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Charging Time

Pamela R. Metzger
Southern Methodist University, Dedman School of Law

Janet C. Hoeffel
Tulane University of Louisiana

Author ORCID Identifier:

Pamela R. Metzger: https://orcid.org/0000-0001-5582-4953

CHARGING TIME

Pamela R. Metzger[*] *& Janet C. Hoeffel*[**]

ABSTRACT: On the verge of his 1,000th day in an El Paso, Texas jail, Robert Antonio Castillo was still waiting for a prosecutor to formally charge him with a crime. Mr. Castillo is one of thousands of people across the country who are arrested and jailed for weeks, months, and even years without charges. In one year in New Orleans, 275 people each spent an average of 115 days in jail only to have the prosecution decline all charges against them. Together, these men and women spent 31,625 days in one of the nation's most dangerous jails, with no compensation for their incarceration, fear, lost wages, shame, and distress. Yet this violates no laws; it circumvents no constitutional protections.

To date, there has been legal scholarship about the necessity of an extended time period between arrest and formal charging by information or indictment. Many states give prosecutors extended or indefinite time periods to file indictments and informations, and prosecutors appear to take that time. Until a prosecutor decides to accept or decline charges, the arrestee is in a procedural abyss. In this Article, we explore the equities at stake and the realities at play in this dark period.

Prosecutors' crushing caseloads, police officers' shoddy and inadequate investigative work, and a lack of training or written policies on charging contribute to the delay. From the detained defendants' perspective, the consequences of delayed charging are steep. Extended time in jail jeopardizes their lives, health, jobs, and case outcomes. Yet the constitutional protections granted to criminal defendants provide no remedy for this uncharged detention. After exposing this disturbing state of affairs, we offer practical, subconstitutional solutions to minimize needless delay in prosecutors' formal charging decisions.

[*] Professor of Law and Director of the Deason Criminal Justice Reform Center, SMU Dedman School of Law.

[**] Catherine D. Pierson Professor of Law, Tulane Law School.

INTRODUCTION

In August 2022, an El Paso, Texas judge finally dismissed the case against Roberto Antonio Castillo, who had been in jail nearly one thousand days for

resisting arrest.[1] In those one thousand days, the prosecution had failed to file any formal charges against him.[2] Under Texas law, the prosecution had one hundred eighty days to file charges.[3]

Roberto Castillo was only one of hundreds of people jailed in El Paso, Texas for over six months without having any indictment filed against them.[4] The judge who dismissed the case against Mr. Castillo "dismissed nearly 100 [other] criminal cases"—and was poised to dismiss hundreds more—for the failure of the El Paso District Attorney's Office to timely file formal charges.[5]

This is not an isolated problem. An ACLU report revealed that in 2022, 46.6 percent of the 3,572 people held in custody in Fulton County, Georgia jails had not had formal charges filed against them.[6] Alarmingly, "750 people, or [twenty-one percent] of [those] held by Fulton County had been in custody" beyond Georgia's ninety-day statutory limit for formal charging with no indictment forthcoming.[7] Another, "117 people ha[d] been held in custody for more than one year without [an] indictment," and "[twelve] people had been held for [more than] two years without [an] indictment."[8] In 2021, prosecutors failed to file timely charges in the cases of forty-four percent of people detained on felony charges in Orleans Parish, Louisiana.[9]

News reports are replete with similar stories.[10] On July 14, 2020, when William Haymon turned sixteen, it was his 511th day in a Mississippi jail, but

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1. Aaron J. Montes, *Nearly 100 Criminal Cases Dismissed in El Paso County, More Up for Review*, KTEP (Aug. 15, 2022, 4:00 PM), https://www.ktep.org/ktep-local/2022-08-15/nearly-100-criminal-cases-dismissed-in-el-paso-county-more-up-for-review [https://perma.cc/BV4R-BA5Q].

2. *Id.*

3. TEX. CODE CRIM. PROC. ANN. art. 32.01(a) (West 2022) (setting formal charge deadline as last day of next term of court or 180 days from defendant's detention, whichever is later). As we discuss, this is one of the more liberal timelines in the country. *See infra* notes 85–95 and accompanying text (citing and discussing timelines for terms of court).

4. Montes, *supra* note 1.

5. *Id.*

6. ACLU, THERE ARE BETTER SOLUTIONS: AN ANALYSIS OF FULTON COUNTY'S JAIL POPULATION DATA 4 (2022), https://www.aclu.org/sites/default/files/field_document/there_are_better_solutions-rev.pdf [https://perma.cc/6XVC-USLG].

7. *Id. See* GA. CODE ANN. § 17-7-50 (West 2022) (requiring indictment within ninety days).

8. ACLU, *supra* note 6, at 4 (emphasis omitted).

9. METRO. CRIME COMM'N, ORLEANS PARISH 2021 CASE SCREENING WITHIN LOUISIANA RIGHT TO A SPEEDY TRIAL DEADLINES 5 (2022), https://metrocrime.org/wp-content/uploads/2022/02/Orleans-701-Right-to-a-Speedy-Trial-Deadlines.pdf [https://perma.cc/P4HB-BR4M].

10. Mississippi resident, Octavious Burks, spent nearly three years in jail on three different cases, all of that time uncharged. *See* Jerry Mitchell, *Miss. Man Spent 3 Years in Jail, Still No Trial*, CLARION-LEDGER (Sept. 24, 2014, 10:21 AM), https://www.clarionledger.com/story/journeytojustice/2014/09/24/scott-county-jail-arrests-no-trials/16138253 [https://perma.cc/4Z9A-H6K8]; *see also* Amended Class Action Complaint at 3–5, Burks v. Scott Cnty., No. 3:14-cv-745 (S.D. Miss. Dec. 12, 2014) (providing additional information on Burks's imprisonment). In Nevada, Jonas Maxwell was arrested and sat in jail for eleven months without a formal charge. Bethany Barnes, *Man Arrested 11 Months Ago Sits in Jail, Still Awaiting Charges*, LAS VEGAS SUN (Aug. 20, 2013, 2:00 AM), http://lasvegassun.com/news/2013/aug/20/man-arrested-11-months-ago-sit

prosecutors had still not formally charged him with a crime.[11] During Mr. Haymon's first twelve months in jail, the police officer assigned to his case did no investigation and his public defender never visited him.[12] Mr. Haymon could not even demand a speedy trial because there were no formal charges to be tried.[13] Yet, a judge held that his rights had not been violated.[14] Mr. "Haymon is 'one of thousands' in the same situation."[15] Delays in formal charging are "not [an] exception to the rule, [they are] the rule."[16]

In this Article, we interrogate this extended formal charging delay—its necessity, its causes, and its consequences. We explore the shadowy period between arrest and information or indictment. Why does it take some prosecutors weeks, months, or even years to make a charging decision? What are the costs associated with lengthy delays between arrest and formal charging? Is there any solution or remedy in the U.S. Constitution? And, if not, can state and local practices help to cure this disease?

In Part I, we outline the formal charging process on the books. After a brief primer on formal charging, we survey state laws about when prosecutors must make their postarrest formal charging decisions. It may be surprising to many, for example, that Mississippi, where William Haymon was jailed, is one of ten states that does not limit the time between arrest and formal charging.[17] In those states, a person can be arrested and detained, indefinitely, without formal charges. Other states set extremely generous deadlines, allowing arrestees

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[https://perma.cc/97ET-HT25]. In Louisiana, Brice Poole was held for sixty-three days in jail without charges, which were ultimately declined. Daniel Bethencourt, *Some Baton Rouge Inmates Serving Excessive Jail Time: What's the Cause; How's It Being Fixed?*, ADVOCATE (Jan. 26, 2015, 1:53 PM), https://www.theadvocate.com/baton_rouge/news/article_9d665ca5-c159-52f0-a2f5-f7708e18382a.html [https://perma.cc/6CFJ-WNLE]. *The Advocate* in Baton Rouge found that during a two-year period, nineteen arrestees "sat in jail for as long as six months until they were charged." *Id. See generally* ZHEN ZENG, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., JAIL INMATES IN 2018, at 1 (2020), https://www.bjs.gov/content/pub/pdf/ji18.pdf [https://perma.cc/VB98-FHPK] (finding that in 2018, approximately 490,000 persons sat in jail awaiting court action); BRIAN A. REAVES, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 - STATISTICAL TABLES (2013) [hereinafter BJS LARGE URBAN COUNTIES], https://www.bjs.gov/content/pub/pdf/fdluc09.pdf [https://perma.cc/RZB2-LYYE] (finding that, in the seventy-five largest U.S. counties, thirty-eight percent of all felony arrestees are held in jail for the entire duration of their case, and twenty-five percent of all felony arrests result in a dismissal of all charges).

11. Lauren Gill, *Mississippi Teen Who Has Languished in Jail for 17 Months Without an Indictment Is Just 'One of Thousands,'* APPEAL (July 30, 2020), https://theappeal.org/mississippi-teen-who-has-languished-in-jail-for-17-months-without-an-indictment-is-just-one-of-thousands [https://perma.cc/H27N-3F4X].

12. *Id.*

13. *Id.*; *see also infra* Section III.A (discussing ineffectiveness of speedy trial doctrine).

14. Gill, *supra* note 11.

15. *Id.*

16. *Id.*

17. *See infra* Section I.B (giving statutory timelines); *see also infra* Section I.A (providing a primer on "formal charging").

to spend months in jail waiting for prosecutors to decide whether to pursue charges against them.[18]

In Sections II.A and II.B, we describe empirical data about prosecutorial charging practices, highlighting a new Deason Criminal Justice Reform Center investigation of charging practices in three midsized jurisdictions. There is limited information about the outcomes of prosecutorial charging, but what we do know is alarming. Prosecutors are supposed to make charging decisions that are both prompt and carefully considered.[19] Too often, however, prosecutors make these decisions with little formal training or guidance about their offices' charging policies.[20] They confront "crushing caseloads," frequently armed only with shoddy or inadequate police work and little to no input from defense counsel.[21] As a result, many formal charging decisions are made both hastily and at the last minute.[22] Yet to date, there has been no scholarly consideration of the necessity—or the legality—of extended postarrest delay in making those charging decisions.

In Section II.C we underscore that prosecutors' declination practices make the extended delay of charging decisions even more shocking when considered. Data show that some prosecutors across jurisdictions decline charges in anywhere from twenty to fifty percent of cases.[23] Consider, for example, declination data from New Orleans, Louisiana. In 2014, 275 people each spent an average of 115 days in the Orleans Parish Prison, only to have the prosecution decline all

18. *See infra* Section I.B (giving statutory timelines).

19. *See infra* note 66 and accompanying text (giving ABA guidelines for prosecutor charging).

20. *See infra* notes 326–31 and accompanying text.

21. *See, e.g.*, DEASON CTR., SMU DEDMAN SCH. OF L., SCREENING AND CHARGING CASES IN THREE MID-SIZED JURISDICTIONS 7 [hereinafter DEASON PREVIEW REPORT], https://www.smu.edu/-/media/Site/Law/DeasonCenter/Publications/Prosecution/Prosecution-Charging-Practices-Project/Series-Preview—Screening-and-Charging-Practices-of-Three-Mid-Sized-Jurisdictions.pdf?la=en [https://perma.cc/VJW7-VABU]; Deason Center Author File on Screening and Charging Cases in Three Mid-Sized Jurisdictions (data, interview notes, and study materials on file with author) [hereinafter Deason Author File]; SPOKANE REG'L CRIM. JUST. COMM'N, A BLUEPRINT FOR REFORM: CREATING AN EFFICIENT AND EFFECTIVE REGIONAL CRIMINAL JUSTICE SYSTEM 41–44 (2013) [hereinafter SPOKANE STUDY], https://www.courts.wa.gov/subsite/mjc/docs/BlueprintSpokane.pdf [https://perma.cc/NF9Q-RHZ5]. As an example, according to a charging attorney in the Phoenix Municipal Court, "incomplete or absent arrest reports occur in approximately [twenty] percent of [ordinary cases]." *Id.* at 87. *See* NAT'L CTR. FOR STATE CTS., INNOVATIONS AND EFFICIENCY STUDY: CITY OF PHOENIX JUSTICE SYSTEM, FINAL REPORT 87 (2012) [hereinafter PHOENIX STUDY], https://www.phoenix.gov/citymanagersite/Documents/072263.pdf [https://perma.cc/9MWK-DMFH]. When that happens, "a defendant may be held over to the next [initial] appearance or remain in jail for as many as three to seven days." *Id.*

22. *See infra* Section II.B (discussing results of Deason Center Study).

23. *See infra* notes 152–56 and accompanying text (providing declination percentages). In William Haymon's case, one of his accusers was dead and the other was apparently uncooperative, so it was unclear whether the state had any reasonable likelihood of securing a conviction or even proceeding to trial. *See* Gill, *supra* note 11.

charges against them.[24] Meanwhile, New Orleans taxpayers paid dearly for these unnecessary incarcerations. Avoiding these detentions would have saved New Orleans taxpayers $994,188.40.[25] Instead, this unnecessary predeclination detention imposed $12,038,400 in "human costs of . . . (1) violence and physical harm; (2) loss of liberty; (3) lost pay; (4) fees during incarceration; and (5) replacement childcare."[26]

In Section II.D, we catalogue the consequences of delayed formal charging for a detained defendant. Prosecutors' wholly discretionary charging decisions trigger important steps in the criminal process.[27] Until a prosecutor decides to accept or decline charges, the defendants are in a procedural abyss.[28]

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24. JAMES AUSTIN & JOHNETTE PEYTON, JFA INST., ORLEANS PRISON POPULATION PROJECTION UPDATE 14 tbl.7 (2015), https://www.nola.gov/getattachment/Criminal-Justice-Coordination/Reports/Orleans-Parish-Prison-Population-Projection-2015.pdf [https://perma.cc/VH8Z-RC83]. Other data does not distinguish between declinations and dismissals but is still telling. In Chicago in 2010, 12,446 defendants spent an average of twenty-five days in jail before their cases were dismissed—more than 300,000 days of incarceration based on allegations that were never pursued. KATY WELTER, CHI. APPLESEED FUND FOR JUST., EARLY CRIMINAL CASE ASSESSMENT IN URBAN JURISDICTIONS 1 (2012) [hereinafter APPLESEED REPORT], http://chicagoappleseed.org/wp-content/uploads/2012/06/Early-Case-Assessment-Brief-Final.pdf [https://perma.cc/WA4Z-8TSZ]. A 2009 sampling of 110 Milwaukee County felony arrestees demonstrated that suspects spent an average of seventy-two days in jail before their cases were dismissed. JOHN CLARK, PRETRIAL JUST. INST., MILWAUKEE COUNTY JAIL POPULATION ANALYSIS 17 tbl.8 (2010), http://milwaukee.gov/ImageLibrary/Groups/cjcouncil/Documents/Milwaukee_Jail_Population_Analysis_Final_Report.pdf [https://perma.cc/NX9D-XABL]. Meanwhile, 177 misdemeanor arrestees each spent an average of 23.6 days in jail before their cases were dismissed. *Id.* at 18 tbl.9.

25. The cost is based on the Vera Institute of Justice's estimate of a $31.38 daily marginal cost for the New Orleans jail in 2016. CHRISTIAN HENRICHSON ET AL., VERA RSCH. DEP'T, VERA INST. OF JUST., THE COSTS AND CONSEQUENCES OF BAIL, FINES AND FEES IN NEW ORLEANS 44 (2017), https://www.vera.org/downloads/publications/past-due-costs-consequences-charging-for-justice-new-orleans-technical-report.pdf [https://perma.cc/5WT6-38J5].

26. *See id.* at 11, 44. The cost is based on the Vera Institute of Justice's estimate of a $380 daily human cost for incarceration in the New Orleans jail in 2016. *See id.*

27. As we discuss in Section I.A, the term "charge" can have multiple meanings. The term can be associated with arrest charges, the informal charges made after initial screening by a magistrate or prosecutor, or with the formal prosecutorial commitment to proceed against a defendant. In this Article, we refer to informal charging as "screening" and use the terms "charging" and "formal charges" to reference charging decisions formalized by the filing of an indictment or information. We use the terms "decline" and "declination" to refer to the rejection of informal charges before the filing of an indictment or information. In contrast, the terms "dismiss" and "dismissal" describe the termination of a case after formal charging and without any verdict. Decisions to decline prosecution can occur at any time from screening through any formal charging deadline, by which time prosecutors must present a formal charging instrument or decline prosecution. *See* 4 WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE § 13.1(c) (4th ed. 2004).

28. *See infra* Part III (discussing paucity of procedural protections at this stage). In a previous Article, we excavated the criminal legal system's failure to provide prompt and meaningful initial appearances for detained arrestees. *See* Pamela R. Metzger & Janet C. Hoeffel, *Criminal (Dis)Appearance*, 88 GEO. WASH. L. REV. 392, 396–417 (2020). As discussed further in Section II.D, a detained arrestee has no constitutional right to the assistance of counsel at bail proceedings; no constitutional right to investigation or discovery precharge; and no constitutional right to an adversarial judicial review of the evidence used to restrain their liberty. *See infra* Section II.C. In their own nomenclature,

So presumptively innocent people sit in jails that are among the most dangerous and deadly places in the United States. They have scant access to counsel and no mechanism to get into court to argue for release.[29] Every day spent in jail means jobs, housing, and family ties are lost.[30] Suffering abuse and isolation in precharge detention, these defendants are easily coerced into early pleas, often without access to discovery and other important criminal rights.[31]

In Part III, we show that there are no constitutional frameworks to provide a remedy for the thousands of people who are languishing in jail without any formal charges against them. Finally, in Part IV, we offer actionable solutions for the state and local institutional actors who are best equipped to promote prompt, accurate, and meaningful charging decisions. Some of these proposals are for lawmakers. Others are for criminal justice stakeholders.[32] Drawing on our proposals, state and local criminal legal systems *can* address the injustices of unreasonable precharge delay.

I. FROM ARREST TO FORMAL CHARGING DECISIONS

In this Part, we offer a brief primer about what transpires between arrest and formal charging decisions. We then describe the landscape of state laws that regulate (or fail to regulate) the timing of the charging process.

A. PRIMER ON CHARGING

The process of selecting and formalizing criminal charges varies from place to place.[33] From a defendant's perspective, an arrest means that the State has "charged" him with a crime and means to prosecute him. However, as a legal matter, arrest does not commit the state to a prosecution. An arrest simply

prisoners call this precharge period of incarceration doing "D.A. time." *See* Pamela R. Metzger, *Doing Katrina Time*, 81 TUL. L. REV. 1175, 1183 (2007) (describing term's source); *see also* Bennett L. Gershman, *Prosecutorial Decisionmaking and Discretion in the Charging Function*, 62 HASTINGS L.J. 1259, 1271 (2011) ("[O]nce charges are filed, and the case is in the public arena, there are many systemic protections available for an accused to correct a mistaken charge, which are unavailable prior to charges being filed.").

29. *See* Metzger & Hoeffel, *supra* note 28, at 412–13.

30. *See infra* Section II.D (discussing consequences).

31. *See infra* notes 182–89 and accompanying text.

32. Considering the movement toward smart and sustainable prosecution, many of our recommendations focus on changes to prosecutorial charging policies and workflows. We note, however, that progressive prosecutors' impact on practice remains largely unknown. *See* Megan S. Wright, Shima Baradaran Baughman & Christopher Robertson, *Inside the Black Box of Prosecutor Discretion*, 55 U.C. DAVIS L. REV. 2133, 2136 (2022) ("[I]t is unclear whether isolated progressive statements from head prosecutors translate into meaningful leniency from line prosecutors. Indeed, prosecutor decision making, including what factors they consider in charging and plea bargaining, has been referred to as the 'black box.'" (quoting Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 129 (2008))).

33. 4 LAFAVE ET AL., *supra* note 27, § 13.2(a) ("[I]t would be in error to assume that discretionary enforcement by prosecutors is essentially the same in all locales.").

brings a defendant into the criminal legal system.[34] After arrest, a screening procedure weeds out cases that are manifestly unfit for prosecution.[35] In felony cases, a subsequent preliminary hearing may test the strength of the claims that support the arrest.[36] The charging process concludes when prosecutors file a formal charging document, typically by way of a bill of information or indictment.[37] At each stage in the process, prosecutors can return a case to the police for further investigation or can decline prosecution altogether.

1. Arrest

With some exceptions, most defendants enter the criminal legal system through a custodial arrest.[38] To make an arrest, police officers must have probable cause to believe the defendant violated the criminal law.[39] If the police have an arrest warrant, they established that probable cause when a judge issued the warrant.[40] But most arrests are made without a warrant.[41] In those cases, within forty-eight hours of arrest, a magistrate or judge must review the arrest charges to ensure there was probable cause to arrest.[42] In either situation, these can be described as "arrest charges."

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34. *See* Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 181 (2019) ("'[I]t takes a village' to send someone to prison. The track is laid by legislators and passes through critical gateways controlled by police, judges, and other actors. A journey on that track begins when the police arrest a person and deliver the case to the prosecutor for a charging decision." (footnotes omitted) (quoting Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 837 (2018))).

35. 4 LAFAVE ET AL., *supra* note 27, § 13.1(c).

36. *Id.* § 14.1(a).

37. In a small minority of jurisdictions, police prosecute low-level misdemeanor cases. *See* Andrew Horwitz, *Taking the Cop Out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases*, 40 ARIZ. L. REV. 1305, 1306 (1998); Alexandra Natapoff, Opinion, *When the Police Become Prosecutors*, N.Y. TIMES (Dec. 26, 2018), https://www.nytimes.com/2018/12/26/opinion/police-prosecutors-misdemeanors.html [https://perma.cc/N5HP-G2FC].

