NOLLE-AND-REINSTITUTION: OPENING THE DOOR TO REGULATION OF CHARGING POWERS

*JOSEPH A. THORP**

* Visiting Assistant Professor and Friedman Fellow, Jacob Burns Community Legal Clinic, George Washington University School of Law. For their assistance, the author thanks Phyllis Goldfarb, Janet C. Hoeffel, Pamela R. Metzger, Anne K.

INTRODUCTION

Prosecutorial charging power is out of control. The American prosecutor wields the most awesome of the state's powers and operates largely free of judicial oversight. A strong system of deference to prosecutorial discretion gives prosecutors control over every aspect of the charging process: they decide whether, when, where, and which charges should be filed.[1] Savvy prosecutors combine two of these powers to create a new power that far exceeds the sum of its parts: *nolle*-and-reinstitution.

Nolle-and-reinstitution occurs when a prosecutor voluntarily dismisses a criminal charge and later reinstates the same charge. Prosecutors often reap strategic advantages from *nolle*-and-reinstitution. They can use it to shop for better forums, dodge discovery sanctions, evade trial court orders, circumvent speedy trial limitations, and coerce guilty pleas.[2] In contrast, defendants often suffer considerable harm when charges against them are dismissed and then reinstated. The practice of *nolle*-and-reinstitution exposes a defendant to re-arrest, prolongs her pre-trial incarceration, and may require her to pay a second bond.[3] *Nolle*-and-reinstitution also jeop-

---

Olesen, and Karen Thornton. Special thanks also to the Friedman Fellows: Mira Edmonds, Alice Hamilton Everett, and Claire Donohue.

1. *See generally*, WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §§ 13.1–13.2, at 707–16 (5th ed. 2009); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

2. *See, e.g.*, People v. Dunbar, 625 N.W.2d 1 (Mich. 2001) (prosecution not precluded from using *nolle*-and-reinstitution to obtain new judge and evade consequences of original judge's evidentiary ruling); State v. Miller, 683 N.W. 2d 485, 489 (holding that, when the trial judge refused to allow state's expert to testify as a discovery sanction for failing to turn over expert witness materials, the prosecution could *nolle*, reinstitute identical charges, and then call the expert witness to testify in "new" case); State v. King, 2010-2638 (La. 5/6/11); 60 So. 3d 615 (acknowledging that *nolle*-and-reinstitution gives the prosecution a unique power to circumvent a judge's denial of a continuance and holding that the court should not interfere unless the defendant can show that the prosecutor used the power to gain an advantage and that the defendant was prejudiced); United States v. MacDonald, 456 U.S. 1, 7 (1982) (holding that the period after dismissal and before reinstitution does not count towards a speedy trial claim); State v. Henson, 642 A.2d 432, 434 (1994) (holding that the *entire* period preceding a *nolle* does not count towards a Sixth Amendment speedy trial analysis if the state acted in good faith when dismissing the charge). *But see* State v. Bible, 892 P.2d 116, 119 (Wash. Ct. App. 1995) (evasion of speedy trial limitations is an impermissible reason for seeking dismissal without prejudice).

3. *See, e.g.*, Kenyon v. Commonwealth, 561 S.E.2d 17, 19 (Va. Ct. App. 2002) (upholding *nolle*-and-reinstitution when the state dismissed and then re-filed charges by obtaining a second arrest warrant); *see also* State v. Winer, 945 A.2d 430, 441 (Conn. 2008) (holding that after a case is *nollee*d, it can only resume with a new charging document and re-arrest); *see, e.g.*, United States v. MacDonald, 531

ardizes a defendant's right to counsel of choice, impairs her trial defense, and erodes her confidence in the court's ability to conduct a fair trial.[4] This combination of consequences tears at the fabric of the adversary system by sabotaging a defendant's rights and enabling the executive to usurp powers properly held by the judicial branch.

Although *nolle*-and-reinstitution has flown beneath the radar of scholars, courts, and legislatures for decades, it requires attention and analysis now more than ever. In May of 2014, in the case of *Martinez v. Illinois*, the Supreme Court encouraged prosecutors to use *nolle*-and-reinstitution as a vehicle to avoid constitutional limits on double jeopardy when they are not ready to proceed to trial.[5] The Court's casual endorsement of *nolle*-and-reinstitution exposes a structural flaw in the way the judiciary views, and therefore regulates, prosecutorial charging power. The Court has failed to distinguish between two very different uses of charging power: inquisitorial charging power and adversarial charging power.

Inquisitorial charging powers occur *before* the prosecutor has filed charges and begun the adjudicative process. These "classic" prosecutorial powers include the authority to decide what, if any, charges to file. During this inquisitorial phase, judicial regulation is not just infeasible,[6] it also creates legitimate separation of powers problems.[7] Adversarial charging powers, by contrast, are only exercised after a prosecutor files an initial charge and begins the adjudicative process. Adversarial charging powers include the power to enhance, reduce, dismiss, divert, and *nolle*-and-reinstitute a charge. At this stage, the prosecutor is no longer acting as an inquisitor making policy decisions; instead, the prosecutor is acting as a party-opponent in an adversarial proceeding. This change is far from just symbolic—it marks a seismic shift in the life of a criminal case.[8]

Unlike the inquisitorial phase, where judicial regulation would strain a court's competency and infringe on separation of powers, regulation during the adversarial phase is essential to the integrity

---

F.2d 196, 201 (4th Cir. 1976) (describing that after the military dismissed its case against Mr. MacDonald, the Department of Justice indicted him, re-arrested him, and the district court set bail), *rev'd on other grounds*, 456 U.S. 1 (1982).

4. *See infra* Part II.

