]

In the absence of Supreme Court guidance, federal courts remain divided about whether the Due Process Clause establishes the right to a prompt and substantive initial appearance procedure, with the assistance of counsel. Some courts have rejected the notion that a state law requiring that a detained person be brought before a judge within a specified period of time creates a federal constitutional liberty interest. [122] In their view, the appearance guaranteed by

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Supreme Court has held that prohibition applies only to a convicted prisoner. *See* Armstrong v. Squadrito, 152 F.3d 564 (7th Cir. 1998) (*citing* Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244 (1983)). While the Eighth Amendment prohibition on excessive bail hearing does apply, the Court's jurisprudence has not been generous here either, not requiring a timely, counseled, or adversary hearing. *See,* Douglas L. Colbert, *Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1, 34 (1998) (hereinafter *The Illusory Right*).

[121] Given the Court's insistence, described in Part II, that an *ex parte* judicial determination of probable cause under the Fourth Amendment is all the process that is due an arrested defendant, it is understandable that a lower court would conclude that the Fourth Amendment occupies the field. *See, e.g.,* Alexander v. City of Muscle Shoals, Ala., 766 F. Supp. 2d 1214 (N.D. Ala. 2011) (stating that where "a detainee was arrested in the course of the commission of a crime and without a warrant, any due process right to an initial appearance may be subsumed by the Fourth Amendment right to a prompt judicial determination of probable cause.").

[122] *See* Armstrong v. Squadrito, 152 F.3d 564, n. 4 (7th Cir. 1998) (rejecting reasoning of Ninth Circuit in *Oviatt* that statutory procedure creates procedural due process right); Moya v. Garcia, 895 F.3d

state law is just a guarantee of further procedure, and not of release.[123] Other courts have held that a state statute does not create a due process liberty interest unless the state law imposes a specific time limit on the initial appearance (e.g., 72 hours). [124] For those courts, a less precise command (e.g., "without unnecessary delay") creates no constitutional liberty interest at all.

When federal courts recognize a freestanding due process initial appearance right, they struggle to determine whether that right lies in procedural or substantive due process.[125] Courts will only find a violation of substantive due process if the detention "shocks the conscience" of

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1229, 1241 (10th Cir. 2018) (McHugh, concurring and dissenting) (finding no procedural due process right in statutory right to timely bail determination because "'an expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause.'") (*quoting* Olim v. Wakinekona, 461 U.S. 238, 250 n.12 (1983)); Alexander v. City of Muscle Shoals, Ala., 766 F. Supp. 2d 1214, 1232, 1235 (N.D. Ala. 2011) (holding that violation of state law by delay in initial appearance does not create procedural due process right where initial appearance is just "a process to an end; the hearing itself will not assure release."); Jackson v. Hamm, 78 F. Supp. 2d 1233, 1239 (M.D. Ala. 1999) (same).

[123] *See*, *e.g., Alexander*, 766 F. Supp. at 1235.

[124] *See* Diaz v. Wright, 2016 WL 10588098, at *16 (D.N.M. 2016) (holding that New Mexico law prohibiting "unnecessary delay . . . allows for considerable discretion and thus cannot be the basis of a constitutionally protected liberty interest") (citing *Ky. Dept. of Corr. v. Thompson*, 490 U.S. 454, 461 (1989); Cordova v. City of Albuquerque, 2013 WL 12040728, at *5 (D.N.M. 2013) (same).

[125] *Compare* Coleman v. Frantz, 754 F.2d 719, 723 (7th Cir. 1985) (7th Cir.) (finding substantive due process violation), *and* Hayes,v. Faulkner County, Ark., 388 F. 3d 669 (8th Cir. 2004) (same), *with* Oviatt v. Pearce, 954 F.2d 1470, 1477 (9th Cir. 1992) (finding procedural due process violation), *and* Jauch v. Choctaw County, 874 F.3d 425 (5th Cir. 2017) (same).

the court.[126] Whether a detention shocks the court's conscience will depend upon how long the detention lasted, and upon whether the plaintiff-detainee can show that the [civil] defendant was—individually or officially—"deliberately indifferent" to the plaintiff's detention without initial appearance. Typically, this requires that the court find that: (1) the plaintiff endured a lengthy post-arrest delay[127] without access to the courts or counsel; and (2) the plaintiff complained to her jailers vigorously and repeatedly about this delay.[128]

Regardless of whether a claim lies in substantive or procedural due process, civil legal remedies remain almost unattainable. Identifying the appropriate defendant for suit is the first significant barrier to success. A §1983 plaintiff proceeding against defendants in their individual capacities must show that the defendants have both personal involvement in, and responsibility

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[126] Sacramento v. Lewis, 523 U.S. 833, 846–847 (1998). *See* notes 235–238 *infra* and accompanying text (discussing substantive due process claim).

[127] *See* Sanchez v. Campbell, 2010 WL 547620 (N.D. Fla. 2010) (holding that five-day detention without initial appearance not so long as to "shock the conscience.").

[128] The requirement that a detainee have protested his confinement in order to make a due process claim emanates from the Supreme Court's dicta in *Baker v. McCollan*, where the Court imagines there might be a due process violation if a defendant was detained indefinitely "in the face of repeated protests of innocence." 443 U.S. 137, 144 (1979). *See* Armstrong v. Squadrito, 152 F.3d 564, 575 (7th Cir. 1998) (finding it significant for a due process violation that Armstrong protested his lengthy detention); Coleman v. Frantz, 754 F.2d 719, 721 (7th Cir. 1985) (same);; Curtis v. White, No. 2:09-cv-00097-JLH-JJV, 2010 WL 5625668 at *4 (E.D. Ark. 2010) (holding "deliberate indifference" that "shocks the conscience" shown where Plaintiff asked and made request to file grievance during 10-day detention).

for, the challenged detention.[129] This is often difficult as extended delays in initial appearance are rarely attributable to a single bad actor. Rather, they are generally the result of widespread system failures, in which police, sheriffs, court personnel, and prosecutors all play a role.[130]

Even if a plaintiff could show a defendant's individual fault, immunity doctrines further hamper suits for relief. Judges and prosecutors enjoy absolute immunity.[131] Meanwhile, sheriffs

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[129] Moya v. Garcia, 895 F.3d 1229, 1233 (10th Cir. 2018).

[130] *See* Moya v. Garcia, 895 F.3d 1229, 1234 (10th Cir. 2018) (finding delay in bringing detained defendant to court was not the fault of sheriff and wardens because scheduling of court hearings lay solely with the court); Jones v. Lowndes Cy., Miss., 678 F.3d 344, 350–51 (5th Cir. 2012) (holding that sheriff's potentially unconstitutional policy did not cause delay in appearance, rather, judges did); Dayton v. Lisenbee, No. 418-cv-01670-AGF, 2019 WL 1160816 at *4 (E.D. Missouri March 13, 2019) (dismissing complaint for failure to state a claim because could not show jail officials responsible for 53-day detention when date for first court appearance set by court, not jail).

[131] *See* Pierson v. Ray, 386 U.S. 547, 553–54 (1967) (establishing judicial immunity); Imbler v. Pachtman, 424 U.S. 409, 424–25 (1976) (establishing prosecutorial immunity). *But see* Moya v. Garcia, 895 F.3d 1229, 1250 (McHugh, J., concurring and dissenting) (agreeing jailers cannot force courts to schedule, "[b]ut the solution is not to grant jailers refuge behind judges cloaked with absolute immunity, enabling the jailers to violate the Constitution with impunity"); Armstrong v. Squadrito, 152 F.3d 564, 579 (7th Cir. 1998) (finding the jail responsible for the delay; "The jail acts at its own peril if it passes responsibility off on another party—whether the courts or the prosecutor."). For an example of the difficulties plaintiffs have in naming defendants and making a constitutional claim, *see* Kevin Grasha, *Lawsuit: Fairfield judge violated people's constitutional rights*, CINCINNATI ENQUIRER, Feb. 7, 2019, available at https://www.cincinnati.com/story/news/2019/02/07/lawsuit-fairfield-judge-violated-peoples-

and wardens of jails have qualified immunity from suit.[132] These officials are only liable for damages in their individual capacities if the constitutional right in question has been "clearly established," such that a reasonable official would know that their conduct violated the Constitution.[133] Again, then, the root of the problem lies in the United States Supreme Court's failure to clearly establish the right to a prompt, substantive, and counselled initial appearance.[134]

Suing jail officials, such as the sheriff, in their official capacity, is an equally daunting challenge. Here, a plaintiff must show that there was a "policy" or "custom" that led to the

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constitutional-rights/2791276002/ (naming judge as defendant and inaccurately claiming the Constitution requires a hearing before a judge within 48 hours of arrest).

[132] *See* Coleman v. Frantz, 754 F.2d 719, 726 (7th Cir. 1985) (citing authority supporting qualified immunity for sheriffs).

[133] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). *See, e.g.,* Jones v. Lowndes Cy., Miss., 678 F.3d 344, 346 (5th Cir. 2012) (holding that it was not "clearly established" constitutional law that officer should have done more to bring detainee before court where judges at fault for delay).

[134] In any particular federal circuit, whether the right is clearly established will depend on whether that circuit court has *previously* found the right to exist *See, e.g.,* Moya v. Garcia, 895 F.3d 1161 (10th Cir. 2018) (McHugh, J., concurring and dissenting) (finding constitutional violation but jailers entitled to qualified immunity because no Supreme Court or Tenth Circuit case clearly established the right); Coleman v. Frantz, 754 F.2d 719 (7th Cir. 1985) (holding that due process right of arrestee to prompt first appearance before a judge not "clearly established" where issue was one of first impression in the circuit); Jackson v. Hamm, 78 F. Supp. 2d 1233 (M.D. Ala. 1999) (holding that substantive due process right to initial appearance within reasonable time after arrest was not "clearly established" where no Supreme Court or Eleventh Circuit precedent).

deprivation of the constitutional right.[135] Isolated negligence will be insufficient to show a policy or custom.[136] It is unlikely that any jail's *official* policy will be to hold individuals for lengthy periods, so a plaintiff will have to show that an unofficial policy or custom led to the detention.[137]

Even then, a plaintiff must show the custom or policy was one of "deliberate indifference" to the plight of wrongful detention.[138] To establish this "deliberate indifference," a plaintiff must have openly and vigorously complained about the delay in initial appearance, the insufficient initial appearance procedure, or the absence of court-appointed counsel. [139] Since the very

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[135] *See* Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 694–95 (1978) (establishing a §1983 cause of action for municipal liability).

[136] *See* Pledger v. Reece, 2005 WL 3783428 at *4–5 (W.D. Ark. 2005) (holding no municipal liability for 14-day detention without appearance before a judge where the evidence shows only human error or negligence).

[137] A "policy" is a "deliberate choice to follow a course of action . . . made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." Pembaur v. City of Cincinnati, 475 U.S. 469, 483-84 (1986). To be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 US 635, 640 (1987). A constitutional right is clearly established when "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier v. Katz, 533 US 194, 202 (2001).

[138] *Estelle v. Gamble*, 429 U.S. 97, 106, (1976) (establishing the "deliberate indifference" standard for correctional care cases.)

[139] Some courts have found such a policy or custom showing "deliberate indifference" where jail

purpose of the missing procedure is to *inform* a defendant of his constitutional rights, this requirement places an absurdly unfair burden on indigent and powerless defendants.[140] In sum, even if a plaintiff successfully persuades a court to acknowledge the due process initial appearance right, §1983 sets significant barriers to successfully recovering.[141]

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officials, who are responsible for those in their custody, have a policy of inaction in relying on the court to bring the defendant to court in a timely manner. *See* Hayes v. Faulkner Cy. Ark., 388 F.3d 669, 674 (8th Cir. 2004); Armstrong v. Squadrito, 152 F.3d 564, 578–79 (7th Cir. 1998); Oviatt v. Pearce, 954 F.2d 1470, 1477–79 (9th Cir. 1992); Scott v. Belin, 2008 WL 350628, at *7 (W.D. Ark. 2008).

