Criminal (Dis)Appearance

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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, the temporary suspension of a public school student, or the suspension of a driver's license," than it does for a person who has just been arrested.[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.*

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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1 Gerstein v. Pugh, 420 U.S. 103, 127 (1975) (Stewart, J., concurring) (citations omitted).

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 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. In rural Choctaw County, however, 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, Ms. 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.

—Jauch v. Choctaw County[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, an arrestee has no clearly established constitutional right to appear promptly before a judge, challenge the evidence that supports her arrest, have the prompt post-arrest assistance of counsel, or participate in an adversarial bail hearing.[3] Indeed, the Supreme Court requires more constitutional process for the seizure "of a refrigerator, the temporary suspension of a public school student, or the suspension of a driver's license," than it does for a presumptively innocent person who has just been arrested and detained.[4]

In his jail cell, a new arrestee has been seized, searched, processed, and detained in a system that neither defines nor guarantees any 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."[5] Arrest has launched him into an ill-defined, post-arrest "criminal process" that lacks the structural protections ordinarily associated with our adversary system. As the Covid-19 pandemic makes clear, arrest may also cause a serious medical crisis or even death.[6]

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2 This account of Ms. Jauch's case is taken from *Jauch v. Choctaw County*, 874 F.3d 425, 428 (5th Cir. 2017) and from Brief for Appellant at 6, Jauch v. Choctaw County, 874 F.3d 425 (5th Cir. 2017) (No. 16-60690), 2016 WL 7386084, at *5–6.

3 *See infra* notes 58, 61, 105, 203–04 and accompanying text.

4 *Gerstein*, 420 U.S. at 127 (Stewart, J., concurring) (citations omitted); *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.").

5 Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion).

6 Matthew J. Akiyama et al., *Flattening the Curve for Incarcerated Populations—Covid-19 in Jails and Prisons*, NEW ENG. J. MED. (2020), https://www.nejm.org/doi/pdf/10.1056/NEJMp2005687?articleTools=true [https://perma.cc/74S7-UPSA] ("Highly transmissible novel respiratory pathogens pose a new challenge for incarcerated populations because of the ease with which they spread in congregate settings."); *Responses to the Covid-19 Pandemic*, PRISON POL'Y INITIA-

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 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 these 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 application of Fourth Amendment jurisprudence to 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 ap-

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TIVE (Apr. 10, 2020), https://www.prisonpolicy.org/virus/virusresponse.html [https://perma.cc/BB89-8NYA] (stating that "prisons and jails are amplifiers of infectious diseases such as Covid-19"); CDC, INTERIM GUIDANCE ON MANAGEMENT OF CORONAVIRUS DISEASE 2019 (COVID-19) IN CORRECTIONAL AND DETENTION CENTERS (2020), https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf [https://perma.cc/2Z5G-XBZE].

7 *See, e.g.*, U.S. CONST. amends. V, VI.

8 *See id.*

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, 5:28 AM), https://www.reuters.com/article/us-rights-disappeared/anguish-of-disappearance-continues-across-the-world-say-campaigners-idUSKCN0QY08420150829 [https://perma.cc/ADL2-VYMH] (discussing the continuing phenomena that has resulted in over 100,000 disappearances in the past decade).

pearance can vindicate the important 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, 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. 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 advised them of their rights.

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11 *See, e.g.*, John W. Witt et al., Unreasonable Delay in Bringing Pretrial Detainee Before Judge, *in* Section 1983 Litigation: Forms § 1.187 (2d ed. Supp. 2019); *see also* Moya v. Garcia, 895 F.3d 1229, 1240 (10th Cir. 2018) (McHugh, J., concurring and dissenting) (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" (quoting Dodds v. Richardson, 614 F.3d 1185, 1192 (10th Cir. 2010))).

12 *See, e.g.*, Moya v. Garcia, 895 F.3d 1229, 1231 (10th Cir. 2018) (over 30 days in detention without an initial appearance); Hayes v. Faulkner Cty., 388 F.3d 669, 673 (8th Cir. 2004) (38 days in detention without initial appearance); Oviatt *ex rel.* Waugh v. Pearce, 954 F.2d 1470, 1473 (9th Cir. 1992) (114 days in detention without court appearance); 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) (18 days in detention without initial appearance); Dayton v. Lisenbee, No. 4:18-cv-01670-AGF, 2019 WL 1160816, at *2 (E.D. Mo. Mar. 13, 2019) (53 days in detention before first appearance); Barnes v. Cullman Cty. Dist. Court, No. 5:16-cv-1691-AKK, 2017 WL 1508239, at *1 (N.D. Ala. Apr. 27, 2017) (14 days in detention without appointment of counsel); Hoffman v. Knoebel, No. 4:14-cv-00012-SEB-TAB, 2017 WL 1128534, at *1 (S.D. Ind. Mar. 24, 2017) (60 days in detention without initial appearance or appointment of counsel); Martinez v. Sun, 896 F. Supp. 2d 710, 720 (N.D. Ill. 2012) (18-day delay between arrest and initial appearance); Scott v. Denzer, No. 06-5202, 2008 WL 2945584, at *7 (W.D. Ark. July 28, 2008) (31 days in detention without initial appearance or appointment of counsel); Scott v. Belin, No. 05-CV-1100, 2008 WL 350628, at *1 (W.D. Ark. Feb. 7, 2008) (78 days in detention without initial appearance or appointment of counsel); Hale v. City of Warren, No. 07-1026, 2007 WL 4454734, ¶ 1 (W.D. Ark. Mar. 29, 2007) (70 days in detention without initial appearance or appointment of counsel); Pledger v. Reece, No. 04-3084, 2005 WL 3783428, at *1 (W.D. Ark. Nov. 10, 2005) (15 days in detention without initial appearance); Jackson v. Hamm, 78 F. Supp. 2d 1233, 1241 (M.D. Ala. 1999) (28 days in detention without initial appearance or appointment of counsel); State v. Gribble, 415 P.3d 481 (Mont. 2018) (24 days between arrest and initial appearance); State v. Strong, 236 P.3d 580, 581 (Mont. 2010) (42 day delay between arrest and initial appearance and 31-day delay between arrest and appointment of counsel); Complaint—Class Action at 3, Daves v. Dall. Cty., No. 3:18-cv-154 (N.D. Tex. filed Jan. 21, 2018) (alleging unlawful detention of plaintiff-

No attorney was appointed to represent them. No one argued for their release, investigated their cases, prepared for trial, or negotiated a plea bargain. This Part describes the lackluster process that an arrestee receives, the dire consequences that follow, 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 underresourced criminal justice systems, an appalling lack of early-stage criminal procedure defines the landscape.

In theory, 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. Our criminal justice system relies upon the initial appearance procedure to regulate 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 colonial times, custom and procedure have established a clear expectation about the purpose of the initial court appearance.[14]

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arrestees who cannot afford money bail and wait days or weeks for a first appearance), https://faithintx.org/wp-content/uploads/2018/10/CaseNo.3.18-ev-154.pdf [https://perma.cc/8WLQ-MNLG]; Brooke Adams, *Truck Driver Files Lawsuit, Says He Was Falsely Imprisoned at Northern Utah Jail*, SALT LAKE CITY TRIB. (June 10, 2013) (17 days in detention without initial appearance or access to counsel).

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* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.1(g), Westlaw (5th ed. database updated Oct. 2019) (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).

14 *See Corley*, 556 U.S. at 306; *see also* AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE 77–83 (3d ed. 2007) (prompt first appearance); 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 11.2(b) (4th ed. 2015) (right to appointed counsel: stages of the proceeding); Gross, *supra* note 13, at 841.

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 also inform the suspect of the charges against him as well, thereby implementing the Sixth Amendment right "to be informed of the nature and cause of the accusation."[17] At initial appearance, a judge may set the date for further legal proceedings and advise a defendant of his rights in regard to those future proceedings.[18] Thus, some aspects of an initial appearance procedure "involve the delivery of information—information that allows an arrestee to take appropriate legal action."[19] When a judge or magistrate conducts the initial appearance, the procedure guarantees that "an arrestee receives this information from a neutral source."[20]

The mere fact of initial appearance *in court* also does important procedural work. Requiring the government to produce an arrested defendant in open court alerts the judiciary to the defendant's arrest and safeguards the defendant against "secret detentions."[21] Through the Public Trial Clause of the Sixth Amendment, the initial appear-

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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 Cty., 388 F.3d 669, 673 (8th Cir. 2004).

16 *See Coleman*, 754 F.2d at 724 (citing Miranda v. Arizona, 384 U.S. 436 (1966)); *see also Corley*, 556 U.S. at 308 ("[T]he plain purpose of the requirement that prisoners should promptly be taken before committing magistrates was to check resort by officers to 'secret interrogation of persons accused of crime.'" (quoting Upshaw v. United States, 335 U.S. 410, 412 (1948))); 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"); 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" (quoting State v. Hutcheson, 352 S.E.2d 143, 146 (1986))).

17 U.S. CONST. amend. VI; *see* Armstrong v. Squadrito, 152 F.3d 564, 572–73 (7th Cir. 1998).

18 Rothgery v. Gillespie Cty., 554 U.S. 191, 199 (2008); *accord Corley*, 556 U.S. at 320.

19 *Armstrong*, 152 F.3d at 573.

20 *Id.*

21 *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.").

ance also provides public transparency about arrests and police practices.[22]

The Sixth Amendment right to counsel arises at initial appearance.[23] Accordingly, in many jurisdictions, the initial appearance includes a determination of the defendant's eligibility for public defense services.[24] In addition, at initial appearance a judge usually "determine[s] the conditions for pretrial release,"[25] or modifies preset conditions, thereby implementing the Constitution's prohibition on

22 *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 v. State, 330 F. Supp. 3d 1344, 1354 (N.D. Ala. 2018) (describing initial appearance held by video conference); State v. Hershberger, 5 P.3d 1004, 1006 (Kan. Ct. App. 2000) (describing video first appearance).

23 *Rothgery*, 554 U.S. at 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).

24 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*, BALT. SUN (Mar. 15, 2014, 3:08 PM), http://www.baltimoresun.com/news/maryland/sun-investigates/bs-md-forgotten-in-jail-20140315-story.html# [https://perma.cc/437D-5C5F] (asserting that initial appearance may be a defendant's "first chance for release pending trial"). 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 Corley*, 556 U.S. at 320 (explaining how prompt presentment allows a judge to take "key steps to prevent Government overreaching"); AM. BAR ASS'N, *supra* note 14, at 77 (requiring, pursuant to Standard 10-4.1, prompt first appearance within 24 hours of arrest).

25 *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* Chavez v. State, 832 So. 2d 730, 752 (Fla. 2002) (explaining conditions of release determined at initial appearance); *Gatlin*, 219 P.3d at 878 (stating initial appearance procedure intended "to ensure the defendant is duly informed of his constitutional rights as soon as possible"); AM. BAR ASS'N, *supra* note 14, at 78 ("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 . . . ."). Not all defendants, however, receive the assistance of counsel at the initial appearance. *See generally* Duncan, *supra* note 24 (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, 638–85 (2017) (discussing the variance in bail procedure in different jurisdictions).

excessive bail[26] and promise that liberty shall not be restrained without due process of law.[27]

There is widespread consensus that promptness is essential to the efficacy of an initial appearance. Arrest and custodial interrogation "isolate[ ] and pressure[ ]" a suspect, making them more susceptible to interrogation by the police.[28] A prompt initial appearance "ensures that the police do not use the delay to extract a confession from a defendant through prolonged interrogation."[29]

In most judicial systems, bond is set at the initial appearance. A prompt initial appearance, therefore, 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.[30]

Perhaps most importantly, the right to counsel arises at first appearance.[31] So, a prompt first appearance ensures that an indigent defendant promptly "receives counsel at the important post-arrest stages of a criminal prosecution."[32]

Alas, the Supreme Court has failed to require *any* prompt initial judicial appearance.[33] 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 criminal cases.

B. Initial Appearance Facts

There is no clearly established constitutional right to an initial appearance before a judge.[34] Accordingly, there is also no right to a

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26 *See Armstrong*, 152 F.3d at 573; Coleman v. Frantz, 754 F.2d 719, 724 (7th Cir. 1985) (citing Stack v. Boyle, 342 U.S. 1 (1951)), *abrogated in part on other grounds by* Benson v. Allphin, 786 F.2d 268 (7th Cir. 1986).

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

28 *Corley*, 556 U.S. at 320 (citing Dickerson v. United States, 530 U.S. 428, 435 (2000)).

29 Rogers v. Albert, 541 S.E.2d 563, 567 (W. Va. 2000) (quoting State v. Hutcheson, 352 S.E.2d 143, 146 (1986)); *see also* People v. Suggs, 57 N.E.3d 1261, 1267–70, 1272 (Ill. App. Ct. 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); 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) . . . .").

30 *See infra* notes 74–85 and accompanying text.

31 *See* Rothgery v. Gillespie Cty., 554 U.S. 191, 194 (2008).

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

33 *See infra* Part II (outlining the Court's failure to recognize the right).

34 *See, e.g.*, Moya v. Garcia, 895 F.3d 1229, 1241 (10th Cir. 2018) (McHugh, J., concurring

prompt initial appearance before a judge.[35] An uncharged defendant can spend weeks—or even months—in jail without ever seeing a judge or learning about his rights.[36] True, every state requires some type of initial appearance procedure.[37] That procedure, however, may not ap-

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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); *see also* Diaz v. Wright, No. Civ. 14-922, 2016 WL 10588098, at *16 (D.N.M. Mar. 22, 2016) (holding no due process liberty interest created by New Mexico statute requiring initial appearance "without unnecessary delay"); Cartwright v. Dall. Cty. Sheriff Office, No. 3:15-cv-889-D-BN, 2015 WL 9582905, at *3 (N.D. Tex. Nov. 9, 2015) (finding no constitutional right to arraignment or judicial appearance within set amount of time).