5. 134 S. Ct. 2070, 2076–77 (2014) (per curiam).

6. *See generally* United States v. Armstrong, 517 U.S. 456, 465 (1996); Wayte v. United States, 470 U.S. 598 (1985).

7. *See* discussion *infra* Part IV.

8. For example, the majority of a defendant's constitutional rights only take effect after the prosecutor has formally filed charges.

of the adversary system.[9] However, the Supreme Court has refused to regulate the vast majority of adversarial charging powers. Rather than drawing the line at the initiation of the adversarial process, the Court has only imposed significant regulations upon the post-trial use of prosecutorial charging powers.[10] Thus prosecutors have been given *carte blanche* to use their charging powers at any point leading up to trial, the period during which prosecutors are partisan advocates and therefore most likely to abuse their executive power.[11]

Nolle-and-reinstitution's significance is twofold. First, it highlights the distinction between inquisitorial and adversarial charging powers and exposes a flaw within the Court's current charging power jurisprudence. Second, *nolle*-and-reinstitution creates a viable place for the Court to make its first serious attempt to regulate the prosecution's use of its adversarial charging powers.

In this Article I use the practice of *nolle*-and-reinstitution to begin a long-overdue conversation about the judicial regulation of charging powers. Part I provides an example of prosecutorial abuse of the *nolle*-and-reinstitution power and reviews the history of that power. Part II discusses the consequences of an unregulated *nolle*-and-reinstitution power, including unfair strategic advantages for prosecutors, procedural and substantive harms to defendants, and violations of basic principles of adversarial fairness. Part III surveys the Court's *laissez-faire* approach to the prosecutor's power to *nolle*-and-reinstitute by exploring the limited applicable Supreme Court jurisprudence. Part III also describes the inadequacy of state legislative and judicial responses to this problem. Part IV examines and critiques the Supreme Court's charging power jurisprudence writ large and proposes a viable roadmap for judicial regulation of the prosecution's use of adversarial charging powers.

9. *Wayte*, 470 U.S. at 607.

10. *See, e.g.*, Blackledge v. Perry, 417 U.S. 21, 28–29 (1974) (holding that where a defendant has been convicted of a misdemeanor and then seeks to exercise her statutory right to appeal via a trial *de novo*, it is not constitutionally permissible for a prosecutor to add new, more serious charges against the defendant prior to the trial *de novo*).

11. *See* discussion *infra* Part IV.

I.
BACKGROUND

A. Illustration

In February of 2009, the Orleans Parish District Attorney's Office charged Troy Dunn with the murder of Michael Vacarro.[12] Unable to post his $1,500,000 bond, and facing life in prison without parole, Mr. Dunn remained in custody at the Orleans Parish Prison. Eventually, Mr. Dunn and his family scraped together enough money to hire private counsel.

For almost two years, the State requested, and received, continuance after continuance of the trial. Meanwhile, Mr. Dunn sat in jail. Finally, the trial judge denied the prosecution's request for another continuance and ordered the case to trial. Although it was unable—or unwilling—to go forward, the State did not appeal the trial court's denial of its motion for continuance. Instead, the State dismissed, or *nolle prossed*, its case against Mr. Dunn, and the court ordered his release from jail.

Mr. Dunn's reprieve was short-lived. The next day, the State refiled identical charges against Mr. Dunn, but under a new bill of information. Thus, despite the adversarial posture of the case, the State granted itself a continuance with its *nolle*-and-reinstitution power that the trial court had denied.

This *nolle*-and-reinstitution did more than merely flout the trial court's ruling. It also caused Mr. Dunn significant harm. Following the reinstitution, Mr. Dunn was re-arrested and re-booked into Orleans Parish Prison. Mr. Dunn was unable to post bond, so he was, once again, held in jail pending the resolution of his case. Local court rules forced Mr. Dunn's case into a lengthy administrative limbo as his "new" case was transferred from courtroom to courtroom.[13]

By this time, Mr. Dunn's family had run out of money to pay for private counsel; the legal fees seemed endless and the trial seemed unlikely ever to occur. Private counsel withdrew from the case, and the court appointed a public defender. Mr. Dunn thereby

12. In order to protect client confidentiality, the author has changed all information that might identify the cases and clients that inform this example. The author has, on file, records related to the cases from which this example is drawn.

13. Orleans Parish Court Rules require that reinstituted cases be transferred to the Section to which the original case was allotted. LA. DIST. CT. R. 14.0, App. 14.0A at 29 (Criminal District Court, Parish of Orleans).

lost his counsel of choice, counsel who had represented him for over two-and-a-half years.[14]

Mr. Dunn's public defender filed a motion to dismiss the "new" bill of information, challenging the State's *nolle*-and-reinstitution practice as an unconstitutional violation of the Due Process Clause of the United States Constitution.[15] The trial court granted the motion but stayed the dismissal and held Mr. Dunn in jail pending appellate review. Two years later, the Louisiana Supreme Court issued a one-paragraph decision reinstating the charges against Mr. Dunn. The court offered no analysis that would limit the prosecutorial power of *nolle*-and-reinstitution.

Mr. Dunn's case is not unique. Every state court and federal circuit allows the *nolle*-and-reinstitution of criminal charges.[16] Yet,

---

14. *Cf.* United States v. Gonzalez-Lopez, 548 U.S. 140, 152 (2006) (holding that a judge's removal of a defendant's counsel of choice was a structural error).