[140] *See* Diaz v. Wright, No. Civ. 14-922 JCH/LAM, 2016 WL 10588098, at *17 (D.N.M. 2016) (holding "deliberate indifference" not shown where no evidence that plaintiff here made repeated protests or requests during 18-day detention that officers knew of or ignored); Alexander v. City of Muscle Shoals, Ala., 766 F. Supp. 2d 1214, 1234 (N.D. Ala. 2011) (holding that Plaintiff appears never to have protested his detention and cannot establish "deliberate indifference"). *Cf.* Oviatt v. Pearce, 954 F.2d 1470 (9th Cir. 1992) (finding "deliberate indifference" in policy of inaction where schizophrenic detainee did not complain and was held for 114 days before appearing before a judge).

[141] Significantly as well, one court believes that there is no cause of action for an unlawful detention under §1983 if there is a valid conviction that follows. In *Barnes v. Cullman County Dist. Ct.*, 2017 WL 1508239) (N.D. Ala. 2017), the court believed this outcome is commanded by *Heck v. Humphrey*, 512 U.S. 477, 487 (1994), where the Court held that a §1983 claim for damages that would render a conviction or sentence invalid is not ripe until the conviction or sentence is called into question. While this reasoning is likely in error since the claim of unlawful pretrial detention stands apart from any validity of the underlying charges, this argument is beyond the scope of this Article.

On those rare occasions when plaintiffs have successfully established a §1983 due process violations, courts have awarded obscenely low damages. For example, in one case, a federal court awarded the defendant $1 per day for each of the *seventy-seven* days that he had been held without an initial appearance in court.[142] These nominal damages offer no meaningful recompense for a defendant's extra-judicial incarceration, much less the loss of income and family support, or the damage to his ability to mount a defense. More importantly, these insignificant damage awards fail to meaningfully deter future due process violations.

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In the United States, then, a person can be wrongly jailed for days, weeks or months without ever seeing a judge or a lawyer and the detention may not run afoul of the Constitution. How can a person can be arrested and detained without any constitutional right to a prompt and counseled initial appearance that includes a meaningful constitutional advice-of-rights? Why has United

[142] Scott v. Belin, 2008 WL 350628, at *8 (W.D. Ark. Feb. 7, 2008). *See also* Scott v. Denzer, 2008 No. 06-5202, WL 2945584, at *7 (W.D. Ark. 2008) (awarding only nominal damages of $1 per day for 48 days of detention without an appearance before a judge); Curtis v. White, 2010 WL 5625668, at *1 (E.D. Ark. Dec. 17, 2010), *report and recommendation adopted*, 2011 WL 202330 (E.D. Ark. Jan. 21, 2011) (awarding defendant $1000 after State "violated his constitutional right to due process by detaining him for ten days before allowing him to appear before a judge"). Ms. Jauch's case remains a notable exception. *See Jury Awards $250K to Woman Jailed 96 Days Without Seeing a Judge*, N.Y. POST (Mar. 21, 2019, 12:03 AM), https://nypost.com/2019/03/21/jury-awards-250k-to-woman-jailed-96-days-without-seeing-a-judge/.

States Supreme Court not addressed this problem? Part II illuminates the jurisprudential history of this outrageous state of affairs.

II. THE SUPREME COURT'S MISPLACED RELIANCE ON THE FOURTH AMENDMENT TO REGULATE POST-ARREST PROCEDURE

The Supreme Court's failure to guarantee a meaningful initial appearance process arises from its broader reluctance to apply the Due Process Clause to criminal proceedings.[143] Beginning with *Gerstein v. Pugh*[144] in 1975, the Court has relied solely on the inapposite and inadequate protections of the Fourth Amendment as sufficient procedure for recently arrested defendants. The Court's jurisprudence in this line of cases demonstrates a constrained view of Due Process, an overconfidence in state criminal process, and fear of too much adversariness.

The Court's reliance on the narrow requirements of the Fourth Amendment to regulate the post-arrest process has left a procedural abyss in our criminal justice system. The lax requirements of an *ex parte* probable cause determination may suffice to authorize an arrest, However, the Fourth Amendment was never intended to authorize a continued pretrial detention

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[143] *See* County of Sacramento v. Lewis, 523 U.S. 833 (1998) (noting the Court has "'always been reluctant to expend the concept of substantive due process.'") (*quoting* Collins v. Harker Heights, 503 U.S. 115, 125 (1992)). The Supreme Court has underscored, "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Id.* at 842 (*citing* Albright v. Oliver, 510 U.S. 266, 273 (1994)) (internal quotation marks omitted))

[144] 420 U.S. 103 (1974).

without an initial appearance, nor does the Fourth Amendment speak to the right to an initial appearance.[145]

Between the investigative and the adjudicative stages of a criminal case is a constitutional wasteland.[146] The constitutional directives governing the police end with arrest under the Fourth Amendment, yet the constitutional rights associated a criminal prosecution do not attach until a defendant's first appearance in court before a judge. The Court's parsimonious view of the role of due process in constitutional criminal procedure jurisprudence leaves the post-arrest, pretrial stage of the criminal process strikingly underdeveloped and under-theorized.

A. The Limited Reach of the Fourth Amendment

The Fourth Amendment's history and its contemporary usage demonstrate its unique role in *investigation*, and not *adjudication*, of crime. Yet, the Supreme Court's bizarre overextension of the Fourth Amendment's reach has led to an absurd proposition: that the Fourth Amendment authorizes prolonged post-arrest detention without access to the courts or counsel. The Fourth Amendment probable cause requirement was explicitly tailored to the limited function of authorizing an arrest.[147] Thus, the Fourth Amendment has a limited gatekeeping role in criminal prosecutions. No history or case law extends the Fourth Amendment further.

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[145] *See infra* note 167–173.

[146] *See* Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 17 (2006) (describing the dearth of constitutional protections in pretrial criminal procedure as opposed to protections at trial or in pretrial civil procedure).

[147] Criminal defendants who are served with summonses are not seized under the Fourth Amendment and only rarely experience significant pretrial restraints on their liberty. Accordingly, this Article does not

The Fourth Amendment's proscription on "unreasonable searches and seizures" ensures judicial review of the actions of the police in discrete investigative activities, from the search of a home and seizure of property to the paradigmatic "seizure" of the person, which is an arrest.[148] Notwithstanding interpretive debate over the Fourth Amendment's text,[149] no Fourth

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focus on the pretrial process applicable to defendants served with summonses.

[148] *See* Terry v. Ohio, 392 U.S. 1, 16 (1968) (describing arrest as the greater seizure contemplated by the Fourth Amendment). Note that the Framers did not necessarily intend that a seizure of a person in the form of an arrest was included in the term "seizure." Indications are that the Framers were solely concerned with the "seizure" of physical items upon a search of the home. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 724 (1999) (concluding that the Framers' sole aim was to ban "Congress from authorizing use of general warrants" and "did not intend it to guide officers in the exercise of discretionary arrest").

[149] The debate among scholars is how the Framers intended the "reasonableness" clause to interact with the "Warrants" clause. Akhil Amar is the leading voice arguing that the Framers were focused on primarily reasonableness as the controlling clause, paving the way for warrantless searches. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994) (arguing that the Fourth Amendment simply "require[s] that all searches and seizures be reasonable"). Other scholars argue that "the Framers understood 'unreasonable searches and seizures' simply as a pejorative label for the inherent illegality of any searches or seizures that might be made under general warrants." Davies, *supra* note 148, at 551. *See also* Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1723–24 (1996) (reviewing the seminal work of William J. Cuddihy in his unpublished Ph.D. dissertation *The Fourth Amendment: Origins and Original Meaning,* 602-1791 (1990) and finding that "it supports the conclusion embodied in the conjunctive theory that the Fourth Amendment rejects

Amendment scholarship supports a claim that the Framer's intended that amendment to address all post-arrest detention or post-arrest judicial process.[150] "[T]he historical concerns [about the Fourth Amendment] were almost exclusively about the need to ban house searches under general warrants."[151] And the "unreasonable searches and seizures" regulated by the Fourth Amendment were the government's ubiquitous ransacking of colonists' homes and the seizures of goods found there.[152]

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both warrantless general searches and general warrants as unreasonable").

[150] *See, e.g.,* Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707 (1996); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999); David E. Steinberg, *The Uses and Misuses of Fourth Amendment History*, 10 U. PA. J. CONST. L. 581 (2008); Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925 (1997).

[151] Davies, *supra* note 148, at 551. *See also* David E. Steinberg, *The Uses and Misuses of Fourth Amendment History*, 10 U. PA. J. CONST. L. 581, 583 (2008) (concluding that history bears out that the Framers concern was "a single, narrow problem: physical trespasses into houses by government agents").

[152] *See* Maclin *supra* note 150 at 939 (*quoting* William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning,* 602-1791, 376-77, 385 (1990) (unpublished Ph.D. dissertation)) ("'Promiscuous powers of search and seizure were common to the laws of the colonies on all these topics'. The New England colonies in general, and Massachusetts in particular, enacted laws that provided for various forms of general searches and seizures that affected ordinary people . . . [and] allowed intrusions to 'collect taxes, safeguard the quality of processed merchandise, and discourage debauchery, idleness and profanation of the Sabbath'").

While the Fourth Amendment is not frozen in time,[153] case law and treatises still uniformly understand the Fourth Amendment to apply to the investigative processes of police searches and seizure.[154] Today, the prototypical seizure is an arrest, which requires a judicial finding of probable cause.[155]

The Fourth Amendment probable standard honors the investigative role of a police officer who must be given latitude to investigate crime.[158] When the officer submits those investigative conclusions to a reviewing judge, the "[t]echnical requirements of elaborate specificity once exacted under common law pleadings have no proper place" in the Fourth Amendment

[153] For example, government intrusions not contemplated by the Framers must be covered by the term "search". *See, e.g.,* Katz v. United States, 389 U.S. 347, 359 (1967) (holding "search" applies to wiretapping); Kyllo v. United States, 533 U.S. 27, 40 (2001) (holding "search" applies to thermal imaging); Carpenter v. United States, 138 S. Ct. 2206, 2220 (2018) (holding "search" applies to cell site location data).

[154] *E.g.* Search and Seizure Frequently Asked Questions, Justia.com (last visited Oct. 15, 2019) justia.com/criminal/docs/search-seizure-faq/

[155] *See infra* notes 189–192 and accompanying text.

[158] The replacement of a "felony in fact" standard with the much lower "probable cause" standard for arrest came about long after the passage of the Fourth Amendment. *See* Davies, *supra* note 148, at 636–38 (noting that the import from England of the "probable cause" standard for an arrest "provided the officer with a substantial degree of discretion to judge the appropriateness of an arrest. As a result, an officer enjoyed a much broader latitude for erroneously arresting innocent persons or for making warrantless arrests of persons who were actually guilty only of a misdemeanor").

inquiry.[159] Instead the judge evaluates a probable cause statement that was "drafted by nonlawyers in the midst and haste of a criminal investigation"[160] and "make[s] a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability" that the person to be arrested committed a crime.[161] The resulting Fourth Amendment determination is a compromise: it permits arrests based the "factual and practical considerations" of police investigations, and forbids arrests based solely on an officer's whim.[162]

This compromise explains the Fourth Amendment's generous tolerance for inaccuracy and error in the probable cause determination. The probable cause determination need not be correct. Even (reasonable) investigative mistakes will not undermine probable cause to arrest.[163] Police

[159] Illnois v. Gates, 462 U.S. 213, 235 (1983).

[160] *Id.*

[161] *Id.* at 238.

[162] Draper v United States, 358 U.S. 307, 313 (1959).

[163] *See* Franks v. Delaware, 438 U.S. 154, 165 (1978) (stating that an officer's probable cause showing does not have to be "'truthful' in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily."); Maryland v. Garrison, 480 U.S. 79, 87 (1987) (noting that the Court has "recognized the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants").

affidavits may highlight facts suggesting guilt and downplay facts pointing toward innocence.[164] Police need not have investigated leads that might exonerate a suspect and their probable cause affidavits may rest only on hearsay.[165]

The Constitution makes up for this "quick and dirty" probable cause assessment by guaranteeing a prompt and rigorous adjudicative process. Each seizure (arrest) ripens into pretrial detention, as a suspect is booked into jail and is held to answer the charges in court, through a series of adjudicative processes that begin with initial appearance and extend through disposition, whether by dismissal, plea, or trial.[166] In other words, the probable cause

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[164] An affidavit including misleading information or omitting exculpatory information will not amount to a violation of the Fourth Amendment without a substantial showing that the officers were deliberate or reckless. Franks v. Delaware, 438 U.S. 154, 155–56 (1978). Police can rely in good faith on a warrant issued by a magistrate, even if it is later found not to be supported by probable cause. United States v. Leon, 468 U.S. 897, 913 (1984).