35 *See supra* note 34; *see also infra* notes 188–92 and accompanying text (describing holding in *Gerstein v. Pugh*, 420 U.S. 103 (1975), to this effect).

36 *See supra* note 12 and accompanying text.

37 *See* ALASKA STAT. ANN. § 12.25.150 (West 2019) (within 48 hours of arrest, including Sundays and holidays); ARIZ. R. CRIM. P. 4.1 (after arrest "promptly;" if initial appearance occurs more than 24 hours after arrest, defendant shall "immediately" be released); CAL. PENAL CODE § 825 (West 2003) ("without unnecessary delay, and, in any event, within 48 hours after his or her arrest, excluding Sundays and holidays"); COLO. R. CRIM. P. 5. (without unnecessary delay); CONN. GEN. STAT. § 54-1g (2020) ("promptly" before the next regularly sitting court); DEL. SUPER. CT. CRIM. R. 5 ("without unreasonable delay"); D.C. SUPER. CT. CRIM. R. 5 ("without unnecessary delay"); FLA. R. CRIM. P. 3.130 (for defendant in custody, within 24 hours of arrest); GA. CODE ANN. § 17-4-26 (2019) (within 72 hours of arrest); 8 GUAM CODE ANN. § 45.10 (2008) (within 48 hours after the arrest); HAW. REV. STAT. § 803-9 (2019) (within 48 hours of the arrest); I.C.R. 5 (within 24 hours of arrest, excluding weekends and holidays); 725 ILL. COMP. STAT. ANN. 5/109-1 (West 2018) ("without unnecessary delay"); IND. CODE ANN. § 35-33-7-1 (1991) ("promptly"); IOWA R. CRIM. P. 2.2 ("without unnecessary delay"); KAN. STAT. ANN. § 22-2901 (2007) ("without unnecessary delay"); KY. R. CRIM. P. 3.02 ("without unnecessary delay"); LA. CODE CRIM. PROC. ANN. art. 230.1 (2018) (within 72 hours of arrest, excluding weekends and holidays); ME. R. CRIM. P. 5 (within 48 hours, excluding weekends and holidays); MD. R. CRIM. PROC. 4-212 (within 24 hours of arrest); MASS. R. CRIM. P. 7 (at the first available court session following arrest); MICH. COMP. LAWS § 764.13 (West 2010) ("without unnecessary delay"); MINN. R. CRIM. P. 4.02 (within 36 hours of arrest, excluding the day of arrest, weekends, and holidays); MISS. CODE ANN. § 99-3-17 (West 2018) ("without unnecessary delay"); MO. R. CRIM. P. 22.07 ("as soon as practicable," often "no later than 48 hours"); MONT. CODE ANN. § 46-7-101 (2017) ("without unnecessary delay"); NEV. REV. STAT. § 171.178 (2017) ("without unnecessary delay"); N.H. REV. STAT. ANN. § 594:20-a (2001) (within 24 hours, excluding weekends and holidays); N.J. CT. R. 3:4-2 (within 48 hours of arrest); N.M. STAT. ANN. § 31-1-5 (West 2019) ("without unnecessary delay"); N.Y. CRIM. PROC. LAW §§ 120.90, 140.20 (McKinney 2004) ("without unnecessary delay"); N.C. GEN. STAT. § 15A-501 (2017) ("without unnecessary delay"); N.D. R. CRIM. P. 5 ("without unnecessary delay"); OHIO REV. CODE ANN. § 2935.13 (West 2006) (upon arrest); OKLA. STAT. ANN. ch. xvii, art. x, § 2765 (West 1931) ("without unnecessary delay"); OR. REV. STAT. § 135.010 (West 1983) (during the first 36 hours of custody, excluding holidays, Saturdays and Sundays); PA. R. CRIM. P. 516, 519 ("without unnecessary delay"); P.R. LAWS ANN. tit. 34, § 22 (2019) ("without unnecessary delay"); S.D. CODIFIED LAWS § 23A-4-1 (2016) ("without unnecessary delay"); TEX. CODE CRIM. PROC. ANN. art. 15.17 (2015) (within 48 hours of arrest); UTAH CODE ANN. § 77-7-23 (LexisNexis 2017) ("without unnecessary delay"); VT. R. CRIM. P. 3 ("without unnecessary delay"); VA. CODE ANN.

ply to every type of arrest.[38] Ms. Jauch's travails were the direct result of a Mississippi statute that exempted post-indictment arrests from the initial appearance mandate.[39]

Every state considers its proscribed initial procedure to be "prompt," but promptness, like beauty, lies in the eye of the beholder.[40] Although 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.[41] New Jersey excludes holidays from that calculation[42] and Louisiana excludes holidays and weekends.[43] So, in Louisiana, a person arrested on Wednesday, December 19th, could be detained for seven days until Wednesday, December 26th.[44]

Connecticut and Massachusetts link a defendant's first court appearance to the next available court session, regardless of when it is scheduled to occur.[45] This type of requirement can work particular hardship in rural areas, where the next term of court may not occur for weeks, or even months.[46] Twenty-two states simply require that the

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§ 19.2-80 (2015) ("without unnecessary delay"); WASH. 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"); W. VA. CODE ANN. § 62-1-5 (LexisNexis 2014) ("without unnecessary delay"); WIS. STAT. ANN. § 970.01 (West 2007) ("within a reasonable time"); *accord* AM. BAR ASS'N, *supra* note 14, at 77–83 ("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.'").

38 *See, e.g.*, Jauch v. Choctaw Cty., 874 F.3d 425, 429 (5th Cir. 2017) (discussing Mississippi law that excludes indicted arrestees from protections of state initial appearance rule).

39 MISS. CODE ANN. § 99-3-17.

40 *See* Gross, *supra* note 13, at 840–41 ("[L]ocal custom and practice often trumps [sic] statewide rules of criminal procedure . . . .").

41 GA. CODE ANN. § 17-4-26 (requiring initial appearance within 72 hours of arrest); LA. CODE CRIM. PROC. ANN. art. 230.1 (requiring initial appearance within 72 hours of arrest, excluding weekends and holidays); N.J. CT. R. 3:4-2 (requiring initial appearance within 72 hours of arrest, excluding holidays).

42 N.J. CT. R. 3:4-2 (requiring initial appearance within 72 hours of arrest, excluding holidays).

43 LA. CODE CRIM. PROC. ANN. art. 230.1 (requiring initial appearance within 72 hours of arrest, excluding weekends and holidays).

44 *See id.*

45 *See* CONN. GEN. STAT. § 54-1g (2020) (requiring initial appearance "promptly" before the next regularly sitting court); MASS. R. CRIM. P. 7 (requiring initial appearance at the first available court session following arrest).

46 *See* JACOB KANG-BROWN & RAM SUBRAMANIAN, VERA INST. OF JUSTICE, OUT OF SIGHT 19 (2017), http://www.safetyandjusticechallenge.org/wp-content/uploads/2017/06/Out_of_sight_report.pdf [https://perma.cc/PX36-VGZG] (noting how some rural areas rely on judges who convene court as rarely as a few times per *year*).

initial appearance occur "without unnecessary delay,"[47] "as soon as practicable,"[48] or "within a reasonable time."[49]

Delays in initial appearance can exacerbate problems caused by other gaps in criminal pretrial doctrines, particularly with regard to procedures for setting bail and providing access to counsel Lacking Supreme Court guidance about the constitutional requisites of a pretrial bail determination,[50] states have developed diverse practices.[51] In some jurisdictions, judges set a bond amount when they authorize an arrest warrant[52] or follow a rigid bail schedule that applies to all defendants.[53] In those jurisdictions, the initial appearance is the first op-

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47 COLO. R. CRIM. P. 5; IOWA R. CRIM. P. 2.2; KAN. STAT. ANN. § 22-2901 (2007); KY. R. CRIM. P. 3.02; MICH. COMP. LAWS ANN. § 764.13 (West 2010); MISS. CODE ANN. § 99-3-17 (2015); MONT. CODE ANN. § 46-7-101 (2017); NEV. REV. STAT. § 171.178 (2017); N.M. STAT. ANN. § 31-1-5 (West 2019); N.Y. CRIM. PROC. LAW §§ 120.90, 140.20 (McKinney 2004); N.C. GEN. STAT. § 15A-501 (2017); N.D. R. CRIM. P. 5; OKLA. STAT. ANN. tit. 22, § 181 (West 2019); PA. R. CRIM. P. 516, 519; P.R. LAWS ANN. tit. 34, § 22 (2019); S.D. CODIFIED LAWS § 23A-4-1 (2016); UTAH CODE ANN. § 77-7-23 (LexisNexis 2017); VT. R. CRIM. P. 3; VA. CODE ANN. § 19.2-80 (2015); W. VA. CODE ANN. § 62-1-5 (LexisNexis 2014).

48 MO. R. CRIM. P. 22.07.

49 WIS. STAT. ANN. § 970.01 (West 2007).

50 Although 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.

51 *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).

52 *See, e.g.*, Little v. Frederick, No. 6:17-0724, 2020 WL 605028, at *3 (W.D. La. Feb. 7, 2020); McNeil v. Cmty. Prob. Servs., LLC, No. 1:18-cv-00033, 2019 WL 633012, at *3 (M.D. Tenn. Feb. 14, 2019), *aff'd*, 945 F.3d 991 (6th Cir. 2019).

53 *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* Complaint—Class Action, Daves v. Dall. Cty., Case No. 3:18-cv-154 (N.D. Tex. Jan. 21, 2018), https://faithintx.org/wp-content/uploads/2018/10/CaseNo.3.18-ev-154.pdf [https://perma.cc/X4DV-23CA] (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). In some jurisdictions, law enforcement can enforce the bail schedule before a judge is ever involved in the case. *See, e.g.*, Schultz v. State, 330 F. Supp. 3d 1344, 1351 (N.D. Ala. 2018) (describing system in which local sheriff set bond, pursuant to a bail schedule; the sheriff "released criminal defendants who could post a secured bond for the bail amount and detained criminal defendants who could not afford to post bond").

portunity for an individualized bond determination. Elsewhere, an initial bond determination occurs only at the first court appearance—until the initial appearance occurs, most defendants cannot be released.

Substantively, it is unclear whether, and to what extent, real world initial appearance practices fulfill their advice-of-rights function.[54] 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.[55] 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.[56] 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.[57]

Without a constitutional mandate about the content of the initial appearance procedure, courts may provide incomplete or misleading information.[58] A judge may issue only a partial advice-of-rights, omitting information about expensive, time-consuming, and "inconvenient" rights, such as the right to the assistance of counsel.[59] Worse

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54 *See, e.g.*, *Schultz*, 330 F. Supp. 3d at 1370 (showing "no evidence" that arrestees are "inform[ed] . . . of what is at stake at an initial appearance").

55 STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, GIDEON'S BROKEN PROMISE 24–25 (2004).

56 *Compare* State v. Diroll, No. 2006-P-0110, 2007 WL 4481430, at *5 (Ohio Ct. 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, No. WM-09-012, 2010 WL 877575, at *2 (Ohio Ct. App. Mar. 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* SIXTH AMENDMENT CTR., ACTUAL DENIAL OF COUNSEL IN MISDEMEANOR COURTS 16 (2015), https://sixthamendment.org/wp-content/uploads/2015/05/Actual-Denial-of-Counsel-in-Misdemeanor-Courts.pdf [https://perma.cc/R6X2-KXV4] ("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.").

57 *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. Ct. App. 2000) (describing video first appearance).

58 *See Schultz*, 330 F. Supp. 3d at 1370 (finding that detainees are provided with "vague and substantively inadequate" questionnaire that omits crucial information about initial proceedings).

59 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) (quoting ALISA SMITH ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS,

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."[60]

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. Although 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.[61] The Court requires only that the appointment occur within a "reasonable" time after the right arises and that counsel assist in "any critical stage" of the proceeding.[62] What constitutes a "reasonable" time? No one knows.[63] 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.[64]

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 sev-

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RUSH TO JUDGMENT 6 (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. Ct. 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.").

60 Rothgery v. Gillespie Cty., 554 U.S. 191, 196 n.5 (2008). While Rothgery did not enter a guilty plea, many similarly situated defendants do.

61 *Id.* at 216 (Alito, J., concurring).

62 *Id.* at 212.

63 *See id.* at 216 (Alito, J., concurring) ("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].").

64 *See, e.g.*, Grogen v. Gautreaux, No. 12-0039-BAJ-DLD, 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 Cty., No. 7:10–CV–19–O ECF, 2010 WL 4514641, at *12 (N.D. Tex. Nov. 1, 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."); Commonwealth v. Padilla, 80 A.3d 1238, 1254–55 (Pa. 2013) (holding 47 day delay in appointment of counsel for defendant arrested on murder charges did not violate defendant's constitutional rights); Clark v. State, No. 03–09–00644–CR, 2011 WL 2651902, at *4 (Tex. Ct. App. July 8, 2011) (holding no per se Sixth Amendment violation when counsel was appointed five weeks after initial appearance).

eral days while the defendant completes the application and the court reviews it.[65] Others require indigent defendants to pay an "application fee" for public defender services; the fee deters a defendant from invoking the right to counsel.[66]

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.[67] The harsh reality of the uncounseled initial appearance procedure is that it is woefully inadequate to preserve or protect a defendant's rights.