15. U.S. CONST. amend. XIV.

16. Sheffield v. State, 959 So. 2d 692, 695 (Ala. Crim. App. 2006); ALASKA R. CRIM. P. 43; Belcher v. Superior Court, 466 P.2d 755, 757 (Ariz. 1970); Tipton v. State, 959 S.W.2d 39, 41 (Ark. 1998); Burris v. Superior Court, 103 P.3d 276, 282–83 (Cal. 2005); Van Gundy v. O'Kane, 351 P.2d 282, 285 (Colo. 1960); State v. Winer, 945 A.2d 430 (Conn. 2008); State v. Dennington, 145 A.2d 80, 82 (Del. Super. Ct. 1958); State v. Hurd, 739 So.2d 1226, 1227 (Fla. Dist. Ct. App. 1999); Sanders v. State, 631 S.E.2d 344, 345 (Ga. 2006) (quoting McIntyre v. State, 377 S.E.2d 532 (Ga. Ct. App. 1989)); Iaea v. Heely, 743 P.2d 456, 458 (Haw. 1987); State v. Summers, 266 P.3d 510, 514 (Idaho Ct. App. 2011); People v. Triplett, 485 N.E.2d 9, 18 (Ill. 1985); Davenport v. State, 689 N.E.2d 1226, 1229 (Ind. 1997), *reh'g granted*, 696 N.E.2d 870 (Ind. 1998); State v. Hamrick, 595 N.W.2d 492, 494 (Iowa 1999); State v. Schamp, 262 P.3d 358, at *4 (Kan. Ct. App. 2011) (unpublished table decision); Gibson v. Commonwealth, 291 S.W.3d 686, 691 (Ky. 2009); State v. King, 2010-2638 (La. 5/6/11); 60 So. 3d 615; State v. Nielsen, 2000 ME 202, ¶ 9, 761 A.2d 876, 879; Silver v. State, 23 A.3d 867, 876 (Md. 2011); Commonwealth v. Hrycenko, 810 N.E.2d 851, 854 (Mass. App. Ct. 2004); People v. McCartney, 250 N.W.2d 135, 136 (Mich. Ct. App. 1976); State v. Pettee, 538 N.W.2d 126, 128 (Minn. 1995); De La Beckwith v. State, 94-KA-00402-SCT (¶¶ 57–58) (Miss. 1997); State v. Clinch, 335 S.W.3d 579, 583 (Mo. Ct. App. 2011); State v. Cline, 555 P.2d 724, 735 (Mont. 1976); State v. Dail, 424 N.W.2d 99, 101 (Neb. 1988); Oberle v. Fogliani, 420 P.2d 251, 252 (Nev. 1966); State v. Allen, 837 A.2d 324, 327 (N.H. 2003); State v. Rosen, 145 A.2d 158, 159 (N.J. Sup. Ct. Law Div. 1958); State v. Heinsen, 121 P.3d 1040, 1042 (N.M. 2005); People v. Franco, 657 N.E.2d 1321, 1324 (N.Y. 1995); State v. Jacobs, 495 S.E. 2d 757, 762 (N.C. Ct. App. 1998); State v. Jones, 653 N.W.2d 668, 676 (N.D. 2002); Lampe v. State, 540 P.2d 590, 595 (Okla. Crim. App. 1975); State v. Williams, 520 P.2d 462, 464 (Or. Ct. App. 1974); Com. v. Ahearn, 670 A.2d 133, 134 (Pa. 1996); State v. Reis, 815 A.2d 57, 65 (R.I. 2003); Mackey v. State, 595 S.E.2d 241, 242 (S.C. 2004); State v. Asimakis, 195 N.W.2d 407, 407 (S.D. 1972); State v. Moore, 713 S.W.2d 670, 675 (Tenn. Crim. App. 1985); *Ex parte* Legrand, 291 S.W.3d 31, 34 (Tex. App. 2009); State v. Steele, 236 P.3d 161, 166 (Utah. Ct. App. 2010); State v. Seagroves, 637 A.2d 1379, 1380 (Vt. 1993); Kenyon v. Commonwealth, 561 S.E.2d 17, 19 (Va. Ct. App. 2002); State v.

as demonstrated by Mr. Dunn's case, the prosecutorial practice of *nolle*-and-reinstitution can constitute a flagrant abuse of process with grave consequences for the defendant. How has it come to this? Why have courts ignored the potential for abuse and harm that is inherent in the practice of *nolle*-and-reinstitution?

B. Evolution

The power to *nolle* a criminal case has existed since at least the sixteenth century; however, it began as a very different power than it is today.[17] In pre-eighteenth century England, the power to *nolle prosequi* existed to shield defendants against frivolous prosecutions.[18] At the time, criminal prosecutions had much more in common with our modern civil court system than our criminal courts.[19] There were no public police or public district attorneys.[20] Private individuals, most frequently victims, were expected to pay for investigation and prosecution of crimes themselves.[21]

The power to enter a *nolle prosequi* was not an option for these private prosecutors; once felony charges were filed, a case was expected to go to trial.[22] Only the Attorney General had the *nolle* power, and that power was to be "used . . . to dismiss prosecutions that he regarded as frivolous or in contravention of royal inter-