[165] Franks v. Delaware, 438 U.S. 154, 165 (1978) (finding "probable cause may be founded upon hearsay"); *See* Arizona v. Youngblood, 488 U.S. 51, 59 (1988) (finding police need not hold investigative process to constitutional tests). In lieu of a hearsay law enforcement witness, police could choose to submit the sworn statement of a criminal complainant. However, that practice creates fodder for subsequent cross-examination of a lay witness. As a result, hearsay police affidavits are the most typical basis for sworn statements in support of arrest. Of course, even if police claim first-hand knowledge of the facts, the oath that accompanies their probable cause affidavit is a poor guarantor of truth. If the oath itself were a sufficient guarantor of the declarant's candor, there would be no need for the right to confrontation.

[166] *See* American Bar Association, *How Courts Work*, ABA (Sept. 9, 2019)

determination is a temporary but "necessary accommodation between the individual's right to liberty and the State's duty to control crime."[167] The constitutional compromise that satisfies probable cause to arrest does not supply constitutional authority for extended pretrial detention without adjudicatory procedure.[168]

The cursory procedures associated with the probable cause determination reaffirm its limited purpose. A criminal defendant has no constitutional right to any "adversary safeguards" in the judicial review of probable cause.[169] The judicial probable cause determination may be both *ex parte* and non-adversarial.[170] Indeed, the judicial probable cause review begins, and ends, with

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https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/arrestprocedure/

[167] *Gerstein*, 420 U.S. at 112. Similarly, the grand jury limits prosecutorial power by interposing citizen-grand jurors between prosecutors and a potential accused. *See* LAFAVE & ISRAEL, CRIMINAL PROCEDURE 793–94 (4th ed. 2004)..

[168] *See* U.S. CONST. AMEND. IV.: ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.")

[169] Gerstein v. Pugh, 420 U.S. 103, 120 (1974). As discussed in the next section, the *Gerstein* Court also refused to recognize the right to have an attorney investigate the facts that allegedly support the probable cause decision. *Id.* at 120 n.21. *See* Jones v. City of Santa Monica, 382 F.3d 1052, 1055 (9th Cir. 2004); Garcia v. City of Chicago, 24 F.3d 966, 969–70 (7th Cir. 1994); King v. Jones, 824 F.2d 324, 327 (4th Cir. 1987).

[170] *See* infra notes 169 and accompanying text (describing *Gerstein*'s holding to this effect). While

the facts presented within the four-corners of the affidavit. As a result of these procedural limitaitons, the Fourth Amendment probable cause assessment is "little more than [a] heightened suspicion [inquiry] . . . not even remotely sufficient to screen out individuals who are factually not guilty."[171] However, these procedural limitations also reflect the limited reach of the Fourth Amendment probable cause requirement: it mandates (minimal) judicial review of the police power to arrest—nothing more.[172]

This, of course, makes good sense. After all, the Framers never intended the probable cause determination to be the beginning—or the end—of post-arrest criminal procedure. Instead, they intended that an arrest would activate the Constitution's adjudicatory procedures and give rise to a defendant's adjudicatory rights. The Fourth Amendment arrest triggers adjudicatory processes that begin with—and are effectuated by—the initial appearance procedure. Sadly, the Supreme Court has gravely misunderstood, or willingly exaggerated, the Fourth Amendment's application in the adjudicative process.

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some jurisdictions conduct the probable cause review at the defendant's initial appearance in court, there is no constitutional requirement that these two be held together.

[171] Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 B.Y.U. L. REV. 669, 680-81 (1992).

[172] *See id*. The judicial probable cause review "safeguard[s] citizens from rash and unreasonable" government intrusions and "from unfounded charges of crime." Brinegar v. United States, 338 U.S. 160, 175-76 (1949).

B. *Gerstein*'s Missteps

With *Gerstein v. Pugh*[174] in 1975, the Supreme Court began a steady descent into rigid reliance on the Fourth Amendment to regulate early post-arrest procedure. *Gerstein* offered the Court an opportunity to establish a coherent constitutional framework for assessing a defendant's post-arrest procedural constitutional rights. The *Gerstein* plaintiffs were criminal defendants who had been arrested without a warrant.[175] Under Florida law, their warrantless arrests triggered a *prosecutorial* probable cause determination, but did not trigger any *judicial* process.[176] As a result, the plaintiffs were detained for weeks, or even months, without any *judicial* probable cause determination.[177] Throughout their prolonged detentions, these defendants never appeared before a judge or met with an attorney.[178] In other words, they never received a prompt initial appearance procedure or had access to counsel.

The *Gerstein* plaintiffs made two claims. First, they argued that arrest and detention, without judicial review, violated their Fourth Amendment rights to be free from unreasonable seizures. Second, they argued that their post-arrest detentions entitled them to a prompt (and adversary)

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[174] 420 U.S. 103.

[175] *Id.* at 105.

[176] *Id.* at 105–106.

[177] *See id.* at 106.

[178] *See id.* at 105–06 (emphasis added). Under then-governing Florida law, if the prosecution filed a formal charge, that charge extinguished a defendant's right to any subsequent judicial probable cause review. *Id.* at 106. As a result, a defendant arrested without a warrant "could be detained for a substantial period solely on the decision of a prosecutor." *Id.*

post-arrest hearing before a judge, which would include advice of their rights and assistance of counsel, enabling them to contest the probable cause allegations, litigate their pretrial release, and begin the process of investigating and defending against the charges.[179]

Turning to the Fourth Amendment's requirement of judicial review, the *Gerstein* Court held that "a person arrested and held for trial under a prosecutor's information is constitutionally entitled to a *judicial* determination of probable cause for pretrial restraint of liberty."[180] A *prosecutorial* determination would not suffice.

The Fourth Amendment required that this judicial determination occur before, or "*promptly"* after arrest.[181] For those detained through an arrest warrant, a magistrate had already found probable cause.[182] The Fourth Amendment required that a prompt *post*-arrest judicial review place roughly the same constitutional protection for warrantless arrests. In both cases, the Fourth Amendment's requirement of judicial approval of probable cause would provide "legal justification for arrest[] . . . and for a brief period of detention"[183]

Had the Court stopped there, *Gerstein* would have provided warrantless arrestees with a necessary—albeit inadequate—protection against the "awful instruments of the criminal law."[184]

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[179] *Id.* at 111.

[180] *Id.* at 105 (emphasis added).

[181] *Id.* at 125 (emphasis added).

[182] *Id.* at 116 n. 18. The majority casually dropped a footnote that a grand jury indictment suffices for a judicial finding of probable cause. *Id.* at 117 n.19.

[183] *Id.* at 113–14, 120.

[184] George C. Thomas III, *The Poisoned Fruit of Pretrial Detention*, 61 N.Y.U. L. REV. 413, 423, 446

And if this cursory, *ex parte* probable cause determination was simply the first in a series of prompt of early-stage procedures, this holding might have made sense. However, the *Gerstein* majority went further and made two significant errors that substantially contributed to the (dis)appearance of new arrestees.

First, the *Gerstein* majority stripped defendants of any prompt post-arrest right to contest the accuracy of the judge's probable cause determination. After a judge signed an arrest warrant or made a "prompt" post-arrest probable cause decision, a defendant had no immediate right to "further investigation" of the probable cause for his arrest and detention.[185] Justifying this decision, the *Gerstein* majority insisted that the probable cause finding "does not require the fine resolution of conflicting evidence that a reasonable doubt or even a preponderance standard demands."[186] Ignoring the possibility of inaccurate or perjurious affidavits, or erroneous arreststhe majority opined that "credibility determinations [would] seldom [be] crucial in deciding whether the evidence supports" probable cause. [187] The *ex parte* judicial review was a sufficiently "fair and reliable determination of probable cause."[188]

Compounding this error, the *Gerstein* majority made a second constitutional misstep. It held that the Fourth Amendment's probable cause-to-arrest determination was the *only* constitutional

(1986) (*quoting* McNabb v. U.S., 318 U.S. 332, 343 (1943)).

[185] *See Gernstein*, 420 U.S. at 120, n. 21.

[186] *Id.* at 121.

[187] *Id.*

[188] *Id.* at 125.

requirement that governed post-arrest criminal procedure.[189] Hence, the bare bones, police-friendly standard used to authorize an arrest was sufficient to authorize a *prolonged* and uncounseled pretrial detention, which need not be accompanied by any in-court judicial process.[190] Thus, the *Gerstein* majority conflated the legality of a police seizure under the Fourth Amendment with the legality of an uncounseled, *ex parte*, pretrial detention that could extend for days, weeks, months, or years.

Under *Gerstein*'s decontextualized reading, the Fourth Amendment defined *all* the "'process that is due' for seizures of person[s] . . . in criminal cases, including the detention of suspects pending trial."[191] (Yet, one looks in vain in Professor Wayne LaFave's leading five-volume treatise, *Search and Seizure*, for a single entry on pretrial detention as "seizure," or for more than

[189] *See id.* at 123. Ironically, the *Gerstein* majority ignored the long-standing common law doctrines it invoked in support of *ex parte* judicial review under which "it was customary, if not obligatory, for an arrested person *to be brought before a justice of the peace shortly after arrest*." *Id.* at 115 (citing to 2 M. HALE, PLEAS OF THE CROWN 77, 81, 95, 121 (1736); 2 W. HAWKINS, PLEAS OF THE CROWN 116–117 (4th ed. 1762) and *Kurtz v. Moffitt,* 115 U. S. 487, 498–499 (1885)).

[190] This Fourth Amendment deference to police arrest decisions is typical of the Court's general approach to other search powers, where the Court rejects judicial oversight in favor of "law enforcement regulatory regimes and professional expertise [that it believes will operate] to constrain the discretion otherwise afforded by lack of judicial legal review." Jennifer E. Laurin, *Quasi-Inquisitorialism: Accounting for Deference in Pretrial Criminal Procedure*, 90 NOTRE DAME L. REV. 783, 789 (2014).

[191] *Gernstein*, 420 U.S. at 125, n. 27.

a passing reference to *Gerstein*.[192]) The majority acknowledged that the risks associated with pretrial detention are distinct from those associated with the antecedent arrest.[193] However, the majority explicitly rejected a Due Process analysis of pre-trial detention, refusing to extend the protections of the Due Process Clause to new arrestees.[194]

In part, this may reflect how poorly the *Gerstein* majority understood the operation of state court criminal procedure. The majority was *certain* that judicial probable cause review was "only the first stage of an elaborate system . . . designed to safeguard the rights of those accused of criminal conduct."[195] The Court was naively confident that, after arrest, "the delay in obtaining counsel would be minimal."[196] The *Gerstein* majority also assumed that States would promptly provide arrested persons with the assistance of counsel, who would mitigate any "detriment to [a defendant's] trial rights" that might otherwise arise from the cursory nature of the probable cause determination.[197]. Instead, thirty-five years later, the Court would still have to consider cases that presented a six-month "delay in obtaining counsel."[199]

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[192] *See* WAYNE LAFAVE, SEARCH AND SEIZURE.

[193] *Gernstein*, 420 U.S. at 114.

[194] *Id.* at 125, n. 27.

[195] *Id.*

[196] Colbert, *The Illusory Right*, *supra* note 120, at 34. Thirty-five years later, in *Rothgery v. Gillespie County, Texas,*, the Court would confront a case that presented a six-month delay between arrest and the appointment of counsel. 554 U.S. 191, 196 (2008).

[197] 420 U.S. at 123–24; *See* Colbert, *The Illusory Right*, *supra* note 120, at 341

[199] *See* Colbert, *The Illusory Right*, *supra* note 120, at 32. The Court did *not* hold, as *Gerstein*

The *Gerstein* majority's firm (but inaccurate) belief that States would provide prompt adjudicative process made it loathe to regulate of the post-arrest process for fear that any constitutional regulation would be counter-productive. The Court believed that early-stage adversary process would increase pretrial detention and exacerbate criminal case delay, clogging the criminal justice system and interfering with the protections that defendants needed.[200] In fact, the best available evidence indicates the opposite: the *denial* of early-stage adversary process increases pretrial detention and exacerbates criminal case delays.[201]

In the *Gerstein* majority's view, since there was "no single preferred pretrial procedure," there was no need for the court to articulate and constitutionally mandate any particular pretrial procedure.[204] In pursuit of "flexibility and experimentation by the States," the Court abandoned

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suggested, that a six-month wait for counsel's assistance was too long. Instead, the Court required only that counsel be appointed within a "reasonable" time after the defendant's initial appearance—an event that, in itself, is not constitutionally guaranteed. One commentator on *Gerstein*'s reliance on an "elaborate system" points out that, to the extent this refers to the many constitutionalized protections at *trial*, this reliance is misplaced as almost no defendants go to trial. Kuckes, *Civil Due Process, Criminal Due Process*, *supra* note 5, at 47 (2006) ("To build due process rules on the premise that rights in the pretrial process can be minimal because a criminal defendant will enjoy extensive rights at trial is thus an illusory, and even pernicious, doctrine.").