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. Generally, the amount and conditions of bail are determined—or modified—at initial appearance.[68] If the bond amount is too high, or the bail conditions are too onerous, a defendant will be detained. When there is a lengthy delay between arrest and initial appearance, an

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65 *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).

66 *See* Jack King, *NACDL News: Board Members Elevate Cynthia Hujar Orr to President-Elect*, CHAMPION, Nov.–Dec. 2008, at 12, 13 (citing 18-month study in seven cities revealing that "[c]ourt systems use excessive application fees . . . to discourage requests for counsel in misdemeanor cases").

67 *See, e.g.*, *In re* Possible Violations of 18 U.S.C. §§ 201, 371, 491 F. Supp. 211, 215 (D.D.C. 1980) ("[T]he due process clause does not provide a constitutional basis for pre-indictment discovery."); People v. Reese, 803 N.Y.S.2d 852, 853 (App. Div. 2005) ("[I]t is well settled that defendants, including those who potentially face capital charges, have 'no right to discovery prior to indictment,' statutory or otherwise."); People v. Sawyer, No. 8949/01, 2002 WL 655273, at *4 (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"); State v. Dabas, 71 A.3d 814, 824 (N.J. 2013) (finding that 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).

68 *See, e.g.*, 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); *Steps in a Criminal Case*, DANE COUNTY DISTRICT ATT'Y'S OFF., https://da.countyofdane.com/case_steps.aspx [https://perma.cc/A47U-SHRH].

(eventual) release on bond may come too late to mitigate some of the damage associated with pretrial detention.[69] In other jurisdictions, initial bail amounts are set before arrest, either by a judicial warrant or by a local bail schedule.[70] If local law requires that a *judge* advise the defendant about the preset bond, the defendant must await an initial appearance for an opportunity to regain his liberty.[71] Even when no judicial appearance is required, case law is replete with stories of newly arrested defendants whose jailers never told them of their bond status.[72] And even if the jailer tells a defendant about the bond and the defendant offers the requisite surety, the jailer may still refuse to accept the bond without an initial appearance.[73] In other words, every day of delay in initial appearance means another day of pretrial detention.

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.[74] Pretrial detainees are at particular risk

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69 *See* Gross, *supra* note 13, at 842, 846, 850, 885 (collecting statutes, including GA. CODE ANN. § 17-12-23(b) (2016), which states that "entitlement 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," and VA. CODE ANN. § 19.2-158 (2016), stating the same, and TEX. CODE CRIM. PROC. ANN. § 1.051(c) (West 2015), which requires a court to 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"); Hurrell-Harring v. State, 930 N.E.2d 217 (N.Y. 2010).

70 *See, e.g.*, MONT. CODE ANN. § 46-6-214 (2019) (stating arrest warrant may contain bail amount); Little v. Frederick, No. 6:17-0724, 2020 WL 605028, at *3 (W.D. La. Feb. 7, 2020); McNeil v. Cmty. Prob. Servs., LLC, No. 1:18-cv-00033, 2019 WL 633012, at *3 (M.D. Tenn. Feb. 14, 2019), *aff'd*, 945 F.3d 991 (6th Cir. 2019). In theory, this allows a defendant with financial resources to post bail without appearing before a judge.

71 *See, e.g.*, MONT. CODE ANN. § 46-7-101 (requiring arrested person to be taken before a judge for initial appearance); *id.* § 46-7-102 (stating that at initial appearance the judge will discuss bail).

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

73 *See* Dodds v. Richardson, 614 F.3d 1185, 1206 (10th Cir. 2010) (emphasis added) (describing how local practice "*prevented* felony arrestees whose bail had been set from posting bail" before initial judicial appearance). As discussed *infra* note 119, 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 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).

74 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); Ion Meyn, *The Unbearable Lightness of Criminal Procedure*, 42 AM. J. CRIM. L. 39, 53–54 (2014) (footnotes omitted) ("[D]etention collaterally provides a prosecutor with leverage. Pretrial detention demoralizes

for suicide,[75] and adverse health outcomes, even if they are otherwise healthy people.[76] Jails are often neglected environments, rife with "mold, poor ventilation, lead pipes, and asbestos."[77] "Highly transmissible novel respiratory pathogens," like Covid-19 are easily spread in the confined spaces of a jail.[78] The jail population itself—a churning population of the poor, the disenfranchised, jail personnel, and family visitors—creates "vector[s] of contagious diseases."[79] Jails are ill-equipped to prevent—much less treat—serious mental and physical illnesses.[80] Many fail even to provide detainees with soap.[81]

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."[82] Without employment, a defendant can fall behind on rent payments, car payments, and bills for utilities, food, and medication,[83] and their "families suffer the absence of an economic provider or child caretaker."[84] 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.[85] Jail rules

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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.'" 4 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 12.1(c) (3d ed. 2007) (quoting PAUL B. WICE, FREEDOM FOR SALE 48 (1974)).

75 MARGARET NOONAN ET AL., U.S. DEP'T OF JUSTICE, MORTALITY IN LOCAL JAILS AND STATE PRISONS, 2000–2013 - STATISTICAL TABLES 3, 12, 21 (2015).

76 *See* AMANDA PETTERUTI & NASTASSIA WALSH, JUSTICE POLICY INST., JAILING COMMUNITIES: THE IMPACT OF JAIL EXPANSION AND EFFECTIVE PUBLIC SAFETY STRATEGIES 15 (2008), http://www.justicepolicy.org/images/upload/08-04_REP_JailingCommunities_AC.pdf [https://perma.cc/E26B-LPA9].

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

78 Akiyama et al., *supra* note 6.

79 Appleman, *supra* note 77, at 1318.

80 Colbert et al., *supra* note 74, at 1720.

81 Conor Friedersdorf, *Can't We at Least Give Prisoners Soap?*, ATLANTIC (Apr. 1, 2020), https://www.theatlantic.com/ideas/archive/2020/04/make-soap-free-prisons/609202/ [https://perma.cc/NS7Y-ABPL].

82 Colbert et al., *supra* note 74, at 1720.

83 Appleman, *supra* note 77, at 1320.

84 Colbert et al., *supra* note 74, at 1720.

85 NANCY G. LA VIGNE ET AL., URBAN INST. JUSTICE POLICY CTR., BROKEN BONDS 1

may prohibit family visits before initial appearance.[86] And when families can visit, their visits are often "time consuming, expensive, and difficult to coordinate."[87]

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."[88] The days immediately after an arrest can be the most critical to the development of a defense. "Delaying an accused's access to counsel . . . hinder[s] 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,"[89] so even when an attorney finally does appear, the damage to the case may be irreparable.

Because a detained and indigent defendant is unlikely to enjoy the assistance of counsel,[90] police may seek to capitalize on a defendant's isolation, hoping that a defendant who has not yet seen a judge or met with an attorney will be more willing to confess.[91] Indeed, "mounting empirical evidence" demonstrates that these circumstances can induce a "frighteningly high percentage of people to confess to crimes they never committed."[92]

(2008), http://goo.gl/54g9Eg [https://perma.cc/6R75-77PU] (noting that pretrial detainees' children confront "significant uncertainty and instability").

86 *See id.* at 5.

87 *Id.* at 4.

88 Colbert et al., *supra* note 74, at 1720.

89 Brief of Amicus Curiae The Nat'l Ass'n of Criminal Def. Lawyers in Support of Petitioner at *4, Rothgery v. Gillespie Cty., No. 07-440, 2008 WL 218874 (U.S. Jan. 23, 2008).

90 *See* Rothgery v. Gillespie Cty., 554 U.S. 191, 216–17 (2008) (Alito, J., concurring) (stating arrested defendant who has had probable cause determination but has not been formally charged does not have the right to "preindictment private investigator" (quoting United States v. Gouveia, 467 U.S. 180, 191 (1984))); *Gouveia*, 467 U.S. at 191 ("[I]t may well be true that in some cases preindictment 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 preindictment private investigator . . . ."); People v. White, 917 N.E.2d 1018, 1039–40 (Ill. App. Ct. 2009) (finding no attachment of Sixth Amendment right to counsel in absence of formal judicial proceeding even when arraignment delayed by eight days).

91 *See* Corley v. United States, 556 U.S. 303, 320 (2009) (describing that incarceration without judicial intervention "isolates and pressures the individual" (quoting Dickerson v. United States, 530 U.S. 428, 435 (2000))).

92 *Id.* at 321 (citing Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 906–07 (2004)). Indeed, pretrial detainees are "more likely to be convicted, to receive a lengthy incarceration sentence, and to accrue more courtroom debt" than those who are released before trial. Megan T. Stevenson, *Distortion of*

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,[93] preliminary hearing,[94] or grand jury indictment.[95] 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.[96] Others waive their right to counsel entirely.[97]

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.[98] Indeed, judges often en-

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Justice: How the Inability to Pay Bail Affects Case Outcomes, 34 J.L. ECON. & ORG. 511, 511, 538 (2018) (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." Thompson, *supra* note 51, 1170 (citing CHRISTOPHER T. LOWENKAMP ET AL., LAURA & JOHN ARNOLD FOUND., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES 3, 10 (2013), https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_state-sentencing_FNL.pdf [https://perma.cc/T8BG-V9AA]). Conversely, those who are arrested and promptly released have a sharply decreased likelihood of being found guilty. Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 202, 224–25 (2018).

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

94 *See What Happens When You've Been Charged with a Misdemeanor*, FOURTH CIR. CT. S.D. UNIFIED JUD. SYS., http://web.archive.org/web/20180222160950/http://ujs.sd.gov/Fourth_Circuit/Procedures/misdemeanor.aspx [https://perma.cc/WCC7-6RD4].

95 *See id.*

96 *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).

97 *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, No. 5:16-cv-1691-AKK, 2017 WL 1508239, at *1–2 (N.D. Ala. Apr. 27, 2017) (holding that, while trial court waited 14 days to order appointment of counsel and defendant did not meet with his attorney until 44 days after his arrest, defendant's plea of guilt vitiated his claim for civil damages, or prejudice to the outcome of his case).

98 *See, e.g.*, 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

courage defendants to plead at initial appearance without counsel's assistance.[99]

Misdemeanor defendants are particularly impacted by delayed, irregular, and insufficient initial appearance procedures. Some jurisdictions require misdemeanor defendants to enter a plea at the initial appearance.[100] Others either do not provide or require that a defendant affirmatively invoke certain rights—such as the right to an adversary preliminary hearing[101] or to a trial by jury[102]—and strict procedural rules govern the form of invocation.[103] 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.[104] 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.[105]

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bargaining); Complaint—Class Action, Daves v. Dall. Cty., No. 3:18-cv-154 (N.D. Tex. filed Jan. 21, 2018) (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). 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.*

99 *See, e.g.*, Kristen Senz, *Pilot Project Seeks to Eliminate Felony Case Delay*, NHB NEWS, Apr. 16, 2014, at 38 (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).

100 *See, e.g.*, State v. Eschrich, No. OT-06-045, 2008 WL 2468572, at ¶ 21 (Ohio Ct. App. June 20, 2008).

101 *See, e.g.*, *What Happens When You've Been Charged with a Misdemeanor*, *supra* note 94 (providing preliminary hearing only to Class 1 misdemeanors); *Frequently Asked Questions (FAQs) in South Carolina Criminal Court*, S.C. JUD. BRANCH (2011), https://www.sccourts.org/selfHelp/FAQGeneralSessions.pdf [https://perma.cc/PQ2Q-6VM8] (requiring affirmative invocation to be provided a preliminary hearing); *Criminal Processes*, UTAH CTS., https://www.utcourts.gov/howto/courtprocess/criminal.html [https://perma.cc/3SV8-427Q] (preliminary hearing only applies in felony cases).

102 *See, e.g.*, OHIO R. CRIM. P. 23 (2019); *see also* State v. Hsu, 66 N.E.3d 1124, 1135 (Ohio Ct. App. 2016) (finding no error in court's failure to advise defendant of right to jury trial where defendant was represented by counsel).

103 *See, e.g.*, OHIO R. CRIM. P. 23(A) (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").

104 *See id.*

105 Argersinger v. Hamlin, 407 U.S. 25, 36 (1972); *see also* John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 1, 4–5 (2013) (describing how uncounseled minor offenders accept a fine or diversionary program, to their detriment, given collateral consequences). *See also* Mark F. Lewis, *First Appearance: So Much to Do, So Little Time*, 74 FLA. BAR J. 54 (2000), https://www.floridabar.org/the-florida-bar-

In sum, a failure to provide prompt and meaningful initial appearance procedures coerces guilty pleas and damages case outcomes. A conviction at the beyond-a-reasonable-doubt standard can be irrevocably tainted by process failures that arose before formal charging.[106] An innocent person—like Ms. Jauch—may spend months in jail, only to have the charges dismissed.

D. Barriers to Effective Remedy

There are few effective legal remedies for delayed or defective initial appearance procedures. By definition, an arrestee's access to court is blocked. A detained person could ask jail officials to take him or her to court.[107] Civil suits, however, tell the stories of detained persons who tried formal, and informal, complaints to their jailers, all to no avail.[108] Jail officials typically act only upon the instructions from

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journal/first-appearance-so-much-to-do-so-little-time/ [https://perma.cc/X2AK-YGZF] (noting that one "job of the first appearance magistrate is to accept pleas of guilty to misdemeanor charges and sentence the defendants accordingly" which "often helps to clear the jail of persons who are being held on offenses such as disorderly intoxication or trespass"); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 306–07 (2011); ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE 33 (2009), https://www.nacdl.org/getattachment/20b7a219-b631-48b7-b34a-2d1cb758bdb4/minor-crimes-massive-waste-the-terrible-toll-of-america-s-broken-misdemeanor-courts.pdf [https://perma.cc/2FLR-MJ2S].