---

Bible, 892 P.2d 116, 117 (Wash. Ct. App. 1995); State v. Cain, 289 S.E.2d 488, 490 (W. Va. 1982); State v. Miller, 2004 WI App 117, ¶ 1, 274 Wis. 2d 471, 477, 683 N.W.2d 485, 489; Allman v. State, 677 P.2d 832, 834 (Wyo. 1984); United States v. Colombo, 852 F.2d 19, 24–26 (1st Cir. 1988); United States. v. Lai Ming Tanu, 589 F.2d 82, 83, 90 (2d Cir. 1978); United States v. Fox, 130 F.2d 56, 58 (3d Cir. 1942); United States v. Smith, 55 F.3d 157 (4th Cir. 1995); United States v. Jones, 664 F.3d 966 (5th Cir. 2011); Dortch v. United States, 203 F.2d 709, 710 (6th Cir. 1953); United States v. Anderson, 514 F.2d 583, 587 (7th Cir. 1975); DeMarrias v. United States, 487 F.2d 19 (8th Cir. 1973); United States v. Moran, 759 F.2d 777 (9th Cir. 1985); United States v. Derr, 726 F.2d 617 (10th Cir. 1984); United States v. Hicks, 798 F.2d 446, 449–50 (11th Cir. 1986); *see also* State *ex rel.* Flynt v. Dinkelacker, 807 N.E.2d 967 (Ohio 2004) (after *nolle*, the State must re-indict; however, *nolle* is no bar to further prosecution); Roe v. Commonwealth, 628 S.E.2d 526, 528–29 (Va. 2006) (absent specific prosecution motion, case was dismissed with prejudice against reinstitution).

17. Goddard v. Smith (1704) 87 Eng. Rep. 1007, 1008–10 (Q.B.); ABRAHAM S. GOLDSTEIN, THE PASSIVE JUDICIARY 12 (1981).

18. *Goddard*, 87 Eng. Rep. at 1008; GOLDSTEIN, supra note 17, at 12.

19. David D. Friedman, *Making Sense of English Law Enforcement in the Eighteenth Century*, 2 U. CHI. L. SCH. ROUNDTABLE 475, 476 (1995) (citations omitted).

20. *Id.* at 475–76.

21. *Id.* at 476.

22. *Id.* at 486–487 (Although many misdemeanor cases were settled short of trial—referred to at the time as 'compounding'—doing so for felonies was illegal).

ests."[23] The Attorney General's decision to *nolle* a case was tantamount to a modern dismissal with prejudice, i.e., there was no possibility of reinstitution of charges.

The combined power of *nolle*-and-reinstitution did not come into existence until the State—rather than private citizens—began to prosecute criminal cases.[24] Once the State became the prosecutor, it acquired the power to file criminal charges *and* retained its power to *nolle* charges as well. Thus the power to *nolle*-and-reinstitute was born. Instead of being used to limit criminal prosecutions and protect defendants, as was originally intended, the power to *nolle* became a power used to defendants' detriment. Unsurprisingly, it did not take long for defendants to begin to complain. Less than thirty years after the United States' independence, criminal defendants began to litigate the State's use of *nolle*-and-reinstitution.[25] However, the significance of the shift from private prosecutors to public prosecutors was lost on the judiciary.[26] When courts first addressed challenges to *nolle*-and-reinstitution, they analyzed the issue by asking whether a *nolle* should act as a pardon or an acquittal.[27]

While early courts occasionally recognized the potential for misuse of *nolle*-and-reinstitutions,[28] they approved of the procedure almost without exception.[29] The most common justification, and the one used by the Supreme Court in 1868, was by reference to English common law.[30] Throughout the early nineteenth century,

---

23. Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 16 (2009).

24. In the United States, public prosecutors began to appear before the colonies gained their independence. John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 516 (1994).

25. *See, e.g.*, State v. I.S.S., 1 Tyl. 178 (Vt. 1801); Commonwealth v. Wheeler, 2 Mass. 172 (1806).

26. *Wheeler*, 2 Mass. at 172.

27. *Id.*

28. Territory v. Fullerton, 16 Haw. 526, 529 (1905) (The practice of the Attorney General to *nolle prosequi* an indictment and the grand jury to indict the defendant again for the same offense "may become vexatious and should not be followed except for good reasons.").

29. *See, e.g.*, *Wheeler*, 2 Mass. at 172; State v. I.S.S., 1 Tyl. 178 (Vt. 1801); State v. Nutting, 39 Me. 359, 361–62 (1855); State v. Thompson, 10 N.C. (3 Hawks) 613 (1825); Price v. Cobb, 3 S.E.2d 131, 133 (Ga. Ct. App. 1939); Parry v. State, 21 Tex. 746 (1858); State v. Hodgkins, 42 N.H. 474 (1861); *see also* Henry v. Commonwealth, 67 Ky. (4 Bush) 427, 429 (1869) (preventing re-indictment even when the original indictment was *nolle*'d based on a mistake of fact).

30. "Under the rules of the common law it must be conceded that the prosecuting party may relinquish his suit at any stage of it, and withdraw from court at his option, and without other liability to his adversary than the payment of taxable

as criminal defendants litigated the constitutionality of the *nolle*-and-reinstitution power, state courts also adopted English common law and almost unanimously upheld this prosecutorial power.[31] This reliance on English common law ushered the *nolle*-and-reinstitution power into American criminal procedure while simultaneously shielding it from substantive judicial analysis.

The problem has only gotten worse with time. In the past fifty years, the criminal justice system has grown dramatically in both scope and volume.[32] This growth is a result of the politicization of crime and the enormous political pressure that is put on state actors to deal with criminals harshly.[33]

II.
DANGERS OF *NOLLE*-AND-REINSTITUTION

The Due Process Clauses of the Fifth and Fourteenth Amendments demand that criminal procedure facilitate a level playing field for the prosecution and the defense.[34] The structure of the United States' adversary system gives the prosecution vast discretion over the investigation and prosecution of crimes. However, once the State files a charge and submits itself to the adversarial process, it becomes a litigant, subject to the fair process norms of the United

costs which have accrued up to the time when he withdraws his suit." The Confiscation Cases, 74 U.S. 454, 457 (1868); *see also* United States v. Cadarr, 197 U.S. 475, 478 (1905); *Wheeler*, 2 Mass. at 172 (citing Goddard v. Smith (1704) 87 Eng. Rep. 1008, 1009 (Q.B.)). The only limitation created by these early courts was a prohibition against entering a *nolle* during a trial without the defendant's consent. *See, e.g.*, State v. Thompson, 95 N.C. 596, 600–01 (1886) ("After the empaneling of the jury, and before verdict, the prosecuting officer cannot enter a *nolle prosequi* without the consent of the accused, as he has a right to a response from the jury to all the charges, and if such is done, it is deemed to be in effect an acquittal.").