38. 4 LAFAVE ET AL., *supra* note 27, § 13.1(a) ("The overwhelming majority of cases that reach the prosecutor are brought to his attention by police after they have made an arrest . . . ."). For some minor crimes, particularly traffic offenses, police may choose not to arrest but instead to issue the violator a citation to appear in court. *Id.* § 12.5(b).

39. *Id.* § 3.3(a) (citing Henry v. United States, 361 U.S. 98 (1959); United States v. Harris, 403 U.S. 573 (1971)).

40. *See, e.g.*, Whiteley v. Warden, 401 U.S. 560, 564 (1971) (holding that issuance of an arrest or search warrant requires probable cause).

41. 4 BARBARA E. BERGMAN, THERESA M. DUNCAN & MARLO CADEDDU, WHARTON'S CRIMINAL PROCEDURE § 23:14 (14th ed. 2021); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1184 (1999); Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1612 (2012); ANNE TOOMEY MCKENNA & CLIFFORD S. FISHMAN, WIRETAPPING AND EAVESDROPPING § 28:40, Westlaw (database updated Nov. 2022).

42. Gerstein v. Pugh, 420 U.S. 103, 126 (1975) (holding that a magistrate must promptly review an arrest for probable cause but rejecting any constitutional requirement of an adversary hearing); Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 58–59 (1991) (holding that "promptly" for this purpose meant within forty-eight hours of arrest).

When a judge reviews the police's statement of probable cause to support the arrest, they may do so *ex parte*.[43] Without any input from the defense, the judge can simply agree with police that there is probable cause to support the arrest charges.[44] Based on information provided by police, and blessed by a judge, a defendant will then be booked into the local jail, where they will remain unless a judge sets an affordable bond.[45]

In theory, prosecutors' deliberations over formal charging decisions will compensate for this unreliable probable cause determination.[46] While arrest charges can detain a defendant, they do not commit the prosecution to anything.[47] As the Supreme Court has said: "[L]aw enforcement officers—lack the authority to initiate or dismiss a prosecution. That authority lies in the hands of prosecutors."[48]

2. Screening

Screening is a preliminary charging process conducted in close proximity to a defendant's arrest.[49] In screening, prosecutors review the arrest charges and make a preliminary decision to decline or accept prosecution.[50] If prosecutors decline (or reject) a case, the defendant is released from custody (or from any bail conditions).[51] Some declinations are only "returns"—prosecutors return a case to police for further investigation with the expectation that police *will* resubmit the case with better evidence.[52] Other declinations are intended to be permanent, such as when a prosecutor's office has a blanket

43. *See Gerstein*, 420 U.S. at 120–22 (holding adversary hearing not required).

44. *See id.* at 119–21. While some legal systems do require a judge to make the probable cause determination in court, a defendant has no constitutional right to contest the probable cause for these arrest charges. *See* Metzger & Hoeffel, *supra* note 28, at 424–25.

45. *See* 4 LAFAVE ET AL., *supra* note 27, § 12.1(b).

46. Jennifer E. Laurin, *Remapping the Path Forward: Toward A Systemic View of Forensic Science Reform and Oversight*, 91 TEX. L. REV. 1051, 1094 (2013) (stating that prosecutorial screening operates as an "institutional check on police discretion").

47. As we have noted elsewhere, state initial appearance timelines vary. Metzger & Hoeffel, *supra* note 28, at 400–06. Prosecutorial practices are similarly diverse. Generally speaking, however, prosecutors "screen" a new arrest just before, or shortly after, an initial appearance. *See, e.g.*, BRUCE FREDERICK & DON STEMEN, NAT'L INST. OF JUST., THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING – TECHNICAL REPORT 133–35 (2012) [hereinafter ANATOMY OF DISCRETION], https://www.ojp.gov/pdffiles1/nij/grants/240334.pdf [https://perma.cc/VQ9W-YE5Q] (describing how prosecutors in different offices use different screening methods to review cases before initial appearance).

48. Manuel v. City of Joliet, 137 S. Ct. 911, 925 (2017) (citation omitted).

49. *See* 4 LAFAVE ET AL., *supra* note 27, § 13.1(c).

50. In a handful of jurisdictions, police "direct file" the informal charges. *Id.* § 14.2(d).

51. *See* Jessica A. Roth, *Prosecutorial Declination Statements*, 110 J. CRIM. L. &. CRIMINOLOGY 477, 487 (2020) (defining a declination as "a decision by a prosecutor not to pursue criminal charges in a discrete case, largely as a matter of the exercise of prosecutorial discretion and judgment").

52. *See, e.g.*, Deason Author File, *supra* note 21 (finding that, in one jurisdiction, prosecutors reported returning an average of forty-six percent of cases back to law enforcement for additional investigation).

policy of declining certain types of cases.[53] These declinations are "without prejudice," meaning that police and prosecutors are free to file charges at a later date.[54]

This early screening process is intended to prevent weak, unworthy, or unnecessary criminal cases from entering the criminal legal system.[55] It is therefore a somewhat cursory review that quickly and efficiently eliminates cases that will never be prosecuted.[56] Often, screening decisions are made solely on the basis of the police report.[57] In other situations, screening decisions may involve conversations with the arresting officer, interviews with witnesses, or brief research into the legality of police conduct.[58]

There is no national standard on the timing of the screening decision. The National District Attorneys Association's *National Prosecution Standards* unhelpfully state that "[t]he decision to initiate a criminal prosecution should be made by the prosecutor's office. Where state law allows criminal charges to be initiated by law enforcement or by other persons or means, prosecutors should, at the earliest practical time, decide whether the charges should be pursued."[59] And the ABA's *Criminal Justice Standards for the Prosecution* has no standards at all for the early screening process.[60]

In some jurisdictions, if prosecutors accept a case for prosecution, they must select and file charges through an informal charging document, often

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53. *See, e.g.*, PAMELA METZGER, VICTORIA SMIEGOCKI & KRISTIN MEEKS, DEASON CRIM. JUST. REFORM CTR., SMU DEDMAN SCH. OF L., BUDDING CHANGE: MARIJUANA PROSECUTION POLICIES AND POLICE PRACTICES IN DALLAS COUNTY, 2019 3 (2021) [hereinafter BUDDING CHANGE], https://www.smu.edu/-/media/Site/Law/Deason-Center/Publications/Prosecution/DALLAS/DALLAS-Budding-Change-v1.pdf?la=en [https://perma.cc/MR95-QT6T] (exploring the effects of the Dallas County District Attorney's decision to decline "most first-time cases of marijuana possession").

54. *See, e.g.*, FED. R. CRIM. P. 48(a) ("The government may, with leave of court, dismiss an indictment, information, or complaint.").

55. *See* 4 LAFAVE ET AL., *supra* note 27, § 13.1(a), (c).

56. *See* ANATOMY OF DISCRETION, *supra* note 47, at 135 (describing screening as "the decision which prosecutors have the least time to make").

57. In misdemeanor cases, prosecutors often "charge arrestees based solely on allegations in police reports." Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1328 (2012).

58. *See* Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 687.

59. NAT'L DIST. ATT'YS ASS'N, NATIONAL PROSECUTION STANDARDS § 4-1.1 (3d. ed. 2009) [hereinafter NDAA STANDARDS], https://ndaa.org/wp-content/uploads/NDAA-NPS-3rd-Ed.-w-Revised-Commentary.pdf [https://perma.cc/464F-U423]. In the commentary on the pretrial section, the NDAA Standards state:

> It could be argued that screening decisions are the most important made by prosecutors in the exercise of their discretion in the search for justice. The screening decision determines whether or not a matter will be absorbed into the criminal justice system. While the decision may be very easy at times, at others it will require an examination of the prosecutor's beliefs regarding the criminal justice system, the goals of prosecution, and a broad assortment of other factors.

Id. § 4-1.8 cmt., at 52.

60. *See generally* CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION (AM. BAR ASS'N 2017) [hereinafter ABA STANDARDS] (showing lack of standards for early screening process).

called a complaint.[61] These informal charges do not commit prosecutors to seeking a conviction on the charges in the complaint. Rather, the informal charges are placeholders. They set the stage for negotiations with defense counsel and may also influence judicial decisions about pretrial release.[62]

3. Formal Charging

Whether to file formal charges, and what charges to file, is a matter of prosecutorial discretion.[63] The more cursory the screening review, the more important it is that a prosecutor carefully reconsider the informal charges. "[A] prosecutor who fails to exercise case-specific charging discretion is, at least potentially, permitting the defendant to be brought to trial on either the decision of a police officer or, even more alarmingly, on the accusation of an individual from whom the police officer merely takes a report."[64] Prosecutors are supposed to engage in a measured evaluation to decide whether to file formal charges and, if so, what charges to pursue.[65] The ABA's *Criminal Justice Standards for the Prosecution Function* provides a list of factors that prosecutors should consider, including:

> (i) the strength of the case;
>
> (ii) the prosecutor's doubt that the accused is in fact guilty;
>
> (iii) the extent or absence of harm caused by the offense;
>
> (iv) the impact of prosecution or non-prosecution on the public welfare;
>
> (v) the background and characteristics of the offender, including any voluntary restitution or efforts at rehabilitation;
>
> (vi) whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender;
>
> (vii) the views and motives of the victim or complainant;

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61. *See* 6 DAVID A. SCHLUETER, FREDERICK K. GRITTNER, CECELIA M. ESPENOZA & EDWARD S. ADAMS, WEST'S FEDERAL ADMINISTRATIVE PRACTICE § 6846 (3d ed. 1999).

62. *See, e.g.*, Deason Center Study, *supra* note 21, at 5–6.

63. *See, e.g.*, People v. Martinez, 996 P.2d 32, 38 (Cal. 2000) (describing procedure); *In re* Darryl P., 63 A.3d 1142, 1153 (Md. Ct. Spec. App. 2013) (stating that, as compared to charges made by the officer at the scene, "[a]n indictment . . . is a carefully designed and frequently prefabricated product of a State's Attorney's Office's strategic pleading experience. With [multicount] thoroughness, it will cover every conceivable crime that a given set of facts could possibly produce, frequently with significant overlap and deliberate redundancy. It will rarely be identical with the original charges . . .").

64. Melilli, *supra* note 58, at 678.

65. In many jurisdictions, the complaint *is* the formal charging document for a misdemeanor. 1 CHARLES ALAN WRIGHT & ANDREW D. LEIPOLD, FEDERAL PRACTICE AND PROCEDURE § 41 (4th ed. 2008).

> (viii) any improper conduct by law enforcement;
>
> (ix) unwarranted disparate treatment of similarly situated persons;
>
> (x) potential collateral impact on third parties, including witnesses or victims;
>
> (xi) cooperation of the offender in the apprehension or conviction of others;
>
> (xii) the possible influence of any cultural, ethnic, socioeconomic or other improper biases;
>
> (xiii) changes in law or policy;
>
> (xiv) the fair and efficient distribution of limited prosecutorial resources;
>
> (xv) the likelihood of prosecution by another jurisdiction; and
>
> (xvi) whether the public's interests in the matter might be appropriately vindicated by available civil, regulatory, administrative, or private remedies.[66]

Formal charging is a critically important procedural step in the criminal process. The formal charging instrument confers jurisdiction upon the trial court.[67] It also sets the parameters of issues to be litigated at trial, alerting the defendant of the elements that the prosecution will attempt to prove.[68] As Justice William O. Douglas stated in a concurrence for the U.S. Supreme Court: "[W]hen a person has been accused of a specific crime, he can devote his powers of recall to the events surrounding the alleged occurrences. When there is no formal accusation, however, the State may proceed methodically to build its case while the prospective defendant proceeds to lose his."[69]

Generally, charges are formalized by a grand jury "indictment" or by a prosecutorial "information," each of which replaces the complaint or other informal charging instrument.[70] About one-third of states, and the federal

66. ABA STANDARDS, *supra* note 60, § 3-4.4; *see also* NDAA STANDARDS, *supra* note 59, § 4-2.4 (listing factors to consider in charging).

67. 42 CECILY FUHR, GLENDA K. HARNAD, MICHELE HUGHES, JOHN KIMPFLEN & WILLIAM LINDSLEY, C.J.S. INDICTMENTS § 2 Westlaw (database updated Mar. 2023); 5 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 19.2(e) (4th ed. 2015); *see, e.g.*, *Ex parte* Cole, 842 So. 2d 605, 607 (Ala. 2002) ("Absent a valid indictment or complaint, a trial court would lack subject-matter jurisdiction to try, to convict, or to sentence a defendant in a contested criminal case.").

68. 42 FUHR ET AL., *supra* note 67, § 2 (2022).

69. United States v. Marion, 404 U.S. 307, 331 (1971) (Douglas, J., concurring).

70. *See* 6 SCHLUETER ET AL., *supra* note 61, § 6846. This largely applies only to felonies. *See id.* In misdemeanor cases, "there is little to no judicial review and no grand jury review" of the prosecutor's decision to charge. 4 LAFAVE ET AL., *supra* note 27, §13.1(a) & n.33.60 (footnote omitted) (first citing ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018); and then citing Alexandra Natapoff, *Criminal Municipal Court*, 134 HARV. L. REV. 964, 1007 (2021)).

government, require formal felony charges to be filed by a grand jury indictment.[71] In those jurisdictions, the prosecution presents its witnesses to a grand jury, typically in a closed session, so that the grand jury can decide whether there is probable cause to proceed to trial.[72] A decision to proceed is called a "true bill" and results in the issuance of an indictment.[73] In the remaining two-thirds of the states, prosecutors can file formal charges with a prosecutorial information, which is the prosecutor's formal, written commitment to pursue specific charges.[74]

4. Preliminary Hearing

After arrest and before indictment or information, felony defendants in most states (and some misdemeanor defendants) can demand an adversarial hearing to test the probable cause that supports their arrest and detention.[75] This judicial review of the initial probable cause determination is "consciously designed to provide adversary testing of the merit of criminal charges."[76] Thus a preliminary hearing can serve as an interim screening mechanism that may compensate for an anemic grand jury or prosecutorial review.[77]

Misdemeanors account for approximately seventy-five percent of all criminal cases. Jenny Roberts, *Prosecuting Misdemeanors*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 513, 513 (Ronald F. Wright, Kay L. Levine & Russell M. Gold eds., 2021).

71. *See* LAFAVE ET AL., *supra* note 27, §14.2(c). In *Hurtado v. California*, the Supreme Court held that the Fifth Amendment guarantee of prosecution by a grand jury was not a fundamental right applicable to the states. Hurtado v. California, 110 U.S. 516, 534–35 (1884).

72. *See* 4 LAFAVE ET AL., *supra* note 27, § 15.2(b), (i).

73. SARA SUN BEALE ET AL., GRAND JURY LAW & PRACTICE § 8:6 (2d ed. 2022).

74. *See, e.g.*, Taylor v. United States, No. 15-po-00404, 2016 WL 11475025, at *2 (N.D. Ala. Mar. 7, 2016) ("[A]n information is essentially an indictment that has been signed by a government prosecutor . . . ."); 1 CHARLES ALAN WRIGHT & ANDREW D. LEIPOLD, FEDERAL PRACTICE AND PROCEDURE § 121 (4th ed. 2008) ("An indictment is a criminal charge returned to the court by a grand jury. An information is a criminal charge prepared by the prosecutor that has not been subject to grand jury review.").

75. This hearing is most commonly called a preliminary hearing but is "also referred to as the 'preliminary examination,' the 'probable cause' hearing, the 'commitment hearing,' the 'examining trial,' and the 'bindover' hearing." 4 LAFAVE ET AL., *supra* note 27, § 14.1(a). *See generally* Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1338–52 (2018) (collecting and discussing preliminary hearing rules and practices). Five states do not provide a right to preliminary hearing. 4 LAFAVE ET AL., *supra* note 27, §14.2(a-1) (citing "Arkansas, Indiana, Maine, Minnesota, and Vermont" (footnotes omitted)).

76. Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 GEO. L.J. 1265, 1281 (2006).

77. *See* 4 LAFAVE ET AL., *supra* note 27, § 14.2(a-1); Kuckes, *supra* note 76, at 1281; Jaffe v. Stone, 114 P.2d 335, 338 (Cal. 1941) ("The purpose of the preliminary hearing is to weed out groundless or unsupported charges . . . and to relieve the accused of the degradation and the expense of a criminal trial."). "An indictment is a formal charge that has been approved by a grand jury, while an information is a formal charge prepared by the prosecutor that has not been subject to grand jury review." 1 CHARLES ALAN WRIGHT & ANDREW D. LEIPOLD, FEDERAL PRACTICE AND PROCEDURE § 122 (5th ed. 2008).

In theory, this adversary testing of the state's evidence should "insure that persons arrested and charged with the commission of crimes are not incarcerated or required to post bail pending the trial unless there is reasonable cause to believe that a crime has been committed and that the defendant committed it."[78] As we discuss in Section III.B, the reality is quite different.

B. STATUTORY TIMELINES FOR FORMAL CHARGING BY INDICTMENT OR INFORMATION

The Constitution does not promise prompt prosecutorial charging decisions. After arrest and screening, it may be weeks or months before prosecutors conduct a more substantive review, select charges, and formally commit to seek a conviction on specific charges. Some jurisdictions set clear deadlines for filing an indictment or information.[79] In other jurisdictions, deadlines are only found by reading several statutes or rules together. Elsewhere, there are no limits at all.

Jurisdictions that regulate filing deadlines rarely adopt a one-size-fits-all approach. Often their timelines depend upon whether a person is detained and whether they were arrested for a misdemeanor or a felony.[80] Remedies for noncompliance range from a right to release, to the right to a release hearing,[81] to the dubious relief of a hearing to consider the defendant's speedy trial rights.[82] At the more conservative end of the spectrum, a handful of states require the prosecution to commit to formal charges within days of the

78. 1 F. LEE BAILEY & KENNETH J. FISHMAN, CRIMINAL TRIAL TECHNIQUES § 3:16 (1994); *see also* Goyer v. State, 131 N.W.2d 888, 890 (Wis. 1965) ("The object or purpose of the preliminary investigation is [generally] to prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, and to save the defendant from the humiliation and anxiety involved in public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based." (quoting Thies v. State, 189 N.W. 539, 541 (Wis. 1922))); Micaela De La Cerda, *Trading Defendants' Rights for Victims' Rights: A Due Process Right to Confrontation at Preliminary Examination After Proposition 115*, 51 CAL. W. L. REV. 147, 153 (2014) (stating that the purpose of the modern preliminary examination is "to weed out groundless or unsupported charges of grave offenses" (quoting *Jaffe*, 114 P.2d at 338)); 1 GILLESPIE MICHIGAN CRIMINAL LAW & PROCEDURE § 15:2 (2d ed. 2022) ("The preliminary examination is designed to take the place of a presentment by a grand jury . . . in protecting a defendant from being subjected to the indignity of a public trial before probable cause has been established against the defendant by evidence under oath." (footnotes omitted)). Because the Supreme Court has never mandated judicial review of precharge detention, there is also some uncertainty about what the probable cause standard means at the preliminary hearing. *See* 4 LAFAVE ET AL., *supra* note 27, § 14.3(a).

79. *See, e.g.*, LA. CODE CRIM. PROC. ANN. art. 701 (1)(a) (2022) ("When the defendant is continued in custody subsequent to an arrest, an indictment or information shall be filed within thirty days of the arrest if the defendant is being held for a misdemeanor and within sixty days of the arrest if the defendant is being held for a [non-capital] felony.").

80. *Compare* LA. CODE CRIM. PROC. ANN. art. 701(1)(a) (2022), *with* LA. CODE CRIM. PROC. ANN. art. 701(2)(a) (2022).

81. LA. CODE CRIM. PROC. ANN. art. 701(1)(b) (2022).

82. *See infra* notes 198–201 and accompanying text (discussing why the Speedy Trial Clause does not cure this issue).

defendant's arrest.[83] But many permit the prosecution to delay filing formal charges for weeks and months after the defendant's arrest.

Seven states lack any discernable outer limit for detaining a person without an indictment or information. In these states, people can sit in jail indefinitely awaiting a prosecutor's unilateral decision to accept or decline charges. Six states specify only that the prosecution must make its decisions within a "reasonable time" or "without unnecessary delay."

Five jurisdictions authorize more than a year of detention without indictment or information. Eight states allow detention of between six months and a year. In three of those states, the time to file an indictment or information may be extended even longer, despite the defendant's detention.

Given the wide variation in formal charging deadlines, these state timelines are, at best, arbitrary, and, at worst, deliberately abusive of defendants' rights. As discussed in the next Section, there is little evidence that prosecutors need these lengthy time periods to make their formal charging decisions and substantial evidence that these long delays cause substantial harm.

Table I provides an overview of permissible detention without filing information or indictment, for a defendant charged in a noncapital felony, in most of the U.S. states, the District of Columbia, and Puerto Rico.[84]

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83. *See infra* Table 1 (showing jurisdictions under thirty days).

84. The Appendix (forthcoming in IOWA L. REV. ONLINE 2023) provides citations for each jurisdiction listed in the table. In some cases, the relevant statutes measure time-to-file from initial appearance, rather than from arrest, and the relevant initial appearance law provides that it must occur "without unnecessary delay." We do not consider time to file in circumstances where the defendant is subject to competency evaluation, revocation proceeding, or other similar circumstances.

An "∴" indicates that the limitation on time in detention without information or indictment comes from rules requiring a speedy trial.

An "*" indicates that the time in detention without an indictment or information can be extended. Where the timeline is based on a speedy trial rule, the "*" also indicates that time in detention without trial can be extended. An "‡" indicates that time to filing depends upon the terms of court.

An "ϕ" indicates that the limitation on time in detention without indictment or information runs from a procedural event other than arrest. Where that limit runs from an initial appearance that must occur "without unnecessary delay," we assume the initial appearance occurs within a week of arrest. Where that limit runs from a judicial ruling on an adversary probable cause, we assume that the hearing ended on the last day of the permissible period for holding the hearing and that the court ruled on the same day. If the deadline runs from a ruling on an adversary probable cause hearing and there is no other statutory limitation on time in detention, we place the jurisdiction in the "none" or "without unreasonable" delay categories.