106 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: 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," and that "[w]e persist in ignoring what we already know").

107 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" (quoting Fay v. Noia, 372 U.S. 391, 440–41 (1963))). 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.

108 *See* Hayes v. Faulkner Cty., 388 F.3d 669, 672 (8th Cir. 2004) (alleging that, during his 38-day detention without initial appearance, plaintiff sent 4 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. Knoebel, No. 4:14-cv-00012-SEB-TAB, 2017 WL 1128534, at *1 (S.D. Ind. Mar. 24, 2017) (alleging 60-day detention without initial appearance despite repeated inquiries).

the court or the prosecutor. 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.[109] Hence, disappeared detainees have little immediate recourse.

Criminal remedies are almost nonexistent. There may be some post hoc regulation of initial appearance rights via the suppression of statements, but this pretrial remedy only benefits those who make statements and are among the small percentage of defendants whose cases proceed to motions or trial.[110] And once a defendant enters a guilty plea, that plea vitiates any claim for criminal relief, even if the plea was motivated by the prospect of continued detention-without-process.[111]

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 allege a violation of constitutional rights and seek damages in federal court under 42 U.S.C. § 1983.[112] There are several fundamental barriers to success on such a claim. First and foremost, a defendant must identify which constitutional provisions have been violated. In most cases, there is no violation of the Fourth Amendment probable cause requirement—either the person was arrested on a valid warrant, or, a judge timely determined

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109 *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).

110 *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).

111 *See, e.g.*, Barnes v. Cullman Cty. Dist. Court, No. 5:16-cv-1691-AKK, 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 14 days to order appointment of counsel and defendant did not meet with his attorney until 44 days after his arrest); Beal v. State, 58 So. 3d 709, 710 (Miss. Ct. App. 2011); Stamps v. State, 151 So. 3d 248 (Miss. Ct. App. 2014).

112 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.

42 U.S.C. § 1983 (2018).

that there was probable cause to support a warrantless arrest.[113] There is no valid Eighth Amendment claim under the Cruel and Unusual Punishment Clause as that prohibition applies only to a convicted prisoner.[114] And the Sixth Amendment speedy trial right typically is not triggered until there has been at least a year of post-arrest delay.[115] Therefore, any constitutional claim based on lengthy pretrial detention between arrest and first appearance must reside in 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.[116]

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. When federal courts recognize a due process right to an initial appearance, they struggle to determine whether that right lies in substantive or procedural due process.[117] But 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 a significant barrier to success. A § 1983 plaintiff proceeding against defendants in their individual capacities

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113 *See infra* notes 145–60 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). The validity of the initial probable cause determination does not turn on whether the police allegations are correct. *See infra* note 151 and accompanying text.

114 *See* Armstrong v. Squadrito, 152 F.3d 564, 570 (7th Cir. 1998) (citing Revere v. Mass. 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).

115 Doggett v. United States, 505 U.S. 647, 652 n.1 (1992); *see also infra* text accompanying note 200 (discussing limitations of the Speedy Trial Clause).

116 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, 766 F. Supp. 2d 1214, 1232 (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").

117 See discussion at notes 269 *et. seq.*, distinguishing claims of procedural and substantive due process and exploring arguments that both protect the right to prompt initial appearance.

must show that the defendants have both personal involvement in, and responsibility for, the challenged detention.[118] 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.[119]

Even if a plaintiff could show a defendant's individual fault, immunity doctrines further hamper suits for relief. Judges and prosecutors enjoy absolute immunity.[120] Meanwhile, sheriffs and wardens of jails have qualified immunity from suit.[121] 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.[122] Again, then, the root of the problem lies in the U.S. Supreme Court's failure to clearly establish the right to a prompt, substantive, and counselled initial appearance.[123]

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118 *Moya*, 895 F.3d at 1233.

119 *See id.* at 1234 (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 Cty., 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. 4:18-cv-01670-AGF, 2019 WL 1160816, at *4 (E.D. Mo. Mar. 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).

120 *See* Imbler v. Pachtman, 424 U.S. 409, 424–25 (1976) (establishing prosecutorial immunity); Pierson v. Ray, 386 U.S. 547, 553–54 (1967) (establishing judicial immunity). *But see Moya*, 895 F.3d at 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*, 152 F.3d at 579 (finding the jail responsible for the delay and stating that "[t]he 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. 21, 2019, 10:44 AM), https://www.cincinnati.com/story/news/2019/02/07/lawsuit-fairfield-judge-violated-peoples-constitutional-rights/2791276002/ [https://perma.cc/3L48-6A3H] (naming judge as defendant and inaccurately claiming the Constitution requires a hearing before a judge within 48 hours of arrest).

121 *See Coleman*, 754 F.2d at 726 (citing authority supporting qualified immunity for sheriffs).

122 Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *see, e.g.*, *Jones*, 678 F.3d at 351 (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).

123 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*, 895 F.3d at 1248 (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*, 754 F.2d at 731 (holding that due process right of arrestee to prompt first ap-

Suing jail officials, such as the sheriff, in their official capacities, is an equally daunting challenge. Here, a plaintiff must show that there was an official "policy" or "custom" that led to the deprivation of the constitutional right.[124] Isolated negligence is insufficient to show a policy or custom.[125] 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 long detention without initial appearance.[126]

Even then, a plaintiff must show that the custom or policy was one of "deliberate indifference" to the plight of those detained without an initial appearance.[127] 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.[128] But the very purpose of the missing procedure is to *inform* a defendant of his constitutional

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pearance before a judge was not "clearly established" where issue was one of first impression in the circuit); Jackson v. Hamm, 78 F. Supp. 2d 1233, 1242 (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).

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

125 *See* Pledger v. Reece, No. 04-3084, 2005 WL 3783428, at *4–5 (W.D. Ark. Nov. 10, 2005) (holding no municipal liability for 14-day detention without appearance before a judge where the evidence shows only human error or negligence).

126 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 U.S. 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 U.S. 194, 202 (2001).

127 Estelle v. Gamble, 429 U.S. 97, 104–06 (1976) (establishing the "deliberate indifference" standard for correctional care cases). Some courts have found "deliberate indifference" exists where jail officials, who are responsible for those in their custody, enact a policy of inaction by relying on the court to bring the defendant to the courtroom in a timely manner. *See* Hayes v. Faulkner Cty., 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, No. 05-CV-1100, 2008 WL 350628, at *1 (W.D. Ark. Feb. 7, 2008).

128 *See* Diaz v. Wright, No. Civ. 14-922 JCH/LAM, 2016 WL 10588098, at *17 (D.N.M. Mar. 22, 2016) (holding "deliberate indifference" was not shown when there was no evidence that the plaintiff made repeated protests or requests during 18-day detention that officers knew of or ignored); Alexander v. City of Muscle Shoals, 766 F. Supp. 2d 1214, 1234 (N.D. Ala. 2011) (holding that the plaintiff appears to have never protested his detention and therefore cannot establish "deliberate indifference"); *cf. Oviatt*, 954 F.2d at 1478 (finding "deliberate indifference" did exist regarding a policy of inaction where a schizophrenic detainee did not complain and was held for 114 days before appearing before a judge).

rights, so this requirement places an absurdly unfair burden on indigent and powerless defendants. 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.[129]

On those rare occasions when plaintiffs have successfully established a § 1983 due process violation, courts have awarded obscenely low damages. For example, in one case, a federal court awarded the defendant two dollars per day for each of the *seventy-seven* days that he had been held without an initial appearance in court.[130] These nominal damages offer no meaningful recompense for a defendant's extrajudicial 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 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 the Supreme Court not addressed this problem? Part II illuminates the jurisprudential history of this outrageous state of affairs.

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129 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 District Court*, No. 5:16-cv-1691-AKK, 2017 WL 1508239 (N.D. Ala. Apr. 27, 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. *Barnes*, 2017 WL 1508239, at *2. 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.

130 *Scott*, 2008 WL 350628, at *8; *see also* Curtis v. White, No. 2:09-cv-00097-JLH-JJV, 2010 WL 5625668, at *1 (E.D. Ark. Dec. 17, 2010) (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"); Scott v. Denzer, No. 06-5202, 2008 WL 2945584, at *7 (W.D. Ark. July 28, 2008) (awarding only nominal damages of one dollar per day for 48 days of detention without an appearance before a judge). Ms. Jauch's case remains a notable exception. *See* Associated Press, *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/ [https://perma.cc/E53Z-W2K8].

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.[131] Beginning with *Gerstein v. Pugh*[132] 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 without an initial appearance, nor does the Fourth Amendment speak to the right to an initial appearance.[133]

Between the investigative and the adjudicative stages of a criminal case lies a constitutional wasteland.[134] The constitutional directives governing the police end with arrest under the Fourth Amendment, yet the constitutional rights associated with 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 undertheorized.

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

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131 *See* Cty. of Sacramento v. Lewis, 523 U.S. 833, 842 (1998) (noting the Court has "always been reluctant to expand the concept of substantive due process" (quoting Collins v. City of 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)).

132 420 U.S. 103 (1975).

133 *See infra* notes 155–60.

134 *See* Kuckes, *supra* note 4, at 17 (describing the dearth of constitutional protections in pretrial criminal procedure as opposed to protections at trial or in pretrial civil procedure).

crime. Yet, the Supreme Court's bizarre overextension of the Fourth Amendment's reach has led to an absurd proposition: the Fourth Amendment authorizes prolonged post-arrest detention without access to the courts or counsel. But the Fourth Amendment's probable cause requirement was explicitly tailored to the limited function of authorizing an arrest.[135] Thus, the Fourth Amendment has a limited gatekeeping role in criminal prosecutions. No history or case law justifies further extending the Fourth Amendment.

The Fourth Amendment's proscription on "unreasonable searches and seizures" ensures judicial review of the actions of the police in discrete investigative activities,[136] from the search of a home and seizure of property to the paradigmatic "seizure" of the person, which is an arrest.[137] Notwithstanding interpretive debate over the Fourth Amendment's text,[138] no Fourth Amendment scholarship supports a claim that the Framer's intended that amendment address all post-arrest detention or post-arrest judicial process.[139] Historically, the Fourth Amendment was "almost exclusively" concerned with "the

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135 *See* Brinegar v. United States, 338 U.S. 160, 175–76 (1949) (explaining probable cause as a standard for arrest or a search or seizure, not for adjudication). Because criminal defendants who are served with summonses are not seized under the Fourth Amendment and only rarely experience significant pretrial restraints on their liberty, this Article does not focus on the pretrial process applicable to defendants served with summonses. *See* 1 WAYNE R. LAFAVE, SEARCH & SEIZURE § 2.1(a) n.31 (5th ed. 2012).

136 U.S. CONST. amend. IV.

137 *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." *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 724 (1999). Indications are that the Framers were solely concerned with the "seizure" of physical items upon a search of the home. *See id.* (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").

138 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 137, 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, The Fourth Amendment: Origins and Original Meaning (1990) (unpublished Ph.D. dissertation, Claremont Graduate School), and finding that "it supports the conclusion embodied in the conjunctive theory that the Fourth Amendment rejects both warrantless general searches and general warrants as unreasonable").

139 *See, e.g.*, Cloud, *supra* note 138; Davies, *supra* note 137; Tracey Maclin, *The Complexity*

need to ban house searches under general warrants."[140] 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.[141]

While the Fourth Amendment is not frozen in time,[142] case law and treatises still uniformly understand the Fourth Amendment to apply to the investigative processes of police searches and seizure.[143] Today, the prototypical seizure is an arrest, which requires a judicial finding of probable cause.[144]

The Fourth Amendment probable cause standard honors the investigative role of a police officer who must be given latitude to investigate crime.[145] 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 inquiry.[146] Instead, the judge evaluates a probable cause statement that was "drafted by nonlawyers in the midst and haste of a criminal investigation"[147] and "make[s] a practical, common-sense decision whether, given all the

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of the Fourth Amendment: A Historical Review, 77 B.U. L. REV. 925 (1997); David E. Steinberg, *The Uses and Misuses of Fourth Amendment History*, 10 U. PA. J. CONST. L. 581 (2008).

140 Davies, *supra* note 137, at 551; *see also* Steinberg, *supra* note 139, at 583 (concluding the Framers concern was "a single, narrow problem: physical trespasses into houses by government agents").

141 *See* Maclin, *supra* note 139, at 939 (footnote omitted) ("'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.'" (quoting Cuddihy, *supra* note 138, at 376–77, 385)).

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

143 *E.g.*, *Search and Seizure Frequently Asked Questions*, JUSTIA, https://www.justia.com/criminal/docs/search-seizure-faq/ [https://perma.cc/9YVP-P3BB].

144 *See infra* notes 177–78 and accompanying text.

145 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 137, 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").

146 Illinois v. Gates, 462 U.S. 213, 235 (1983).

147 *Id.*

circumstances set forth in the affidavit before him . . . there is a fair probability" that the person to be arrested committed a crime.[148] The resulting Fourth Amendment determination is a compromise: it permits arrests based on the "factual and practical considerations of" police investigations and forbids arrests based solely on an officer's whim.[149]

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.[150] Even (reasonable) investigative mistakes will not undermine probable cause to arrest.[151] Police affidavits may highlight facts suggesting guilt and downplay facts pointing toward innocence.[152] Police need not have investigated leads that might exonerate a suspect and their probable cause affidavits may rest only on hearsay.[153]

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

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148 *Id.* at 238.