31. *See, e.g.*, *Wheeler*, 2 Mass. at 172; *Thompson*, 10 N.C. at 613; *Nutting*, 39 Me. at 361; State v. Roe, 12 Vt. 93, 109 (1840); *Hodgkins*, 42 N. H. at 474. *But see Henry*, 67 Ky. (4 Bush) at 429 (holding that mistaken dismissal does not bar subsequent prosecution); State v. Phelan, 68 Tenn. 241 (1877) (same).

32. William J. Stuntz, *Bordenkircher v. Hayes: The Rise of Plea Bargaining and the Decline of the Rule of Law* 29–34 (Harvard Law Sch. Pub. Law Research Paper No. 120,2005), http://papers.ssrn.com/sol3/papers/cfm?abstract_id=854284.

33. For a discussion on the politicization of crime and the resulting increase in prosecutorial power and discretion, see Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9, 13–14 (1999). *See also* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715 (2005).

34. *See* Wardius v. Oregon, 412 U.S. 470, 472 (1973) ("We hold that the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants."); Binion v. Commonwealth, 891 S.W.2d 383, 386 (Ky. 1995) ("[I]n an adversarial system of criminal justice, due process requires a level playing field at trial.").

States Constitution. Prosecutorial abuse of *nolle*-and-reinstitution provides the prosecution with unfair procedural advantages, inflicts significant harm on criminal defendants, and undermines the structures and principles of adversarial criminal procedure.

Despite these dangers, this Article does not call for the wholesale elimination of the *nolle*-and-reinstitution power. Under exceptional circumstances, prosecutors may have an ethical obligation to dismiss a case and may have appropriate reasons for reinstitution in the future. Consider the following hypothetical: the prosecution charges the defendant with robbery and its case rests entirely upon the victim's identification. Shortly before trial, a drunk driver hits the victim and she, along with the State's case, falls into a coma. The State knows that without the victim's testimony, it cannot obtain a conviction. Accordingly, it dismisses the case. A year later, the victim wakes from her coma. Under these circumstances—and absent any speedy trial issues—*nolle*-and-reinstitution would be both justified and desirable. A blanket prohibition against reinstitution would unjustifiably reward the robber and harm society. It might also encourage prosecutors to persist in prosecutions without hope of conviction as a way of keeping the defendant in custody. The necessity of *nolle*-and-reinstitution, however, does not mean it should be left unregulated. As discussed below, *nolle*-and-reinstitution gives prosecutors unfair procedural advantages, prejudices defendants, and violates separation of powers.

A. Unfair Strategic Advantages

Abuse of *nolle*-and-reinstitution is no less egregious than other forms of prosecutorial misconduct, such as withholding exculpatory evidence.[35] An unscrupulous prosecutor can use *nolle*-and-reinstitution to shop for a more favorable forum, control the timing of proceedings, or harass her opponent. Yet the Supreme Court has refused to impose any constitutional limitation upon this practice.[36]

Forum shopping is among the most easily identified abuses of the prosecutorial *nolle*-and-reinstitution power.[37] Prosecutors can

35. Davenport v. State, 689 N.E.2d 1226, 1230 (Ind. 1997) (noting that, in using its power to dismiss and re-file charges, the State has the potential to "abuse its power and prejudice a defendant's substantial rights."), *reh'g granted*, 696 N.E.2d 870 (Ind. 1998).

36. *See infra* Part III.B.

37. *See, e.g.*, State v. Fowler, 106 Idaho 3, 674 P.2d 432 (Idaho Ct. App. 1983) (State's dismissal was without prejudice and did not bar re-filing of charges notwithstanding defendants' contention that State exercised *nolle*-and-reinstitution power in an effort to reinstitute charges before a different judge); People v. Dun-

nolle-and-reinstitute charges to shop for a litigation advantage, such as a better judge or a more favorable jurisdiction.[38] The 2004 Wisconsin case *State v. Miller* exemplifies the forum shopping abuse of *nolle*-and-reinstitution.[39] After Wisconsin prosecutors failed to timely disclose their expert witness, the trial judge imposed discovery sanctions and excluded the expert's testimony.[40] Rather than appeal the discovery sanction, the prosecution dismissed its case against Miller and then re-filed identical charges.[41] Having obtained a new judge and new case number, the prosecution reset the discovery clock.[42] Then, over the defense's objection, the new judge allowed the prosecution's expert witness to testify.[43] Case law is replete with similar examples of prosecutors abusing *nolle*-and-reinstitution to re-litigate matters such as the competence of witnesses,[44] the suppression of evidence,[45] and the existence of probable

bar, 625 N.W.2d 1 (Mich. 2001) (holding that a prosecutor's dismissal and reinstitution to avoid an adverse ruling did not violate due process.); *see also* People v. Traylor, 210 P.3d 433, 435 (Cal. 2009) (permitting prosecutors' "persistent re-filing of charges the evidence does not support in hopes of finding a sympathetic magistrate who will hold the defendant to answer"); Burris v. Superior Court, 103 P.3d 276, 281 (Cal. 2005) (unregulated power to *nolle* and reinstitute charges may enable prosecutors to engage in forum shopping); *see also* Rodgers v. Vasquez, 2013 WL 6240433 (C.D. Cal. Dec. 1, 2013) (prosecutorial *nolle*-and-reinstitution may be an attempt to engage in "impermissible 'forum shopping'" (internal citations omitted)); Stockwell v. State, 573 P.2d 116, 125 (Idaho 1977) (noting, with disapproval, "the practice of 'shopping' among magistrates or the repeated re-filing of a charge until a favorable ruling is obtained").