[200] *See* Carol S. Steiker, *Solving Some Due Process Puzzles: A Response to Jerald Israel*, 45 ST. LOUIS U. L.J. 445, 451 (2001) (positing that *Gerstein* was the Court's reaction to the quick incorporation of the Bill of Rights which had already put a lot of pressure on the states to develop procedures).

[201] *See* Colber, *The Illusory Right*, *supra* note 120, at 34.

[204] 420 U.S. at 123.

any consideration of whether and when a post-arrest judicial appearance was necessary.[207] The majority therefore allowed "the individual States to integrate prompt probable cause determinations into their differing systems of pretrial procedures." [208] The Court merely required that "[w]hatever procedure a State [adopts], it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty."[209] In other words, a timely judicial determination of probable-cause-to-arrest would be all the process necessary for the prolonged pretrial detention of presumptively innocent people, even if that determination was *ex parte* and non-adversarial.[210]

C. *Gerstein*'s Progeny: Doubling Down on *Gerstein*'s Failure

In four cases following *Gerstein*, the Supreme Court reinforced its position that the Fourth Amendment's probable cause determination is the sole prerequisite for detaining a defendant before trial. In each case, the Court went out of its way to reject application of the due process clause.

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[207] *Id*. at 123–24.

[208] *County of Riverside,* 500 U.S. at 53.

[209] *Id*. at 125.

[210] *Id.* at 120 n. 21. This Fourth Amendment deference to police arrest decisions is typical of the Court's general approach to other search powers, where the Court rejects judicial oversight in favor of "law enforcement regulatory regimes and professional expertise [that it believes will operate] to constrain the discretion otherwise afforded by lack of judicial legal review." Jennifer E. Laurin, *Quasi-Inquisitorialism: Accounting for Deference in Pretrial Criminal Procedure*, 90 NOTRE DAME L. REV. 783, 789 (2014).

In *Baker v. McCollan*,[211] Linnie McCollan was arrested on a warrant that was facially valid but factually incorrect.[212] Mr. McCollan spent eight days in jail, protesting his innocence,[213] without seeing a judge or an attorney before police finally realized they had arrested the wrong person and released him.[214] Mr. McCollan claimed that this prolonged detention violated his rights under the Due Process Clause.[215] The Court ignored this claim and considered only whether a person who was arrested on a warrant (which had been subject to an *ex parte* judicial determination of probable cause) had a post-arrest right to a second, "separate judicial determination that there is probable cause."[216] Of course, the Court decided this was unnecessary.

Underlying the Court's decision was the reluctance to apply a due process analysis to the pretrial process. Fretting that it might launch a limitless expansion of the Bill of Rights' procedural protections,[217] the Court insisted that "[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person."[218] Having announced that it would not require "every conceivable step," the Court

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[211] 443 U.S. 137, 143 (1979).

[212] *Id.* at 143.

[213] *Id.* at 149 (Marshall, J., dissenting).

[214] *Id.* at 144.

[215] *Id.* at 142.

[216] *Id.* at 143.

[217] *Id.* at 145.

[218] *Id.*

required that *no* additional steps at all be taken to protect the rights of arrested individuals. With a verbal shrug, the Court noted: "The Constitution does not guarantee that only the guilty will be arrested."[219] The Court never explained how or when the Constitution would guarantee that the innocent would be set free or the guilty would receive constitutional process.

The *Baker* majority did not entirely ignore the possibility that due process might play a role in post-arrest procedure. The majority assumed, *arguendo*, that "following arrest and prior to actual trial, mere detention pursuant to a valid warrant" accompanied by "repeated protests of innocence" will after the lapse of a certain amount of time, deprive the accused of 'liberty . . . without due process of law.'"[221] The Court thus conceded that even if an arrest "met the standards of the Fourth Amendment," the Fourth Amendment would not authorize detaining a defendant "indefinitely in the face of repeated protests of innocence."[222] However, to date, the Court has never explained when such a situation would arise.[223]

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[219] *Id.*

[221] *Id.* at 145.

[222] 443 U.S. at 144.

[223] Moreover, the Court associated the right not to be detained "indefinitely," with the Sixth Amendment Speedy Trial Clause. *Id.* (The Constitution "guarantees an accused the right to a speedy trial, and invocation of the speedy trial right need not await indictment or other formal charge."). A prompt initial appearance procedure is not textually committed to the Sixth Amendment Speedy Trial Clause. Under the Court's Speedy Trial jurisprudence, only an extended delay triggers the constitutional Speedy Trial inquiry—in general that delay must be at least a year. Even if the Speedy Trial clause were theoretically available, invocation of that right also depends upon an initial appearance. If months elapse

In the 1991 case, *McLaughlin v. County of Riverside*, [224] the Court addressed the failure of the States to provide the "prompt" probable cause review it had required in *Gerstein*. The Court established 48 hours as the presumptive outer limit for an *ex parte*, non-adversarial *Gerstein* review.[226] Again, the Court ignored the need for important, post-arrest procedures that would protect a defendant who had been arrested on probable cause.[227] Instead, the Court reiterated its concern that more adversary process would cause—rather than resolve—unjustifiable delay.[228] "[E]veryone involved, including those persons who are arrested, might be disserved by introducing further procedural complexity into an already intricate system."[229] *Gerstein*'s misunderstanding of real world pretrial procedure also pervades the *McLaughlin* analysis.

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before a defendant has an initial appearance that triggers his right to counsel who can file a speedy trial motion, the abstract right to a speedy trial has not benefitted the defendant at all. Because a significant percentage of arrests never result in a prosecution, the Speedy Trial Clause offers no protection to those whose cases are dismissed.

[224] 500 U.S. 44, 53 (1991).

[226] *Id.* at 56.

[227] *Id.* at 53 (citing *Gerstein*, 420 U.S. at 119–123). *See also* Alexander v. City of Muscle Shoals, Ala., 766 F. Supp. 2d 1214, 1232–33 (N.D. Ala.), *aff'd* 444 F. App'x 343 (11th Cir. 2011) (finding that Supreme Court's decision not to address Due Process in *County of Riverside* confirms that any constitutional violation caused by delay in initial appearance after warrantless arrest must lie in Fourth Amendment).

[228] *Riverside*, 500 U.S. at 53.

[229] *Id.* (noting *Gerstein* "acknowledged the burden that proliferation of pretrial proceedings places on the criminal justice system and recognized that the interests of everyone involved, including those persons

In *Albright v. Oliver* – a third case in the *Gerstein* line - the Court strongly reaffirmed *Gerstein*'s rule that an *ex parte* probable cause review was the sole process necessary to authorize the prolonged detention of an arrestee.[230] Police had lied about the circumstances justifying Mr. Albright's arrest.[231] These lies infected the judicial probable cause determination, such that the reviewing court unwittingly issued an arrest warrant for that was – in reality - entirely without cause. [232] Mr. Albright claimed that the resulting arrest – and his subsequent prosecution - violated his due process rights.[233] But a majority of the Court held that Mr. Albright had no "substantive right under the Due Process Clause of the Fourteenth Amendment to be free from criminal prosecution except upon probable cause."[234]

The Court reiterated its now-familiar reluctance "to expand the concept of substantive due process" in criminal cases.[235] While admitting that the Due Process Clause of the Fourteenth

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who are arrested, might be disserved by introducing further procedural complexity into an already intricate system. Accordingly, we left it to the individual States to integrate prompt probable cause determinations into their differing systems of pretrial procedures.")

[230] *See* Albright v. Oliver, 510 U.S. 266 (1994),

[231] *Id.* at 268.

[232] *Id.* at 268.

[233] *Id.* at 268. Albright missed the statute of limitations for filing suit based on his arrest and therefore did not make any Fourth Amendment claim. Albright v. Oliver, 975 F.2d 343, 345 (7th Cir. 1992).

[234] 510 U.S. at 268. *See also id.* at 276 (Ginsburg, J., concurring) (stating Fourth Amendment "seizure" includes the period of pretrial detention following an arrest).

[235] *Id*. at 271–2 (noting that "the guideposts for responsible decision-making in this unchartered area are scarce and open-ended.").

Amendment confers both substantive and procedural rights" in criminal cases,[236] the Court insisted that primarily "[it] was through . . . the Bill of Rights that [the] Framers sought to restrict the exercise of arbitrary authority by the Government in particular situations."[237] As a result, "where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims'."[238] According to the Court, "the Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it."[239] As demonstrated by Mr. Albright's false arrest and very real detention, this is patently untrue.

In 2017, in a final coda to *Gerstein*'s Fourth Amendment fiction, the Supreme Court rejected due process protection for Elijah Manuel, an innocent man arrested and detained for *six weeks* on a constitutionally adequate—but wholly fraudulent—probable cause affidavit.[240]

Manuel squarely confronted the Court with the fact that *Gerstein*'s *ex parte* probable cause determination was grossly inadequate to the task of preventing the prolonged pretrial detention of people whose arrests lacked probable cause. [241] Illinois police arrested Mr. Manuel without

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[236] *Id.* at 272–73.

[237] *Id.*

[238] *Id.* (*quoting* Graham v. Connor*,* 490 U.S. 386, 395 (1989)).

[239] *Id.* at 274.

[240] Manuel v. City of Joliet, Ill., 137 S.Ct. 911 (2017).

[241] 137 S. Ct. 911, 914–15 (2017).

any probable cause. [242] To "validate" the arrest and detain Mr. Manual, they falsified two affidavits which (mis)led the reviewing court into finding probable cause for the arrest. [243]

While local law provided Mr. Manuel with the right to a prompt initial appearance, Mr. Manuel had no right to any of the additional criminal procedures that the *Gerstein* Court had imagined would promptly follow his arrest.[244] Under Illinois law, Mr. Manuel and his attorney had no right to investigate or challenge the (perjurious) probable cause affidavit. [245] *Gerstein* and its progeny had blessed this restriction of post-arrest process.[246]

The Supreme Court granted *certiorari* in Mr. Manuel's case but reasserted that his claims resided solely in the Fourth Amendment and not in the Due Process Clause. In the Court's words, "the Fourth Amendment was tailored explicitly for the criminal justice system," and its

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[242] 137 S. Ct. 911, 914–15 (2017).

[243] 137 S. Ct. 911, 914–15 (2017).

[244] Brief of Petitioner, *Manuel v. City of Joliet*, 2016 WL 2605051, at *4–5 (U.S., 2016) (emphasis added); Brief for Respondents, *Manuel v. City of Joliet, Illinois*, 2016 WL 4137970, at 10–12 (U.S., 2016). Mr. Manuel did have the assistance of counsel at an initial appearance—a "luxury" not guaranteed by the Supreme Court but provided by Illinois law.

[245] Subsequently, Illinois presented Manuel's case to a grand jury, which heard the same false testimony that was presented to the judge. Petitioner's Brief, *Manuel v. City of Joliet*, 2016 WL 2605051, at 4–6 (U.S., 2016). Unsurprisingly, the grand jury issued an indictment against him. *Id.* The indictment then conclusively established probable cause, which Manuel could not challenge in an adversarial judicial proceeding. *Id.* at 20.