149 Draper v. United States, 358 U.S. 307, 313 (1959).

150 *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").

151 *See* 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").

152 *See Franks*, 438 U.S. at 155–56. 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. *Id.* 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).

153 *Franks*, 438 U.S. at 165 (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. That practice, however, 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. *See* Sara J. Berman, *Search Warrants and Probable Cause*, NOLO, https://www.nolo.com/legal-encyclopedia/search-warrants-and-probable-cause.html [https://perma.cc/694L-MXT2]. Of course, even if police claim firsthand 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.

plea, or trial.[154] In other words, the probable cause determination is a temporary but "necessary accommodation between the individual's right to liberty and the State's duty to control crime."[155] The constitutional compromise that satisfies probable cause to arrest does not supply constitutional authority for extended pretrial detention without adjudicatory procedure.[156]

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.[157] The judicial probable cause determination may be both ex parte and non-adversarial.[158] Indeed, the judicial probable cause review begins, and ends, with the facts presented within the four-corners of the affidavit. As a result of these procedural limitations, 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."[159] These procedural limitations, however, 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.[160]

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154 *See How Courts Work*, AM. BAR ASS'N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/arrest-procedure/ [https://perma.cc/FG22-39L8].

155 Gerstein v. Pugh, 420 U.S. 103, 112 (1975). Similarly, the grand jury limits prosecutorial power by interposing citizen-grand jurors between prosecutors and a potential accused. *See* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 15.7(g) (4th ed. 2004).

156 *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.").

157 *Gerstein*, 420 U.S. at 120. 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).

158 *See infra* note 192 and accompanying text (describing *Gerstein*'s holding to this effect). Although some jurisdictions conduct the probable cause review at the defendant's initial appearance in court, *Gerstein*'s holding makes plain that there is no constitutional requirement that these two be held together.

159 Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 680-81.

160 *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, 176 (1949).

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.

B. Gerstein*'s Missteps*

With *Gerstein* 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.[161] Under Florida law, their warrantless arrests triggered a *prosecutorial* probable cause determination, but did not trigger any *judicial* process.[162] As a result, the plaintiffs were detained for weeks, or even months, without any judicial probable cause determination.[163] Throughout their prolonged detentions, these defendants never appeared before a judge or met with an attorney.[164] 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.[165] Second, they argued that their post-arrest detentions entitled them to a prompt—and adversary—post-arrest hearing before a judge, which would include advice of their rights and assistance of counsel, and enable them to contest the probable cause allegations, litigate their pre-

161 *Gerstein*, 420 U.S. at 105.

162 *Id.* at 105–06.

163 *See id.* at 106.

164 *See id.* at 105–06. 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.*

165 *Id.* at 111.

trial release, and begin the process of investigating and defending against the charges.[166]

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."[167] A prosecutorial determination would not suffice. The Fourth Amendment required that this judicial determination occur before, or "*promptly*" after arrest.[168] For those seized through an arrest warrant, a magistrate had already found probable cause.[169] For warrantless arrests, the Fourth Amendment required a prompt *post*-arrest judicial review to provide roughly the same constitutional protections.[170] 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."[171]

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."[172] 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. The *Gerstein* majority, however, 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.[173] 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 pre-

166 *Id.*

167 *Id.* at 105 (emphasis added).

168 *Id.* at 125 (emphasis added).

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

170 *Id.*

171 *Id.* at 113–14, 120.

172 George C. Thomas III, *The Poisoned Fruit of Pretrial Detention*, 61 N.Y.U. L. REV. 413, 423, 446 (1986) (quoting McNabb v. United States, 318 U.S. 332, 343 (1943)).

173 *See Gerstein*, 420 U.S. at 120 n.21.

ponderance standard demands."[174] Ignoring the possibility of inaccurate or perjurious affidavits, or erroneous arrests, the majority opined that "credibility determinations [would] seldom [be] crucial in deciding whether the evidence supports" probable cause.[175] The ex parte judicial review was a sufficiently "fair and reliable determination of probable cause."[176]

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 requirement that governed post-arrest criminal procedure.[177] 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.[178] 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."[179] The majority acknowledged that the risks associated with pretrial detention are distinct from those associated with the antecedent arrest.[180] The majority, however, explicitly rejected a Due Process

174 *Id.* at 121.

175 *Id.*

176 *Id.* at 125.

177 *See id.* at 123. Ironically, the *Gerstein* majority ignored the longstanding 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 114 (emphasis added) (citing 2 MATTHEW HALE, HISTORIA: PLACITORUM CORONAE 77, 81, 95, 121 (1736); 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 116–117 (London 4th ed. 1762); Kurtz v. Moffitt, 115 U.S. 487, 498–99 (1885)).

178 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).

179 *Gerstein*, 420 U.S. at 125 n.27. 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 a passing reference to *Gerstein*. *See* LAFAVE ET AL., *supra* note 14.

180 *Gerstein*, 420 U.S. at 114.

analysis of pretrial detention, refusing to extend the protections of the Due Process Clause to new arrestees.[181]

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."[182] The Court was naively confident that, after arrest, "the delay in obtaining counsel would be minimal."[183] 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.[184] Instead, thirty-five years later, the Court would still have to consider cases that presented a six-month "delay in obtaining counsel."[185]

The *Gerstein* majority's firm—but inaccurate—belief that states would provide prompt adjudicative process made it loathe to regulate the post-arrest process. The Court feared that any constitutional regulation would be counterproductive. It 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.[186] In fact, the best available evidence indicates the opposite: the *denial* of early-stage adversary

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181 *Id.* at 125 n.27.

182 *Id.*

183 Colbert, *supra* note 114, at 34. Thirty-five years later, in *Rothgery v. Gillespie County*, 554 U.S. 191, 196 (2008), the Court would confront a case that presented a six-month delay between arrest and the appointment of counsel.

184 Colbert, *supra* note 114, at 34; *see Gerstein*, 420 U.S. at 123–24.

185 *See* Colbert, *supra* note 114, at 34. The Court did *not* hold, as *Gerstein* 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. *See Rothgery*, 554 U.S. at 212. 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, *supra* note 4, at 47 ("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.").

186 *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).

process increases pretrial detention and exacerbates criminal case delays.[187]

In the *Gerstein* majority's view, because there was "no single preferred pretrial procedure," there was no need for the court to constitutionally mandate any particular pretrial procedure.[188] In pursuit of "flexibility and experimentation by the States," the Court abandoned any consideration of whether and when a post-arrest judicial appearance was necessary.[189] The majority therefore allowed "the individual States to integrate prompt probable cause determinations into their differing systems of pretrial procedures."[190] The Court merely required that "[w]hatever procedure a State . . . adopt[s], it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty."[191] 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.[192]

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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187 *See* Colbert, *supra* note 114, at 34; Alissa Pollitz Worden et al., *What Difference Does a Lawyer Make? Impacts of Early Counsel on Misdemeanor Bail Decisions and Outcomes in Rural and Small Town Courts*, Crim. L. Pol'y Rev. (2018); Alissa Pollitz Worden et al., *Court Reform: Why Simple Solutions Might not Fail? A Case Study of Implementation of Counsel at First Appearance*, 14 Ohio St. L.J. 521 (2017); Mich. Indigent Def. Comm'n, Counsel at First Appearance and Other Critical Stages (2017), https://michiganidc.gov/wp-content/uploads/2017/03/White-Paper-4-Counsel-at-first-appearance-and-other-critical-stages.pdf [https://perma.cc/VRR9-2RDZ]; Ernest J. Fazio, Jr. et al., Nat'l Inst. of Justice, NCJ 97596, Early Representation by Defense Counsel Field Test (1985), https://www.ncjrs.gov/pdffiles1/Digitization/97595NCJRS.pdf [https://perma.cc/32Y3-S9FK].

188 *Gerstein*, 420 U.S. at 123.

189 *Id.* at 123–24.

190 Cty. of Riverside v. McLaughlin, 500 U.S. 44, 53 (1991).

191 *Gerstein*, 420 U.S. at 124–25.

192 *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] operat[e] to constrain the discretion otherwise afforded by lack of judicial legal review." Laurin, *supra* note 178, at 789.

In *Baker v. McCollan*,[193] Linnie McCollan was arrested on a warrant that was facially valid but factually incorrect.[194] Mr. McCollan spent eight days in jail, protesting his innocence,[195] without seeing a judge or an attorney before police finally realized they had arrested the wrong person and released him.[196] Mr. McCollan claimed that this prolonged detention violated his rights under the Due Process Clause.[197] 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."[198] Of course, the Court decided this was unnecessary.[199]

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's procedural protections, 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."[200] Having announced that it would not require "every conceivable step," the Court 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."[201] 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."[202] The Court thus conceded that even if an arrest "met the standards of the Fourth Amendment," the Fourth Amendment would not authorize

193 443 U.S. 137 (1979).

194 *Id.* at 143.

195 *Id.* at 149 (Marshall, J., dissenting).

196 *Id.* at 144 (majority opinion).

197 *Id.* at 142.

198 *Id.* at 143.

199 *Id.*

200 *Id.* at 145 (quoting Patterson v. New York, 432 U.S. 197, 208 (1977)).

201 *Id.*

202 *Id.*

detaining a defendant "indefinitely in the face of repeated protests of innocence."[203] To date, however, the Court has not explained when such a situation would arise.[204]

In the 1991 case, *McLaughlin v. County of Riverside*,[205] the Court addressed the failure of the states to provide the "prompt" probable cause review it had required in *Gerstein*.[206] The Court established 48 hours as the presumptive outer limit for an ex parte, nonadversarial *Gerstein* review.[207] Again, the Court ignored the need for important, post-arrest procedures that would protect a defendant who had been arrested on probable cause.[208] Instead, the Court reiterated its concern that more adversary process would cause—rather than resolve—unjustifiable delay,[209] stating, "everyone involved, including those persons who are arrested, might be disserved by introducing further procedural complexity into an already intricate system."[210]

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

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203 *Id.* at 144.

204 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. *See* U.S. CONST. amend. VI. 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. *See* Doggett v. United States, 505 U.S. 647, 652 n.1 (1992) (explaining that a one-year delay is a typically sufficient to trigger speedy trial analysis). Even if the Speedy Trial Clause was theoretically available, invocation of that right also depends upon an initial appearance in order to make the claim. If months elapse 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.

205 500 U.S. 44 (1991).

206 *Id.* at 53.

207 *Id.* at 56.

208 *Id.* at 53 (citing Gerstein v. Pugh, 420 U.S. 103, 119–23 (1975)); *see also* Alexander v. City of Muscle Shoals, 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 *McLaughlin* confirms that any constitutional violation caused by delay in initial appearance after warrantless arrest must lie in Fourth Amendment).

209 *McLaughlin*, 500 U.S. at 53.

210 *Id.* (*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 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").

in *McLaughlin*, 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.[211]

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 the 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."[212]

In *Albright v. Oliver*[213]—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.[214] Police had lied about the circumstances justifying Mr. Albright's arrest.[215] These lies infected the judicial probable cause determination, such that the reviewing court unwittingly issued an arrest warrant that was—in reality—entirely without cause.[216] Mr. Albright claimed that the resulting arrest—and his subsequent prosecution—violated his due process rights.[217] But a majority of the Court held that Mr. Albright had no "substantive right

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211 *Id.* at 71 (Scalia, J., dissenting).

212 *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. In the decades after *McLaughlin*, high courts, state legislatures, academics, and experienced practitioners have continued to confuse the ex parte probable cause review with an initial appearance proceeding. *See, e.g.*, 1 THOMAS REUTERS, CRIMINAL PRACTICE MANUAL § 1:3 (2019) ("Any system that does not provide for an initial appearance for a judicial determination of probable cause within 48 hours of a warrantless arrest . . . is presumptively unreasonable under the Fourth Amendment . . . ."); *see also* discussion *infra* note 240.

213 510 U.S. 266 (1994).

214 *See id.* at 266.

215 *Id.* at 268.

216 *Id.*

217 *Id.* Mr. 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).

under the Due Process Clause of the Fourteenth Amendment to be free from criminal prosecution except upon probable cause."[218]

The Court reiterated its now-familiar reluctance "to expand the concept of substantive due process" in criminal cases.[219] While admitting "that the Due Process Clause of the Fourteenth Amendment confers both substantive and procedural rights" in criminal cases, the Court insisted that primarily "[i]t was through . . . the Bill of Rights that [the] Framers sought to restrict the exercise of arbitrary authority by the Government in particular situations."[220] As a result, "[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' such a claim."[221] According to the Court, "[t]he Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it."[222] 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.[223] *Manuel v. City of Joliet*[224] 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.[225] Illinois police arrested Mr. Manuel without any probable cause.[226] 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.[227]

While local law provided Mr. Manuel with the right to a prompt initial appearance, Mr. Manuel had no right to any of the additional

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218 *Albright*, 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).

219 *Id.* at 271–72 (noting that "the guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended" (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992))).

220 *Id.* at 272–73.

221 *Id.* at 273 (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)).

222 *Id.* at 274.

223 Manuel v. City of Joliet, 137 S. Ct. 911, 917 (2017).

224 137 S. Ct. 911 (2017).

225 *Id.* at 914–15.