An "α" indicates that violation of the limitation on time in detention requires (rather than simply permits) either the defendant's release or dismissal of the case. When the law requires release or dismissal, except for good cause, we use an "*" to indicate that the time that can be extended and an "α" to indicate the mandatory phrasing of the remedy.

An "†" indicates that any release or dismissal is discretionary, rather than mandatory.

Table I

Maximum detention without filing indictment or information against a person detained on noncapital felony arrest	**Jurisdictions**
None or dependent on undefined terms of court	Alabama, Georgia[85], Massachusetts, Mississippi, Oklahoma, South Carolina$^{*\alpha\dagger\ddagger\therefore}$[86], Virginia$^{\phi*\alpha\ddagger}$, West Virginia$^{\alpha\ddagger}$[87]
Without unnecessary delay[88]	Delaware$^{\phi\dagger}$, North Dakota†, Montana$^{\alpha}$, Pennsylvania†[89], Tennessee†, Wyoming†
More than a year	Nebraska$^{*\alpha\ddagger}$, North Carolina$^{*\phi\alpha\ddagger}$, Ohio*†[90], Texas$^{\alpha\ddagger}$, West Virginia$^{\phi*\alpha}$
6 months and 1 day to 1 year	District of Columbia$^{\phi*\alpha}$, Hawaii$^{\therefore*\psi\alpha}$, Idaho$^{*\alpha\therefore}$[91], Maine$^{*\alpha}$, Pennsylvania$^{\phi\alpha\therefore}$, South Dakota$^{\alpha\therefore}$, Rhode Island$^{\phi\alpha}$, Utah$^{\phi\alpha*}$
3 months and 1 day to 6 months	Alaska$^{\therefore\phi*\psi\alpha}$, Idaho$^{*\alpha}$, Illinois$^{*\alpha}$, Maryland$^{*\phi\alpha\therefore}$, Ohio$^{*\alpha\ddagger}$, New Hampshire$^{*\phi\alpha}$, New Jersey$^{*\alpha}$
61 days to 3 months	Iowa$^{*\alpha}$, Kentucky$^{\phi\alpha}$
46 to 60 days	Arkansas$^{*\psi\alpha}$, Louisiana$^{*\alpha}$, Missouri*, New York$^{*\alpha}$, Ohio$^{*\alpha\therefore}$, Wisconsin$^{\phi*\alpha}$

85. Georgia requires that the state indict a detained defendant within ninety days of arrest. GA. CODE ANN. § 17-7-50 (West 2019). That time can be extended for an additional ninety days. *Id.* The defendant's remedy is not release or dismissal, but the "setting" of bail, regardless of the defendant's ability to post it. Hernandez v. State, 669 S.E.2d 434, 435 (Ga. App. 2008) (after the state's failure to timely indict, GA. CODE ANN. § 17-7-50 requires the court to set bail, and the court may "set an amount reasonably calculated to ensure [the defendant's] presence at trial," notwithstanding defendant's inability to post that bond). *Id.*

86. South Carolina requires bail to be set when there is a delay of one term of court and requires the defendant's release when there is a delay of two terms of court. S.C. CODE ANN. § 17-23-90 (2006).

87. West Virginia appears twice as a court must release the defendant if they are not indicted before the end of the second term of court and must dismiss the charges if there is "unnecessary delay of more than one year" in indicting a defendant held to answer in the circuit court. *See* W. VA. CODE ANN. § 62-2-12 (West 2022); W. VA. R. CRIM. P. 48 (2022).

88. Jurisdictions in this category have no express time limit for filing a felony information or indictment but offer remedies for "unnecessary" or "unreasonable" delay in filing those formal charges against a detained person.

89. Pennsylvania appears twice as there is a permissive dismissal for failing to file an information within a reasonable time and a mandatory dismissal under the speedy trial statute within 180 days of filing the complaint. *See* PA. R. CRIM. P. 587 (2022); PA. R. CRIM. P. 600 (2023).

90. Ohio appears twice as there is a permissive dismissal for delaying an indictment beyond the term of court in which they were held to answer and upon a timely motion by the defendant a mandatory dismissal under the speedy trial statute with ninety days of arrest. *See* OHIO REV. CODE ANN. § 2939.24 (West 2023); OHIO REV. CODE ANN. § 2945.73 (West 2023).

91. Idaho appears twice on this chart as it has two speedy filing provisions. One provision requires the court to dismiss a case after six months without filing. IDAHO CODE ANN. § 19-3501 (West 2020). The other allows the court to dismiss after thirty-five days without filing. IDAHO R. CRIM. 48(a)(1) (2023). *See* Appendix (forthcoming in IOWA L. REV. ONLINE 2023) for an explanation of this time-to-file calculation.

31 to 45 days	Florida$^{\psi\alpha}$, Iowa$^{\dagger 92}$, Nevada$^{*\phi\dagger}$, Puerto Rico$^{\dagger *}$, Oregon$^{*\phi\alpha}$, Washington$^{\phi\alpha}$
30 days or less	Arizona$^{\phi *\psi\alpha}$, California$^{\phi *\alpha}$, Colorado†, Connecticut, Idaho$^{\phi *\dagger}$, Indiana$^{\phi *\dagger}$, Minnesota, New Mexico$^{*\phi\alpha}$, Vermont$^{\alpha}$

At least six jurisdictions lack any discernable outer limit for detaining a person without an indictment or information. A similar number of jurisdictions specify only that the prosecution must make its decisions within a "reasonable time" or "without unnecessary delay."[93] In these states, people can sit in jail indefinitely awaiting a prosecutor's unilateral decision to accept or decline charges.

Several states tie their filing deadlines to "terms of court." For example, in Nebraska, a defendant charged with an indictable offense may be incarcerated without formal charges until the end of "the term of court at which he or she is held to answer."[94] Since terms of court typically last for a calendar year, a Nebraska defendant arrested and detained in January can remain in custody for a year without any formal state commitment to prosecute the case.[95] In these states, formal charges may be filed more than a year after arrest, no matter how long the defendant has been incarcerated.

Among states that have some temporal limitations, more than a dozen jurisdictions authorize more than six months of detention without indictment or information. In New Hampshire, for example, prosecutors have ninety days after filing a felony complaint to obtain an indictment.[96] For "good cause" that deadline can be extended indefinitely.[97] In Georgia, adults can be held on noncapital charges for ninety days before they must be released.[98] However, an incarcerated child detained under the jurisdiction of a Georgia adult court

92. Effective July 1, 2023, the relevant Iowa law will change and the time to file formal charges will run from initial appearance, not arrest. *See* IOWA R. CRIM. P. 2.33 (amended October 14, 2022, effective July 1, 2023).

93. *See supra* note 87 and accompanying text and Appendix (forthcoming in IOWA L. REV. ONLINE 2023). These state statutes' limitless opportunities for precharge detention may be unique among developed nations. *See* Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 413–14 (1992) ("[M]ost Continental structures endow an accused with important protection absent in our system of justice."). For example, "French police have explicit but time-limited authority to detain suspects for each of [several] purposes through the investigatory detention and identity check procedures." Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CALIF. L. REV. 539, 603 (1990).

94. NEB. REV. STAT. ANN. § 29-1201 (West 2022).

95. *See Rule 3-1. Term of Court*, STATE OF NEB. JUD. BRANCH, https://supremecourt.nebraska.gov/external-court-rules/district-court-local-rules/district-3/rule-3-1-term-court [https://perma.cc/JYL5-YSQ5] ("There shall be one term of court, commencing on January 1 and ending on December 31 of each calendar year.").

96. N.H. R. CRIM. P. 8(d)(2) (2020).

97. *See id.*

98. GA. CODE ANN. § 17-7-50 (2020).

can be held for 180 days without an indictment.[99] Upon motion by the prosecution, a court can extend the child's incarceration for up to ninety additional days.[100] In Rhode Island, an incarcerated defendant can wait six months to see whether formal charges will be filed, while in the District of Columbia, the prosecution has nine months, plus extensions for good cause, to decide whether to accept or decline charges.[101]

Given the wide variation in formal charging deadlines, these state timelines are, at best, arbitrary and, at worst, deliberately abusive of defendants' rights. As discussed in the next Part, there is little evidence that prosecutors need these lengthy time periods to make their formal charging decisions and much evidence that these long delays cause substantial harm.

II. CHARGING REALITIES

New Orleans District Attorney Jason Williams ran for office in 2020 as a progressive prosecutor.[102] Williams strongly denounced the incumbent district attorney's charging delays, which left New Orleans citizens sitting in jail in limbo.[103] He pledged to reduce the average screening time to five days from arrest.[104] In his first year in office in 2021, not only was his office unable to decide charges in five days, but in many cases, it was unable to make those decisions within sixty days for felonies or thirty days for misdemeanors, as required by law.[105] As a result, judges released over 140 people from jail.[106] Even when there is the will, it seems there is not a clear way: Charging delay appears to be an intractable problem. In this Part, we ask why.

There are very few studies of prosecutorial charging practices and even less data tracking how long it takes prosecutors to make their formal charging decisions.[107] While there is much to say about the *quality* of prosecutors' charging

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99. *Id.* § 17-7-50.1.

100. *Id.* If 270 days expire without indictment, the only remedy the state of Georgia offers the jailed and uncharged child is transfer to juvenile court. *Id.* § 17-7-50.1(b).

101. *See* R.I. GEN. LAWS ANN. § 12-13-6 (West 2022); D.C. CODE § 23-102 (West 2023).

102. *See* John Simerman, Matt Sledge & Jeff Adelson, *Prosecutors' Slow Decisions Fuel High Numbers of Inmate Releases from Orleans Parish Jail*, NOLA (Feb. 4, 2022, 6:41 PM), https://www.nola.com/news/courts/article_ea9d221e-8613-11ec-8ffe-a30a058df63e.html [https://perma.cc/SG3Y-2NRZ].

103. *Id.*

104. *Id.*

105. *Id.*

106. Travers Mackel, *Release of Nearly 150 Ordered from N.O. Jail Since Last January After Charges Not Filed in Time*, WDSU NEWS (Feb. 3, 2022, 8:12 PM), https://www.wdsu.com/article/new-orleans-district-attorney-jail-releases/38974854# [https://perma.cc/TY7S-JZNL].

107. The limited data available suggest that, regardless of the suspect's custodial status, there are significant lags between arrest and formal charges. A 2009 report on federal cases found that "[t]he median time from the receipt of a matter by a U.S. attorney's office to a decision to prosecute, decline, or dispose by magistrate was [eighteen] days." MARK MOTIVANS, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., FEDERAL JUSTICE STATISTICS, 2009, at 7 (2011), http://www.prisonpolicy.org/scans/bjs/fjs09.pdf [https://perma.cc/ML64-X4FR]. For declinations, the time to decision

decisions, our focus is on their timing. The best available evidence draws a picture of a chaotic process that is plagued both by long delay and by hasty, last-minute decisions. Rather than a "hurry up and wait" bureaucracy, prosecutorial charging looks like a start-and-stop-and-start-again train, where prosecutors first hurry and then wait, only to hurry up again when deadlines arise. Prosecutors may make almost instantaneous screening decisions, then do nothing on a case for months, only to spend ten minutes making a formal charging decision on the eve of a statutory deadline—a decision based on precisely the same information that was available to them when they first received the case.

A. *Cursory Screening: Hurry Up*

Screening rarely serves as a substantive review of policework, much less a meaningful assessment of the merits of prosecution. As Kenneth Melilli found, "the initial charging decision will frequently be made in a matter of minutes, given the necessity of processing many arrested individuals through the initial judicial appearance in a very short time."[108] Where prosecutors have standing orders to decline certain types of cases, screening decisions can be made quickly and efficiently.[109] However, making individualized screening assessments may be far more challenging.

At the screening stage, honorable prosecutors are eager to dismiss charges against innocent people and to rid themselves of "weak cases" rather than adding those cases to their burgeoning caseloads.[110] However, screening decisions are "made solely on the basis of information from a police officer and, if applicable (and then typically only indirectly), from the victim of the crime."[111] This limited screening information "is not always accurate and complete," and "the cursory screening process rarely allows for immediate investigation."[112] At this stage, prosecutors may lack sufficient time and resources to conduct the investigations necessary for prompt and accurate screening decisions.[113] Careful prosecutors might therefore err on the side of caution—"accepting" a case at the screening stage and delaying any charging decision until they have conducted an additional investigation, spoken to defense counsel, met with witnesses, or reviewed forensic evidence.

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took a median of 453 days; for accepted prosecutions, the time to decision took a median of twenty-four days. *Id.* There are no data correlating declinations or acceptances with detention or release; however, we do know that seventy-seven percent of all those federal arrestees were detained until their cases were resolved, whether by declination, dismissal, or conviction. *Id.* at 10.

108. Melilli, *supra* note 58, at 687.

109. *See, e.g.*, Pamela R. Metzger, Victoria M. Smiegocki & Shem Vinton, Deason Crim. Just. Reform Ctr., (forthcoming 2023) (on file with authors).

110. *See* Adam M. Gershowitz & Laura R. Killinger, Essay, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 285–86 (2011).

111. Melilli, *supra* note 58, at 687.

112. *Id.*

113. For example, in misdemeanor cases, prosecutors often "charge arrestees based solely on allegations in police reports." Natapoff, *supra* note 57, at 1328.

But there may be less principled reasons for an aversion to early screening and declination. In a recent Deason Criminal Justice Reform Center study, researchers investigated screening and charging practices in three mid-sized jurisdictions, pseudonymously referred to as Hazelton, Lakeview, and Springfield.[114] Qualitative and quantitative analyses revealed concerning screening patterns in the Springfield office's screening practice.[115]

In Springfield, prosecutors screen new cases shortly before defendants had their initial appearance in court, delegating that work to the office's most junior attorneys.[116] During screening, these junior attorneys have only one task—to evaluate the arresting officer's probable cause statement to see whether it alleges all of the elements of a crime.[117] If the officer's allegations are sufficient, the screening prosecutor must accept the case, allowing it to move forward.[118] But if the statement lacks probable cause, office policy instructs the prosecutors to decline prosecution.[119]

Yet, even when these junior Springfield prosecutors doubt that police have met the probable cause standard, they hesitate to decline prosecution.[120] During interviews, prosecutors estimated that they declined no more than five percent of all new cases during screening.[121] Yet after screening, during the more deliberative charging process, prosecutors declined nearly eighteen percent of the remaining cases.[122] Why might these Springfield prosecutors postpone declinations during the screening stage, only to have the office decline those same cases weeks or months later?

The Deason researchers concluded that Springfield's administrative workflows create strong disincentives for declining a case at screening. As one Springfield prosecutor complained, "[y]ou have to call so many people," from contacting "the officer to try to correct the pleading," to working with the jailers for release.[123] Perhaps more importantly, a screening declination requires that a junior attorney seek approval from high-ranking office staff.[124] Little wonder then that one inexperienced Springfield prosecutor explained, "if I'm kind of on the fence, I let it slide," rather than declining prosecution.[125] As we discuss in Sections II.C and II.D, this decision to "let it slide" can have disastrous consequences for the accused.

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114. DEASON PREVIEW REPORT, *supra* note 21, at 2–3.
115. *See id.* at 10.
116. *Id.* at 5.
117. Deason Author File, *supra* note 21.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*

B. Long Delays Selecting and Filing Formal Charges: Wait and Hurry Up

In all jurisdictions in the Deason Study, prosecutors reported that most of their charging decisions are easy to make. Veteran prosecutors estimated that they spent only ten to fifteen minutes making formal charging decisions.[126] Yet, most prosecutors delayed making those straightforward formal charging decisions, waiting for weeks, or even months, after an arrest to file the indictment or information, often ignoring a case until a deadline loomed.[127]

Why do prosecutors delay making these "easy" decisions? Common causes of delay fall into four categories: (1) prosecutors' organizational structure and workflows; (2) prosecutors' dependence on evidence from external actors, such as police and witnesses; (3) prosecutors' active review or negotiation of charging decisions; and (4) prosecutors' strategic use of charging delay to influence case outcomes. We discuss each in turn.

In jurisdictions without any screening mechanisms, it may be weeks or months after an arrest before any prosecutor is aware of the arrestee's existence, their incarceration, or their alleged crime.[128] In all jurisdictions, burdensome prosecutorial caseloads are among the most prevalent factors.[129] Prosecutorial

126. *Id.* Contrast that with the recollection of one veteran prosecutor that early in his career it often took him thirty to forty minutes to charge a single case. *Id.* Either way, that is an extremely short time frame. *But see* Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 ARIZ. L. REV. 1065, 1115–16 (2014) [hereinafter *Cure for YPS*] (noting that the American Prosecutors Research Institute found that prosecutors with five or more "years of experience spent [thirty-five percent] more time than less experienced prosecutors on the [initial charging decision]").

127. Deason Author File, *supra* note 21. In many instances, the deadline that spurred them to action was not a statutory deadline for formal charging, but a court date that had been automatically calendared for them to present the defendant with the formal charges. *Id.* In Springfield, for example, where prosecutors have months to charge defendants, the average time to charge in all cases was 134 days. *Id.*

128. *See, e.g.*, Rothgery v. Gillespie Cnty., 554 U.S. 191, 198 (2008) (noting that "no prosecutor was aware of Rothgery's [initial appearance] or involved in it"). "For many misdemeanor cases, . . . the prosecutor is likely to see the case file for the first time the day before or the morning of the scheduled trial." Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 22 (2000). Even for felonies, "[t]ypically, the prosecutor will make the charging decision by consulting" the police report; if it "contains elements of a prima facie case[,] . . . this report . . . will be sufficient to meet the pretrial screening requirements imposed to justify the detention and charging of the defendant." Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1361–62 (1997).

129. *See* Gershowitz & Killinger, *supra* note 110, at 285 (reporting excessively high caseloads in various jurisdictions and finding that such caseloads "[p]revent [p]rosecutors from [p]romptly [d]ismissing [c]ases with [w]eak [e]vidence" (emphasis omitted)). In 1973, the National Advisory Commission on Criminal Justice Standards and Goals recommended that defense attorneys handle a maximum of 150 felonies or four hundred misdemeanors per year. AM. PROSECUTORS RSCH. INST., HOW MANY CASES SHOULD A PROSECUTOR HANDLE?: RESULTS OF THE NATIONAL WORKLOAD ASSESSMENT PROJECT 1 (2002), http://www.jmijustice.org/wp-content/uploads/2019/12/NDAA-APRI-How-Many-Cases.pdf [https://perma.cc/HMG9-HFJ7]. While prosecutors have adopted this caseload standard informally, there has never been an established caseload standard for prosecutors. *See id.* Instead, "[t]he number of cases entering the system has continued to rise,

workflows are another frequent cause of unnecessary delay.[130] If screening is handled by one group of prosecutors and charging is handled by another, newly screened cases may languish for weeks without any prosecutor acting. Indeed, no prosecutor may even be *assigned* to review and prosecute those cases.[131]

When prosecutors in the Deason Study offered substantive reasons for delays in charging, many cited their need for improved cooperation with police, witnesses, victims, and defense counsel.[132] For example, prosecutors complained that poor law enforcement work frequently prevented them from making prompt charging decisions.[133] New Orleans District Attorney Williams likewise blamed charging delays on the lack of cooperation of the police, witnesses, and victims.[134]

Prosecutors also reported long wait times for medical records and forensic evidence, such as laboratory results.[135] In drug cases, these delays arise because the high volume of arrests for drug crimes overwhelm the limited number of state-funded laboratories that can test those drugs.[136] Difficulties in maintaining contact with victims and witnesses also delayed charging decisions.[137]

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while the amount of state and local resources available to handle these cases has failed to keep pace." *Id.* As opposed to a standard of 150 felonies, for example, Gershowitz and Killinger found that prosecutors in Harris County, Texas, handled an average of more than five hundred felonies at any time, and in Cook County, Illinois, an average of three hundred or more felonies at any time. Gershowitz & Killinger, *supra* note 110, at 271–72; *see also* BARBARA JORDAN & MICKEY LELAND, CTR. FOR JUST. RSCH., TEX. S. UNIV., RESEARCH BRIEF: AN EXAMINATION OF PROSECUTORIAL STAFF, BUDGETS, CASELOADS AND THE NEED FOR CHANGE 4 (2019), https://assets-global.website-files.com/5ef1f236f51b59892a5aec87/5f5e0ad483b2a17b9fdd26a4_ProsecutorWorkload%20Report.pdf [https://perma.cc/SL2B-HSMF] (gathering data related to the prosecutors' high caseloads).

130. *See* DONALD E. PRYOR, CTR. FOR GOV'T RSCH., STRENGTHENING CRIMINAL JUSTICE SYSTEM PRACTICES IN CHEMUNG COUNTY, NY 32–37 (2006) [hereinafter CGR REPORT], https://reports.cgr.org/details/1481 [https://perma.cc/CR9Q-286Z] (finding that 125 defendants a year were released from Chemung County jail, because prosecutors missed the forty-five-day statutory deadline for formal charging and blaming that delay on inadequate initial screening, inefficient allocation of prosecutorial resources, and poor communication within the prosecutor's office as well as with police and defense attorneys).

131. *See, e.g.*, Deason Author File, *supra* note 21.

132. *Id.*

133. *Id.*

134. Simerman et al., *supra* note 102. Specifically, DA Williams blamed police for not getting their reports to his office in time. *Id.*

135. One office in the study had a longer timeline to charge in drug cases, due to the wait for lab results. Deason Author File, *supra* note 21. For another example, the New Hampshire Supreme Court held that the State's violation of a formal charging deadline was not unreasonable when the delay was due to the state laboratory's failure to timely return a lab report. State v. Hughes, 605 A.2d 1062, 1065 (N.H. 1992) ("We further stated that the delay need not be necessary to obtain the indictment in order to be reasonable." (citing State v. Dodier, 600 A.2d 913, 918 (N.H. 1991))).