38. For example, prosecutors may dismiss a case in municipal court and re-file it in district court or, conversely, dismiss a case in a district court and re-file it in a lower court.

39. State v. Miller, 2004 WI App 117, ¶ 31, 274 Wis. 2d 471, 492, 683 N.W.2d 485, 496. Judicial estoppel is unlikely to afford defendants any protection from misuse of *nolle*-and-reinstitution because one of the elements requires a showing that "the party to be estopped convinced the first court to adopt its [inconsistent] position." *Id.* Thus, to be estopped from reinstituting a case, the prosecutor must have convinced the first court to allow a dismissal on the ground that the defendant was factually innocent.

40. *Id.* at 490.

41. *Id.*

42. *Id.*

43. *Id.*

44. People v. Walls, 324 N.W.2d 136, 138 (Mich. Ct. App. 1982).

45. People v. Turmon, 128 Mich. App. 417, 422 (1983) ("[D]efendant was clearly the victim of judge shopping" when, after the judge "ruled that the search . . . was illegal, the prosecutor, rather than appealing the ruling, initiated proceedings again. In this manner, the prosecutor could reargue the search issue before a different judge."); Joyner v. State, 678 N.E.2d 386, 392–93 (Ind. 1997) (noting that after a Superior Court judge suppressed evidence, the prosecution dismissed the case and re-filed it in Circuit Court, where a different judge denied

cause.[46]

The power to control the timing of a criminal charge is another enormous procedural advantage created by *nolle*-and-reinstitution. There are a number of reasons why the prosecutor may use *nolle*-and-reinstitution to delay a case.[47] She may want to locate an essential witness,[48] punish a defendant for demanding a trial,[49] or coerce a plea bargain.[50] *Nolle*-and-reinstitution enables the State to control whether a case will go to trial on any given day; this ensures that the State need never try a case before it has obtained favorable rulings on important issues.

Perhaps the most common abuse of the *nolle*-and-reinstitution power is as a means for the prosecutor to grant herself an unauthorized continuance. A simple example will illustrate the problem: on the day of trial, the State is unable to locate its star witness. Unable to proceed with the trial without this witness, the prosecutor requests a continuance, which the judge denies. This leaves the prosecutor with three options: (1) go to trial and face certain defeat; (2)

---

the defendant's motion to suppress); Stockwell v. State, 573 P.2d 116, 119 (Idaho 1977) ("[I]in an apparent attempt to circumvent the ruling of the magistrate reducing the charge against Stockwell from second degree murder to voluntary manslaughter," prosecutor dismissed all charges and filed a "second criminal complaint charging Stockwell with second degree murder.); People v. Dunbar, 463 Mich. 606, 615 (2001) (prosecution used *nolle*-and-reinstitution to present "exactly the same case to two different judges" in an effort "to avoid an adverse ruling" on the disclosure of its confidential informant; Michigan Supreme Court reversed, reinstating charges against the defendant because there was "no record evidence to support the circuit court's determination that the assistant prosecutor sought a dismissal of the charges in hope of obtaining a more favorable substantive result before a different judge").

46. State v. Brickey, 714 P.2d 644, 646 (Utah 1986) (Prosecutor admits to forum shopping, explaining: "My theory of the prosecution is I disagreed with the [first judge], to be honest with you . . . I have a chance to come back here every time and represent evidence until I get it bound over."); State *ex rel.* Fallis v. Caldwell, 498 P.2d 426, 428 (Okla. Crim. App. 1972) ("[T]his Court views critically the practice of 'shopping' among magistrates or the repeated refiling of a charge until a favorable ruling is obtained.").

47. Delay is the only aspect of *nolle*-and-reinstitution that the Supreme Court has not completely ignored. Still, the protections the Court has created against delay are far from adequate. *See infra* Part III.

48. Stockwell v. State, 573 P.2d 116, 124 (Idaho 1977) (acknowledging prosecutor's power to dismiss and re-file charges in order to "enable the prosecution to obtain further witnesses") (emphasis omitted).

49. Andrew M. Siegel, *When Prosecutors Control Criminal Court Dockets: Dispatches on History and Policy from a Land Time Forgot*, 32 AM. J. CRIM. L. 325, 352 (2005).

50. Of course, delay may also be the strategic ally of a defendant. Capital defendants may seek long delays for obvious reasons, or, by serendipity, the State's star witness may become unavailable.

file an interlocutory appeal, if available; or (3) dismiss the case and reinstitute the charges once it is prepared. In this way, prosecutors can briefly "reset" a case to the inquisitorial phase only to promptly re-file charges and start the adversarial proceedings anew, thus ensuring the State never need try a case before it is prepared.[51]

These abuses of *nolle*-and-reinstitution are most egregious when prosecutors eschew an available appeal of a trial court's order, preferring, instead, to dismiss and reinstitute the charges.[52] The dismissal "free[s] the proceedings of the unfavorable ruling," so that the issue in contention can "be reargued before a different judge with the chance that this new judge might be persuaded by the prosecutor's argument."[53] In contrast, the outcome of an appeal would be binding in the case at bar and might establish precedent for future cases. Little wonder then that prosecutors prefer to take their chances on finding a better forum.