226 *Id.*

227 *Id.*

criminal procedures that the *Gerstein* Court had imagined would promptly follow his arrest.[228] Under Illinois law, Mr. Manuel and his attorney had no right to investigate or challenge the (perjurious) probable cause affidavit.[229] *Gerstein* and its progeny had blessed this restriction of post-arrest process.[230]

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.[231] In the Court's words, "[t]he Fourth Amendment . . . was 'tailored explicitly for the criminal justice system,'" and its balance between individual and public interests.[232] Therefore, the Fourth Amendment "'define[s]' the appropriate process 'for seizures of person[s] . . . in criminal cases, including the detention of suspects pending trial.'"[233] The Court bluntly declared, "the Fourth Amendment governs a claim for unlawful pretrial detention *even beyond the start of legal process* . . . ."[234]

In dissent, Justice Alito objected that the Fourth Amendment analysis should not extend to pretrial detention.[235] 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.[236] 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."[237] Justice Alito supported his position with a historical perspective,

> The Members of Congress who proposed the Fourth Amendment and the State legislatures that ratified the Amendment

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228 Brief for Petitioner at *4–5, Manuel v. City of Joliet, No. 14-9496, 2016 WL 2605051 (U.S. May 2, 2016); Brief for Respondents at *10–12, Manuel v. City of Joliet, No. 14-9496, 2016 WL 4137970 (U.S. Aug. 3, 2016). Mr. Manuel had the assistance of counsel at an initial appearance—a "luxury" not guaranteed by the Supreme Court but provided by Illinois law. Brief for Petitioner, *supra*, at *4.

229 Brief for Petitioner, *supra* note 228, at *4. Subsequently, Illinois presented Mr. Manuel's case to a grand jury, which heard the same false testimony that was presented to the judge. *Id.* at *4–6. Unsurprisingly, the grand jury issued an indictment against him. *Id.* The indictment then conclusively established probable cause, which Mr. Manuel could not challenge in an adversarial judicial proceeding. *Id.* at *20.

230 *Id.*

231 *See Manuel*, 137 S. Ct. at 917.

232 *Id.* (quoting Gerstein v. Pugh, 420 U.S. 103, 125 n.27 (1975)).

233 *Id.* (quoting *Gerstein*, 420 U.S. at 125 n.27).

234 *Id.* at 920 (emphasis added).

235 *Id.* at 923 (Alito, J., dissenting).

236 *Id.* at 926–27.

237 *Id.* at 927.

> 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.[238]

Like *McLaughlin*, *Manuel* reflects confusion about what *Gerstein* actually requires. 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.[239] But Justice Alito was incorrectly conflating the prompt probable cause review—*required* by *Gerstein* and *McLaughlin*—with an optional post-arrest court appearance that had been *suggested* by the *Gerstein* Court. Despite decades of confusion about this, the Court has repeatedly failed to clarify the distinction between the prompt probable cause review, which is required under *Gerstein* and *McLaughlin*, and the initial appearance procedure, which is not regulated by any Supreme Court case law.[240]

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 actualize his other constitutional and statutory rights. The Supreme Court assumes that such a proceeding will occur but has never explained when the Constitution requires initial appearance or what rights and procedures must accompany it.[241] It is thus necessary to theorize a constitutional right to prompt—and counselled—initial appearance.

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238 *Id.*

239 *Id.* at 928.

240 This is not for lack of opportunity in other cases. For example, in *Powell v. Nevada*, 511 U.S. 79 (1994), a group of detainee-plaintiffs challenged the constitutionality of Nevada's post-arrest procedure. *Powell*, 511 U.S. at 81, 83–85. 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 *McLaughlin*. *Id.* at 85.

241 *See, e.g.*, Cartwright v. Dall. Cty. Sheriff Office, No. 3:15-cv-889-D-BN, 2015 WL 9582905, at *1, *3 (N.D. Tex. Nov. 9, 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." (quoting Amir-Sharif v. Comm'rs of Dall., No. 3:07-CV-175-G, 2007 WL 1138806, at *2 (N.D. Tex. Apr. 17, 2007))).

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[242] and inconsistent in their due process analysis.[243] Although a few federal courts have held that there is "a constitutional right to a timely first appearance under the Due Process Clause,"[244] others are silent or have refused to recognize such a right.[245] Courts that acknowledge a due process guarantee are divided about whether a right to prompt initial appearance lies in procedural or substantive due process.[246] 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.[247] The time is past due for

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242 *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.").

243 *See supra* notes 120–23 and accompanying text.

244 *Coleman*, 754 F.2d at 725 (holding 18-day detention without initial appearance is a violation of substantive due process); *see also* Jauch v. Choctaw Cty., 874 F.3d 425, 427 (5th Cir. 2017) (holding 96-day detention without initial appearance violated procedural due process); Hayes v. Faulkner Cty., 388 F.3d 669, 673 (8th Cir. 2004) (holding 38-day detention without initial appearance violates substantive due process); Armstrong v. Squadrito, 152 F.3d 564, 573 (7th Cir. 1998) (holding 57-day detention without initial appearance is a violation of substantive due process); Oviatt v. Pearce, 954 F.2d 1470, 1477 (9th Cir. 1992) (holding that 114-day detention without initial appearance violated procedural due process).

245 *See, e.g.*, Diaz v. Wright, No. Civ. 14-922 JCH/LAM, 2016 WL 10588098, at *17 (D.N.M. Mar. 22, 2016) (holding no procedural due process right to prompt initial appearance and no clearly established substantive due process right in Tenth Circuit or Supreme Court); *Cartwright*, 2015 WL 9582905, at *3 (holding no constitutional right to initial appearance within a set time); Cordova v. City of Albuquerque, No. 1:11-cv-806-GBW/ACT, 2013 WL 12040728, at *6 (D.N.M. Dec. 19, 2013) (same); Alexander v. City of Muscle Shoals, 766 F. Supp. 2d 1214, 1229–30 (N.D. Ala. 2011) (holding no due process violation in nine-day detention without initial appearance); Sanchez v. Campbell, No. 4:09-CV-420-SPM-WCS, 2010 WL 547620, at *5 (N.D. Fla. Feb. 10, 2010) (holding no due process violation in five-day detention without initial appearance); Pledger v. Reece, No. 04-3084, 2005 WL 3783428, at *4 (W.D. Ark. Nov. 10, 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 Eleventh Circuit or Supreme Court).

246 *See supra* note 244.

247 *See, e.g.*, *Armstrong*, 152 F.3d at 569, 575 (detainee's "protest[ ] to . . . [officials]" is an important factor in assessing the existence of a due process right to an initial appearance); *Alexander*, 766 F. Supp. 2d at 1232–33 (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 determination of probable

the Supreme Court to clearly guarantee a prompt and meaningful initial appearance procedure.

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

In criminal cases, the Supreme Court's due process jurisprudence is often restrictive, convoluted, and ungenerous.[248] 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*.[249] But *Gerstein* need not preclude an application of the Due Process Clause to post-arrest procedure.[250] Rather *Gerstein*, and its progeny, *Baker*, contain the seeds of a due process doctrine that can regulate post-arrest access to the courts and counsel.

The *Baker* Court pointed the way toward a due process analysis, stating 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."[251] *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."[252] In the face of evidence that such an "elaborate system" does not exist, at least in the pretrial con-

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cause" and noting "plaintiff was not arrested pursuant to a warrant and appears never to have protested his detention as it was occurring").

248 *See* Kuckes, *supra* note 4, 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).

249 *But see* Israel, *supra* note 248, at 402–03 (finding that Amendment-precluding approach dictated by *Graham v. Connor*, 490 U.S. 386, 395 (1989), limits only substantive due process and not procedural due process despite *Gerstein*'s suggestion).

250 *See, e.g.*, Jauch v. Choctaw Cty., 874 F.3d 425, 429 (5th Cir. 2017) ("*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.").

251 Baker v. McCollan, 443 U.S. 137, 144 (1979). The language cited from *Gerstein* as support for a due process right extending beyond the Fourth Amendment's coverage is, "[t]he 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." *Id.* at 153 (quoting Gerstein v. Pugh, 420 U.S. 103, 114 (1975)).

252 Gerstein v. Pugh, 420 U.S. 103, 125 n.27 (1975); *see also* Manuel v. City of Joliet, 137 S. Ct. 911, 929 (2017) (Alito, J., dissenting) (arguing that *Gerstein* does not stand for the notion that the Fourth Amendment alone guides procedure for a continued detention).

text,[253] and that the rights of arrested defendants are not promptly and effectively vindicated, *Gerstein*'s Fourth Amendment reliance is misplaced.

Satisfaction of the Fourth Amendment's probable cause requirement is *necessary* to justify an initial seizure, but it is not *sufficient* to satisfy all of a criminal defendant's other pretrial rights.[254] Several lower courts have recognized this, holding that the protections of the Fourth Amendment cover the legality of the seizure of an arrestee, but thereafter the protections of due process apply to pretrial detention.[255] In other words, there *is* a due process right to a prompt initial appearance for a detained arrestee.[256]

Although a due process initial appearance doctrine would intersect with the Fourth Amendment probable cause rule, that intersection is not fatal to a due process analysis. As the Supreme Court explained in *Soldal v. Cook County*,[257] "[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands."[258] If an Amendment's "provisions target[ ] the same sort of governmental conduct," as the conduct that is challenged, the Supreme Court requires analysis under that Amendment, as it is the "explicit textual source of constitutional protection."[259] If, however, the challenged conduct is outside the scope of an explicit constitutional provision, or that conduct implicates different and unenumerated government acts or individual rights, analysis proceeds under the Due Process Clause.[260]

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253 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, *supra* note 4, at 46–47.

254 *See id.* 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 deprivations of his liberty or property in the course of the criminal case.").

255 *See, e.g.*, *Jauch*, 874 F.3d at 429 (finding that *Manuel v. Joliet*, 137 S. Ct. 911 (2017), cannot be read to mean that only the Fourth Amendment is available to pretrial detainees); Armstrong v. Squadrito, 152 F.3d 564, 569 (7th Cir. 1998) (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))).

256 *See* Hayes v. Faulkner Cty., 388 F.3d 669, 673 (8th Cir. 2004) (citing language in *Gerstein* and *Baker* supportive of finding a substantive due process right forbidding extended detention without initial appearance); *Armstrong*, 152 F.3d at 571–72 (same); Coleman v. Frantz, 754 F.2d 719, 723–24 (7th Cir. 1985) (same).

257 506 U.S. 56 (1992).

258 *Id.* at 70.

259 *Id.* (quoting Graham v. Connor, 490 U.S. 386, 394–95 (1989)).

260 *See id.* Even where the interest at stake *is* covered by a specific amendment, on occasion

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,[261] the conditions of pretrial detention,[262] and the denial of bail.[263] 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."[264] The "touchstone of due process" remains "protection of the individual against arbitrary action of government."[265]

It is hard to imagine anything other than arbitrariness at play when presumptively innocent defendants disappear into our nation's jails for weeks without initial appearance. Illogically, *convicted* defendants have greater due process protections than pretrial detainees. Under *Gerstein*, presumptively innocent pretrial detainees have no right to an adversarial pretrial hearing about the probable cause for their arrest.[266] By stark contrast, the Court guarantees that convicted felons have a prompt, adversarial hearing about the validity of an alleged probation or parole violation.[267] This due process anomaly strains the integrity of our criminal process.

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.[268] But, the right to a prompt and meaningful initial appearance lays claim to both procedu-

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the Court has employed due process, either alone or in conjunction with a specific guarantee. *See* Israel, *supra* note 248, at 407 nn.592–94 (citing cases).

261 Kingsley v. Hendrickson, 135 S. Ct. 2466, 2473 (2015).

262 Bell v. Wolfish, 441 U.S. 520, 533 (1979).

263 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 release may be coextensive 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.

264 Oviatt v. Pearce, 954 F.2d 1470, 1474 (9th Cir. 1992).

265 Wolff v. McDonnell, 418 U.S. 539, 558 (1974).

266 *See supra* notes 157–58 and accompanying text.

267 *See* Gagnon v. Scarpelli, 411 U.S. 778, 786–87 (1973) (establishing right to notice and adversarial hearing prior to revocation of probation); Morrissey v. Brewer, 408 U.S. 471, 486–89 (1972) (establishing due process right to prompt preliminary hearing prior to revocation of parole); *see also* Kuckes, *supra* note 4, at 40 (discussing greater due process protections for post-conviction seizure of property than seizure of person pretrial).

268 Although it is beyond the scope of this Article to level a full-throated critique of the

ral and substantive due process rights. Although no "hermetic line" clearly delineates substantive and procedural due process, the Supreme Court has provided some limited guidance for defining each concept.[269]

Substantive due process "limits what [the] government may do regardless of the fairness of [the] procedures that it employs," thereby protecting against the arbitrary and oppressive exercise of state power.[270] In other words, substantive due process "safeguards individuals against certain offensive government actions" even if government uses "facially fair procedures" to implement those actions.[271] Thus, when the government detains an arrestee for days and weeks without bringing him before a judge, substantive due process is implicated.

A contested government action only violates substantive due process if it "shocks the conscience" of the reviewing court.[272] Whether a detention shocks the court's conscience will depend upon how long the detention lasted and whether the plaintiff-detainee can show that the defendant was—individually or officially—"deliberately indifferent" to the plaintiff's detention without initial appearance.[273] Typically, this requires that the court find that: (1) the plaintiff endured a lengthy post-arrest delay[274] without access to the courts or counsel; and (2) the plaintiff complained to her jailers vigorously and repeatedly about this delay.[275]

Court's ineffective and inconsistent jurisprudence in this area, Professor Israel offers one of the most comprehensive descriptions. *See* Israel, *supra* note 248.

269 Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 103–04 (2009) (Souter, J., dissenting); *see also* Albright v. Oliver, 510 U.S. 266, 301 (1994) (Stevens, J., dissenting) (citation omitted) ("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.").