136. For an argument that this imbalance reflects a disconnect between legislative funding priorities and local electoral politics, see generally Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475 (2006).

137. Deason Author File, *supra* note 21. Although many declinations were the result of "victim issues," the offices in the Deason Study tended to charge victim crimes faster than nonvictim crimes, and violent crimes faster than nonviolent crimes. *Id.* That has the laudatory effect

In some cases, what appears to be delay is really just the time it takes to make the right charging decision. Sometimes prosecutors are seeking more information about a defendant's personal characteristics. Others are actively negotiating with the defense.[138] These findings underscore the strategic power of charging times.

Then there are strategic delays. Some delays in filing formal charges are *sub rosa* opportunities for forum shopping. In many states, filing a formal charge divests a lower court of jurisdiction and vests that jurisdiction, instead, with a higher court.[139] Elsewhere, prosecutors with weak cases may delay charging for as long as possible, hoping to encourage a guilty plea or just to extract a little jail time before declining prosecution.[140] Prosecutors in the Deason Study expressed the strong belief that "no one pleads from the street," signifying a strategy of holding arrestees in jail to encourage pleas.[141]

Of course, the reasons for delay may be intertwined. For example, in the three Deason jurisdictions, the longest delays occurred in cases where the prosecutors filed formal charges that reduced the arrest or informal charges.[142] This might be because prosecutors were hard at work looking for more evidence. Or it could be that, in weak cases, prosecutors deliberately delayed filing formal charges, hoping that the lengthy precharge period would pressure a defendant into pleading guilty before a lack of evidence requires the state to decline prosecution.

In some instances, charging delay may simply be a form of extrajudicial punishment. When police know that an arrest without formal charges can "buy" the state a finite period of precharge detention, they may ask prosecutors

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of moving faster on more serious cases but means that the nonviolent, nonvictim defendants are waiting in jail even longer.

138. *But see* State v. Wellman, 513 A.2d 944, 950 (N.H. 1986) (holding State's sixty days delay in seeking indictment was unreasonable where the delay arose from plea negotiations).

139. Delay in filing formal charges may operate as kind of *sub rosa* forum shopping. In many states, filing a formal charge divests a lower court of jurisdiction and vests that jurisdiction, instead, with a higher court. *See, e.g.*, People v. Gervais, 756 N.Y.S.2d 390, 393 (N.Y. Crim. Ct. 2003) ("A criminal court is divested of jurisdiction over a felony complaint when an indictment is filed with a superior court."); People v. Brancoccio, 634 N.E.2d 954, 955–56 (N.Y. 1994) (holding that where an indictment had been voted, but not filed, criminal court was divested of jurisdiction).

140. On the last-minute waiting time, see CGR REPORT, *supra* note 130, at viii (finding 125 defendants a year are released from jail after forty-five days for failure to institute charges in a timely manner); and Bethencourt, *supra* note 10 (reporting that the district attorney responded to complaints about six month detention without charges by stating: "Our goal and intent is to never have anyone pass their [sixty day] date that the law imposes on them to be charged or released . . . . I don't want anyone to stay in jail *beyond that time*" (emphasis added)).

141. Deason Author File, *supra* note 21.

142. For example, in Hazelton, prosecutors took almost 118 days to file formal charges in cases where they downgraded the charges from law enforcement. In contrast, the shortest timeline to charging—seventy-three days—occurred in cases where prosecutors increased the severity of charges. For a variety of reasons, charging also took extended time in child and sexual assault cases. *Id.*

to deliberately delay a declination decision.[143] In contrast, the prosecutor who knows that they have a weak trial case might attempt to obtain a guilty plea, perhaps to some lesser offense, rather than simply declining prosecution.[144]

C. MISSED DEADLINES AND HIGH DECLINATION RATES

Amid all these pressures, prosecutors routinely miss their statutory filing deadlines.[145] We opened this Article with the stories of people waiting in jail without formal charges far past statutory deadlines.[146] Defendants in Louisiana routinely languish in jail as prosecutors wantonly ignore the charging deadlines. In one Louisiana parish, charging deadlines of sixty days routinely take an average of 186 days.[147] Similar problems abound in other Louisiana parishes.[148] And, of course, in 2021, under progressive District Attorney Jason Williams, more than 140 New Orleans defendants were released from jail when prosecutors failed to timely file formal charges against them.[149] A study of Wichita County, Texas showed that, even with a provision for release, if charges were not filed by the statutory deadline, thousands of defendants were detained past the filing deadline.[150]

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143. When Professor Metzger practiced in Louisiana, it was not unusual for a prosecutor to tell her, "I'm not going to indict, but my cop wants your guy to 'do his [sixty] days.'"

144. *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 85 (2002) ("[A] prosecutor might believe that a defendant will be uninformed about the weaknesses of the case and will [therefore agree to] plead guilty to more than the true value of the case."); United States v. Ruiz, 536 U.S. 622, 629–33 (2002) (holding that due process does not require a prosecutor to disclose impeachment evidence prior to a guilty plea, which appears to endorse this type of prosecutorial bluffing as a way to grease the wheels of the plea bargaining system). Indeed, given the high rate of declinations and dismissals, many defendants may be pleading guilty to cases that would eventually be refused by a screening prosecutor. When the choice is jail without conviction or freedom with a record, they choose to plead guilty. *See* Richard S. Frase, *Defining the Limits of Crime Control and Due Process*, 73 CALIF. L. REV. 212, 238–39 (1985) (Book Review) (describing jail's coercive effect on guilty pleas).

145. *See supra* notes 1–9 and accompanying text.

146. *See id.*

147. AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S* BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 26 (2004), https://www.in.gov/publicdefender/files/ABAGideonsBrokenPromise.pdf [https://perma.cc/4D46-KBV3]; Bethencourt, *supra* note 10 (describing how East Baton Rouge Parish defendants spent months in jail without prosecutorial charging).

148. *See, e.g.*, Daniel Bethencourt, *Defendants Held Excessive Time Before Charging*, ADVOCATE (Jan. 26, 2015, 3:00 AM), https://www.theadvocate.com/baton_rouge/news/crime_police/defendants-held-excessive-time-before-charging/article_209f9030-41bd-570b-b32e-e7fd7ab87252.html [https://perma.cc/WLE6-EQ2W].

149. Mackel, *supra* note 106; *see also* METRO. CRIME COMM'N, *supra* note 9, at 4 (presenting statistics on whether arrested felony suspects were prosecuted within their state right to a speedy trial deadline).

150. DOTTIE CARMICHAEL & MINER P. MARCHBANKS III, PUB. POL'Y RSCH. INST., TEX. A&M UNIV., WICHITA COUNTY PUBLIC DEFENDER OFFICE: AN EVALUATION OF CASE PROCESSING, CLIENT OUTCOMES, AND COSTS 57 (2012), https://ppri.tamu.edu/files/WichitaPDOStudy.pdf [https://perma.cc/5UJ9-2G5T]. New Hampshire's Supreme Court created—and then abandoned—a judicial rule that required indictment within sixty days of arrest. *See* State v. Hughes, 605 A.2d

One shocking aspect of charging delay is the substantial number of arrestees who are detained in jail only to have prosecutors decline to file formal charges. While no national source tracks the incarceration of uncharged detainees,[151] experts agree that prosecutors decline to prosecute a "substantial proportion" of arrests.[152] In the federal system, prosecutors decline between fifteen and twenty percent of matters referred to them by law enforcement.[153]

1062, 1066 (1992) (revoking judicially created rule requiring indictment within sixty days of defendant's detention because "[t]he need for prompt indictment is generally accepted and honored"). As a result, in 2014, some New Hampshire felony cases languished "for three months or more[,] . . . idling until a prosecutor can present it to a grand jury." Kristen Senz, *Court News: Pilot Project Seeks to Eliminate Felony Case Delay*, N.H. BAR ASS'N (April 16, 2014) (on file with authors). As one judge explained: "Nobody's working on it, nobody's looking at it, nobody's analyzing it." *Id.* The "Felonies First" project that established this statutory rule temporarily adopted a sixty-day timeline but ultimately extended it to ninety days due to the wishes of prosecutors and over the complaints of public defenders. *See* STATE OF N.H., SUPREME COURT OF NEW HAMPSHIRE ORDER 1–3 (2017), https://www.courts.state.nh.us/supreme/orders/6-15-17-order.pdf [https://perma.cc/95FN-M8U7] (amending the state rules of criminal procedure); N.H. JUD. COUNCIL, REPORT ON FELONIES FIRST 53 (2017), https://www.judicialcouncil.nh.gov/sites/g/files/ehbemt511/files/inline-documents/sonh/felonies-first-02-19.pdf [https://perma.cc/A8LR-Z3KU] (quoting a managing public defender calling the extension a "bait and switch" with "no similar accommodations [] made for the defense"); Alyssa Dandrea, *Success of 'Felonies First' in Merrimack County up for Debate, as More Felony Cases Inundate System*, CONCORD MONITOR (Aug. 26, 2017, 9:34 PM), https://www.concordmonitor.com/Felonies-First-program-in-Merrimack-County-11866307 [https://perma.cc/8RZ2-PTSA] ("[A]ttorneys [said] that a [sixty]-day deadline was nearly impossible to meet . . . .").

151. Available data tracks either prosecutorial declinations, without regard to the suspects' custodial status, or the larger category of pretrial "dismissals"—a category that includes both prosecutorial declinations and judicial dismissals. The Bureau of Justice Statistics "does not regularly report on declinations of matters received in prosecutors' offices. Instead, the reports begin when the prosecutor files the case." Wright & Miller, *supra* note 144, at 55 n.90; *see also* BRIAN D. JOHNSON, THE MISSING LINK: EXAMINING PROSECUTORIAL DECISION-MAKING ACROSS FEDERAL DISTRICT COURTS 48 (2014), https://www.ncjrs.gov/pdffiles1/nij/grants/245351.pdf [https://perma.cc/JAZ5-LLBQ] (stating that "data limitations largely preclude investigation" of declination statistics); *id.* at 86 ("Relatively few studies have been published in the past [twenty-five] years examining prosecutorial discretion to decline . . . charges in criminal cases" and many of those that have been published "are based on small samples of specific crime types from a single city or county jurisdiction.").

152. JOHNSON, *supra* note 151, at viii (citing multiple sources).

153. In 2013, U.S. Attorneys' Offices reported that they had declined federal prosecution in nearly fifteen percent of all matters referred to them by law enforcement. U.S. DEP'T OF JUST. EXEC. OFF. FOR U.S. ATT'YS, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2013, at 7, http://www.justice.gov/sites/default/files/usao/legacy/2014/09/22/13statrpt.pdf [https://perma.cc/54UV-EFZL] (finding federal prosecutors declined prosecution in 25,629 of 172,024 criminal matters submitted by law enforcement). Experts contend that this number underestimates declinations and that declination rates are closer to twenty percent. JOHNSON, *supra* note 151, at 90 ("Examination of declination rates . . . suggested that closer to [one] in [five] cases resulted in a declination."). For some types of offenses, federal declination rates can be as high as sixty-two percent. Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 79–80 nn.39–40 (2005). On tribal reservations, federal prosecutors decline thirty-four percent of all submissions for prosecution. Press Release, Department of Justice Releases Second Report to Congress on Indian Country Investigations and Prosecutions, Dep't of Just. (Aug. 26, 2014), http://www.justice.gov/opa/pr/department-justice-releases-second-rep

The available data from state systems suggest similar rates of declination.[154] Statistics from the Department of Justice indicate that prosecutors in some urban jurisdictions decline prosecution of between twenty-five and thirty-eight percent of all arrests.[155] Other studies suggest that state prosecutors decline to prosecute between twenty-five and fifty percent of the cases referred to them.[156]

Given the large percentage of arrests that are declined for prosecution, the need for early screening would seem paramount. People should not sit in

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ort-congress-indian-country-investigations-and [https://perma.cc/3HJ9-ZKJD]. These declination rates have remained relatively constant over the last few years: In 2012, federal prosecutors declined thirty-one percent of all submissions for prosecution; and, in 2011, they declined thirty-seven percent of submissions for prosecution. *Id.* And, in the Superior Court for the District of Columbia (which is also a federal jurisdiction), prosecutors declined to pursue around twenty-eight percent of all arrests presented to them. *See* U.S. DEP'T OF JUST. EXEC. OFF. FOR U.S. ATT'YS, *supra* at 14.

154. THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., STATE COURT PROCESSING STATISTICS, 1990-2004: PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 7 (2007), https://www.bjs.gov/content/pub/pdf/prfdsc.pdf [https://perma.cc/FD5W-ZQ3K]. The Bureau of Justice Statistics estimates that state and federal prosecutors eventually decline to prosecute nearly twenty percent of all felony detainees and, on average, those detainees spent forty-five days in jail before screening and release. *Id.* at 7. Data gathered by Measures for Justice show that between 2009 and 2013, prosecutors in Florida declined charges in 21.97 percent of cases. *Florida*, MEASURES FOR JUST., https://measuresforjustice.org/portal/FL?c=1 [https://perma.cc/T9S2-TSP3]. Between 2013 and 2017, prosecutors in Missouri declined charges in 19.95 percent of cases. *Missouri*, MEASURES FOR JUST., https://measuresforjustice.org/portal/MO?c=3 [https://perma.cc/9WYX-44QQ]. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 45–46 (1997) ("One-fifth of felony arrestees in state cases are never charged . . . ."); *see also* Elizabeth E. Joh, Essay, *The Myth of Arrestee DNA Expungement*, 164 U. PA. L. REV. ONLINE 51, 55–56 & nn.33–36 (2015) (citing similar dismissal rates in California and New York). Misdemeanor refusal rates may be higher. *See id.* at 56 n.37 (citing a misdemeanor dismissal rate of eighty percent in one county in Illinois and a fifty percent dismissal rate in New York City).

155. 4 LAFAVE ET AL., *supra* note 27, § 14.1(a) n.9 (citing BUREAU OF JUST. STAT., DEP'T OF JUST., NCJ-130914, THE PROSECUTION OF FELONY ARRESTS, 1988 (1992)).

156. *See* Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 795 & n.59 (2012). For example, in 2014, California prosecutors dismissed nearly fifteen percent of all felony arrest cases, because the evidence against the defendant was inadequate. Joh, *supra* note 154, at 56 & n.34. In Mecklenburg County, North Carolina, prosecutors decline approximately thirty percent of all cases submitted. WAYNE MCKENZIE, DON STEMEN, DEREK COURSEN & ELIZABETH FARID, VERA, PROSECUTION AND RACIAL JUSTICE: USING DATA TO ADVANCE FAIRNESS IN CRIMINAL PROSECUTION 7 (2009), https://www.vera.org/downloads/publications/Using-data-to-advance-fairness-in-criminal-prosecution.pdf [https://perma.cc/23EQ-3GFN]. In Milwaukee County in 2021, the district attorney's office refused charges in sixty percent of all felonies and sixty-five percent of all misdemeanors brought to them by law enforcement. Jim Piwowarczyk & Jessica McBride, *NOT CHARGED: The Milwaukee County DA's "No Process Files,"* WIS. RIGHT NOW (April 3, 2021), https://www.wisconsinrightnow.com/milwaukee-county-da-john-chisholm [https://perma.cc/AZW7-3CBS]. In Waco, Texas, the County District Attorney's Office declines to prosecute nearly half of all law enforcement generated felony cases. Cindy V. Culp, *Data Offer Clues on McLennan County District Attorney's Performance*, WACO TRIB. HERALD, Dec. 13, 2009, at 1. In Shawnee County, Kansas, in 2009, prosecutors declined "intake" in 1262 of 3641 cases, or thirty-five percent, brought to them by law enforcement. CHADWICK J. TAYLOR, OFF. OF THE DIST. ATT'Y, THIRD JUD. DIST. OF KAN., 2009 ANNUAL REPORT 15 (2010), https://www.snco.us/da/document/annual_report.pdf [https://perma.cc/X24R-JL7M].

jail doing unwarranted time on unwarranted arrests. We return to this phenomenon in Part IV when we offer ways to prevent such arrests or more expeditiously screen the cases likely headed for declination.

D. THE CONSEQUENCES OF CHARGING DELAY

Every day, thousands of uncharged criminal defendants languish behind bars, waiting for prosecutors to file charges against them or decline to charge and return them to their lives. Lengthy formal charging timelines can mean that, for weeks or months after an arrest, no prosecutor is even aware of the arrestee's existence, much less their detention.[157]

While an arrested person waits in jail, their support network in the outside world crumbles. Defendants lose their jobs and cannot regain footing in the job market upon release.[158] As rent checks, car payments, and bills for utilities and medical expenses go unpaid, defendants and their families lose their homes, cars, and essential services.[159] Relationships with significant others are strained, and the children of jailed parents are particularly traumatized by their disappearance.[160]

Every day in jail presents horrible risks to a person's life, health, and sanity. Jails break down a person's mental and physical wellbeing.[161] While the onset of the COVID-19 pandemic in 2020 heightened public awareness of the

157. *See, e.g.*, Rothgery v. Gillespie Cnty., 554 U.S. 191, 197–98 (2008) (stating that prosecution was uninvolved with and unaware of the defendant's initial appearance). "For many misdemeanor cases, . . . the prosecutor is likely to see the case file for the first time the day before or the morning of the scheduled trial." Brady, *supra* note 128, at 22. Even for felonies, "[t]ypically, the prosecutor will make the charging decision by consulting" the police report; if it "contains elements of a prima facie case[,] . . . this report . . .will be sufficient to meet the pretrial screening requirements imposed to justify the detention and charging of the defendant." *Id.* at 22 n.103 (quoting Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1361–62 (1997)).

158. Douglas L. Colbert, Ray Paternoster & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1720 (2002).

159. *See* Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1319–20 (2012) (describing the harm pretrial detention inflicts on families).

160. *See* Colbert et al., *supra* note 158, at 1720 ("[F]amilies suffer the absence of an economic provider or child caretaker."); *see also* NANCY G. LA VIGNE, ELIZABETH DAVIES & DIANA BRAZZELL, URB. INST.: JUST. POL'Y CTR., BROKEN BONDS: UNDERSTANDING AND ADDRESSING THE NEEDS OF CHILDREN WITH INCARCERATED PARENTS 1 (2008), https://www.urban.org/sites/default/files/publication/31486/411616-Broken-Bonds-Understanding-and-Addressing-the-Needs-of-Children-with-Incarcerated-Parents.PDF [https://perma.cc/N2P6-GQR3] (noting that pretrial detainees' children confront "significant uncertainty and instability"). When families *can* visit, their visits are often "time consuming, expensive, and difficult to coordinate." *Id.* at 4.

161. *See* AMANDA PETTERUTI & NASTASSIA WALSH, JUST. POL'Y INST., JAILING COMMUNITIES: THE IMPACT OF JAIL EXPANSION AND EFFECTIVE PUBLIC SAFETY STRATEGIES 15 (2008), https://justicepolicy.org/research/jailing-communities-the-impact-of-jail-expansion-and-effective-jail-expansion-and-public-safety-strategies [https://perma.cc/ENA8-CRHU].

toll that the jail environment takes on human lives,[162] it is just the tip of the iceberg. Jails' confined spaces spread disease, and their poor ventilation breeds mold and circulates asbestos.[163] Clean water, healthy food, and exercise are often nonexistent.[164] Daily hygiene is an insurmountable challenge.[165] People in jails face violence at the hands of other inmates and guards; they are at increased risk for suicide.[166]

Then there are the legal consequences. An uncharged and detained defendant has no constitutional right to the prompt assistance of counsel.[167] While the right to counsel attaches at initial appearance,[168] a defendant has no constitutional right to have counsel present for the initial appearance. Instead, "counsel [only] must be appointed within a reasonable time after" the defendant's initial appearance.[169] Since there is no constitutional definition of a "reasonable time," uncharged detainees may not have the assistance of counsel for weeks—or even months—after their arrest.[170]

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162. *See, e.g.*, Madeleine Carlisle & Josiah Bates, *With Over 275,000 Infections and 1,700 Deaths, COVID-19 Has Devastated the U.S. Prison and Jail Population*, TIME (Dec. 28, 2020, 2:52 PM), https://time.com/5924211/coronavirus-outbreaks-prisons-jails-vaccines [https://perma.cc/JV9J-KPAW].

163. *See* Appleman, *supra* note 159, at 1318 (stating jails are "vector[s] of contagious diseases" and rife with "mold, poor ventilation, lead pipes, and asbestos").

164. *See* 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 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].").

165. *See* Conor Friedersdorf, *Can't We at Least Give Prisoners Soap?*, ATLANTIC (April 1, 2020), https://www.theatlantic.com/ideas/archive/2020/04/make-soap-free-prisons/609202 [https://perma.cc/49ML-UJ68?type=image].

166. E. ANN CARSON, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., MORTALITY IN LOCAL JAILS, 2000–2018—STATISTICAL TABLES 3, 12, 21 (2021), https://bjs.ojp.gov/content/pub/pdf/mljo018st.pdf [https://perma.cc/2MPZ-33Q3].

167. Rothgery v. Gillespie Cnty., 554 U.S. 191, 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 his magistration."); *see, e.g.*, Sanchez v. Campbell, No. 4:09-cv-420, 2010 WL 547620, at *2 (N.D. Fla. Feb. 10, 2010) (stating that arrested and detained defendant's right to counsel does not attach until initial appearance; however, "the Sixth Amendment does not require" a prompt initial appearance).

168. *Rothgery*, 554 U.S. at 194 ("[T]he right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer. . . .").