[246] *Id.*

balance between individual and public interests.[248] Therefore, the Fourth Amendment "define[s] the 'process that is due' for seizures of persons . . . in criminal cases, including the detention of suspects pending trial."[249] The Court bluntly declared, "[T]he Fourth Amendment governs a claim for unlawful pretrial detention *even beyond the start of legal process*."[250]

In dissent, Justice Alito objected that the Fourth Amendment analysis should not extend to pretrial detention.[251] For Justice Alito, the majority's position that "every moment in pretrial detention constitutes a 'seizure'" was a position "hard to square with the ordinary meaning" of a seizure.[252] In Justice Alito's words, "[t]he term 'seizure' applies most directly to the act of taking a person into custody or otherwise depriving the person of liberty. It is not generally used to refer to a prolonged detention."[253] Justice Alito supported his position with an historical perspective, "[t]he Members of Congress who proposed the Fourth Amendment and the State legislatures that ratified the Amendment would have expected to see a more expansive term, such as 'detention' or 'confinement,' if a Fourth Amendment seizure could be a long event that continued throughout the entirety of the pretrial period."[254]

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[248] 137 S. Ct. at 917 (Alito, J., dissenting) (citing *Gerstein*, 420 U.S. at 126, n. 27).

[249] *Id.*

[250] 137 S. Ct. at 920 (emphasis added).

[251] *Id.* at 923 (Alito, J., dissenting).

[252] *Id.* at 926–27 (Alito, J., dissenting).

[253] *Id.* at 927

[254] *Id.*

One wonders how much of the Court's rigid adherence to the Fourth Amendment stems from its own misunderstandings of *Gerstein*'s minimal requirements. For example, in Justice Scalia's dissent in *Riverside*, he excoriated the majority for countenancing more than a 24-hour delay between a warrantless arrest and a probable cause review, saying:

"Hereafter a law-abiding citizen wrongfully arrested may be compelled to await the grace of a Dickensian bureaucratic machine, as it churns its cycle for up to two days—never once given the opportunity to show a judge that there is absolutely no reason to hold him, that a mistake has been made."[255]

Justice Scalia's indignation was warranted, but misplaced. The crisis confronting the "law-abiding citizen wrongfully arrested" lay not in the delay of an *ex parte* probable cause review, but in absence of any mandated courtroom appearance for the arrested defendant. Only a court appearance—not prompt judicial review of probable cause—could provide a person with "the opportunity to show a judge that there is absolutely no reason to hold him."[256]

In the decades after *County of Riverside*, high courts, state legislatures, academics, and experienced practitioners have continued to confuse the *ex parte* probable cause review with an initial appearance proceeding.[257] Today—nearly 20 years after *County of Riverside*, and nearly

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[255] *County of Riverside*, 500 U.S. at 71 (Scalia, J., dissenting).

[256] *Id.* Justice Scalia's error highlighted ongoing (and continuing) confusion about the difference between the *ex parte* probable cause determination required by *Gerstein* and the in-court initial appearance proceedings that some states combine with that determination.

[257] *See, e.g.,* West State Courts, 1 CRIM. PRAC. MANUAL § 1:3 ("Any system that does not provide for an initial appearance for a judicial determination of probable cause within 48 hours of a warrantless

40 years after *Gerstein*—even justices of the Supreme Court remain confused about County of Riverside's reach. In *Manuel*, Justice Alito incorrectly asserted that "when an arrest is made without a warrant, the arrestee, generally within 48 hours, must be brought before a judicial officer" who conducts a probable cause review.[258] But Justice Alito was incorrectly conflating the prompt probable cause review - *required* by *Gerstein* and *McLaughlin* - with optional post-arrest that had been *suggested* by the *Gerstein* courts. Despite decades confusion about this, the Court has repeatedly failed to clarify the distinction between the prompt probable cause review, which is required under *Gerstein* and *County of Riverside*, and the initial appearance procedure, which is unregulated by any Supreme Court case law.[259]

Through the *Gerstein* line of cases, the Court has resisted developing a due process analysis of early stage criminal procedure. Specifically, it has refused to require a prompt initial appearance before a judge where a defendant can, with counsel's assistance, hear the charges against him, contest probable cause, and to actualize his other constitutional and statutory rights.

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arrest . . . is presumptively unreasonable under the Fourth Amendment").

[258] 137 S. Ct. at 927 (Alito, J., dissenting).

[259] This is not for lack of opportunity in other cases. For example, in *Powell v. Nevada,* 511 U.S. 79, 81, 83–85 (1994), a group of detainee-plaintiffs challenged the constitutionality of Nevada's post-arrest procedure. There, under state law, the judicial probable cause review occurred at the defendant's initial appearance in court, which occurred four days after arrest. *Id.* at 81. The Court declined to address the plaintiffs' Due Process claims concerning the delay in initial appearance. *Id.* at 84–85. It held only that the four-day delay between arrest and the judicial probable cause determination presumptively violated the 48-hour rule established in *County of Riverside. Id.* at 85.

The Supreme Court assumes that such a proceeding will occur, but has never explained when the constitutional requires initial appearance or what rights and procedures must accompany it.[260] It is thus necessary theorize a constitutional right to prompt (and counselled) initial appearance.

III. The Due Process Right to a Prompt and Meaningful Initial Appearance Procedure

The plight of new arrestees has caused consternation and confusion among federal courts. As discussed in Part I, complex immunity doctrines have made initial appearance lawsuits both rare[261] and inconsistent in their due process analysis.[262] While a few federal courts have held that there is "a constitutional right to a timely first appearance under the Due Process Clause"[263]

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[260] *See, e.g.,* Cartwright v. Dallas Cty. Sheriff Office, 2015 WL 9582905, at *3 (N.D. Tex. Nov. 9, 2015), *report and recommendation adopted*, 2015 WL 9581772 (N.D. Tex. Dec. 30, 2015) ("Neither the laws nor the Constitution of the United States recognize or require an [initial appearance] within a set amount of time of a person's arrest.")

[261] *See* Coleman v. Frantz, 754 F.2d 719, 723 (7th Cir. 1985) ("The notable lack of authority regarding [right to initial appearance] is apparently explained by structural limitations on the opportunity afforded litigants to raise the issue in federal courts.")

[262] *See supra* Part I.D.

[263] *Coleman*, 754 F.2d at 725 (holding 18-day detention without initial appearance violation of substantive due process). *See also* Armstrong v. Squadrito, 152 F.3d 564, 573 (7th Cir. 1998) (holding 57-day detention without initial appearance violation of substantive due process); Hayes v. Faulkner County, Ark., 388 F.3d 669, 673 (8th Cir. 2004) (holding 38-day detention without initial appearance violates substantive due process); Jauch v. Choctaw County, 874 F.3d 425, 429 (5th Cir. 2017) (holding 96-day detention without initial appearance violated procedural due process); Oviatt v. Pearce, 954 F.2d 1470, 1477 (9th Cir. 1992) (holding that 114-day detention without initial appearance violated procedural due

others are silent or have refused to recognize such a right.[264] The courts that acknowledge a due process guarantee are divided about whether a right to prompt initial appearance lies in procedural or substantive due process.[265] Confusion persists over whether the existence of an arrest warrant, a failure to demand initial appearance, or a failure to proclaim one's innocence, precludes a due process claim.[266] The time is past due for the Supreme Court to clearly guarantee a prompt and meaningful initial appearance procedure.

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process).

[264] *See, e.g.,* Diaz v. Wright, 2016 WL 10588098, at *17 (D.N.M. 2016) (holding no procedural due process right to prompt initial appearance and no clearly-established substantive due process right in 10th Circuit or Supreme Court); Cordova v. City of Albuquerque, 2013 WL 12040728, at *6 (D.N.M. 2013) (same); Cartwright v. Dallas Cy. Sheriff's Office, 2015 WL 9582905, at *3 (N.D. Tex. 2015) (holding no constitutional right to initial appearance within a set time); Alexander v. City of Muscle Schoals, Ala., 766 F. Supp. 2d 1214, 1229–30 (N.D. Ala. 2011) (holding no due process violation in 9-day detention without initial appearance); Sanchez v. Campbell, 2010 WL 547620, at *2–3 (N.D. Fla. 2010) (holding no due process violation in 5-day detention without initial appearance); Pledger v. Reece, 2005 WL 3783428, at *4 (W.D. Ark. 2005) (holding no due process violation in 14-day detention without initial appearance); Jackson v. Hamm, 78 F. Supp. 2d 1233, 1241 (M.D. Ala. 1999) (holding no procedural due process right to 72-hour initial appearance and no clearly established substantive due process right to prompt initial appearance in 11th Circuit or Supreme Court).

[265] *See* note 263 *supra* (citing cases).

[266] *See e.g., Alexander,* 766 F. Supp. 2d at 1232, 1233 (finding that when "detainee was arrested in the course of the commission of a crime and without a warrant, any due process right to an initial appearance may be subsumed by the Fourth Amendment right to a prompt judicial

A. The Seeds of the Due Process Right in Supreme Court Doctrine

In criminal cases, the Supreme Court's due process jurisprudence has been restrictive, convoluted and ungenerous.[267] Whenever possible, the Supreme Court eschews both substantive and procedural due process in favor of a narrow textual approach to criminal procedure, as it explicitly did in *Gerstein* and *Manuel*.[268] But *Gerstein* doctrine need not preclude an application of the Due Process Clause to post-arrest procedure.[269] Rather *Gerstein*, and its progeny *Baker*, contain the seeds of a due process doctrine that can regulate prolonged post-arrest detention.

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determination of probable cause" and noting "plaintiff was not arrested pursuant to a warrant and appears never to have protested his detention as it was occurring"); *Armstrong*, 152 F.3d at 575 (detainee's "protest to officials" is an important factor in assessing the existence of a due process right to an initial appearance).

[267] *See* Kuckes, *Civil Due Process, Criminal Due Process*, *supra* note 5, at 2 (describing the "anomalous divergence between civil and criminal due process rules" with pretrial criminal procedure getting none of the due process protections given to pretrial civil procedure). For a thorough examination of the Court's confounding criminal due process jurisprudence, *see* Jerold H. Israel, *Free Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U.L.J. 303 (2001).

[268] *But see* Israel, *supra* note 267, at 403 (finding that Amendment-precluding approach dictated by *Graham v. Connor*, 490 U.S. 386, 395 (1980), limits only substantive due process and not procedural due process despite *Gerstein*'s suggestion).

[269] *See, e.g., Jauch*, 874 F.3d at 429 ("*Manuel* [*v. City of Joliet*] does not address the availability of due process challenges after a legal seizure, and it cannot be read to mean . . . that *only* the Fourth Amendment is available to pre-trial detainees.").

The *Baker* Court's statement that a person "could not be detained indefinitely in the face of repeated protests of innocence even though the warrant under which he was arrested and detained met the standards of the Fourth Amendment" points the way to a due process analysis.[270] *Gerstein* itself noted that the Fourth Amendment probable cause determination is only one piece of an "elaborate system" of procedure, "unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct."[274] In the face of evidence that such an "elaborate system" does not exist, at least in the pretrial context,[275] and that the rights of arrested defendants are not promptly and effectively vindicated, *Gerstein*'s Fourth Amendment reliance is misplaced. Recognizing this, several lower courts have held that, while the protections of the Fourth Amendment cover the legality of the seizure of an arrestee, thereafter the protections of

[270] 443 U.S. at 144. The language cited from *Gerstein* as support for a due process right extending beyond the Fourth Amendment's coverage is, "The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships." 420 U.S. at 114.

[274] *Manuel,* 137 S. Ct. at 929 (Alito, J., dissenting).

[275] Professor Kuckes notes another possible meaning of "elaborate system" is the extensive due process protections at the criminal trial, which do not benefit the many pretrial defendants who plead guilty. *See* Kuckes, *Civil Due Process, Criminal Due Process*, *supra* note 5, at 46–47.

Due Process apply to pretrial detention.[276] In other words, there *is* a due process right to a prompt initial appearance for a detained arrestee.[277]

While a due process initial appearance doctrine would intersect with the Fourth Amendment probable case rule, that intersection is not fatal to a due process analysis. As the Supreme Court explained in *Soldal v. Cook County*, "[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands."[278] Where the "provisions target[] the same sort of governmental conduct," the Supreme Court requires analysis under the more "explicit textual source of constitutional protection."[279] Where, however, the provisions "target[]" different and unenumerated government conduct or individual rights, analysis proceeds under the Due Process Clause.[280] While satisfaction of the Fourth

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[276] *See, e.g.,* Armstrong, 152 F.3d at 569-70 (holding Fourth Amendment not implicated because a valid warrant covers period until the probable cause determination is made, "while due process regulates the period of confinement after the initial determination of probable cause.") (quoting *Villanova v. Abrams*, 972 F.2d 792, 797 (7th Cir. 1992); *Jauch*, 874 F.3d at 429 (finding that *Manuel v. Joliet* cannot be read to mean that only the Fourth Amendment is available to pretrial detainees).