270 Cty. of Sacramento v. Lewis, 523 U.S. 833, 846 (1998).

271 Harron v. Town of Franklin, 660 F.3d 531, 536 (1st Cir. 2011).

272 *Lewis*, 523 U.S. at 846–47; *see infra* notes 219–21 and accompanying text (discussing substantive due process claim).

273 *Lewis*, 523 U.S. at 850.

274 *See* Sanchez v. Campbell, No. 4:09-CV-420-SPM-WCS, 2010 WL 547620, at *3 (N.D. Fla. Feb. 10, 2010) (holding that five-day detention without initial appearance not so long as to "shock the conscience").

275 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 imagined that 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. Dec.

Procedural due process, on the other hand, requires that the government provide "fundamental procedural fairness" before it engages in otherwise permissible deprivations of liberty.[276] Procedural due process thus guarantees fair process regarding rights that "arise from the Constitution itself" or rights that "arise from an expectation or interest created by state laws or policies."[277] Some federal courts have held that state initial appearance statutes do not create a federal constitutional liberty interest.[278] In their view, the appearance guaranteed by state law is just a guarantee of further procedure, and not of release.[279] 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.[280] For those courts, a less precise command—e.g., "without unnecessary delay"—creates no constitutional liberty interest at all.[281]

In criminal procedure, the Court has most often turned to procedural due process,[282] which requires that the government provide "fundamental procedural fairness" before it engages in otherwise permissible deprivations of life, liberty, or property.[283] Procedural due process guarantees fair process regarding liberty interests that "arise from the Constitution itself" or that "arise from an expectation or in-

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17, 2010) (holding "deliberate indifference" that "shocks the consc[ience]" shown where plaintiff asked and made request to file grievance during 10-day detention).

276 *Lewis*, 523 U.S. at 845. *See also* Fuentes v. Shevin, 407 U.S 67, 82 (1972).

277 Wilkinson v. Austin, 545 U.S. 209, 221 (2005).

278 *See* Moya v. Garcia, 895 F.3d 1229, 1241 (10th Cir. 2018) (McHugh, J., 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))); *Armstrong*, 152 F.3d at 575 n.4 (rejecting reasoning of Ninth Circuit in *Oviatt v. Pearce*, 954 F.2d 1470 (9th Cir. 1992), that statutory procedure creates procedural due process right); Alexander v. City of Muscle Shoals, 766 F. Supp. 2d 1214, 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*, 78 F. Supp. 2d at 1239 (same).

279 *See, e.g.*, *Alexander*, 766 F. Supp. at 1235.

280 *See* Diaz v. Wright, No. Civ. 14-922 JCH/LAM, 2016 WL 10588098, at *16 (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. Dep't of Corr. v. Thompson, 490 U.S. 454, 461 (1989))); Cordova v. City of Albuquerque, No. 1:11-cv-806-GBW/ACT, 2013 WL 12040728, at *5 (D.N.M. Dec. 19, 2013) (same).

281 *See Diaz*, 2016 WL 10588098, at *16.

282 *See* Israel, *supra* note 248, at 403 & n.577 (finding that the vast majority of Supreme Court doctrine on criminal procedure involves procedural, not substantive, due process).

283 Cty. of Sacramento v. Lewis, 523 U.S. 833, 845–46 (1998); *see also* Fuentes v. Shevin, 407 U.S 67, 82 (1972) (describing long-held constitutional right to due process before deprivation of property).

terest created by state laws or policies."[284] 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.

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."[285] The government violates due process when it fails to provide procedural safeguards adequate to protect against an unjust deprivation of liberty.[286] The first step in a procedural due process analysis is to determine whether a protected "liberty interest" is at stake.[287] This liberty interest can arise from a guarantee under state law or from the Due Process Clause itself.[288]

State law is not a reliable source for a procedural due process claim. Some federal courts have held that state initial appearance statutes do not create a constitutional liberty interest.[289] In their view, the appearance guaranteed by state law is just a guarantee of further procedure, and not of release.[290] 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

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284 Wilkinson v. Austin, 545 U.S. 209, 221 (2005).

285 Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992); *see also* 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 2.7(a) (4th ed. 2015) (stating same).

286 Swarthout v. Cooke, 562 U.S. 216, 219 (2011) (per curiam) (citing Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 460 (1989)).

287 *Id.*

288 Hewitt v. Helms, 459 U.S. 460, 466 (1983) (citing Meachum v. Fano, 427 U.S. 215, 223–27 (1976)).

289 *See* Moya v. Garcia, 895 F.3d 1229, 1241 (10th Cir. 2018) (McHugh, J., 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))); Armstrong v. Squadrito, 152 F.3d 564, 575 n.4 (7th Cir. 1998) (rejecting reasoning of Ninth Circuit in *Oviatt v. Pearce*, 954 F.2d 1470 (9th Cir. 1992), that statutory procedure creates procedural due process right); Alexander v. City of Muscle Shoals, 766 F. Supp. 2d 1214, 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).

290 *See, e.g.*, *Alexander*, 766 F. Supp. at 1235.

hours.[291] For those courts, a less precise command—e.g., "without unnecessary delay"—creates no constitutional liberty interest at all.[292]

Fortunately, the Due Process Clause itself provides the requisite liberty interest. Even when the indefinite detention of an arrestee, without an access to the courts or counsel, arises from state law, that detention implicates a constitutional due process interest.[293] After all, "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause."[294] It is an unassailable truth that due process establishes a protected liberty interest in being free from extended incarceration without a hearing.[295] The *Baker* Court said as much when it acknowledged that the prolonged detention of an innocent person may violate due process.[296] The question is what process is due after the state has arrested and detained a person.

Ordinarily, the Court uses the generous three-part balancing test of *Mathews v. Eldridge*[297] to determine whether a government procedure satisfies procedural due process. In criminal cases, however, the

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291 *See* Diaz v. Wright, No. Civ. 14-922 JCH/LAM, 2016 WL 10588098, at *16 (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. Dep't of Corr. v. Thompson, 490 U.S. 454, 461 (1989))); Cordova v. City of Albuquerque, No. 1:11-cv-806-GBW/ACT, 2013 WL 12040728, at *5 (D.N.M. Dec. 19, 2013) (same).

292 *See Diaz*, 2016 WL 10588098, at *16.

293 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*, 2016 WL 10588098, at *16 (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 *Thompson*, 490 U.S. at 461)), *and Cordova*, 2013 WL 12040728, at *3–4, *with* Oviatt, 954 F.2d at 1475 (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* Moya v. Garcia, 895 F.3d 1229, 1241 (10th Cir. 2018) (McHugh, J., 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))); 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); *see also Jackson*, 78 F. Supp. 2d at 1243–44 (finding no procedural due process right created by Alabama's statute requiring initial appearance within 72 hours).

294 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).

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

296 *See* Baker v. McCollan, 443 U.S. 137, 144–45 (1979).

297 424 U.S. 319 (1976).

Court employs the narrower inquiry of *Medina v. California*.[298] Of the two, *Mathews* is the richer inquiry, as it explores both the nature of the claimed right and the practical options for establishing procedures that protect the rights in question.[299] The *Mathews* analysis thus facilitates an expansive costs-benefits analysis of requiring more process at initial appearance. Ultimately, however, any initial appearance doctrine will also have to clear *Medina*'s substantial hurdles.[300]

1. Consideration of the Mathews *Criteria*

There are three factors that are relevant to a claim of procedural due process under *Mathews*:

> First, the private interest that will be affected by the official action; second 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 finally, the [g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[301]

As for the private interest, it is difficult to imagine a greater interest than a presumptively innocent person's detention, without access to courts or counsel. Due process follows principles of proportionality so as the importance of the interest increases, so too do the procedures required by due process.[302]

The *Mathews* proportionality assessment evaluates the severity, length, and finality of the deprivation.[303] As discussed in Part I, the deprivation of pretrial liberty without a prompt and counselled court appearance has severe consequences. A defendant faces harm to his health, livelihood, family, and to likelihood of a successful defense.[304] As to the length and finality of the liberty deprivation, the very nature of the problem—detention without any judicial process—strikes at the

298 505 U.S. 437 (1992).

299 *See Oviatt*, 954 F.2d at 1473–76 (using *Mathews* criteria to find procedural due process violation in 114-day detention without initial appearance and doing so before the Supreme Court's 1992 decision in *Medina*).

300 *See, e.g.*, Jauch v. Choctaw Cty., 874 F.3d 425, 431–32 (5th Cir. 2017) (explaining that there was "room to argue" that the *Mathews* 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).

301 *Mathews*, 424 U.S. at 335.

302 *See* Gilbert v. Homar, 520 U.S. 924, 932 (1997); *Mathews*, 424 U.S. at 334.

303 *Gilbert*, 520 U.S. at 932.

304 *See supra* notes 74–92 and accompanying text.

core of our expectations about constitutional procedure. Failure to provide a prompt initial appearance has resulted in detentions that last for months.[305] But a prompt and counselled initial appearance process can provide the key to unlock the door to a detainee's cell.[306]

As to the second *Mathews* factor, the omission of a prompt initial appearance creates a risk of erroneous deprivations of liberty. Without an initial appearance procedure, where an attorney can raise legal arguments and advocate for bail, a person is likely to be detained based on the alleged charge alone, no matter how weak the evidence or how strong the likelihood of his return to court.[307] Lacking a required constitutional initial appearance procedure, a defendant may even be unaware of the accusations against him. Notice of the allegations that support the deprivation of liberty and a fair opportunity to rebut those allegations, "are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations."[308]

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. "[M]ultiple levels of review" can reduce the risk of outcome error.[309] Providing an *early* opportunity for review is essential to avoiding the harm of detention without access to the courts or an attorney. Again, the greater the likelihood that protective procedures can improve accuracy in outcome, the 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."[310] There is no legitimate government interest in delaying an arrested person's access to the courts, counsel, and a

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305 *See supra* note 12.

306 For example, Jessica Jauch spent 96 days waiting for an initial appearance because she had no counsel and bail had not been set. Jauch v. Choctaw Cty., 874 F.3d 425, 427–28 (5th Cir. 2017). At initial appearance, the court set bail and appointed counsel. *Id.* at 428. Ms. Jauch was released six days later. *Id.* at 428.

307 *See supra* note 109 and accompanying text.

308 Wilkinson v. Austin, 545 U.S. 209, 225–26 (2005) (citing Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 15 (1979)).

309 *Id.* at 227. *See also* 16B Am. Jurirsprudence, 2d Constitutional Law § 958 (2009) (citing Mathews v. Eldridge, 424 U.S. 319 (1976)) (proper assessment of the risk of wrongful deprivation requires consideration "not only [of] the reversal rate for appealed cases but also [of] the overall rate of error").

310 *Mathews*, 424 U.S. at 335.

robust advice of rights.[311] The fiscal and administrative burdens are negligible, since state and federal statutes already require a prompt initial appearance with procedural protections.[312] To the extent that due process requires a balancing of interests, a defendant's interest in a hearing to receive counsel, contest 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.[313]

2. *Consideration of the* Medina *Criteria*

In contrast to *Mathews*, *Medina v. California* does not use a balancing test. Instead, *Medina* holds that due process is offended when the available procedural mechanisms are "fundamentally inadequate to vindicate the substantive rights" at issue.[314] If the claimed procedural protections are not enumerated in the Bill of Rights, they must be supplied by the "independent content" of due process.[315] 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.[316]

There are two ways to establish a violation of procedural due process. The challenged conduct must either (1) "offend[ ] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," or (2) "transgress[ ] any recognized principle of 'fundamental fairness' in operation."[317] As to whether a practice is "so rooted in [our] traditions and conscience" as to be "fundamental,"[318] 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 fun-

311 *See* Coleman v. Frantz, 754 F.2d 719, 724 (7th Cir. 1985).

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

313 Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970); *see* Oviatt v. Pearce, 954 F.2d 1470, 1472, 1475–76 (9th Cir. 1992) (using *Mathews* criteria to find procedural due process violation in 114-day detention without initial appearance).

314 Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 69 (2009); *see* Medina v. California, 505 U.S. 437, 446–48 (1992).

315 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 2.7(b) (4th ed. 2015).

316 *Medina*, 505 U.S. at 443, 448 (quoting Dowling v. United States, 493 U.S. 342, 352 (1990)).

317 *Id.* at 446, 448 (quoting Patterson v. New York, 432 U.S. 197, 202 (1977)).

318 *Id.* at 445.

damentally unfair."[319] 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."[320]

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. 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's legal tradition. Early English jurisprudence prohibited extended pretrial detention without a court appearance.[321] Thirteenth century justices travelled across long distances to provide arrestees with regular access to the criminal courts.[322] "[J]udicial absenteeism" was no excuse for "stalling prosecution, nor would it excuse the withholding of bail."[323] The Habeas Corpus Act of 1679 was a response to the possibility that "vacation-time" might delay an arrestee's ability to obtain pretrial release.[324]

The American colonists had similar expectations. Under settled principles of common law, an arresting officer was obliged "to bring his prisoner before a magistrate as soon as he reasonably could."[325] 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

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319 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 2.7(b) (4th ed. 2004); *see also Medina*, 505 U.S. at 446 ("Historical practice is probative of whether a procedural rule can be characterized as fundamental.").

320 *Medina*, 505 U.S. at 443.

321 Jauch v. Choctaw Cty., 874 F.3d 425, 432 (5th Cir. 2017) (citing EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 43 (London, W. Rawlins, 6th ed. 1681)).