169. *Id.* at 212. Notwithstanding this clear right, many courts may discourage defendants from seeking the appointment of counsel. *Id.* at 196 n.5 ("[T]he magistrate informed [Rothgery] that the appointment of counsel would delay setting bail (and hence his release from jail).").

170. The Supreme Court requires only that the appointment must be made at a time that will "allow for adequate representation at any critical stage before trial, as well as at trial itself." *Id.* at 212. While we focus on the problem of detained defendants, those who are on pretrial release are also injured by delays in formal charging. For example, an uncharged criminal suspect may be "'unable to find any employment for wages' because . . . 'of the criminal charge pending against him'" and because potential employers are unlikely to care that the prosecutor has not formally "accepted" the case. *Id.* at 208.

Unless, or until, formal charges are accepted or declined by the prosecutor, a defendant must assume that they "[are] headed for trial and need[] to get a lawyer working, whether to attempt to avoid that trial or to be ready with a defense when the trial date arrives."[171] However, many indigent and detained defendants have little or no access to counsel.[172] For them, delays in formal charging are delays in critically important pretrial procedures.

Consider, for example, what happens to unindicted and detained criminal defendants in Mississippi, where there are no postarrest deadlines for formalizing a charging decision. A 2018 report by the Sixth Amendment Center evaluated indigent defense practices in ten Mississippi counties, where the delay between arrest and indictment "ranged from two months to over a year."[173] For most indigent felony defendants "the entire period between a felony arrest and the arraignment on indictment" is a "'black hole' in which they are not represented by an attorney."[174] Without counsel, uncharged defendants are unlikely to be released from jail on bail.[175] So, they sit in jail, "lose jobs and face eviction from their homes; and [their] families suffer the absence of an economic provider or child caretaker."[176]

These delays also jeopardize a defendant's ability to defend against any charges that are eventually filed. For example, until formal charges are filed, a defendant has no constitutional right to an attorney's investigative assistance.[177]

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171. *Id.*

172. *See infra* Part III (discussing limits of Sixth Amendment right to counsel).

173. SIXTH AMEND. CTR., THE RIGHT TO COUNSEL IN MISSISSIPPI: EVALUATION OF ADULT FELONY TRIAL LEVEL INDIGENT DEFENSE SERVICES ix (2018), https://sixthamendment.org/6AC/6AC_mississippi_report_2018.pdf [https://perma.cc/SJ8M-49AY].

174. *Id.*

175. *See* 4 LAFAVE ET AL., *supra* note 27, § 12.1(c). Yet, the Supreme Court has never held that the bail determination is a critical stage that requires the assistance of counsel. Perhaps as a result, ten "states deny counsel at initial bail proceedings" while "ten states guarantee representation at the initial assessment of bail at an initial appearance," and in the remainder of states, the practice varies on a county-by-county basis. *Id.* (quoting Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 345 (2011)).

176. Colbert et al., *supra* note 158, at 1720. The assistance of counsel at subsequent bail hearings does not cure the substantial injury inflicted by an uncounseled initial bail determination. Since defense 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 LAFAVE ET AL., *supra* note 27, § 12.1(c) (quoting PAUL B. WICE, FREEDOM FOR SALE: A NATIONAL STUDY OF PRETRIAL RELEASE 48 (1974)).

177. Rothgery v. Gillespie Cnty., 554 U.S. 191, 216–17 (2008) (Alito, J., concurring) (stating that an arrested defendant who has had a 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))); *see also 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 . . . ."); Gordon v. Ponticello, 879 P.2d 741, 744–45 (Nev. 1994) (holding that before prosecution files formal charges, defendant has no right to investigation by counsel).

So, lengthy delays in formal charging often mean equally lengthy delays in pretrial investigation of the defendant's case. Delayed investigation "impedes preparation of a defense and is a sure-fire prescription for miscarriages of justice and convicting innocents at trial."[178] Crucial witnesses may disappear, their memories may fade, and physical evidence may degrade or be discarded.[179]

Without formal charges, a defendant has no constitutional right to discover the prosecution's *Brady* materials.[180] Whatever "police reports[,] . . . lab reports, mental state assessments, medical reports, and information from law enforcement" prosecutors may have, they are under no constitutional obligation to provide that information until the defendant is formally charged.[181]

Delaying representation, discovery, and investigation can also hamper proper prosecutorial screening.[182] Without counsel, there is no one who can

178. Colbert et al., *supra* note 158, at 1720.

179. *See* Brief for The National Ass'n of Criminal Defense Lawyers as Amicus Curiae Supporting Petitioner, *Rothgery*, 554 U.S. 191 (No. 07-440), 2008 WL 218874, at *4 ("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."); Colbert et al., *supra* note 158, at 1720 ("[D]elay in defense investigations and witness interviews . . . impedes preparation of a defense and is a sure-fire prescription for miscarriages of justice and convicting innocents at trial."). Since the prosecution has no constitutional obligation to preserve potential evidence, it is particularly important that defense investigation begin as soon as possible. *See* Arizona v. Youngblood, 488 U.S. 51, 57–58 (1988) (holding that, absent a showing of bad faith by police, the state has no due process obligation to preserve evidentiary material).

180. Few—if any—state statutes provide uncharged defendants with precharge discovery, even in capital cases. *See, e.g.*, People v. Gervais, 756 N.Y.S.2d 390, 396 (N.Y. Crim. Ct. 2003) (noting "that no New York court has yet . . . require[d] the disclosure of Brady material" before the filing of formal charges); People v. Sawyer, No. 8949/01, 2002 WL 655273, at *3 (N.Y. Sup. Ct. Mar. 21, 2002) ("New York law has not . . . required that *Brady* material be turned over to the target of a Grand Jury investigation while the Grand Jury is still . . . investigating the case." (citation omitted)); People v. Reese, 803 N.Y.S.2d 852, 853 (N.Y. 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." (quoting People v. Walker, 15 A.D.3d 902, 903 (N.Y. App. Div. 2005))); State v. Dabas, 71 A.3d 814, 824 (N.J. 2013) (stating that a defendant's automatic right to discovery begins when "an indictment has issued" (quoting State v. Scoles, 69 A.3d 559, 568 (N.J. 2013))); United States v. Sgarlat, 705 F. Supp. 2d 347, 361 (D.N.J. 2010) (stating that the U.S. Attorney's Office "was not obliged" to produce "[preindictment] discovery"); Gordon v. Ponticello, 879 P.2d 741, 745 (Nev. 1994) (stating that grand jury targets are not entitled to "[preindictment] discovery"); United States v. Hustead, Crim. No. WMN-09-622, Civ. No. WMN-12-3618, 2013 WL 3984613, at *2 (D. Md. July 31, 2013) (stating that defendants are not entitled to discovery before indictment); State v. Laux, 117 A.3d 725, 728–29 (N.H. 2015) (stating that "no statute or court rule specifically authorizes discovery prior to the probable cause hearing" but court has "inherent authority to order that discovery," but only "in particular cases").

181. Laura Berend, *Less Reliable Preliminary Hearings and Plea Bargains in Criminal Cases in California: Discovery Before and After Proposition 115*, 48 AM. U. L. REV. 465, 475 n.36 (1998).

182. For example, in *Rothgery v. Gillespie County*, Walter Rothgery was arrested and charged with being "a felon in possession of a firearm." Rothgery v. Gillespie Cnty., 554 U.S. 191, 195 (2008). Rothgery spent nearly six months on bail, waiting to see whether the state would file formal charges against him. *Id.* at 196. Only after the state indicted him, did Rothgery receive the

conduct negotiations, raise issues of a wrongful arrest, or argue for declination or diversion. Even if an uncharged defendant is represented, any charge negotiations will be conducted with a significant "informational imbalance."[183] Without discovery, a defendant is unable to make persuasive arguments about declination, deferred prosecution, or a reduction in charges.[184]

Trapped in this procedural wasteland, thousands of defendants resolve their cases by plea, exchanging their right to have prosecutors make a formal charging decision for the promise of immediate release and a sentence of probation or "time served."[185] In these early negotiations, "[d]eals are often struck in a matter of minutes, in courthouse hallways, on the first court date following an arraignment or even at the first appearance, without any additional discovery of the state's case or investigation on behalf of the accused."[186] Many bargains will take place although the "case[s] are not investigated at all."[187]

Lacking information about the merits of the prosecution's case, a defendant is ill equipped to make a rational decision about the likelihood of success at trial or the viability of negotiating for lesser charges or dismissal.[188] Often, defendants plead guilty without waiting to see whether the State will file formal

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assistance of counsel. *Id.* at 196–97. Counsel quickly determined that Rothgery had never been convicted of any felony and, upon this showing, the prosecution dismissed the case. *Id.*

183. Erica Hashimoto, *Toward Ethical Plea Bargaining*, 30 CARDOZO L. REV. 949, 952 (2008).

184. *See* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 877 (1995).

185. *See* ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, NAT'L ASS'N OF CRIM. DEF. LAWS., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 8 (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/DDT9-MB6M] (citing high percentage of those charged with misdemeanors pleading on their first appearance); *see also* Kennedy v. United States, 756 F.3d 492, 493 (6th Cir. 2014) (noting that until prosecution files formal charges, defendant has no right to the assistance of counsel in plea bargaining).

186. Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 558–60. To the extent that one wishes to assess precharge underregulation as a problem of systemic accuracy, the earliest postarrest states are "precisely where external scrutiny should be at its peak, rather than (as the current doctrinal approach dictates) at its nadir." Jennifer E. Laurin, *Quasi-Inquisitorialism: Accounting for Deference in Pretrial Criminal Procedure*, 90 NOTRE DAME L. REV. 783, 797 (2014).

187. 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, 1109 n.53 (2004); Cynthia Alkon, *The Right to Defense Discovery in Plea Bargaining Fifty Years After* Brady v. Maryland, 38 N.Y.U. REV. L. & SOC. CHANGE 407, 408 (2014) ("*Brady* fails to protect defendants' rights in the context of a system that routinely pressures them to plead guilty before they know the full extent of the prosecution case against them and in circumstances under which this inadequate information may mean that their lawyers are at a disadvantage in trying to negotiate better deals.").

188. *See* Meares, *supra* note 184, at 877. In contrast, the prosecutor may know that she has a weak trial case and before deciding to decline prosecution, will attempt to obtain a guilty plea, perhaps to some lesser offense. *Id.* at 875–76; *see also* Wright & Miller, *supra* note 144, at 85 ("[A] prosecutor might believe that a defendant will be uninformed about the weaknesses of the case and will [therefore agree to] plead guilty to more than the true value of the case.").

charges against them.[189] Indeed, given the high rate of declinations and dismissals, many defendants may plead guilty to cases that would, eventually, have been refused by a screening prosecutor.

Meanwhile, delays in declination cause additional irreparable harm to the significant number of defendants who the state declines to prosecute.[190] These defendants receive no compensation for the weeks and months that they spend in jail. They can neither sue for wrongful incarceration, nor seek recompense for the loss of employment, housing, health, or reputation. In short, these individuals suffer all the dangers and indignities associated with incarceration but are never subject to criminal trial.

III. THE DOCTRINES PERMITTING LENGTHY UNCHARGED DETENTION

It may be tempting to assume that the problem of precharge delay is a mirage—surely there are procedural rules or constitutional doctrines that limit how long a person can wait between arrest and charging. But the U.S. Supreme Court's jurisprudence on postarrest, precharge procedure is piecemeal and anemic. The Court has largely declined to regulate prosecutorial charging practice.[191] Without any constitutional obligation to provide speedy formal charging decisions, states are free to allow lengthy delays between arrest and formal charging. There are few protections that limit detention without formal charges, and none speak directly to the problem of postarrest, precharge delay.

A. NO CONSTITUTIONAL RIGHT TO SPEEDY POSTARREST CHARGING DECISIONS

The Supreme Court's hands-off approach to the charging decisions of the prosecutor is deeply entrenched. The Court's reluctance to police this discretionary decision is grounded in separation of powers doctrine.[192] But the

189. "Faced with these high defense burdens, defendants jailed pretrial often accept plea bargains in lieu of persevering through trial." Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1356 (2014).

190. When "weak or baseless charges are not promptly reviewed and dismissed, defendants may face unnecessary hardship and embarrassment, and everyone involved—witnesses, parties, and public officials—is subjected to needless expense." Frase, *supra* note 93, at 625. Misdemeanor defendants, in particular, may be subject to charging delays, as these cases "are generally not subject either to initial screening or to later preliminary hearing and formal charging procedures requiring prosecutorial attention," declinations in those cases are often quite delayed. *Id.* at 612.

191. The only constitutional limits on prosecutorial discretion in charging lie in rare claims of discriminatory (selective) or vindictive prosecution. *See* United States v. Armstrong, 517 U.S. 456, 465–68 (1996) (addressing a claim of selective prosecution); Blackledge v. Perry, 417 U.S. 21, 25–28 (1974) (addressing a claim of vindictive prosecution).

192. *See, e.g.*, Wayte v. United States, 470 U.S. 598, 607–08 (1985) (stating that the "broad discretion" of the prosecution "rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal

Court has failed to recognize that the defendant's rights are inextricably intertwined with these decisions.

The Fifth Amendment's Grand Jury Clause is not incorporated to the states, so there is no right to have an independent group of citizens approve the prosecutor's decision to seek a conviction.[193] In lieu of this citizen review, the Court could have required judicial review via a preliminary hearing at which a defendant could contest the validity of prosecutorial information. However, in *Lem Woon v. Oregon*, the Supreme Court held that there is no due process right to *any* judicial review of the prosecution's formal charging decisions.[194]

While the Supreme Court recognizes a limited constitutional right to speedy criminal process, its speedy process doctrines offer little relief for the arrested defendant facing a delay in formal charging. The Court held in *United States v. Marion* that prearrest, preindictment delay violates the Due Process Clause if the delay causes "substantial prejudice to [defendants'] rights to a fair trial" and the prosecutorial "delay was an intentional device to gain tactical advantage over the accused," and it underscored that holding in *United States v. Lovasco*.[195] Thus the Court's cases on preindictment delay are of no assistance

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proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute").

193. Hurtado v. California, 110 U.S. 516, 534–35 (1884).

194. Lem Woon v. Oregon, 229 U.S. 586, 590 (1913) (holding that the Due Process Clause does not make "an examination, or the opportunity for one, prior to the formal accusation by the district attorney . . . obligatory upon the States"); *see also* Beck v. Washington, 369 U.S. 541, 545 (1962) (finding that felony prosecutions have "been instituted on informations filed by the prosecutor, on many occasions without even a prior judicial determination of 'probable cause'—a procedure which has . . . had approval" in prior Supreme Court cases (first citing Ocampo v. United States, 234 U.S. 91 (1914); and then citing *Lem Woon*, 229 U.S. 586)); Gibbs v. Phelps, No. 07-36, 2008 WL 2019363, at *7 (D. Del. May 9, 2008) ("[A] State does not violate the Fourteenth Amendment if it prosecutes by information without holding a preliminary hearing."); Simmons v. Ricci, No. 10-0250, 2011 WL 4073589, at *21 (D.N.J. Sept. 13, 2011) (also stating that prosecution may be initiated by information even without a court determining probable cause); Nesmith v. Cathel, No. 05-4069, 2007 WL 2247899, at *9 (D.N.J. Aug. 2, 2007) (making the same assertion as *Beck* and *Simmons*).

195. United States v. Marion, 404 U.S. 307, 324–25 (1971); United States v. Lovasco, 431 U.S. 783, 795–96 (1977) (holding same). In any event, in jurisdictions that apply a bad faith standard, a heavy caseload and multiple reassignments of a case among prosecutors have been accepted as legitimate justifications for preindictment delay. *See, e.g.*, United States v. Engstrom, 965 F.2d 836, 839 (10th Cir. 1992) (stating that "a heavy and active criminal docket in [the U.S. Attorney's O]ffice with a consequent number of shifts of the case from one Assistant U.S. Attorney to another" were legitimate factors in delaying indictment); United States v. Bouthot, 685 F. Supp. 286, 298 (D. Mass. 1988) (finding a preindictment delay legitimate where it "was caused by the assignment of manpower, reflecting the priority of investigations established by the U.S. Attorney's office"); United States v. Greenfield, No. 84 Cr. 297, 1984 WL 853, at *2 (S.D.N.Y. Sept. 11, 1984) (deciding that reassignment of a case "to different Assistant United States Attorneys due to heavy caseloads or transfers to different divisions" justified preindictment delay); United States v. Altro, 358 F. Supp. 1034, 1038–39 (E.D.N.Y. 1973) (holding that a delay "occasioned by a changing

to detained precharge arrestees. Because *Marion* and *Lovasco* speak only to the "delay between the commission of an offense and the initiation of prosecution,"[196] a defendant complaining of delay between arrest and the formal initiation of prosecution must turn to the Sixth Amendment's Speedy Trial Clause.[197]

A postarrest, precharge delay is unlikely to gain any purchase under the Court's Speedy Trial Clause jurisprudence either. A reviewing court must balance the "[l]ength of delay, the reason for the delay," the strength of the defendant's demand for speedy trial, and the prejudice caused to the defendant, according to *Barker v. Wingo*.[198] However, full analysis of the four *Barker* factors is generally unwarranted unless there has been a delay of at least one year from arrest,[199] so an arrested defendant who has been detained for months without an indictment is unlikely even to achieve a hearing on their speedy trial claim. Even if a court does conduct the full *Barker* inquiry, that defendant is unlikely to succeed. An uncharged arrestee sitting in jail for weeks or months will undoubtedly have failed to assert his right to a speedy trial *pro se*. Furthermore, it will be difficult to show how the delay has prejudiced the defendant's case.[200] Without formal charges, there is no way to assess what the State intends to prove, much less how the defendant might hope to mount a defense, and what defenses have been lost due to delay.

In sum, the U.S. Constitution "guarantee[s] a speedy trial but not a speedy indictment" or information.[201] There is no clearly established constitutional impediment to the extended precharge delay. In theory, the Due Process Clause might protect against indefinite detention, but the Supreme Court has yet to give shape to such a right.

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of the guard in the United States Attorney's office, coupled with a rapidly expanding caseload" was not violative of due process).

196. *Lovasco*, 431 U.S. at 784.

197. Baker v. McCollan, 443 U.S. 137, 144 (1979) ("[T]he 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 . . . ."). *But see* Estevez-Figueredo v. United States, No. 18-16430, 2020 WL 3287139, at *3–4 (D.N.J. June 18, 2020) (holding that fifteen-month delay between arrest and indictment of detained defendant should be resolved under the *Marion-Lovasco* test).

198. Barker v. Wingo, 407 U.S. 514, 530 (1972).

199. *See id.* at 530–33; *see also* Doggett v. United States, 505 U.S. 647, 652 n.1 (1992) (noting that lower courts had developed a rule of thumb that a delay of a year or more required inquiry into speedy trial).

200. In terms of the reasons for the delay, the Court in *Barker* states that "[a] deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government" while "[a] more neutral reason such as negligence or overcrowded courts should be weighted less heavily." *Barker*, 407 U.S. at 531. Courts may not even view delayed charging as rising to the level of negligence. In terms of prejudice, the Court recognized the potential for prejudice in "oppressive pretrial incarceration" and in "anxiety and concern of the accused" but highlights the most serious prejudice as showing impairment to the defense, such as a witness dying or disappearing. *Id.* at 532.

201. State v. Hastings, 417 A.2d 7, 8 (N.H. 1980) (per curiam).

B. *Limited Protections Against Precharge Detention*

Among underregulated criminal precharge procedures, perhaps none has garnered more attention than the pretrial release decision.[202] The Court does not require adversary process as a precondition of bail or detention.[203] Outside of the criminal context, some Supreme Court justices have expressed confidence that detention without a bail hearing violates the Due Process Clause.[204] But within the confines of its criminal procedure jurisprudence, the Supreme Court has never held that the Constitution requires any minimum set of pretrial release procedures.

The Court has held that the Due Process Clause is applicable when the state wants to hold a defendant without bond pretrial.[205] In *United States v. Salerno*, the Court's only significant assessment of the constitutional limitations on pretrial detention, the Court applied a due process analysis to the prolonged detention of individuals unconvicted under the Federal Bail Reform Act of 1984.[206] The *Salerno* Court assumed that, at some point, "detention in a particular case might become excessively prolonged," but it provided no insight as to when that might be.[207] The *Salerno* Court found that the particulars of the hearing required under the Bail Reform Act provided due process, but the Court did not set a floor on the minimum procedures required.[208]

There is no constitutional right to the assistance of counsel at the bond determination.[209] As noted in Section II.D, many defendants will wait to meet

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202. *See* Wendy R. Calaway & Jennifer M. Kinsley, *Rethinking Bail Reform*, 52 U. RICH. L. REV. 795, 795–96 (2018); Eric T. Washington, *State Courts and the Promise of Pretrial Justice in Criminal Cases*, 91 N.Y.U. L. REV. 1087, 1087–90 (2016); Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 417–25 (2016); Appleman, *supra* note 159, at 1299–1304.

203. *See* Sandra Guerra Thompson, *Do Prosecutors Really Matter?: A Proposal to Ban One-Sided Bail Hearings*, 44 HOFSTRA L. REV. 1161, 1169–70 (2016) (discussing divergence between use of individualized hearings versus bail schedules in state courts).

204. *See, e.g.*, Jennings v. Rodriguez, 138 S. Ct. 830, 861 (2018) (Breyer, J. dissenting) ("[W]here there is no bail proceeding, there has been no bail-related 'process' at all. The Due Process Clause—itself reflecting the language of the Magna Carta—prevents arbitrary detention.").

205. United States v. Salerno, 481 U.S. 739, 755 (1987).

206. *Id.* at 746. The defendants in *Salerno* had already been indicted and so were not in the position of the uncharged defendants discussed in this Article. *Id.* at 743. Hence, they mounted a facial challenge to the statute. *Id.* at 745.