[277] *See Coleman*, 754 F.2d at 723–24 (citing language in *Gerstein* and *Baker* supportive of finding of a substantive due process right forbidding extended detention without initial appearance); *Armstrong*, 152 F.3d at 571-72 (same); *Hayes*, 388 F.3d at 673 (same).

[278] Soldal v. Cook Cty., Ill., 506 U.S. 56, 70–71 (1992).

[279] *Id.* at 70.

[280] *See id.* Even where the interest at stake *is* covered by a specific amendment, on occasion the Court has employed due process, either alone or in conjunction with a specific guarantee. *See* Israel, *supra* note

Amendment's probable cause requirement is *necessary* to justify an initial seizure, it is not *sufficient* to satisfy all of a criminal defendant's other pretrial rights.[281]

In other contexts, the Supreme Court has explicitly recognized that conditions of pretrial confinement implicate the due process clause. The Court has used due process to analyze claims relating to the excessive use of force on a pretrial detainee,[283] the conditions of pretrial detention,[284] and the denial of release on bail.[285] There is no logical or reasoned basis to exclude new arrestees from coverage presented by "the paradigmatic liberty interest under the due process clause[,] freedom from incarceration."[286] The "touchstone of due process" remains

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267, at 407 & nn. 592–94 (citing cases).

[281] *See* Kuckes, *Civil Due Process, Criminal Due Process*, *supra* note 5, at 44 ("A defendant could, without any internal contradiction, possess both a Fourth Amendment right to a judicial determination of probable cause with respect to his arrest, and a due process right to an adversary proceeding with respect to cognizable deprivation of his liberty or property in the course of the criminal case.").

[283] Kingsley v. Hendrickson, 135 S. Ct. 2466, 2473 (2015).

[284] Bell v. Wolfish, 441 U.S. 520 (1979).

[285] United States v. Salerno*,* 481 U.S. 739 (1987). *See also* Dodds v. Richardson, 614 F.3d 1185, 1192–93 (10th Cir. 2010) (holding that without prompt access to a bail determination, pretrial detention "constitute[s] punishment prior to trial, in violation of due process."). The right to initial appearance and the right to pretrial release are often conflated, as access to pretrial may be co-extensive with the provision of a prompt initial appearance. It is important to make clear here that relying on the due process right to bail to guarantee the broader right to initial appearance would offer an incomplete account of the fundamental liberty interests at stake.

[286] *Oviatt*, 954 F.2d at 1474.

"protection of the individual against arbitrary action of government."[287] It is hard to imagine anything other than arbitrariness at play when arrestees disappear into our Nation's jails for weeks without initial appearance.

Illogically, *convicted* defendants have greater due process protections than do pretrial detainees. Under *Gerstein*, presumptively innocent pretrial detainees have no right to an adversarial pretrial hearing about the probable cause for their arrest.[288] By stark contrast, the Court guarantees that convicted felons have a prompt, adversarial hearing about the validity of an alleged probation or parole violation.[289] This due process anomaly strains the integrity of our criminal process.

The right to a prompt and meaningful initial appearance lays claim to both procedural and substantive due process rights. It is no easy task to define the right at stake here when the Court has so muddied the waters with inconsistent and vague doctrine on free-standing due process in criminal procedure.[290] While no "hermetic line" clearly delineates substantive and procedural

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[287] Wolff v. McDonnell, 418 U.S. 539, 558 (1974).

[288] *See* notes 169–170and accompanying text.

[289] *See* Morrissey v. Brewer, 408 U.S. 471, 486–89 (1972) (establishing due process right to prompt preliminary hearing prior to revocation of parole); Gagnon v. Scarpelli, 411 U.S. 778, 786–87 (1973) (establishing right to notice and adversarial hearing prior to revocation of probation). *See also* Kuckes, *Civil Due Process, Criminal Due Process*, note 5 *supra* at 40 (discussing greater due process protections for post-conviction seizure of property than seizure of person pretrial).

[290] While it is beyond the scope of this article to level a full-throated critique of the Court's ineffective and inconsistent jurisprudence in this area, Professor Israel offers one of the most comprehensive

due process, the Supreme Court has provided some limited guidance for defining each concept.[291]

In criminal procedure, the Court has most often turned to procedural due process,[292] which requires that the government provide "fundamental procedural fairness" before it engages in otherwise permissible deprivations of life, liberty, or property.[293] Procedural due process guarantees fair process regarding liberty interests that "arise from the Constitution itself" or that "arise from an expectation or interest created by state laws or policies."[294] When there is no prompt or effective initial appearance procedure, the basic liberty interests that arise from the due process clause (and from relevant state initial appearance statutes) have not been adequately protected.

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descriptions. Jerold H. Israel, *Free Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U.L.J. 303 (2001).

[291] District Attorney's Office v. Osborne, 557 U.S. 52, 103–04 (2009) (Souter J., dissenting). *See also Albright*, 510 U.S. at 301 (1994) (Stephens, J. dissenting) ("The Fourteenth Amendment contains only one Due Process Clause. Though it is sometimes helpful, as a matter of doctrine, to distinguish between substantive and procedural due process, the two concepts are not mutually exclusive, and their protections often overlap.").

[292] *See* Israel, *supra* note 290, at 403 & n.577 (finding that the vast majority of Supreme Court doctrine on criminal procedure involves procedural, not substantive, due process).

[293] Cy. of Sacramento v. Lewis, 523 U.S. 833, 845–46 (1998). *See also* Fuentes v. Shevin, 407 U.S 67, 82 (1972).

[294] Wilkinson v. Austin, 545 U.S. 209, 221 (2005).

In contrast, the criminal procedure application of substantive due process "limits what [the] government may do regardless of the fairness of [the] procedures that it employs." [295] It thereby protects against the arbitrary and oppressive exercise of state power. In other words, substantive due process "safeguards individuals against certain offensive government actions" regardless of whether they were implemented via "facially fair procedures."[297] Thus, when the government detains an arrestee for days and weeks without bringing him before a judge, substantive due process should be implicated.

B. The Procedural Due Process Right to a Prompt and Meaningful Initial Appearance

The foundational purpose of the Due Process Clause is "to provide a guarantee of fair procedure in connection with any deprivation of life, liberty, or property by a State."[298] Due process is violated when government fails to provide procedural safeguards adequate to protect against an unjust deprivation of liberty.[299] The first step in a procedural due process analysis is to determine whether a protected "liberty interest" is at stake.[300] This liberty interest can arise from

[295] Boyanowski v. Capital Area Intermediate Unit, 215 F.3d 396, 399 (3rd Cir. 2000) (*citing* County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998)).

[297] Harron v. Town of Franklin, 660 F.3d 531, 536 (1st Cir. 2011) (*quoting* Depoutot v. Raffaelly, 424 F. 3d 112, 118 (1st Cir. 2005)).

[298] Collins v. City of Harker Heights, Tex. 503 U.S. 115, 125 (1992). *See also* LAFAVE, ET. AL, Regulation by procedural due process after selective incorporation, 1 CRIM. PROC. § 2.7(a) (4th ed.).

[299] Swarthout v. Cooke, 562 U.S. 216, 219 (2011) (citing Ky. Dep't of Corr. V. Thompson, 490 U.S. 454, 460 (1989)).

[300] *Id.*

a guarantee under state law or from the Due Process Clause itself.[301] The indefinite detention of an arrestee, without an appearance before a judge or appointment of counsel might arise from state law but, as described below, is necessarily implicates a constitutional due process interest.[302]

[301] Hewitt v. Helms, 459 U.S. 460, 466 (1983) (citing Meachum v. Fano, 427 U.S. 215, 223–27).

[302] As a matter of state law, courts are divided over whether state statutes requiring initial appearances within either a set time (e.g., 72 hours) or "without unnecessary delay" create a protected liberty interest. One issue is that if the state law is not mandatory, but is discretionary, then it may not create a liberty interest. *Compare* Diaz v. Wright, No. Civ. 14-922 JCH/LAM, 2016 WL 10588098, at *13 (D.N.M. Mar. 22, 2016) (holding that New Mexico law prohibiting "unnecessary delay" "allows for considerable discretion and thus cannot be the basis of a constitutionally protected liberty interest") (*citing* Ky. Dept. of Corr. v. Thompson, 490 U.S. 454, 461 (1989); *and* Cordova v. City of Albuquerque, No. 1:11-cv-806-GBW/ACT, 2013 WL 12040728, at *3–4 (D.N.M. Dec. 19, 2013) (same); *with* Oviatt v. Pearce, 954 F.2d 1470, 1475 (9th Cir. 1992) (holding state law requiring initial appearance of detainee within 36 hours created a liberty interest). A second issue is that some courts believe that the right must be grounded in substantive due process and not procedural due process because an initial appearance is merely a right to further procedure and not a right to liberty. *See* Armstrong v. Squadrito, 152 F.3d 564, 575–76 (7th Cir. 1998) (rejecting reasoning of Ninth Circuit in *Oviatt* that statutory procedure creates procedural due process right); Moya v. Garcia, 895 F.3d 1229, 1241 (10th Cir. 2018) (McHugh, J., concurring & dissenting) (finding no procedural due process right in statutory right to timely bail determination because "'an expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause.'") (citation omitted). *See also* Jackson v. Hamm, 78 F. Supp. 2d 1233, 1243–44 (M.D. Ala. 1999)

As a matter of Due Process itself, "freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause."[303] It is an unassailable truth that a person has a protected liberty interest to be free from extended incarceration without a hearing.[304] The *Baker* Court said as much when it acknowledged that the prolonged detention of an innocent person may violate due process.[305] The question then just becomes what process is due before the State may incarcerate a person before trial.

To determine whether the procedures followed in any given case satisfy procedural due process in criminal cases, the Court has declined to apply the more generous three-part balancing test of *Mathews v. Eldridge* (used in civil cases),[306] in favor of the narrower inquiry of *Medina v. California*.[307] Because *Medina* is the more restrictive inquiry, any due process claim that clears *Medina*'s substantial hurdles will also pass the *Mathews* test.[308] Still, *Mathews* is the richer

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(finding no procedural due process right created by Alabama's statute requiring initial appearance within 72 hours).

[303] Foucha v. Louisiana, 504 U.S. 71, 80 (1992). *See also* Turner v. Rogers, 564 U.S. 431, 445 (2011) (describing "loss of personal liberty through imprisonment" as sufficient to trigger due process protections).

[304] *See* Oviatt, 954 F.2d at 1474 ("Indeed, the paradigmatic liberty interest under the due process clause is freedom from incarceration.").

[305] 443 U.S. at 144–45.

[306] 424 U.S. 319 (1976).

[307] 505 U.S. 437 (1992).

[308] *See, e.g., Jauch*, 874 F.3d at 431–32 (explaining that there was "room to argue" that the *Mathews*

inquiry, as it explores both the nature of the claimed right and the practical ways to provide procedures that to protect that right.[309] Thus, both are relevant to a fulsome discussion of the procedural due process right to initial appearance.

1. Consideration of the *Mathews* Criteria

Three factors are relevant to a claim of procedural due process under *Mathews*: (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3), "the [g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." [310]

As for the private interest, it is difficult to imagine a greater interest than a presumptively innocent person's detention. Due process follows principles of proportionality, so, as the importance of the interest increases, so too do the procedures required by due process.[311] As part

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test was more appropriate, but chose not to decide and used *Medina* because even that narrower inquiry leads to finding a procedural due process violation in an indefinite-detention procedure).

[309] *See* Oviatt v. Pearce, 954 F.2d 1470, 1473–76 (9th Cir. 1992) (using *Mathews* criteria to find procedural due process violation in 114-day detention without initial appearance, deciding the case before the Supreme Court's 1992 decision in *Medina*).

[310] 424 U.S. at 335.