Once a prosecutor's investigation comes to a close, she transitions to an adversarial posture. In this context, *nolle*-and-reinstitution allows prosecutors to convert executive charging discretion into an adversary advantage that will never be available to the defendant.[54] When a judge rules against a defendant, defense counsel cannot unilaterally "erase" the unfavorable ruling by dismissing the case. Instead, a defendant must seek recourse through the legal process, with an application for rehearing or a petition for appellate review.

Court rules and statutes can mitigate this abuse of *nolle*-and-reinstitution by assigning reinstituted cases to the original judge[55]

---

51. Siegel, *supra* note 50, at 352.

52. *See* People v. Walls, 324 N.W.2d 136, 138 (Mich. Ct. App. 1982).

53. *Id.*

54. As discussed *infra* Part III.A, some state courts have acknowledged that abuse of *nolle*-and-reinstitution may constitute a due process violation. *See, e.g.*, Stockwell v. State, 573 P.2d 116, 125 (Idaho 1977) (noting, with disapproval, "the practice of 'shopping' among magistrates or the repeated re-filing of a charge until a favorable ruling is obtained"). *See also* Commonwealth v. Spay, 44 Pa. D. & C.3d 126, 141–142 (Pa. Ct. Com. Pl. 1986) (quoting Nicodemus v. Court of Okla. Cnty., 473 P.2d 312, 316 (Okla. Crim. App. 1970)) (recognizing that reinstitution after dismissal by a magistrate "can become a form of harassment which may violate the principle of fundamental due process and equal protection of the law"). However, the Supreme Court has refused to identify the due process harm of *nolle*-and-reinstitution.

55. *See, e.g.*, Jones v. State, 1971 OK CR 27, 481 P.2d 169, 171–72 (Okla. Crim. App. 1971) ("When an examining magistrate rules that the evidence offered by the State is insufficient to hold the accused over for trial on the charge, such a ruling is binding and final on him and any other examining magistrate unless the State produces additional evidence or proves the existence of other good cause to justify

or by setting the reinstituted case on the same speedy trial clock as the original case.[56] However, rules change at the whim of the court and statutes at the whim of the legislature.[57] In the absence of constitutional limitations, prosecutors can *nolle*-and-reinstitute criminal cases again and again, until they get the result they originally sought.[58]

B. Prejudice to Defendant

Pre-trial delay is an enormous obstacle for any defendant who wants to exercise her right to a trial. Delay impacts all defendants, regardless of their custodial status.[59] An unresolved charge "may subject [the defendant] to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes."[60] The possibility of reinstitution prolongs "this oppression, as well as the anxiety and concern accompanying public accusation."[61]

---

a subsequent preliminary examination. . . . The magistrate at a subsequent preliminary examination for the same defendant on the same charge should not consider the matter anew as on first impression as a prior dismissal is binding and final until overcome by additional evidence."); *see also* LA. DIST. CT. R. 14.0, App. 14.0A at 29 (Criminal District Court, Parish of New Orleans) (reinstituted cases must be transferred to the Section to which the original case was allotted).

56. Of course, this would not change the Supreme Court's holding that the period between dismissal and reinstitution does not enter the Sixth Amendment constitutional speedy trial calculus. *See* United States v. MacDonald, 456 U.S. 1, 7 (1982).

57. *See, e.g.*, People v. George, 318 N.W.2d 666, 669 (Mich. Ct. App. 1982) ("We likewise find the prosecutor's methodology to be in actuality 'judge shopping' and find such tactics to be offensive. However, because we can find no law preventing this course of action, we feel constrained to allow the reinstitution.").

58. As set forth *infra* Part II.C, this exercise of prosecutorial power usurps and undermines both the power of individual judges and the integrity of the adversary system.

59. "For those who secure pre-trial release, there will be a desire to draw tedious, inconvenient, and sometimes humiliating court appearances to an end." Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 419 (2008).

60. Klopfer v. North Carolina, 386 U.S. 213, 221–22 (1967).

61. *Id.*; *see also MacDonald*, 456 U.S. at 9 (noting that between dismissal and reinstitution a defendant may experience a "restraint on liberty, disruption of employment, strain on financial resources, and exposure to public obloquy, stress and anxiety," but asserting that the defendant's experience is no different than that of "anyone openly subject to a criminal investigation," regardless of whether there has been a dismissal and reinstitution).

Delay increases the accused's "considerable investment of his time and funds in defending against the prosecution."[62] Multiple delays of the proceedings burden the defendant with "the often considerable inconvenience of repeated appearances in court."[63] This, in turn, takes a toll on the defendant's professional and personal life.[64]

Nolle-and-reinstitution allows "state prosecuting officials to put a person under the cloud of an unliquidated criminal charge for an indeterminate period."[65] This delay may be used to harass and frustrate defendants who have been released on bond. Amid the overwhelming stress and anxiety that accompanies a criminal charge, *nolle*-and-reinstitution adds one more element of unpredictability to a process that is notoriously unpredictable.[66]

This is especially true for defendants who are held in jail.[67] Despite the legal distinction courts have drawn between pre-trial and post-trial incarceration, defendants experience them the same way—as punishment. For a defendant, any prospective pre-trial detention increases the cost of going to trial.[68] There is only so much delay that an incarcerated defendant will endure before the prospect of going to trial becomes too costly.[69] In our overburdened

62. Brief for Petitioner at 17, Klopfer v. North Carolina, 386 U.S. 213 (2004) (No. 100), 1966 WL 100764.

63. *Id.*

64. *Id.*; *see also* Nicodemus v. Dist. Court of Okla. Cnty., 473 P.2d 312, 316 (Okla. Crim. App. 1970).

65. *Klopfer*, 386 U.S. at 226–27 (Harlan, J., concurring).