207. *Id.* at 747 n.4. The Court noted that the Speedy Trial Act would limit the length of pretrial detention at some point. *Id.* at 747. As we discuss, the Speedy Trial Clause has limited use for the arrestee detained pretrial for less than a year. *See supra* Section III.A.

208. *Salerno*, 481 U.S. at 755. The Bail Reform Act allowed defendants to request presence of counsel, to testify and present witnesses, to proffer evidence, and to cross-examine witnesses, and it required the government to prove their case for preventive detention by clear and convincing evidence. *Id.* at 751–52.

209. *See* Douglas L. Colbert, *Thirty-Five Years After* Gideon*: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1, 5–6 (arguing for recognition of a right to counsel at bail proceedings).

counsel for months, until formal charging,[210] and wait longer still "for their assigned lawyer's advocacy before a judicial officer."[211] While the Sixth Amendment right to counsel attaches at the initial appearance, a defendant does not have an established constitutional right to have counsel *present* for the initial appearance.[212]

Nor is there any requirement that the defendant themselves have an opportunity to appear before the judge for the setting of bail.[213] There is not even a requirement that the bail decision be made promptly.[214] In one study, fifty-four percent of county criminal legal systems used a preset bail schedule to determine the bond for an uncharged defendant's bond amount, often set at arrest or booking.[215] Typically, the bail schedule uses only two factors to determine the bond amount: the police charges and police representations about the defendant's criminal history.[216]

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210. Perhaps as a result, ten states "deny counsel at initial bail proceedings"; ten states "guarantee representation at the initial assessment of bail at an initial appearance"; and, in the remainder of states, the practice varies on a county-by-county basis. 4 LAFAVE ET AL., *supra* note 27, § 12.1(c); *see* Britta Palmer Stamps, *The Wait for Counsel*, 67 ARK. L. REV. 1055, 1055 (2014) (explaining that an indigent criminal defendant in Arkansas waited thirty days before meeting appointed counsel).

211. Douglas L. Colbert, *When the Cheering (for* Gideon*) Stops: The Defense Bar and Representation at Initial Bail Hearings*, CHAMPION 10 (June 2012). Professor Colbert estimates that detainees wait "between two and [seventy] days" for an adversary bail hearing. *Id.*

212. Rothgery v. Gillespie Cnty., 554 U.S. 191, 212 (2008). In *Rothgery*, the Supreme Court confronted the case of a factually innocent defendant who waited *six months* for the appointment of counsel—three of those weeks were spent in jail. *Id.* at 196–97. The Court refused to "decide whether the 6-month delay in appointment of counsel resulted in prejudice to [the defendant's] Sixth Amendment rights," insisting that it had "no occasion to consider what standards should apply." *Id.* at 213.

213. *See* Metzger & Hoeffel, *supra* note 28, at 403, 407 & nn. 50–52, 70–73 (describing various *ex parte* procedures for setting bail).

214. Brandon Buskey, *Escaping the Abyss: The Promise of Equal Protection to End Indefinite Detention Without Counsel*, 61 ST. LOUIS U. L.J. 665, 675 (2017).

215. PRETRIAL JUST. INST., SCAN OF PRETRIAL PRACTICES 20 (2019), https://static1.squarespace.com/static/61d1eb9e51ae915258ce573f/t/61df3e19dc500a1e42344351/1642020381052/Scan+of+Pretrial+Practices.pdf [https://perma.cc/A6WV-JDL9] (noting that of the fifty-four percent of counties reporting use of set bail schedules, ten percent used them at arrest and forty-seven percent used them at booking).

216. A preset bail schedule presents Equal Protection concerns. *See* Colin Starger & Michael Bullock, *Legitimacy, Authority, and the Right to Affordable Bail*, 26 WM. & MARY BILL RTS. J. 589, 615–17 (2018). Furthermore, *Stack v. Boyle* held that the Eighth Amendment's Excessive Bail Clause requires an individualized bail determination. Stack v. Boyle, 342 U.S. 1, 5 (1951). The Clause is applicable to the states. Schilb v. Kuebel, 404 U.S. 357, 365 (1971). As such, to the extent the preset bail schedule does not include any individualized consideration of the defendant, courts have been ruling such practice unconstitutional. *See* Christine S. Scott-Hayward & Sarah Ottone, Essay, *Punishing Poverty: California's Unconstitutional Bail System*, 70 STAN. L. REV. ONLINE 167, 176–78 (2018) (reviewing cases).

In other jurisdictions, bond decisions are made at initial appearance, where judges routinely set bail for uncounseled defendants.[217] Those hearings are often brief, one-sided affairs that last only minutes.[218] Without counsels' input, judges base their bail decisions upon the limited information presented by police or prosecutors.[219] The Supreme Court's failure to mandate the assistance of counsel in pretrial release proceedings makes reliance on police allegations inevitable. The results are alarming, but unsurprising: "Unrepresented indigent defendants . . . remain in jail simply because they are unable to advocate effectively on their own for release on their own recognizance or a reasonable reduction in their bond amount."[220]

We leave for another day a discussion of why the Due Process Clause should protect against this punishment-without-prosecution. Seeking reform through Supreme Court rulings is a risky process and one that may take decades to bear fruit. Instead, we consider the failure of statutory law to adequately regulate charging-time practices.

C. No Meaningful Statutory Regulation of Postarrest Formal Charging Delay

State and federal statutes provide three touch points that could potentially provide some protection to uncharged defendants: statutes of limitation, time

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217. *See* Stamps, *supra* note 210, at 1065–66; PRETRIAL JUST. INST., *supra* note 215, at 20 (stating that twenty-seven percent of counties reporting used preset bail schedules at initial appearance).

218. *See, e.g.*, Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 720 n.35 (2017) ("[B]ail hearings are three minutes long on average in North Dakota, and they are often less than two minutes long in Illinois's Cook County. Harris County bail hearings . . . are usually only a couple of minutes long, as is true in Philadelphia." (citations omitted)).

219. SIXTH AMEND. CTR., PRETRIAL JUST. INST., EARLY APPOINTMENT OF COUNSEL: THE LAW, IMPLEMENTATION, AND BENEFITS 9 (2014), http://sixthamendment.org/6ac/6ACPJI_earlyappointmentofcounsel_032014.pdf [https://perma.cc/M2EK-2KZE].

220. Church v. Missouri, 268 F. Supp. 3d 992, 1000 (W.D. Mo. 2017). A study of criminal cases in Wichita County, Texas, showed that people who do not request counsel at the first appearance can spend months in jail without an attorney and that "there is no reliable procedure for identifying uncounseled individuals until the time of indictment—potentially up to [ninety] days following arrest." CARMICHAEL & MARCHBANKS III, *supra* note 150, at 20. Unrepresented defendants are far less likely to be released from jail on bail than those who have counsel. *See id.* As compared to represented defendants, unrepresented defendants "are more likely to have more perfunctory hearings, less likely to be released on [personal] recognizance, more likely to have higher and unaffordable bail, and more likely to serve longer detentions or to pay the expense" associated with commercial bail bondsmen. DeWolfe v. Richmond, 76 A.3d 1019, 1024 (Md. 2013). Moreover,

> [t]he 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.'"

Metzger & Hoeffel, *supra* note 28, at 407–08 n.74 (quoting 4 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 12.1(c) (3d ed. 2007)).

to charging statutes, and the preliminary hearing. However, none are adequate to combat the problem of prolonged precharge delay.

While statutes of limitations "provide predictable, legislatively enacted limits on prosecutorial delay," they speak to the time between commission of the offense and the commencement of prosecution.[221] Statutes of limitations do not address the problem of postarrest, precharge delay. Instead, they serve as "the primary guarantee against bringing overly stale criminal charges."[222] Furthermore, the time periods within which to commence prosecutions are longer than charging timelines and do nothing to speed up the charging process.[223]

As for statutory "speedy" formal charging deadlines discussed in Section II.A, the frequency of detention without charges in violation of these deadlines suggests that these laws are insufficient to deter charging delay.[224] One reason may be that these deadlines are scarcely enforced in any consequential way. Many states authorize significant extensions of charging deadlines, based on the slightest of evidentiary claims. And the most common remedy for violation of charging deadlines is the dismissal of charges, without prejudice to reprosecution.[225]

Arguably, preliminary hearings could regulate the time between arrest and formal charging. However, consistent with its reluctance to regulate a prosecutor's charging decision, the Supreme Court has never guaranteed a defendant a constitutional right to a preliminary hearing.[226] Indeed, in five states, defendants have no right to any adversarial judicial review of the informal charges under which they are held.[227] In some jurisdictions that provide

221. United States v. Lovasco, 431 U.S. 783, 788–89 (1977).

222. United States v. Ewell, 383 U.S. 116, 122 (1966). The Supreme Court concedes that a "statute of limitations does not fully define the [defendants'] rights with respect to the events occurring prior to indictment." United States v. Marion, 404 U.S. 307, 324 (1971). The Court also grudgingly acknowledges "that the Due Process Clause has a limited role to play in protecting against oppressive delay." *Lovasco*, 431 U.S. at 789.

223. For a case in point, see Dickerson v. Superior Court, 252 Cal. Rptr. 3d 871, 876 (Cal. App. Dep't Super. Ct. 2019). When the defendants moved to dismiss the complaints against them because of a ten-month precharge delay, the prosecution argued, and the trial court agreed, that the extended time period was justified, in part, because it was within the statute of limitations. *Id.*

224. *See supra* notes 145–50 and accompanying text.

225. *See* Appendix (forthcoming in IOWA L. REV. ONLINE 2023). Contrast this with the dire consequences of violating the Sixth Amendment Speedy Trial Clause, which requires dismissal of charges with a permanent bar against reprosecution.

226. *See, e.g.*, Howard v. Cupp, 747 F.2d 510, 510–11 (9th Cir. 1984) (per curiam) ("[T]here is no fundamental right to a preliminary hearing."); Collins v. Swenson, 443 F.2d 329, 331 (8th Cir. 1971) ("[I]t is uniformly held that a defendant is not [constitutionally] entitled to a preliminary hearing . . . .").

227. *See* 4 LAFAVE ET AL., *supra* note 27, § 14.2(a-1). Those states are "Arkansas, Indiana, Maine, Minnesota, and Vermont." *Id.* (footnotes omitted).

preliminary hearings, the right depends on the defendant's request.[228] But defendants who have not yet had an attorney appointed to defend them are unlikely to make such a demand.[229] Additionally, a shockingly high percentage of defendants waive their right to a preliminary hearing.[230]

Regardless of the strength of their case, few prosecutors want a preliminary hearing, which broadcasts the state's evidence and commits witnesses to sworn testimony at that point in time.[231] And most states oblige, allowing a prosecutor to moot the preliminary hearing by filing formal charges.[232] When a preliminary hearing looms, the impending deadline may prompt a prosecutor to file formal charges or to decline prosecution. In this sense, preliminary hearings serve as a goad to accelerate the filing of the formal charges.[233]

When a preliminary hearing does occur, three factors limit the rigor and utility of this review. First, the standard of review at the preliminary hearing is typically only probable cause.[234] But probable cause does not predict the likelihood of formal charging by the prosecution. Second, in many states, the rules of evidence do not apply at the preliminary hearing, and thus prosecutors only need present the testimony of one police officer, who can summarize the case through hearsay.[235] The officer may not have been meaningfully involved in the investigation, may not remember key facts, and may not reveal the weakness of the evidence supporting the charges.[236] And, third, while the defense has the right to cross-examine the prosecution's witness, in the vast majority of jurisdictions, the defense cannot subpoena prosecution witnesses to the hearing.[237]

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228. *Id.* § 14.2(e) & n.67 (citing Maryland, South Carolina, Colorado, Massachusetts and Georgia as states requiring request); *see, e.g.*, S.C. R. CRIM. P. 2(b) (2023) (stating that the right to a preliminary hearing is waived if the defendant fails to make a timely request).

229. *See supra* Section II.D (discussing lack of access to counsel).

230. 4 LAFAVE ET AL., *supra* note 27, §14.2(e). Reasons for doing so vary from "the inadequacy of the payment schedule of appointed counsel for representation at a preliminary hearing" to waiver in return for some concession from the prosecutor to "the conventional wisdom of the local defense bar that the preliminary hearing is . . . unnecessary where the prosecution" appears to have "a strong case." *Id.*

231. *See* Crespo, *supra* note 75, at 1348 & n.132. Only six states guaranteed criminal defendants a preliminary hearing: Nebraska, North Dakota, Oklahoma, Pennsylvania, Tennessee, and Wisconsin. *Id.*

232. 4 LAFAVE ET AL., *supra* note 27, § 14.2(a-1) (describing bypass procedures in states).

233. This is particularly true in states that tie charging deadlines to the date of a preliminary hearing, rather than the date of arrest.

234. Crespo, *supra* note 75, at 1349 & n.134. Only in a few states must the judge decide there is a greater assurance of a finding of guilt at trial. *Id.*

235. *See id.* at 1349–51 & nn.135–40. According to Professor Crespo's research, only about six states ban hearsay at the preliminary hearing, a few states give judges discretion to accept or reject hearsay, and a few others allow hearsay in limited circumstances. *Id.*

236. Professor Hoeffel was a public defender in the District of Columbia and can attest this was the regular practice of the U.S. Attorney's office.

237. Crespo, *supra* note 75, at 1350–51 & n.140.

In the end, even if the prosecution does not meet its low burden of proof at the preliminary hearing, there are few consequences. While a "no probable cause" finding always means that the judge must release the defendant from custody,[238] what happens to the charges themselves depends on state law. In some states, if there is no probable cause, the judge must dismiss the charges, without prejudice to reprosecution.[239] In other states, a "no probable cause" finding has no impact on the pending charges.[240] The prosecution is free to move forward, even without enough proof to justify a person's arrest and detention.[241] In most states, an indictment moots the outcome of a past preliminary hearing and precludes the court from holding any future such hearing.[242] The bottom line is that, while a defendant is being processed for release upon a finding of "no probable cause," a prosecutor can run to the grand jury for a quick indictment or simply refile the informal charges—perhaps even before the defendant reaches the jailhouse door.[243]

IV. CURING UNNECESSARY PRECHARGE DELAY

Change in constitutional doctrine will come slowly, if at all. Until then, stakeholders in the criminal legal system and lawmakers at the state and local level, must work to reduce lengthy precharge detentions. Where charging delays cannot be reduced, stakeholders must mitigate the harms associated with those delays.

In this Part, we make recommendations for reform. Because criminal practice is profoundly local, we do not offer categorical, one-size-fits-all solutions. Instead, we offer strategic approaches and, wherever possible, offer examples of successful implementation. Because well-intentioned reforms can have unintended and harmful consequences, we also urge caution in the implementation of changes to charging timetables. We propose reforms that can: (1) reduce the volume of detained defendants in the screening-

238. *See* 4 LAFAVE ET AL., *supra* note 27, § 14.1(a). If the judge concludes that the evidence is weak, they can reduce a defendant's bail. Conversely, if the judge finds probable cause, they may increase the defendant's bond amount or even order a defendant who has been released to be remanded into custody. *See, e.g.*, Bolton v. Irvin, 373 S.W.3d 432, 435–36 (Ky. 2012) (citing a procedural rule allowing judges to reconsider bond after a finding of probable cause); People v. Mascarenas, 706 P.2d 404, 405 (Colo. 1985) (citing a statute that allows for the same).

239. *See* Crespo, *supra* note 75, at 1351 (describing a variety of statutory outcomes).

240. *See id.* at 1351 & n.141.

241. *See id.*

242. *See* 4 LAFAVE ET AL., *supra* note 27, § 14.4(e). In contrast, in many information jurisdictions, a finding of probable cause at the preliminary hearing is "ajurisdictional prerequisite to the filing of an information." *Id.*

243. Only a few states require the prosecutor to make a showing of new evidence before refiling charges. *Id.* at 1351 n.143 (first citing CAL. PENAL CODE §§ 871, 1387(a)(1) (2018); then citing MICH. R. CRIM. P. 6.110(F) (2020); then citing 12 R.I. GEN. LAWS § 12-12-1.10 (2002); and then citing WIS. STAT. § 970.04 (2018)).

charging pipeline; (2) promote prompt screening and charging decisions; and (3) mitigate the harms of delayed charging, particularly for detained defendants.

A. *Reducing the Volume of Detained Defendants in the Screening-Charging Pipeline*

The crushing workload of prosecutors, particularly in large counties, is directly related to the arrest practices of the local police. We can think of the criminal legal system like a funnel. Outside the funnel is the larger world in which people commit, or are accused of committing, crimes. At the mouth of the funnel, police gather suspects and make arrests or issue citations. Here, the funnel's widest point, is an important opportunity to reduce the number of cases entering the criminal court system.

Each year, prosecutors decline to pursue thousands of police arrests and citations.[244] Reducing arrests that will not be prosecuted is a critical first step in improving charging systems. When prosecutors communicate their screening policies and priorities to police, they can powerfully improve the screening process.[245] To do so, every district attorney's office should establish formal, written policies about how their office will screen arrests and share those policies with police.[246] These policies should explicitly identify the characteristics of cases that will be unilaterally declined for prosecution.[247] They should also highlight prosecutorial charging priorities. Additionally, the policies should

244. *See supra* notes 151–56 and accompanying text; *see also* MARK MOTIVANS, BUREAU OF JUST. STATS., DEP'T OF JUST., FEDERAL JUSTICE STATISTICS, 2019, at 1 fig.1 (2021), https://bjs.ojp.gov/content/pub/pdf/fjs19.pdf [https://perma.cc/HLC2-UMV3] (comparing the volume of federal arrests and to the volume of charges filed).

245. *See* 4 LAFAVE ET AL., *supra* note 27, § 13.2(b) ("[I]t is clear beyond question that discretion is regularly exercised by the police in deciding when to arrest and that such decisions have a profound effect upon prosecution policy."). The ABA recommends that prosecutors and law enforcement agencies meet regularly to discuss their respective policies. ABA STANDARDS, *supra* note 60, § 3-3.2(c) ("The prosecutor's office should . . . advise law enforcement personnel of relevant prosecution policies and procedures.").

246. The chief prosecutor's significance to this process of developing office policy depends on their strength and communication skills. Especially in the case of an elected district attorney, the chief prosecutor can have a huge impact on the norms and policies implemented by the prosecutors below. Miller & Wright, *supra* note 32, at 177–79. A chief who takes office with a strong vision of how cases should be prosecuted can fundamentally change the priorities and customs of their attorneys, loosening or tightening up policies on charging, plea bargaining, discovery, and so on. *See* ROY B. FLEMMING, PETER F. NARDULLI & JAMES EISENSTEIN, THE CRAFT OF JUSTICE: POLITICS AND WORK IN CRIMINAL COURT COMMUNITIES 40–44 (1992). However, a chief prosecutor with little interest in changing the way their office operates, or who fails to effectively transmit their priorities, creates an office in which policy is created by line prosecutors. *See id.* at 45.

247. *See, e.g.*, Memorandum from Alvin L. Bragg, Jr., District Attorney, Cnty. of N.Y., to All Staff, Day 1 Policies and Procedures 1–2 (Jan. 3, 2022), https://www.manhattanda.org/wp-content/uploads/2022/01/Day-One-Letter-Policies-1.03.2022.pdf [https://perma.cc/HEX34XSA] (specifying exactly which petty crimes will not be prosecuted by his office).

explain the standard of proof that prosecutors will apply at the charging stage, and identify any evidentiary requirements associated with specific case types.[248]

These policies will set expectations for law enforcement officers, reducing the number of arrests that will be returned or declined. If police eschew the arrest of people whose charges will ultimately be declined, they can reduce prosecutors' screening caseloads and eliminate thousands of unnecessary bookings and prescreening incarcerations. In theory, declinations themselves are a way to educate police.[249] However, written policies can be far more effective.

A recent study from Dallas County, Texas demonstrates the importance of written screening communications.[250] When Judge John Creuzot campaigned for Dallas County District Attorney in 2018, he promised that, if elected, he would decline prosecution of most first-time cases of misdemeanor marijuana possession.[251] But when Mr. Creuzot took office, police did not reduce their marijuana arrests. In fact, misdemeanor marijuana arrests increased countywide.[252] However, after District Attorney Creuzot sent a written copy of his policy to local law enforcement, police made fewer arrests.[253] During the six months following the policy communication, police countywide submitted twenty-four percent fewer marijuana cases for prosecution than they had in 2018.[254] As a result, prosecutors had fewer marijuana cases to screen, and far fewer people suffered the indignity of arrest and the hazards of detention while waiting for prosecutors to decline their cases.

Additionally, written screening policies can reduce the number of cases that prosecutors return to police because of insufficient evidence or flawed police work. In some instances, those cases will never reappear on a prosecutor's desk. In other cases, police will have to locate the missing information and resubmit the case for prosecution. But, if police "get it right the first time," they only submit cases that meet prosecutors' evidentiary criteria. So, prosecutors review fewer cases and review them only once—not twice.

Again, Dallas County powerfully illustrates how specific evidentiary standards can reduce the number of cases that enter the criminal legal system. When

248. We note with concern an emerging movement to curtail the use of prosecutorial discretion and prohibit non-prosecution policies. For example, at the time of this writing (March of 2023), several states have either enacted, or proposed, legislation that removes an elected prosecutor from office if they adopt any formal or informal policy that limits "enforcement of any state law." JORGE CAMACHO, NICHOLAS GOLDROSEN, RICK SU & MARISSA ROY, LOC. SOLS. SUPPORT CTR., PUB. RTS. PROJECT, PREEMPTING PROGRESS: STATES TAKE AIM AT LOCAL PROSECUTORS 3 (2023), https://static1.squarespace.com/static/592c8640c534a5adf895986b/t/63dad362de56d35595d2271d/1675285357150/ProsecutorialDiscretion2023.pdf [https://perma.cc/Y23B-UJE9].