[311] *See* Gilbert v. Homar, 520 U.S. 924, 932 (1997); *Mathews*, 424 U.S. at 335.

of this proportionality assessment, *Mathews* evaluates the severity, length and finality of the deprivation.[312]

As discussed in Part I, the deprivation of pretrial liberty without a prompt, adversarial initial hearing has severe consequences. A defendant faces harm to his health, livelihood, family, and to the chances of a positive outcome in his case. As to the length and finality of the liberty deprivation, the very nature of the problem—indefinite detention, or detention with no required endpoint—strikes at the core of our expectations about constitutional procedure. Failure to provide a prompt initial appearance has resulted in detentions that last for months.[313] But the initial appearance process can provided the key to unlock the door to a detainee's cell.[314]

As to the second factor, the risk of erroneous deprivations of liberty is quite high. Without an adversarial hearing, contesting probable cause and bail, a person is likely to be detained based on the alleged charge alone, no matter how weak the evidence of the charge or of flight risk.[315] Proper assessment of the risk of an erroneous deprivation requires consideration "not only [of] the reversal rate for appealed cases but also [of] the overall rate of error."[316] Notice of the allegations supporting a deprivation of a protected interest, and a fair opportunity to rebut those

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[312] *Gilbert*, 520 U.S. at 932.

[313] [cross reference to

[314] For example, Jessica Jauch spent 96 days waiting for an initial appearance because she had not counsel and bail had not been set. At initial appearance, the court set bail and appointed counsel. Ms. Jauch was released six days later. *Jauch*, 874 F.3d 425, 428.

[315] *See supra* note 115 and accompanying text.

[316] 16B AM. JUR. 2D CONSTITUTIONAL LAW § 958 (*citing Mathews*).

allegations, "are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations."[317] "[M]ultiple levels of review" similarly suggest a reduced risk of outcome error.[318] Further, the probable value of additional safeguards would be high. A prompt first appearance would initiate the constitutional protections that work to reduce error and increase fairness, including the right to counsel, notice of charges, and advice of other rights such as the privilege against self-incrimination. Again, the greater the likelihood that protective procedures can improve accuracy in outcome, more heavily the Mathews inquiry favors requiring those procedures.

As for the third *Mathews* factor, a court considers the government's interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[319] There is no legitimate government interest in delaying access to constitutional rights to arrested, and particularly detained, persons.[320] The fiscal and administrative burdens are negligible since the states and the federal government already require a prompt initial appearance with certain procedural protections.[321] To the extent that due process requires a balancing of interests, a defendant's interest in a hearing to receive counsel, contest

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[317] Wilkinson v. Austin, 545 U.S. 209, 225-226 (2005) (*citing* Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 15 (1979)).

[318] *Id.* at 227.

[319] *Mathews*, 424 U.S. at 335.

[320] *See* Coleman, 754 F.2d at 724.

[321] *See id.*(discussing the small administrative burden to ensure timely first appearance where state already requires one).

probable cause, contest conditions of release, and receive advice of his constitutional rights, surely "outweighs the governmental interest in summary adjudication" of the type provided by an *ex parte* judicial determination of probable cause.[322]

2. Consideration of the *Medina* Criteria

Medina v. California holds that due process is offended when the available procedural mechanisms are "fundamentally inadequate to vindicate the substantive rights provided."[323] Where the claimed procedural protections are not enumerated in the Bill of Rights, they must be supplied by the "independent content" of due process.[324] In criminal free-standing due process cases, the Supreme Court "very narrowly" defines "the category of infractions that violate [the] 'fundamental fairness'" required by the Due Process Clause.[325] There are two ways to establish a violation of procedural due process. The challenged conduct must either (i) "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," or (ii) "transgress[] any recognized principle of fundamental fairness in operation."[326]

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[322] Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970). *See* Oviatt v. Pearce, 954 F.2d 1470, 1472, 1475 (9th Cir. 1992) (using *Mathews* criteria to find procedural due process violation in 114-day detention without initial appearance).

[323] *Osborne*, 557 U.S. at 69; Medina v. Califronia, 505 U.S. 437 (1992).

[324] LAFAVE, ET. AL. The "limited" role of free-standing due process, 1 CRIM. PROC. § 2.7(b) (4th ed.).

[325] *Medina*, 505 U.S. at 443, 448.

[326] *Id.* at 446 (internal citations omitted).

As to whether a practice is "so rooted in [our] traditions and conscience" as to be "fundamental," the Court "places a heavy emphasis on historical acceptance of a practice and the consensus of the states, with both factors serving as important limitations on what may be deemed fundamentally unfair."[327] Settled historical practices are those with deep common law roots and practices supported by a contemporary consensus that exemplify a "settled view" among the states.[329] Relying on these two criteria, the Supreme Court attempts to maintain the "careful balance that the Constitution strikes between liberty and order" without "undue interference with [] considered legislative judgments."[330] Both history and modern consensus demonstrate a "norm" of prompt initial appearance.

A prompt initial appearance following arrest is a practice deeply rooted in the United States' legal tradition. Early English jurisprudence prohibited extended pretrial detention without a court appearance.[331] Thirteenth century justices travelled across long distances to provide arrestee's with regular access to the criminal courts.[332] "[J]udicial absenteeism would not justify stalling

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[327] LAFAVE, ET. AL. The "limited" role of free-standing due process, 1 CRIM. PROC. § 2.7(b) (4th ed.). *See also Medina*, 505 U.S. at 446 ("Historical practice is probative of whether a procedural rule can be characterized as fundamental").

[329] *See Medina*, 505 U.S. at 447.

[330] *Id.* at 443.

[331] *Jauch,* 874 F.3d at 432 (citing COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 43 (Rawlins, 6th ed. 1681)).

[332] Klopfer v. North Carolina*.,* 386 U.S. at 24 (1967) (citing COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 45 (Brooke, 5th ed., 1797)).

prosecution, nor would it excuse the withholding of bail."[333] The 1679 Habeas Corpus Act was a response to the possibility that "vacation-time" might delay an arrestee's ability to obtain pretrial release.[334]

The American colonists had similar expectations. Under settled principles of common law, an arresting officer was obligated "to bring his prisoner before a magistrate as soon as he reasonably could."[335] Further, "[t]his 'presentment' requirement tended to prevent secret detention and served to inform a suspect of the charges against him, and it was the law in nearly every American State and the National Government."[336] The right to a prompt appearance in court was firmly entrenched in practice.

As to the contemporary consensus of the states, it is unanimous. In 2019, no state tolerates the indefinite detention of an arrestee without a court appearance.[337] Rather, "ubiquitous" state rules require "the prompt taking of persons arrested before a judicial officer," and "[t]he most prevalent American provision is that requiring judicial examination 'without unnecessary

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[333] *Jauch*, 874 F.3d at 433 (citing 2 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 583 (2d ed. 1905), and 3 W. BLACKSTONE, COMMENTARIES, 131).

[334] *Id.* (citing Opinion on the Writ of Habeas Corpus, 97 Eng. Rep. 29, 31–51 (H.L. 1758) (Wilmot, J.), in 3 THE FOUNDERS' CONSTITUTION 313–24 (1987) and W. CHURCH, WRIT OF HABEAS CORPUS §§ 16–17, p. 18–20 (2d ed. 1893)).

[335] Corley v. United States, 556 U.S. 303, 306 (2009).

[336] *Id.*

[337] McNabb v. United States, 318 U.S. 332, 342 n.7 (1943).

delay.'"[338]. History and modern consensus converge on the primacy of procedures protecting against prolonged detention pretrial.[339]

In addition, detention-without-appearance transgresses recognized principles of "fundamental fairness" in operation.[340] Prolonged pre-trial detention without the oversight of a judicial officer and the opportunity to assert constitutional rights is facially unfair. The Supreme Court has recognized that "[t]he consequences of prolonged detention may be more serious than the interference occasioned by arrest" because "[p]retrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships."[341] Indefinite postponement of the first judicial appearance and the advice-of-rights that accompanies it, "denies criminal defendants their enumerated constitutional rights relating to criminal procedure by cutting them off from the judicial officers charged with implementing constitutional criminal procedure."[342] Heaping these consequences on an accused and blithely waiting days, weeks or months before affording him access to the justice system is the antithesis of procedural due process.[343]

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[338] Culombe v. Connecticut, 367 U.S. 568, 585 (1961); *see also* McNabb v. United States, 318 U.S. 332, 342 n.7 (1943).

[339] *See Jauch*, 874 F.3d at 434, ("a procedure calling for extended pre-trial detention without any sort of hearing is alien to our law" and there is "no sanction, historical or modern, for [an] indefinite detention procedure" without initial appearance).

[340] *Cf. Medina*, 505 U.S. at 448 (giving the standard for transgressing "fundamental fairness").

[341] *Gerstein*, 420 U.S. at 114.

[342] *Jauch*, 874 F.3d at 435.

[343] For the opinions of the two federal circuit courts that have established this procedural due process

Accordingly, the United States Constitution protects criminal defendants from being "lawfully … committed to a purgatory where [their] rights and protections are out of reach, the Constitution made to wait."[344]

C. The Substantive Due Process Right to a Prompt and Meaningful Initial Appearance

Regardless of the fairness of the procedures employed to deprive a person of a liberty interest, substantive due process protects criminal defendants "against government power arbitrarily and oppressively exercised."[345] As the Court has stated, "Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three."[346] Detaining a person indefinitely without timely access to an initial appearance is the epitome of arbitrary state action.[347]

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right, *see* Jauch v. Choctaw County, 874 F.3d 425 (5th Cir. 2017) and Oviatt v. Pearce, 954 F.2d 1470 (9th Cir. 1992).

[344] *Jauch*, 874 F.3d at 433.

[345] County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) (*citing* Daniels v. Williams, 474 U.S. 327, 331 (1986)).

[346] Washington v. Glucksberg, 521 U.S. 702, 763-64 (1997) (Souter J., concurring) (*quoting* Poe v. Ulman, 267 U.S. 497, 541 (1961)). The arbitrary and oppressive exercise of power is not immune from the requisites of due process simply because that power is exercised after the administration of formally adequate criminal procedures. *See Lewis*, 523 U.S. at 846.

[347] The Court has declared that a "detention prior to trial or without trial" is a liberty interest

The substantive due process doctrine utilized depends upon whether the contested government action is legislative or executive.[348] Because every state has legislation reflecting a fundamental liberty interest in prompt presentment,[349] the issue in cases of indefinite detention without an initial appearance is one of arbitrary executive action.[350] In such cases, the Court asks whether the executive action "shocks the conscience."[351] In *Sacramento v. Lewis*,[352] the Court held that

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implicating a substantive due process analysis. United States v. Salerno, 481 U.S. 739, 746 (1987).

[348] The proper rubric for a substantive due process claim is a matter of some confusion. *Compare Lewis*, 523 U.S. at 846–47 (using "shocks the conscience" standard) *with id.* at 860–62 (Scalia, J., concurring) (critiquing "shocks the conscience" test, favoring historical fundamental rights analysis). *See also* United States v. Salerno, 481 U.S. 739, 746 (1987): ("So-called 'substantive due process' prevents the government from engaging in conduct that "shocks the conscience," *Rochin v. California*, 342 U.S. 165, 172 [ ] (1952), or interferes with rights 'implicit in the concept of ordered liberty,' *Palko v. Connecticut*, 302 U.S. 319, 325-326 [ ] (1937)."). In essence, there are "two strands of the substantive due process doctrine. One strand protects an individual's fundamental liberty interests, while the other protects against the exercise of governmental power that shocks the conscience." Moya v. Garcia, 895 F.3d 1229, 1243 (McHugh, J., concurring and dissenting) (citation omitted). It appears that the Court employs the former for legislative actions, *see, e.g., Salerno*, 481 U.S. at 747 (assessing Bail Reform Act under substantive due process) and the latter for executive actions, *see Lewis*, 523 U.S. at 846.

[349] *Infra* note 42 (citing statutes).

[350] The kind of legislative claim at issue in this Article—that current legislation is inadequate to protect the liberty interest—invokes a procedural due process analysis.

[351] *Lewis*, 523 U.S. at 846–47.

[352] 523 U.S. 833 (1998).

"deliberate indifference" on the part of prison officials will suffice to "shock the conscience" under certain conditions.[353] It explained as follows:

> "As the very term 'deliberate indifference' implies, the standard is sensibly employed only when actual deliberation is practical, and in the custodial situation of a prison, forethought about an inmate's welfare is not only feasible but obligatory under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare."[354]

In contrast with the many on-the-spot determinations police officers on the street must make, law enforcement and jail officials overseeing the detention of arrestees have the luxury of deliberation.[355] In this context, "[w]hen such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking."[356]

Deliberate indifference is inaction and stems from inadequacies and failures. As the Seventh Circuit found when deciding that an arrested man's 57-day detention without an appearance before a judge "shocked the conscience":

> "Prolonged detention after arrest with a warrant is not as common as the problem addressed in *Gerstein*, but it certainly seems to be a basic concern of jail administration. In a constitutional sense, how much more basic could it get – jails cannot confine people without the authority to do so. A policy that ignores whether the jail has the authority for long-term confinement seems to be a policy of deliberate indifference. Furthermore, jailers hold not only the keys to

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[353] *Id.* at 850.