322 *See* Klopfer v. North Carolina, 386 U.S. 213, 223–24 (1967) (citing EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 54 (R.H. Helmholz & Bernard D. Reams, Jr. eds., William S. Hein Co. 1986) (5th ed. 1797)).

323 *Jauch*, 874 F.3d at 433 (citing 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 583 (2d ed. 1905) and 3 WILLIAM BLACKSTONE, COMMENTARIES *131).

324 *See id.* (citing Opinion on the Writ of Habeas Corpus (1758) 97 Eng. Rep. 29 (HL) 31–51, *reprinted in* 3 THE FOUNDERS' CONSTITUTION 313–24 (Philip B. Kurland & Ralph Lerner eds., 1987); WILLIAM S. CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS §§ 16–17 (San Francisco, Bancroft-Whitney Co., 2d ed. 1893)).

325 Corley v. United States, 556 U.S. 303, 306 (2009) (citing Cty. of Riverside v. McLaughlin, 500 U.S. 44, 61–62 (1991) (Scalia, J., dissenting)).

Government."[326] Thus, the right to a prompt appearance in court was firmly entrenched in colonial practice.

As to the contemporary view of the states, there is unanimity. In 2020, no state tolerates the indefinite detention of an arrestee without a court appearance.[327] Instead, states require that a newly arrested person appear promptly "before a judicial officer."[328] "The most prevalent American provision" requires "judicial examination 'without unnecessary delay.'"[329] In sum, history and modern consensus converge on the necessity of post-arrest procedures that provide judicial oversight and foreclose prolonged pretrial detention without access to counsel.[330]

In addition, detention-without-appearance transgresses recognized principles of "fundamental fairness" in operation.[331] Prolonged pretrial 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."[332] 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."[333] 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.[334] Accordingly, the U.S. Constitution protects criminal defendants from being "lawfully . . . committed to a purgatory where

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326 *Id.*

327 *See* McNabb v. United States, 318 U.S. 332, 342 & n.7 (1943).

328 *Jauch*, 874 F.3d at 434 (quoting Culombe v. Connecticut, 367 U.S. 568, 584–85 & n.26 (1961)) (citing *McNabb*, 318 U.S. at 342).

329 *Id.*

330 *Id.* at 434 ("[A] procedure calling for extended pre-trial detention without any sort of hearing is alien to our law" and "[t]here is no sanction, historical or modern, for [an] indefinite detention procedure" without initial appearance.).

331 *See id.*; *cf.* Medina v. California, 505 U.S. 437, 448 (1992) (giving the standard for transgressing "fundamental fairness").

332 *Jauch*, 874 F.3d at 434 (quoting Gerstein v. Pugh, 420 U.S. 103, 114 (1975)).

333 *Id.* at 435.

334 *Id.* at 434. For the opinions of the two federal circuit courts that have established this procedural due process right, see generally *Jauch*, 874 F.3d 425, and *Oviatt v. Pearce*, 954 F.2d 1470 (9th Cir. 1992).

[their] rights and protections are out of reach, the Constitution made to wait."[335]

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

Even if the state uses fair procedures to deprive an arrestee of her liberty interest, substantive due process protects criminal defendants "against government power arbitrarily and oppressively exercised."[336] 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.[337] Indefinitely detaining a person without timely access to an initial appearance is the epitome of arbitrary state action.[338]

The test for substantive due process depends upon whether the contested government action is legislative or executive.[339] Every state has legislation that reflects a fundamental liberty interest in prompt presentment.[340] The issue in cases of detention without an initial appearance is almost always one of arbitrary executive action.[341] In such

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335 *Jauch*, 874 F.3d at 434.

336 Cty. of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) (citing Daniels v. Williams, 474 U.S. 327, 331 (1986)).

337 Washington v. Glucksberg, 521 U.S. 702, 763–64 (1997) (Souter, J., concurring) (quoting Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting)); *see Lewis*, 523 U.S. at 846.

338 The Court has declared that a "detention prior to trial or without trial" is a liberty interest implicating a substantive due process analysis. United States v. Salerno, 481 U.S. 739, 755 (1987) (Marshall, J., dissenting).

339 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 and favoring historical fundamental rights analysis); *see also Salerno*, 481 U.S. at 746; Rochin v. California, 342 U.S. 165, 172 (1952) (due process prevents the government from engaging in conduct that "shocks the conscience"); Palko v. Connecticut, 302 U.S. 319, 324–25 (1937) (substantive due process prevents interference with rights "implicit in the concept of ordered liberty"), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969) (overruling application of Double Jeopardy Clause to states); Moya v. Garcia, 895 F.3d 1229, 1243 (10th Cir. 2018) (McHugh, J., concurring and dissenting) (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" (quoting Seegmiller v. LaVerkin City, 528 F.3d 762, 767 (10th Cir. 2008))). It appears that the Court employs the fundamental liberty interest analysis for legislative actions. *See, e.g.*, *Salerno*, 481 U.S. at 747 (assessing Bail Reform Act under substantive due process). And it supplies the latter "shocks the conscience" standard for executive actions. *See Lewis*, 523 U.S. at 846.

340 *See supra* note 37.

341 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.

cases, the Court asks whether the executive action "shocks the conscience."[342]

In *County of Sacramento v. Lewis*,[343] the Court held that "deliberate indifference" on the part of prison officials will suffice to "shock the conscience" under certain conditions.[344] It explained:

> 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.[345]

In contrast with the many on-the-spot determinations that police officers on the street must make, law enforcement and jail officials overseeing the detention of arrestees have the luxury of deliberation.[346] In this context, "[w]hen such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking."[347]

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 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.[348]

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.[349]

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342 *Lewis*, 523 U.S. at 846–47.

343 523 U.S. 833 (1998).

344 *Id.* at 850.

345 *Id.* at 851 (citation omitted).

346 *See id.* at 853.

347 *Id.*

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

349 *See* Coleman v. Frantz, 754 F.2d 719, 724 (7th Cir. 1985) (discussing the small adminis-

This due process violation underscores how the initial appearance is a right "implicit in the concept of ordered liberty."[350] 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 U.S. Constitution."[351] The initial appearance

> 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 consult with counsel; and deciding between detention or release.[352]

A prompt and robust initial appearance proceeding "has such great value in protecting numerous rights that its denial presumptively disrupts those rights."[353]

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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."[354] 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 a conversation about the importance of regulating constitutional criminal pretrial procedure. It excavates the long overlooked due process right to prompt initial appearance and offers an assessment of the due process right to a prompt, substantive, and

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trative burden to ensure timely first appearance where state already requires one); *Armstrong*, 152 F.3d at 572 (citing *Coleman* for same proposition).

350 Palko v. Connecticut, 302 U.S. 319, 324–26 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969) (overruling application of Double Jeopardy Clause to states).

351 Jackson v. Hamm, 78 F. Supp. 2d 1233, 1240–41 (M.D. Ala. 1999).

352 Corley v. United States, 556 U.S. 303, 320 (2009).

353 *Jackson*, 78 F. Supp. 2d at 1240 (agreeing with reasoning of Seventh Circuit in *Coleman* and finding substantive due process right to prompt initial appearance).

354 Albright v. Oliver, 510 U.S. 266, 302 (1994) (Stevens, J., dissenting).

counselled initial appearance. In so doing, it establishes a blueprint for litigation to establish and enforce this right.[355] Until the Supreme Court clearly establishes the right, however, there is much that reform-minded lawyers, legislators, and judges can do to mitigate the initial appearance crisis that plagues this country.

As described in Part I, there are serious deficiencies in the operation of initial appearance proceedings. To support litigation and reform efforts, researchers, policymakers, and scholars should document current practice. They must expose 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 are ultimately declined or dismissed by the local prosecutor. The higher the percentage of cases where prosecution is declined, the greater the risk that detention and delay without initial appearance serve no lawful purpose.[356]

Researchers must also document the dire consequences of delayed initial appearance and lags in the appointment of counsel. Exposing the realities of state practice is critical to helping the appellate courts and the Supreme Court properly identify a due process right to a prompt and counseled initial appearance. Without empirical evidence about state practices, the courts will rely only on "data as well as mere anecdote [that] likely at best [ ] capture a sense of federal practices;" they may never know the ugly truth about "the mine-run of state and local activities."[357]

As a matter of state law reform, states must require strong procedural safeguards that ensure prompt initial appearances. States that allow for initial appearance "without unnecessary delay" should impose instead a strict 24-hour time limit for initial appearance. This

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355 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.

356 *See* 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) ("[I]t takes only a charge for a defendant to be detained pending trial, with little to no consideration of the strength of the supporting evidence . . . ."); *see also* 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. REAVES, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2000, at 24 (2003), https://www.bjs.gov/index.cfm?ty=pbdetail&iid=897 [https://perma.cc/LH2Y-PSKH])). 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).

357 Laurin, *supra* note 178, at 839.

would accomplish two goals. First, it might create a due process liberty interest for the detained arrestee.[358] Second, it would give police officers, sheriffs, wardens, and jailers a bright line rule to follow.

For that bright line to be meaningful, states must also enact legislation that empowers police, sheriffs, wardens, and jailers to facilitate prompt initial appearances. For example, sheriffs and police chiefs should be required to notify the responsible court about anyone detained for more than 24 hours without an initial appearance. In addition, states should legislate meaningful remedies for detention-without-appearance. For example, if the detainee's custodian is properly notified of the prolonged detention and fails to act within 24 hours, the custodian should be statutorily empowered to release that individual.[359]

State law reform must also require a *meaningful* initial appearance procedure that includes a right to contest the ex parte probable cause determination. This procedure—which is already guaranteed to convicted defendants[360]—lies at the heart of the many cases of wrongful incarceration.[361] States should also guarantee the actual appearance of counsel, and not just the attachment of the right. Counsel's assistance is critical to a meaningful opportunity to contest a finding of probable cause or succeed in establishing defendant's release on bail.[362]

Temporal "gaps" in local law, shoddy practice, and institutional errors will prove resistant to change. Concrete state law reforms may be most challenging in rural jurisdictions, which may struggle to 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.[363] In rural communities and high-volume, high-tech ur-

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358 *See supra* note 278 (discussing problematic holdings that state statutes with vague, as opposed to mandatory, timelines do not create a liberty interest).

359 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., concurring) (arguing remedy should be dismissal with prejudice); The Associated Press, *Court Delay Leads to Dismissal of Aggravated Assault Charge*, NBC MONT. (May 8, 2019), https://nbcmontana.com/news/local/court-delay-leads-to-dismissal-of-aggravated-assault-charge [https://perma.cc/7K2D-4KFM].

360 *See* Kuckes, *supra* note 4, at 40.

361 For example, in the Supreme Court's cases, *Baker v. McCollan*, 443 U.S. 137, 143 (1979), involved an arrest of the wrong person, *Albright*, 510 U.S. at 292–93 & n.4, involved an arrest on unreliable hearsay, and *Manuel v. City of Joliet*, 137 S. Ct. 911, 914, 915 (2017), involved the arrest of an innocent man based on a fraudulent affidavit.

362 *See* Gross, *supra* note 13, at 849–50; Colbert, *supra* note 114, at 34; *see supra* note 187.

363 *See, e.g.*, Brandon Buskey, *Escaping the Abyss: The Promise of Equal Protection to End*

ban centers, courts will have to grapple with whether video relays can provide adequate first appearances or adequate access to counsel.[364] To assist courts, social scientists must conduct research that empirically assesses the merits of technological adaptations.[365] In other words, states must create an infrastructure that makes prompt and counseled initial appearances both viable and fair.[366]

CONCLUSION

"The history of liberty has largely been the history of observance of procedural safeguards."

—Corley v. United States[367]

The detention-without-appearance of criminal suspects is a "recurring part of the state sanctioned prosecutorial system."[368] 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 loses his freedom, loses his job, suffers reputational damage, risks physical harm during incarceration, and ultimately loses 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"

Indefinite Detention Without Counsel, 61 ST. LOUIS U. L.J. 665, 666–69, 676–77 (2017) (describing how counties in Mississippi had only four or fewer trial terms per year, and urging an Equal Protection approach to guaranteeing counsel's early entry into criminal cases).

364 *See supra* note 56 and accompanying text.

365 The scant available evidence suggests that video appearances may increase bond amounts and decrease the quality of attorney-client communications. Eric T. Bellone, *Private Attorney-Client Communications and the Effect of Videoconferencing in the Courtroom*, 8 J. INT'L COM. L. & TECH. 24, 47 (2013).

366 *See* Rothgery v. Gillespie Cty., 554 U.S. 191, 206–07 (2008) ("[O]nly '[s]ome Texas counties . . . have computer systems that provide arrest and detention information simultaneously to prosecutors, law enforcement officers, jail personnel, and clerks.'" (quoting Brief Amici Curiae of the Brennan Center for Justice Amicus Curiae et al. in Support of Petitioner at 10–12, Rothgery v. Gillespie Cty., 554 U.S. 191 (2008) (No. 07-440))).

367 556 U.S. 303, 321 (2009) (quoting McNabb v. United States, 318 U.S. 332, 347 (1943)).

368 Pugh v. Rainwater, 332 F. Supp. 1107, 1113 (S.D. Fla. 1971).

will be minor.[369] Case law, news accounts, and anecdotal data prove that reliance on this assumption 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 well-developed initial appearance 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.

Ultimately, 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 underregulated, and deeply coercive, assembly line for plea bargains. The unregulated procedural abyss, between arrest and disposition, is the fuel that drives that assembly line.

Although our resolution-focused system of criminal procedure provides elaborate protections for the disposition of a criminal case, there are no such protections 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.[370] 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.

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369 Colbert, *supra* note 114, at 34.

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