249. *See* Wright & Miller, *supra* note 144, at 65 (finding one prosecutor's office also declines to prosecute a large number of cases to encourage "police officers to investigate more thoroughly").

250. BUDDING CHANGE, *supra* note 53, at 15–17.

251. *Id.* at 15.

252. *Id.* at 15.

253. *Id.* at 16–17.

254. *Id.* at 3.

Texas legalized hemp (a cannabis product), it distinguished (legal) hemp from (illegal) marijuana by their respective concentrations of THC.[255] Doubling down on his goal of eliminating prosecutions for misdemeanor marijuana possession, District Attorney Creuzot shared a new written policy with police: His office would summarily decline to prosecute any marijuana case that was not accompanied by a chemical laboratory report.[256] This policy was associated with a further reduction in the number of marijuana cases that prosecutors had to review. In the six months after the laboratory policy was announced, prosecutors received forty-six percent fewer marijuana cases to review than they had the year before.[257]

B. Promoting Prompt Screening and Charging Decisions

To encourage prompt screening and charging decisions, incentives must come from both within and without the prosecutor's office. State lawmakers must consider reasonable timelines for charging, and prosecutors must work to improve, formalize, and communicate their charging processes to stakeholders in the criminal legal system.

1. Legislating Reasonable Limitations

State legislatures must mandate reasonable charging timelines. There is simply no excuse for allowing indefinite incarceration without formal charges. If prosecutors in states as different as Florida and Iowa can make their charging decisions within thirty or forty-five days,[258] surely prosecutors in states like Mississippi and Alabama can do the same.[259]

However, changes to statutory deadlines must be carefully calibrated. Hasty charging decisions can be as bad as those that take too long. Unreasonably short charging deadlines encourage prosecutors to use less discretion and file formal charges in more cases than necessary. During a recent effort to dramatically reduce Louisiana's forty-five-day time-to-charge for misdemeanors, a five-day charging limit was proposed. But prosecutors insisted that a five-day deadline would preclude careful assessment of each case and force them to file charges in a much higher percentage of cases.[260] As one district attorney insisted: "[I]f

255. *Id.* at 18.

256. *Id.* at 19.

257. *Id.* at 3. Police appear to have responded more strongly to the evidentiary requirements than to the policy of unilateral declination. This may be because the laboratory policy imposed financial costs (approximately two hundred dollars per laboratory report) for submitting marijuana cases. *Id.* at 19. In contrast, the initial policy imposed no cost on police who submitted cases that were clearly marked for declination. *See id.*

258. *See* FL. R. CRIM. P. 3.134 (mandating thirty days); IOWA R. CRIM. P. 2.33 (mandating forty-five days).

259. The caveat here is that in some states, the timeline may be dictated by how often a grand jury is seated. If it is only every sixty days, this complicates faster charging times.

260. *See Hearing on H.B. 46 Before the House Committee on Administration of Criminal Justice*, LA. HOUSE OF REPRESENTATIVES [hereinafter *Louisiana Hearings*], https://house.louisiana.gov/H_Vi

you put this burden on me, I'm charging everybody. . . . We're not gonna review it, we're just gonna charge everybody. That's what's going to happen."[261]

There may well be some correlation between speedy charging and overacceptance of prosecutions. For example, in Philadelphia, former District Attorney Lynn Abraham required that her office file charges within twenty-four hours of arrest. Her successor, District Attorney R. Seth Williams, posited that this demand for speedy charging backfired, making the charging unit an "inefficient gatekeeper" that allowed the state to move forward with weak cases that should have been weeded out.[262]

Similarly, in New York, where prosecutors have only six days after arrest to bring felony charges to the grand jury for an indictment, acceptance rates are high, and prosecutors make relatively few changes to the charges presented by police. A 2014 study reports that "49,621 out of 212,719 (23.3 [percent]) cases accepted for prosecution [were] dismissed at some point in the case process."[263] It is certainly reasonable to hypothesize that lengthier—and therefore more thorough—precharge reviews might allow prosecutors to decline or dismiss prosecutions earlier in the criminal process.

Given the wide variation in state grand jury laws and the relatively underdeveloped research about how prosecutors respond to changing charging timelines, time limits from arrest to charging should follow these general guidelines:

(a) Charging timelines should be differentiated by a defendant's custodial status. Defendants who are in custody should be protected by shorter charging timelines.
(b) Charging timelines should be differentiated by the seriousness of the offense, as measured by the maximum available sentence. Petty offenses, misdemeanors, and low-level felonies should, respectively, have shorter charging timelines.
(c) Charging timelines should be informed by statistical data about declination rates. If there is a statistically high likelihood that certain

deo/VideoArchivePlayer?v=house/2021/apr/0422_21_CJ [https://perma.cc/4B9L-DDHU]; *see also* Blake Paterson, *Legislation Limiting Prolonged Jail Stays Advances from House Committee Despite DA Opposition*, ADVOCATE (Apr. 22, 2021, 12:09 PM), https://www.theadvocate.com/baton_rouge/news/politics/legislature/article_8c86a45c-a38d-11eb-8969-f704c8aa3385.html [https://perma.cc/B395-RHWD] ("Some lawmakers argued [the proposed timeline] would cause prosecutors to charge more people with crimes."). Whether such a charging approach would be ethical is another question entirely.

261. *Louisiana Hearings*, *supra* note 260, at 2:38:59.

262. PHILA. RSCH. INITIATIVE, THE PEW CHARITABLE TRS., PHILADELPHIA'S CROWDED, COSTLY JAILS: THE SEARCH FOR SAFE SOLUTIONS 22 (2010), https://www.pewtrusts.org/en/research-and-analysis/reports/2010/05/17/philadelphias-crowded-costly-jails-the-search-for-safe-solutions [https://perma.cc/NNK7-X4XN].

263. BESIKI LUKA KUTATELADZE & NANCY R. ANDILORO, PROSECUTION & RACIAL JUST. PROGRAM, VERA INST. OF JUST., PROSECUTION AND RACIAL JUSTICE IN NEW YORK COUNTY – TECHNICAL REPORT 99 (2014) [hereinafter PROSECUTION AND RACIAL JUSTICE], https://www.ojp.gov/pdffiles1/nij/grants/247227.pdf [https://perma.cc/BDL8-KLCF].

types of arrests will not be prosecuted, policymakers should reduce charging timelines for those cases.

(d) Extension of charging timelines should be conditioned on consent by defense counsel and approval by the judge, based on active plea negotiations or another similarly substantive compelling reason.

Ultimately, legislating reasonable charging deadlines is necessary, but not sufficient, to address the problem of charging delay. As discussed earlier, even prosecutors who support shorter charging timelines have difficulty meeting longer ones.[264]

2. Improving the Speed and Quality of Communications Between Police and Prosecutors

Improving the speed of screening and charging decisions depends upon improving communications between police and prosecutors. That, in turn, will help police to submit case files that contain all the information prosecutors need.[265] In too many places, police and prosecutors take a sequential approach to screening and charging.[266] First, "the police gather and package the evidence and then the district attorney's office examines it and makes a decision."[267] This precludes regular opportunities for prosecutors to educate police about the information that prosecutors need to make their screening decisions, such as evidence police may have omitted from their reports or documentation that they failed to gather.[268]

Instead, prosecutors and police should communicate about new cases within twenty-four hours of a new case being submitted for review.[269] As the Vera Institute of Justice explains: "This allows prosecutors to quickly weed out low-priority or weak cases, reducing costs to jails, courts, police, and prosecutors. It also enables police and prosecutors to garner sufficient evidence in stronger cases and those that pose the greatest threat to public safety, reducing unnecessary releases and declinations of prosecution."[270] Absent this type of

264. *See supra* notes 102–06 and accompanying text (discussing New Orleans District Attorney Jason Williams's failure to meet deadlines despite pledge to reduce time to charging).

265. In some instances, the information prosecutors need for prompt screening will also suffice for prompt charging. In other instances, a complete police file for screening is simply the first step in providing prosecutors with the additional information they need for charging.

266. *See* VERA INST. OF JUST., PROPOSALS FOR NEW ORLEANS' CRIMINAL JUSTICE SYSTEM: BEST PRACTICES TO ADVANCE PUBLIC SAFETY AND JUSTICE 3 (2007) [hereinafter PROPOSALS FOR NEW ORLEANS], https://www.vera.org/publications/proposals-for-new-orleans-criminal-justice-system-best-practices-to-advance-public-safety-and-justice [https://perma.cc/PEH4-EXHV].

267. *Id.*

268. *Id.*

269. *See id.*

270. *Id.* at ii; *see also* CGR REPORT, *supra* note 130, at iv ("The DA should improve communications and training with law enforcement officials about what is needed in arrest documents and evidence in order to ensure that cases meet standards necessary for effective prosecution.").

communication, prosecutors who receive police files with "missing, delayed or incomplete" policework must return cases to the police for additional information.[271] The resulting delays of twenty-four or forty-eight hours may feel like an eternity to a presumptively innocent person who has been booked and detained.

After screening, continued communication between police and prosecutors is essential to prompt and meaningful charging outcomes.[272] There is some evidence that prosecutors and police perceive misaligned incentives in the charging process. In a study of jurisdictions of over 100,000 people, prosecutors reported that "police are too arrest-oriented" and insufficiently invested in pursuing additional investigation into a case that had been "cleared" in police records by making an arrest.[273] Those prosecutors' most consistent complaint was that police failed to provide them with the evidence that they needed.[274]

A prosecutor's evidentiary needs will vary according to the type of case they are considering.[275] In sexual assault and domestic violence cases, for example, prosecutors may place an unusually high premium on victim and witness testimony.[276] And if the physical evidence is ambiguous, the prosecutor may insist upon evaluating the character, actions, and trustworthiness of the victim before filing formal charges. In those cases, prosecutors depend upon police to help them contact the victim—a step that is rarely necessary in drug cases, for example. In contrast, in a drug possession case, prosecutors may

271. *See, e.g.*, PHOENIX STUDY, *supra* note 21, at 6 (describing challenges in the quality of police submissions); SPOKANE STUDY, *supra* note 21, at 33–34 (describing similar challenges).

272. *See* ABA STANDARDS, *supra* note 60, § 3-3.2(d); *see also* APPLESEED REPORT, *supra* note 24, at 4 (describing features that make screening programs more successful).

273. WILLIAM F. MCDONALD, NAT'L INST. OF JUST., DEP'T OF JUST., POLICE–PROSECUTOR RELATIONS IN THE UNITED STATES 7, 10 (1982), https://www.ojp.gov/pdffiles1/Digitization/77829NCJRS.pdf [https://perma.cc/Z4B4-PZHW].

274. *See id.* In one study of prosecutors' offices, evidence-related concerns accounted for over seventy percent of declinations at screening in person and property cases rejected at screening and over ninety-six percent declinations at screening in drug cases. *See* ANATOMY OF DISCRETION, *supra* note 47, at 266–67. During an eleven-year period, evidentiary concerns accounted for twenty-six percent of declinations made by the New Orleans District Attorney's Office. *See* Marc L. Miller & Ronald F. Wright, *The Black Box*, 84 IOWA L. REV. 125, 135 (2008). Among cases declined without any charges at all being filed, the percentage of evidence-based declinations jumped to forty-two percent. *Id.* at 137. Prosecutors characterized these deficiencies as "'testimony insufficient to prove crime,' 'insufficient nexus,' 'analytical results insufficient,' 'unlawful search no warrant,' 'no corroboration of evidence,' 'good defense,' 'physical evidence insufficient,' 'no probable cause for arrest,' and 'other evidence problems.'" *Id.* at 136. Similarly, a study of federal declinations concluded that forty-eight percent of declinations were due to evidentiary concerns. Michael Edmund O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1458 (2004). Indeed, in a study of fifteen years of federal prosecution, evidentiary issues consistently accounted for forty percent to fifty percent of case declinations. CHRISTINA L. BOYD, MICHAEL J. NELSON, IAN OSTRANDER & ETHAN D. BOLDT, THE POLITICS OF FEDERAL PROSECUTION 126 (2021).

275. *See* ANATOMY OF DISCRETION, *supra* note 47, at 6.

276. *See id.* at 66.

need police to expedite forensic analyses or rule out the possibility of lawful possession.

Communicating evidentiary priorities to the police requires more than cordial relationships.[277] It requires the type of active engagement recommended by the National District Attorneys Association ("NDAA"), which encourages chief prosecutors to "assist in the on-going training of law enforcement officers by conducting periodic classes, discussions, or seminars to acquaint law enforcement agencies within their jurisdiction with recent court decisions, legislation, and changes in the rules of criminal procedure."[278] Wherever possible, the NDAA urges "that each major law enforcement agency . . . assign at least one officer specifically to the prosecutor's office . . . . [to] serve as a liaison."[279] Additionally, we recommend that prosecutors and police should collect and regularly review data about case returns and case declinations. That data should be used to refine screening and charging policies and assist in further communications with police.

There are other, less formal, means by which prosecutors can work with police to improve charging timelines. Some prosecutors' offices view declinations themselves as a type of informal training that can encourage "police officers to investigate more thoroughly."[280] However, there are more direct avenues. In the Deason Study, one experienced Hazelton prosecutor described being informally "on call" to answer police questions.[281] Another prosecutor told researchers that they routinely called officers to explain any charging decision that did not track the officers' suggested charges.[282] Both prosecutors believed that this type of informal training was partially responsible for an increase in the quality of the police work on new cases.[283]

Insufficient law enforcement infrastructure resources pose challenges to timely filing of formal charges.[284] While an officer's observations or a quick-and-dirty "field test" might support a screening decision, many prosecutors

277. *See* ABA STANDARDS, *supra* note 60, § 3-3.2(c) ("The prosecutor's office should . . . advise law enforcement personnel of relevant prosecution policies and procedures.").

278. NDAA STANDARDS, *supra* note 59, § 2-5.4; *see also id.* § 2-5.1 (recommending close communication between law enforcement and prosecutors).

279. *Id.* § 2-5.5.

280. Wright & Miller, *supra* note 144, at 65.

281. Deason Author File, *supra* note 21.

282. *Id.*

283. *Id.*

284. *Louisiana Hearings*, *supra* note 260, at 2:52:02. Objecting to a proposed five-day deadline for formal charging, the executive director of the Louisiana District Attorney's Association said: "[T]here is nothing about [five] days in and of itself that is problematic, it is the [five] days on top of the system that it's being laid." *Id.* at 2:52:52. From his perspective, timely charging often depended upon "competent [] law enforcement" with access to "crime labs that were well-funded and well-staffed." *Id.* at 2:52:14.

require chemical proof of substances' contents before filing formal charges.[285] But there is a national shortage of laboratories that can conduct forensic drug analyses, and it can take months for prosecutors to receive forensic proof necessary for a drug prosecution.[286] These drug testing wait times cause lengthy delays in formal charging.[287] Where laboratory delays are predictable, police should refrain from making custodial arrests until laboratory results have been received. If police do make those arrests, prosecutors should return the cases to police pending receipt of laboratory results.

New infrastructure can improve the timeliness of prosecutorial screening and charging decisions. In some instances, that infrastructure will support more prompt policework. In Phoenix, for example, "[s]pecial mobile vans are dispatched to draw blood from those arrested for DUI," and the results are electronically transmitted to the prosecution.[288] Similarly, providing prosecutors with "access to automated databases for arrest records and criminal histories can decrease the amount of time needed to screen cases [and] make charging decisions."[289]

3. Organizing Screening and Charging Workflows to Promote Prompt, Fair, and Effective Decisions

The structure of prosecutors' offices, and their manner of case assignments, can have a powerful impact on screening and charging.[290] Here again, however,

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285. *See, e.g.*, BUDDING CHANGE, *supra* note 53, at 19 (describing Dallas County DA's new policy requiring drug testing before charging).

286. *See* Marie Albiges, *Drug Testing Backlog Delays Cases, Defendants Linger in Jail*, AP NEWS (May 12, 2019), https://apnews.com/article/c054def28e464c1c87b1eb233cd38fb0 [https://perma.cc/QK4N-7F72] ("[I]n fiscal year 2018, it took an average of four months for a scientist to finish testing evidence in a single case."); *Lack of Resources at State Crime Lab Causing Delays in Drug Case Prosecutions*, WRAL NEWS (Aug. 20, 2013, 6:16 PM), https://www.wral.com/lack-of-resources-at-state-crime-lab-causing-delays-in-drug-case-prosecutions/12798653 [https://perma.cc/Q4Y4-SX5B]; FORENSIC EVIDENCE TESTING DISTRICT ATTORNEY'S OFFICE, https://eagenda.collincountytx.gov/docs/2021/CC/20210208_2594/49743_Forensic%20Evidence%20Testing%20District%20Attorney.pdf [https://perma.cc/728T-BK7U] (describing Collin County, Texas' District Attorney's backlog); Marty Roney, *Justice Delayed: Forensic Scientists Face Crushing Backlog That Clogs Judicial System*, MONTGOMERY ADVERTISER (June 9, 2018, 4:35 PM), https://www.montgomeryadvertiser.com/story/news/local/solutions-journalism/2018/06/08/justice-delayed-forensic-scientists-face-crushing-backlog-clogs-judicial-system/657299002 [https://perma.cc/C5P7-3KGR].

287. *See, e.g.*, CGR REPORT, *supra* note 130, at 37 ("The state lab is often backed up with tests, so it is not unusual for results not to have been returned within the [forty-five]-day limit [for filing charges]."). We take no position on the suggestion that prosecutors proceed to the grand jury without laboratory results.

288. PHOENIX STUDY, *supra* note 21, at 5.

289. AM. PROSECUTORS RSCH. INST., *supra* note 129, at 7; *see also* PAUL BISHOP, DONNA HARRIS & DON PRYOR, CTR. FOR GOVERNMENTAL RSCH., OSWEGO COUNTY PUBLIC SAFETY AND CRIMINAL JUSTICE SYSTEM - EVALUATION OF EXISTING CONDITIONS AND RECOMMENDATIONS FOR CHANGE 9 (2018), https://reports.cgr.org/details/1870 [https://perma.cc/MQA5-V8BS] (describing information-sharing problems in a district attorney's office).

290. Vertical prosecution structures—in which "a single attorney (or group of attorneys) handles a case from the initial screening through final adjudication"—may be appropriate for

there are no one-size-fits-all strategies for addressing prosecutorial charging delay. Instead, we outline suggestions for effective streamlining of the screening and charging process.

District attorneys' offices should implement a system of case review in which a prosecutor (or team of prosecutors) evaluates the previous day's arrests.[291] This will permit quicker identification of cases that are too weak to prosecute or do not constitute a crime.[292] Particularly in high-volume systems, "[b]oth early screening and summary dispositions [can be] crucial techniques for handling the high volume of charges."[293]

For rapid screening to be effective, administrative structures must facilitate prompt declinations, and prosecutors must be empowered to decline cases without fear of repercussions. Consider, for example, the rapid screening process in the Springfield office of the Deason Study. There, the office's most junior prosecutors screen new cases for declination within twenty-four hours of arrest.[294] However, those declinations require extensive paperwork and must be approved at the office's highest levels of authority.[295] As a result, prosecutors reported that only five percent of cases are declined at screening—a mere fraction of the cases that prosecutors believe should be rejected at this early stage. [296] Much later, another fifteen to twenty percent of these cases are declined, but only after defendants have waited in jail for several weeks.[297]

A properly implemented rapid screening program can produce radically different results. When the district attorney in Mecklenburg County, North Carolina implemented a rapid screening process for drug cases, it produced a thirteen percent increase in declinations at this initial stage[298] and a

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some smaller offices and for highly specialized cases. AM. PROSECUTORS RSCH. INST, *supra* note 129, at 7. In larger offices, horizontal workflows—in which different attorneys (or group of attorneys) handle different stages of a case's progress through the criminal process—may be the better choice.

291. *Id.* at 7.

292. Extended delays are not necessary and a shorter time-to-decision timeline has distinct benefits. For example, one district attorney did the following:

> [I]mplement a more rigorous initial screening process for drug cases, resulting in a greater than [ten] percent decrease in prosecutions and a corresponding decrease in dismissals later in the process. Because the new procedures allowed prosecutors to identify weak cases at the beginning of the process, the office was able to direct resources to more meritorious cases.

VERA INST. OF JUST., A PROSECUTOR'S GUIDE FOR ADVANCING RACIAL EQUITY 15 (2014) [hereinafter ADVANCING RACIAL EQUITY] (footnote omitted), https://www.vera.org/downloads/publications/prosecutors-advancing-racial-equity_0.pdf [https://perma.cc/ZA5L-L4GA].

293. Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1596 (2010).