[354] *Id.*. at 851 (citation omitted).

[355] *Id.* at 853.

[356] *Id.*

the jail cell, but also the knowledge of who sits in the jail and for how long they have sat there. They are the ones directly depriving detainees of liberty."[357]

There is simply no legitimate justification for the state to allow people to languish in jail for days, weeks, or months, without being brought before a judge.[358].

This due process violation occurs not simply because the arrestee is detained indefinitely through this deliberate indifference, but because of the important role of the initial appearance in our criminal justice system, one "implicit in the concept of ordered liberty."[359] Almost by definition, the initial appearance is an arrestee's "first opportunity for vindication of a number of constitutional rights, including those under the fifth, sixth, and eighth amendments to the United States Constitution."[360] The initial appearance or "presentment is the point at which the judge is required to take several key steps to foreclose Government overreaching: informing the defendant of the charges against him, his right to remain silent, his right to counsel, the availability of bail, and any right to a preliminary hearing; giving the defendant a chance to

[357] Armstrong v. Squadrito, 152 F.3d 564, 578–79 (7th Cir. 1998).

[358] *See* Coleman v. Frantz, 754 F.2d 719, 724 (1985); (discussing the small administrative burden to ensure timely first appearance where state already requires one); *Armstrong*, 152 F.3d at 572 (citing *Coleman* for same).

[359] Palko v. Connecticut, 302 U.S. 319, 325–26 (1937) *overruled by* Benton v. Maryland, 395 U.S. 784 (1969) (overruling application of Double Jeopardy Clause to states).

[360] Jackson v. Hamm, 78 F. Supp. 2d 1233, 1240–1241 (M.D. Ala. 1999) (citing *Coleman*, 754 F.2d 719).

consult with counsel; and deciding between detention or release."[361] A prompt and fulsome initial appearance proceeding "has such great value in protecting numerous rights that its denial presumptively disrupts those rights."[362]

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Ultimately, it may be immaterial whether the issue is "more appropriately characterized as substantive or procedural . . . . In either event, the same Due Process Clause operates to protect the individual against the abuse of governmental power."[363] A constitutionally valid arrest does not obviate the need for initial appearance procedures. Satisfaction of the Fourth Amendment probable cause standard is not a constitutional blank check. The Constitutional right to due process demands more; it demands that newly arrested suspects receive a prompt and meaningful initial appearance.

IV. INTERIM STEPS TO REFORM

This Article begins the conversation about the importance of regulating constitutional criminal pretrial procedure by excavating the long-overlooked due process right to prompt initial appearance. The assessment of the due process right to a prompt, substantive, and counsel initial appearance, establishes a blueprint for litigation to establish and enforce this right.[364] Until the Supreme Court clearly establishes the right, however, there is much that reform-minded lawyers,

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[361] *Corley v. United States*, 556 U.S. 303, 320 (2009).

[362] *Id.* (*quoting* Armstrong, 152 F.3d at 573) (agreeing with reasoning of Seventh Circuit in *Coleman* and finding substantive due process right to prompt initial appearance).

[363] Albright v. Oliver, 510 U.S. 510 U.S. 266, 302 (1994) (Stephens, J. dissenting).

[364] The authors' work-in-progress on the right to counsel at initial appearance will further exploit the nexus of the Sixth Amendment right to counsel and the Due Process initial appearance right.

legislators and judges can do in the interim to alleviate the unjust over-detention that plagues this country.

As a matter of state law reform, states can require strong procedural safeguards that ensure prompt initial appearances. First, states that allow for initial appearance "without unnecessary delay" should impose instead a strict 24 hour time limit for initial appearance. This would accomplish two things. First, it might create a due process liberty interest for the detained arrestee.[365] Second, it would give police officers, wardens, and jailers bright line rules to follow.

States should also enact legislation that empowers stakeholders who are part of the detention process to facilitate prompt initial appearances. For example, sheriffs and police chiefs should be authorized (or even required) to notify the responsible court about anyone detained for more than 24 hours without an initial appearance. In addition, states should legislate forthwith remedies for detention-without-appearance. For example, if the detainee's custodian is properly notified of the over-detention and fails to act within 24-hours, the custodian should be statutorily empowered to release that individual.[366]

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[365] *See* note 124 *supra* (discussing problematic holdings that state statutes with vague, as opposed to mandatory, timelines, do not create a liberty interest).

[366] This can also be argued as a judicial remedy in an individual case. *See* State v. Strong, 236 P.3d 580, 584 (Mont. 2010) (Nelson, J., specially concurring) (arguing remedy should be dismissal with prejudice); The Associated Press, *Court delay leads to dismissal of aggravated assault charge*, NBC, MONTANA, (May 8, 2019), available at https://nbcmontana.com/news/local/court-delay-leads-to-dismissal-of-aggravated-assault-charge.

State law reform must also require a *meaningful* initial appearance procedure that guarantees a right to contest the *ex parte* probable cause determination. This procedure – which is already guaranteed to convicted defendants,[367] lies at the heart of the many cases of wrongful incarceration.[368] States should also guarantee the actual appearance of counsel, and not just attachment of the right as counsel's assistance is critical to a meaningful opportunity to contest the probable cause finding and the terms of bail.[369]

As described in Part I, there are serious deficiencies in the operation of initial appearance proceedings on the local level. Temporal "gaps" in local law, shoddy practice, and institutional errors will prove resistant to change. Concrete state law reforms will have their greatest impacts in rural jurisdictions, which must ensure the availability of judge and counsel. Jurisdictions that operate under "terms of court" calendars must make arrangements for prompt post-arrest judicial appearances, no matter where any local "circuit rider" may be.[370] Meanwhile, in both rural

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[367] *See* Kuckes *supra* note 5 at 40.

[368] For example, in the Supreme Court's cases, *Baker* involved an arrest of the wrong person, 443 U.S. at 143; *Albright* involved an arrest on unreliable hearsay, 510 U.S. 266; and *Manuel* involved the arrest of an innocent man based on a fraudulent affidavit, 137 S. Ct. 914.

[369] *See* Gross, *supra* note 13, at 850. PRM – NOTE- there are forthcoming studies on why there is a right to counsel at first appearance.

[370] *See e.g.* Brandon Buskey, *Escaping the Abyss: The Promise of Equal Protection to End Indefinite Detention Without Counsel*, 61 ST. LOUIS U. L.J. 665, 666–69 (2017) (describing how counties in Mississippi had only four or fewer trial terms per year, and urging an Equal Protection approach to counsel's early entry into criminal cases).

communities and high-volume, high-tech, urban centers, courts will have to grapple with whether video relays provide adequate first appearances.[371] Whatever the decision, jurisdictions will have to create an infrastructure that make prompt and counseled initial appearances viable.[372]

To support litigation and reform efforts, researchers, policy makers and scholars should engage in data-driven empirical research to document the current practice.[373] Certainly, to attract the attention of appellate courts and the Supreme Court, the spotlight must shine on the realities of local practice in our country. After all, in the Supreme Court, "meaningful data as well as mere anecdote are likely at best to capture a sense of federal practices – not the mine-run of state and local activities."[374]

Researchers should document the dire consequences that confront new arrestees, as well as the timing and the content of initial appearance proceedings. There must be an empirical assessment of the frequency with which police arrest and detain suspects whose cases will ultimately be declined or dismissed by the local prosecutor. The higher the percentage of cases

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[371] *See infra* note 60 and accompanying text. ADD NEW RESEARCH ON BANDWIDTH AND CONTENT

[372] *See* Rothgery v. Gillespie Cy., 554 U.S. 191, 206-07 (2008) (noting that "only '[s]ome Texas counties . . . have computer systems that provide arrest and detention information simultaneously to prosecutors, law enforcement officers, jail personnel, and clerks").

[373] PRM – I will gather some research questions.

[374] Jennifer E. Laurin, *Quasi-Inquisitorialism: Accounting for Deference in Pretrial Criminal Procedure*, 90 NOTRE DAME L. REV. 783, 839 (2014).

where prosecution is declined, the greater the risk that detention and delay without initial appearance serve no lawful purpose.[375]

Along the way, courts and commentators must begin to understand that the initial appearance crisis is merely the tip of the criminal justice iceberg. Lurking below the surface is a deeper, denser, more dangerous problem: the displacement of criminal case outcomes. Ours is no longer a system of highly regulated, and deeply adversary, adjudicative procedures. Rather, it is a wildly under-regulated, and deeply coercive, assembly line for plea bargains.

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[375] *See* Sadiq Reza, *Privacy and the Criminal Arrestee or Suspect: In Search of A Right, in Need of A Rule,* 64 MD. L. REV. 755, 773, 801 (2005) (noting that between 10% and 40% of state felony cases in major urban centers are dismissed after arrest) (citing Gerard Rainville & Brian A. Deaves, Bureau of Justice Statistics, U.S. Dep't of Justice, Felony Defendants in Large Urban Counties, 2000, at 24, available at https://www.bjs.gov/index.cfm?ty=pbdetail&iid=897; Bureau of Justice Statistics, U.S. Dep't of Justice, Federal Criminal Case Processing, 2001, with Trends 1982-2001, at 9 tbl.3 and, at 11 tbl5, available at https://www.bjs.gov/index.cfm?ty=pbdetail&iid=845). *See also* Carrie Leonetti, *When the Emperor Has No Clothes: A Proposal for Defensive Summary Judgment in Criminal Cases*, 84 S. CAL. L. REV. 661, 666 (2011) ("it takes only a charge for a defendant to be detained pending trial, with little to no consideration of the strength of the supporting evidence"). This analysis would echo the due process inquiry in civil commitment cases, where the Supreme Court has held that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." Jackson v. Indiana, 406 U.S. 715, 738 (1972).

CONCLUSION

"THE HISTORY OF LIBERTY HAS LARGELY BEEN THE HISTORY OF OBSERVANCE OF PROCEDURAL SAFEGUARDS."[376]

The detention-without-appearance of criminal suspects is a "recurring part of the state sanctioned prosecutorial system."[377] Arrest launches a suspect into an ill-defined cascade of judicial "processes" that lack the structural protections ordinarily associated with an adversarial system. Without an initial appearance in court, a defendant is utterly lost. No defense attorney is advocating for his release, investigating his case, preparing for trial, or taking affirmative steps to obtain the best-possible plea bargain. Meanwhile, the defendant endures the loss of freedom, the physical risks of incarceration, the loss of employment, damage to reputation, and impairment of his ability to defend himself, without any due process entitlement to an adversary hearing. This is the Supreme Court's jurisprudence under *Gerstein* and its progeny.

For too long, the Supreme Court has assumed that, after arrest, there will be a prompt court appearance, and that "the delay in obtaining counsel [will] be minimal" and the "detriment to trial rights" will be minor.[378] Case law, news accounts and anecdotal data prove that this reliance is misplaced. Arrested and detained persons disappear into jails and holding cells for days, weeks, or even months. Without a constitutional right to prompt and fulsome initial appearance

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[376] *Corley*, 556 U.S. at 321 (*quoting McNabb*, 318 U.S., at 347).

[377] Pugh v. Rainwater, 332 F. Supp. 1107, 1113 (S.D. Fla. 1971) *supplemented*, 336 F. Supp. 490 (S.D. Fla. 1972).

[378] Colbert, *The Illusory Right*, *supra* note 196, at 34.

procedures, defendants must rely upon their jailers, or upon the dubious protections of state and local practice, to prevent their prolonged incarceration without criminal process.

While our resolution-focused system of criminal procedure provides elaborate protections for the disposition of a criminal case, there are no such protection for new arrestees. Without a prompt, meaningful, and counseled initial appearance procedure, a defendant is alone, facing "the prosecutorial forces of organized society [and] the intricacies of substantive and procedural criminal law" from the depths of a holding cell.[379] His peril is sure; his rescue is uncertain. Recognizing the due process right to a prompt and meaningful initial appearance is a critical first step in curing his criminal disappearance.

[379] *Rothgery,* 554 U.S. at 198.