294. Deason Author File, *supra* note 21.

295. *Id.*

296. *Id.*

297. *Id.*

298. *See* WAYNE MCKENZIE, DON STEMEN, DEREK COURSEN & ELIZABETH FARID, VERA INST. OF JUST., PROSECUTION AND RACIAL JUSTICE: USING DATA TO ADVANCE FAIRNESS IN CRIMINAL PROSECUTION

corresponding decrease in later-stage case dismissals.[299] Significantly, however, the district attorney "appointed new supervisory staff and *required* assistant district attorneys to screen cases more carefully."[300] Not only were prosecutors eliminating "weak cases at the beginning of the process," but "the office was able to direct resources to more meritorious cases."[301]

These screening units need not be confined to the postarrest period. Adam Gershowitz has written persuasively about the merits of establishing prearrest screening procedures.[302] As he explains, when prosecutors screen warrantless arrests *before* police book suspects, there are myriad benefits. First, "prosecutors regularly screen out weak, inefficient, and unjust charges prior to arrest."[303] Second, when prosecutors "work with a police officer at the time of arrest" they help to "strengthen[] cases that will be filed."[304] Third, these interactions provide critically important on-the-job training for police, helping them better understand what prosecutors need in their case files.[305] Fourth, "[p]rosecutor involvement at the arrest stage also allows for a more careful look at bond amounts."[306]

Furthermore, screening and charging decisions should be made by experienced attorneys.[307] Larger offices, which can afford horizontal prosecution structures, should create specialized screening and charging units staffed with senior attorneys.[308] Wherever possible, prosecutors' offices should have dedicated intake units that screen and charge most, if not all, of the cases referred by police. Intake units should be staffed by expert prosecutors—not by novices. These expert prosecutors should screen and review new cases *before* they are assigned to a trial-level attorney who will handle the case through disposition. Attorneys in the screening and charging unit should review the police report to make an initial determination whether the case should be prosecuted at all. They should also be responsible for gathering any additional information necessary to their charging decision. In some instances, this will require working closely with police to identify missing evidence or

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7 (2009), https://www.vera.org/downloads/publications/Using-data-to-advance-fairness-in-criminal-prosecution.pdf [https://perma.cc/9FMC-5S7Z].

299. *Id.*

300. ADVANCING RACIAL EQUALITY, *supra* note 292, at 15 (emphasis added).

301. *Id.*

302. *See* Adam M. Gershowitz, *Justice on the Line: Prosecutorial Screening Before Arrest*, 2019 U. ILL. L. REV. 833, 864–65.

303. *Id.* at 864.

304. *Id.* at 865.

305. *Id.*

306. *Id.*

307. *See* Wright & Miller, *supra* note 144, at 62–66.

308. *See* Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. 775, 797 (2016); Melilli, *supra* note 58, at 687; Wright & Miller, *supra* note 144, at 62–63 (explaining how putting highly experienced prosecutors into the screening department was a key element of New Orleans's well-regulated screening system).

problematic issues and questions of proof. In other instances, they will have to engage with defense counsel.[309]

In too many prosecutors' offices, these are viewed as tasks for new lawyers. But research indicates that new prosecutors fail to appreciate or fully exercise the requisite discretionary judgment.[310] They also tend to be harsher and more rigid in their decision-making than prosecutors with more experience.[311] As a result, junior prosecutors tend to accept prosecution and charge each defendant with every crime for which the police report provides a legal basis.[312] In contrast, experienced prosecutors make decisions that are both more practical and more nuanced, decline weak cases, refer first-time or especially sympathetic defendants to diversion programs, and concentrate prosecutorial resources on building cases against defendants they view as truly dangerous.[313]

Experienced prosecutors may also screen and charge cases more carefully than novice prosecutors. The American Prosecutors Research Institute found "that prosecutors with more than five years of experience spent [thirty-five percent] more time than less experienced prosecutors on the [initial charging] decision."[314] More experienced prosecutors are less likely to be concerned about how an individual charging decision will affect their careers, and they have learned through trial and error which kinds of charges are not worth bringing.[315]

Novice prosecutors may also be more susceptible to charging pressures from police. One study of state prosecutors found that new prosecutors tend to view all members of law enforcement as trustworthy and accept their word

309. *See* Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 819 (2003) ("[T]he more contact the prosecutor has with the evidence at an early stage, the more informed her screening decisions will be.").

310. *See* Wright et al., *supra* note 32, at 2145 (discussing this research).

311. *See, e.g.*, Crane, *supra* note 308, at 781; ANATOMY OF DISCRETION, *supra* note 47, at 69; Seth Harding, *On Prosecutorial Decision Making: Factors and Philosophies*, 43 LAW & PSYCH. REV. 193, 204 (2019).

312. *See Cure for YPS*, *supra* note 126, at 1085; Kay L. Levine & Ronald F. Wright, *Prosecutor Risk, Maturation, and Wrongful Conviction Practice*, 42 LAW & SOC. INQUIRY 648, 660 (2017) [hereinafter *Prosecutor Risk*].

313. *Cure for YPS*, *supra* note 126, at 1085–86; *Prosecutor Risk*, *supra* note 312, at 660–61. We note, however, unlike their veteran colleagues, who have long grown accustomed to "the filth, the wretched conditions, and the frenetic pace" that characterize so many criminal courts, prosecutors may be more attuned to the cruelty that pervades the criminal legal system. *See* Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1688 (2010). And new prosecutors may be more idealistic about what the criminal legal system can achieve. H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1702 (2000); *see also Cure for YPS*, *supra* note 126, at 1109 (discussing the more experienced "prosecutor's sense of despair about the limits of the criminal justice system to accomplish meaningful change").

314. *Cure for YPS*, *supra* note 126, at 1115–16.

315. Robert N. Miller, *Balancing the Duty to Prosecute and the Obligation to Do Justice*, 37 LITIGATION 47, 50–51 (2011) (recounting how a former state prosecutor's experience in bringing charges against a police officer who shot a fleeing teenager taught him to be weary of bringing similar cases in the future).

without question.[316] Veteran prosecutors, however, are more likely to bring a healthy degree of skepticism to their review of police work[317] and are less likely to cave to police charging pressures.[318]

Wherever possible, new cases should be triaged for case-differentiated screening and charging workflows. In some instances, this may mean sending new arrests of specialized cases to a select group of lawyers who have deep expertise in those areas. For example, homicide, sexual assault, interpersonal violence, and child abuse cases should be screened and charged by prosecutors who are familiar with the complexities of these cases.[319] These attorneys are best equipped to interview key witnesses and victims and accurately assess legal and evidentiary issues.[320] More "standard" cases, such as first-time drug possession or DWI, can be diverted to a prosecution resolution unit that offers expedited diversions, deferred adjudications, or other standardized plea offers. Such early case resolution divisions have been successfully implemented in places as diverse as Seattle, Washington, Montgomery, Alabama, and Brooklyn, New York.[321]

Finally, notwithstanding the Deason Study and others like it, we have far too little data about charging practices to fully understand when and how cases are declined or accepted.[322] Gathering that data within an individual office would help inform best practices in charging for that office. Once they understand their charging timelines, trends, and outcomes, prosecutors can expedite screening and charging review for those offenses with high declination rates.[323]

4. Formalize Screening and Charging Policies and Provide Training About How to Implement Them[324]

National best practices recommend that a "prosecutor's office . . . establish standards and procedures for evaluating complaints to determine whether formal criminal proceedings should be instituted."[325] But formal, written charging

316. *Prosecutor Risk*, *supra* note 312, at 658.

317. *See id.* at 663–64.

318. *See id.*; *Cure for YPS*, *supra* note 126, at 1099.

319. *See* Wright & Miller, *supra* note 144, at 63; SPOKANE STUDY, *supra* note 21, at 42 (Recommendation 5.6 (3)).

320. Wright & Miller, *supra* note 144, at 63.

321. FAIR & JUST PROSECUTION, PROMISING PRACTICES IN PROSECUTOR-LED DIVERSION 10–14 (2017), https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.Diversion.9.26.pdf [https://perma.cc/4HDW-PS4C].

322. *See* Wright et al., *supra* note 32, at 2141–42 (discussing the lack of any data on prosecutor charging practices).

323. There has been no national study of causes for prosecutorial declination decisions. *See id.*

324. Not every prosecutor's office will have the resources to have both a screening process and a charging process. Nonetheless, the practical suggestions here about screening procedures can apply just as well to charging.

325. ABA STANDARDS, *supra* note 60, § 3-4.2(b).

policies are rare.[326] And most prosecutors receive little, if any, explicit guidance about how to screen and charge cases.[327] Instead, informal, attorney-to-attorney transmission of unwritten norms are the predominant education for prosecutors who exercise this critically important role.

This lack of explicit, written charging policies can hinder both the quality and the timeliness of screening and charging decisions.[328] And lacking written standards against which to measure prosecutors' performance, it is hard to imagine how to provide adequate training.[329] As a result, screening and charging decisions may be "left to individual attorneys 'who may have their own approaches or axes to grind, or feel they need to "make their mark" by acting in certain ways.'"[330] In such situations, the timelines from arrest to charging may depend upon the luck of case assignments, rather than thoughtful prosecutorial policy.[331]

Chief prosecutors should develop written screening and charging policies that address substantive standards, prosecutor workflows, and case processing deadlines. Those policies should specifically instruct prosecutors to prioritize timely decision-making in cases where a defendant is detained. Additionally, those policies must provide a roadmap for how prosecutors should respond

326. *See, e.g.*, ACLU OF OR., A PEEK BEHIND THE CURTAIN: SHINING SOME LIGHT ON DISTRICT ATTORNEY POLICIES IN OREGON 20, 30–31 (2019) [hereinafter *A Peek Behind the Curtain*], https://www.aclu-or.org/sites/default/files/field_documents/a_peak_behind_the_curtain_0_1.pdf [https://perma.cc/A4JR-ZSDG] (finding that at least forty percent of the state's district attorneys' offices have no internal written policies on charging and few required training on charging); *see also* Wright et al., *supra* note 32, at 2145 ("Overall the lack of office policies in charging or a centralized charging unit has been theorized to cause variability in prosecutor charging." (citing multiple sources to support claim)). Wright, Baughman & Robertson point out that "fear of litigation or public review might prevent" prosecutors from memorializing written charging guidelines. *Id.* at 2153. *But see* Todd Lochner, *Strategic Behavior and Prosecutorial Agenda Setting in United States Attorneys' Offices: The Role of U.S. Attorneys and Their Assistants*, 23 JUST. SYS. J. 271, 289 (2002) (describing written charging policies for federal prosecutors).

327. *See* Melilli, *supra* note 58, at 687; *see also* David Schwendiman, *The Charging Decision: At Play in the Prosecutor's Nursery*, 2 B.Y.U. J. PUB. L. 35, 43–44 (1988) (arguing that a high-quality charging system should require prosecutors to obtain and maintain a special certification).

328. *See A Peek Behind the Curtain*, *supra* note 326, at 20–21; James Babikian, Note, *Cleaving the Gordian Knot: Implicit Bias, Selective Prosecution, & Charging Guidelines*, 42 AM. J. CRIM. L. 139, 161–62 (2015); Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187, 2207 (2010).

329. *See* O'Neill, *supra* note 274, at 1492; Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 262 (2001).

330. CGR REPORT, *supra* note 130, at 34–35.

331. The ABA Standards offer the vague advice that "[a] core training curriculum should also seek to address . . . exercises in the use of prosecutorial discretion." ABA STANDARDS, *supra* note 60, § 3-1.13(b); *see also* CTR. FOR GOV'T RSCH., STRENGTHENING ALTERNATIVES TO INCARCERATION PROGRAMS AND CRIMINAL JUSTICE SYSTEM PRACTICES IN STEUBEN COUNTY 23 (2005) [hereinafter STEUBEN COUNTY REPORT], https://reports.cgr.org/details/1478 [https://perma.cc/PWJ2-QBET] (describing unclear guidelines that are "not always consistently followed in practice by all ADAs, given the lack of consistent orientation or training of new ADAs, or update reminders to veterans").

if their workloads make it impossible for them to timely screen and charge their cases.

Caseload pressures are among the chief causes of charging delay.[332] Consider, for example, the situation that confronts prosecutors in Alameda County, California. Testifying in 2019 at a hearing on charging delay, a deputy district attorney described the challenges his office faces:

> Our office obviously has 150 attorneys, but only [ten] or [twelve] of them are reviewing cases at one time for charging. The number that we came up with is about 3,100 cases reviewed per year per DA . . . for charging. That, obviously, doesn't take into account the police departments themselves who obviously are coming in with several arrests and need to bring those cases over to us for charging . . . .[333]

In other words, charging delays were in "the nature of the beast of Alameda County and our office and how many cases we have to review."[334] Under those circumstances, merely reviewing a case within the statute of limitations was the office's "number one goal."[335]

Chief prosecutors must adopt and enforce ABA Standard 3-1.8(a), which states that:

> [A] prosecutor should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers the interests of justice in fairness, accuracy, or the timely disposition of charges, or has a significant potential to lead to the breach of professional obligations.[336]

Further, if a prosecutorial "workload prevents competent representation," the office "should not accept additional matters until the workload is reduced, and should work to ensure competent representation in existing matters."[337]

If charging deadlines cannot be met, prosecutors must make hard decisions about new declination policies and communicate those policies to police so that their caseloads decline. Critically, we are not suggesting that offices add more prosecutors to feed our bloated system of mass incarceration. Rather, prosecutors must triage their existing workloads, declining some cases for

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332. *See* Nelson O. Bunn, Jr., *Overworked and Understaffed: The Shifting Landscape in Local Prosecutor Caseloads*, NAT'L DIST. ATT'YS ASS'N (Feb. 24, 2020), https://ndaajustice.medium.com/overworked-and-understaffed-the-shifting-landscape-in-local-prosecutor-caseloads-122f7ef5e4f1 [https://perma.cc/DH3B-6T7Q]; Gershowitz & Killinger, *supra* note 110, at 285–86. In 2002, the American Prosecutors Research Institute conducted caseload and workload assessments in fifty-six prosecutors' offices around the country. *See* AM. PROSECUTORS RSCH. INST., *supra* note 129, at 1–2. While concluding that the variabilities from office to office meant a national standard was not feasible, the report gave concrete guidance on how each office should set its caseload limits. *Id.*

333. Dickerson v. Superior Court, 252 Cal. Rptr.3d 871, 876 (Cal. App. Dep't Super. Ct. 2019).

334. *Id.*

335. *Id.*

336. *See* ABA STANDARDS, *supra* note 60, § 3-1.8(a).

337. *Id.*

prosecution altogether, and returning other cases to police for additional work. Again, their decisions must prioritize the prompt release of defendants who are languishing in jail while their case files lie unattended on an overworked prosecutor's desk.[338]

Office policy should also clearly prohibit prosecutors from using charging delay to impose extrajudicial punishment or to pressure a defendant into pleading guilty. Unfortunately, these deeply unethical practices do occur in some prosecutors' offices. One of the authors practiced criminal law in New Orleans, where a person can spend sixty days in jail waiting for a decision about felony charges. In the early and mid-2000s, it was not uncommon for a prosecutor to report that a case would be declined on the sixtieth day after arrest, "because we aren't going to indict, but my cop wants your client to do some time." Written prosecutorial policies must unequivocally forbid this reprehensible use of postarrest, precharge delay to punish people who will never be charged, much less convicted.

Similarly, prosecutorial policies must forbid the strategic use of charging delay to extract plea concessions. When a case has weak facts, a prosecutor may delay their charging decision, hoping that a long wait in detention will persuade a defendant to plead guilty—even to a charge that the prosecution might never actually file. For example, in one upstate New York study, researchers described how prosecutors deliberately delayed making their charging decisions, because they believed that the "'best' pleas are often . . . negotiated with the current reality of jail hanging over the defendant."[339] And in the Deason Study, Hazelton prosecutors openly embraced the strategic advantages of a long precharge detention, commenting that, "no one pleads from the street."[340] Written screening and charging policies can help to curb this abusive practice.

C. MITIGATING THE HARMS

Without changes to policing practices, prosecutorial workflows, or legal charging timelines, there are still ways to mitigate the harms of precharge detention. Earlier, we argued that prosecutors must prioritize the screening and charging of cases with in-custody defendants. Judges and defense attorneys can similarly turn their attention to uncharged defendants who are in custody.

As a preliminary matter, this means that detained defendants must have defense counsel who are actively working to defend them. Counsel must be appointed at the defendant's initial appearance in court and must be responsible for actively investigating and negotiating on the defendant's behalf even

338. Implementing these strategies will require thoughtful structuring of charging priorities. For example, a chief prosecutor might direct his office to screen and charge violent crimes ahead of victimless crimes. As a result, cases involving victimless crimes might be flagged for declination until prosecutors can meet office standards for timely screening and charging those cases.

339. STEUBEN COUNTY REPORT, *supra* note 331, at 22.

340. Deason Author File, *supra* note 21.

before formal charges have been filed.[341] Defense counsel should challenge the constitutionality of prolonged precharge detention and should move for reduction of bond.

Wherever possible, defense counsel should use data about declinations to bolster their arguments. For example, in 2013, North Carolina prosecutors dismissed forty-nine percent of all cases filed in court.[342] Surely that data highlights the unfairness of precharge detention. The longer a defendant sits in jail without a state commitment to prosecute and the more likely it is that their case will be declined or dismissed, the greater the equitable arguments that precharge detention violates the Due Process Clause.

Judges should insist upon regular precharge status conferences. These conferences will prevent cases from falling through the cracks and will give the parties structured opportunities to negotiate charging outcomes. Where state law sets charging deadlines, precharge cases should be calendared for a status conference on the last legal day to file charges. At that conference, the judge must confirm that the prosecution met its formal charging deadline or order the defendant's prompt release. This will avoid the tragic overdetention that occurs in many jurisdictions.

For example, the problem of precharge delay in New Orleans in 2021 was only made visible to the public because of the mechanism in place for release of uncharged arrestees.[343] Orleans Parish courts automatically calendar new cases for a hearing on the date of the charging deadline.[344] If the prosecution has not filed charges, the arrestees are automatically released from jail.[345] Not only does this prevent illegal and unwarranted detention but it incentivizes prosecutors to charge cases in a timelier manner. At this point in time, many jurisdictions lack the automatic release mechanism that is sorely needed.

Prosecutors who care about fair process can also provide discovery before formal charges are filed. Without police reports, a defense attorney cannot adequately consider the charges nor consider what options are in the client's best interest. In states that allow prosecution by information, defenders and

341. DEASON CTR., SMU DEDMAN SCH. OF L., ENDING INJUSTICE: SOLVING THE INITIAL APPEARANCE CRISIS 3 (2022), https://scholar.smu.edu/cgi/viewcontent.cgi?article=1002&context=deasoncenter [https://perma.cc/254Y-CQU4].

342. *Data Portal: North Carolina Measures 2013*, MEASURES FOR JUST., https://measuresforjustice.org/portal/NC?c=2013 [https://perma.cc/5B3M-QNBC]. Other states report dismissal rates ranging from thirteen percent to thirty-seven percent. *See generally Data Portal*, MEASURES FOR JUST., https://measuresforjustice.org/portal [https://perma.cc/M82A-D6Z8] (displaying the statistics of various states).

343. *See* Simerman et al., *supra* note 102 (citing statutory provision "Section 701" allowing for automatic release).

344. State v. Cheneau, 336 So. 3d 908, 911 (La. Ct. App. 2022) (finding that the trial court's *sua sponte* setting of "a hearing date to safeguard the observance of [charging deadlines]" was "within the court's authority to conduct criminal proceedings expeditiously and ensure that justice is done" in compliance with the relevant rules about charging deadlines).

345. LA. CODE CRIM. PROC. ANN. art. 701(D)(2) (2022).

prosecutors can avoid lengthy waits for grand jury sessions and agree to waive the right to indictment.[346] When competent defense counsel represent precharge detainees, there is no impediment to a defendant's knowing, intentional, and voluntary waiver of grand jury review.

While prosecutors have the greatest ability to effect change, defense attorneys and judges can play critical roles preventing endless detention without a charging decision. Extended charging delay is an emergent and pervasive problem in need of a solution.

CONCLUSION

Over ten million people are arrested each year.[347] The Vera Institute of Justice estimates that a person is arrested every three seconds.[348] It is no surprise that district attorneys' offices around the country are severely overburdened trying to keep pace. Prosecutors will ultimately decline charges in anywhere from twenty to over fifty percent of cases,[349] and, of the cases where charges are accepted, ninety to ninety-five percent of those defendants will plead guilty.[350] Therefore, almost all the half million people sitting in our jails on any given day[351] will never have a trial. Instead, they await a charging decision for weeks and months, and even years, on end, only to be released without even an apology. In this Article, we have sought to expose the intractability of this costly postarrest, precharge delay while making concrete, practical suggestions for alleviating the problem.

As it stands, the U.S. Supreme Court insists that the Constitution is indifferent to the plight of arrested and detained individuals held on only the word of a police officer. The Court has paid scant attention to precharge criminal procedure.[352] It has assumed anachronistically that any errors or problems that occur in the screening and charging process will ultimately be

346. We ascribe to the commonly held view that a grand jury will indict a ham sandwich.

347. Rebecca Neusteter & Megan O'Toole, *Every Three Seconds: Unlocking Police Data on Arrests*, VERA INST. OF JUST. (Jan. 2019), https://www.vera.org/publications/arrest-trends-every-three-seconds-landing/arrest-trends-every-three-seconds/overview [https://perma.cc/B2EX-789Z].

348. *Id.*

349. *See supra* notes 151–56 and accompanying text (discussing declination rates).

350. LINDSEY DEVERS, BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST., PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 3 (2011), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf [https://perma.cc/DWY4-KAXY].

351. Alexi Jones & Wendy Sawyer, *New Data on Jail Populations: The Good, the Bad, and the Ugly*, PRISON POL'Y INITIATIVE (Mar. 17, 2021), https://www.prisonpolicy.org/blog/2021/03/17/jails [https://perma.cc/H696-ERH4] (giving jail population as of 2020 as approximately a half million).

352. 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.").

solved by a trial, with its many attendant constitutional protections.[353] State law is rarely better, sometimes allowing people to languish in jail without charges indefinitely.

We have described the host of barriers that prosecutors face in making expeditious and meaningful charging decisions and the problems stemming from extended charging time. With a Supreme Court that is unlikely to articulate immediate constitutional solutions, we look to criminal legal stakeholders to create robust screening and charging policies with reasonable timelines, to set caseload caps with improved lines of communication between prosecutors and police, and to effectuate procedural safeguards for the thousands of men and women who bear the burdens caused by the delay.

353. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 125 n.27 (1975) (finding adversary review of arrest charges unnecessary because this is "only the *first* stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct"); *see also* Kuckes, *supra* note 352, 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.").