66. Every time a case is dismissed, the defendant is unsure whether the prosecutor will reinstitute the case and, if so, when that will happen. The defendant is left in a constant state of anticipation, wondering when the sheriff will show up with the next arrest warrant.

67. That is not to say that delay is never the ally of an incarcerated defendant. Delay may be used strategically by the defendant (for example, in a capital case) just as it may bring serendipitous benefits (the state's star witness dies). But for the incarcerated defendant who affirmatively wants to have a trial, delay is rarely a benefit.

68. Local jail conditions are often so dire that they significantly impact a defendant's decision to go to trial or plead guilty. In the author's experience as a public defender, most clients pleading guilty to a prison sentence want to know "How soon can I be transferred out of jail and into prison?"

69. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2493 (2004) (recognizing that pre-trial detention places a premium on quick plea bargains in small cases, even if the defendant would likely win an acquittal); Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 444 (1971) ("Several factors enhance the prosecutor's bargaining position when the defendant is in custody. If the prosecutor believes that the defendant has already been incarcerated for a sufficient period of time and is willing to recommend a 'time-in' sentence, the defendant will invariably agree to plead

system, a defendant may wait in jail for months or years. Prosecutors can use *nolle*-and-reinstitution to delay a proceeding and, by refiling charges on the same day, ensure a defendant's continued pretrial detention. While a defendant on bond might be willing to bear the risk of a trial, the equation changes dramatically if she has to wait for her trial from a jail cell.[70]

In addition to delay, *nolle*-and-reinstitution also creates unjust financial consequences for defendants. Perhaps the worst 'reinstitution cost' is setting a second bail. Defendants must post a second bond or face a remand into custody.[71] If defendants posted their own surety, the second bond would impose minimal harm. But, the reality is that the vast majority of defendants rely on a bail bondsman, or bonding agent, for their pre-trial release.[72] The process of using a bonding agent is straightforward. If a defendant cannot afford to post her own bond, she can pay a bonding agent a fee to post bail on her behalf.[73] The bonding agent keeps the fee as profit and returns the principal at the end of the case.[74] The defendant, on the other hand, gets nothing back. When a case is *nolle prossed,* the bond instrument evaporates; when the case is reinstituted, a new bond may, and in some instances must, be set. The defendant must then find the money for a second bond fee. For many defendants, it is a struggle to pay the first bond fee; impoverished defendants simply cannot afford a second fee.

---

guilty to obtain immediate freedom. Even if the prosecutor does not agree to a 'time-in' sentence, an incarcerated defendant, frightened and demoralized by the prospect of an indefinite period of confinement, may be willing to enter a plea and accept a fixed period of imprisonment.").

70. *See also* Siegel, *supra* note 50, at 358 (Prosecutors can create delay in order to "manipulate a plea out of a defendant who would otherwise exercise her right to trial.").

71. *See, e.g.*, Brief for Petitioner, *supra* note 63, at 17 (dismissal with threat of reinstitution imposed harms upon defendant that included "posting of two different bonds"). While the Nevada state legislature has passed a statute addressing this problem, Nevada remains in the minority of jurisdictions to offer this protection after *nolle*-and-reinstitution. *See* NEV. REV. STAT. ANN. § 174.085(6)(b) (LexisNexis 2015) ("A court shall not issue a warrant for the arrest of a defendant who was released from custody pursuant to subsection 5 or require a defendant whose bail has been exonerated pursuant to subsection 5 to give bail unless the defendant does not appear in court in response to a properly issued summons in connection with the complaint.").

72. *See, e.g.*, Harold Don Teague, Comment, *The Administration of Bail and Pretrial Freedom in Texas*, 43 TEX. L. REV. 356, 364 (1965).

73. *Id.*

74. The risk for the bonding agent is that the defendant will miss court. If the defendant does not show up, the bonding agent may lose the entire bond; in this way, the bonding agent is a guarantor that the defendant will appear in court.

Subject to local statutes, a determined and scrupulous judge may help a defendant avoid a second bond. The judge may release the defendant on her own recognizance, set a small nominal bail, find no probable cause for detention, or reinstate the original bond instrument. However, some trial judges are too busy or too overburdened to pay attention to the second bond; others may simply not be sympathetic to the defendant's plight. At least one state legislature has recognized and responded to the unfair imposition of a second bond.[75] Other states ignore the problem or even make it worse.[76]

For many defendants, their ability to pay bond will be a determinative factor in their decision to plead guilty or go to trial.[77] If a defendant cannot come up with the money for the second bond, she will be stuck in jail until she pleads guilty or her case is called for trial. As noted earlier, this increases the likelihood of a guilty plea. Thus, *nolle*-and-reinstitution's impact on a defendant's ability to pay bond is inherently coercive and has a direct effect on the quality of justice in our system.

C. Systemic Impact

Cumulatively, when prosecutors abuse the *nolle*-and-reinstitution power, there is a pervasive psychological impact on both defense lawyers and their clients.[78] Because *nolle*-and-reinstitution creates an adversarial charging power to control which case will actually go to trial on any given day, it ensures that the State is always prepared for trial.[79] Defense lawyers, on the other hand, enjoy no such advantage. Preparing every case for trial is an untenable strategy for the vast majority of lawyers, particularly public defenders.[80] Trial preparation is laborious and emotionally exhausting and

75. NEV. REV. STAT. ANN. § 174.085(6)(b) (LexisNexis 2015) (prohibiting a judge from issuing a warrant or imposing a second bail obligation unless the defendant does not appear to court after being properly summoned).

76. Louisiana, for example, leaves the defendant at the mercy of the former bonding agent, who has total discretion to repost the bond for the hapless defendant. See LA. CODE OF CRIM. PROC. ANN. art. 334.5 (2012) (requiring consent of the surety, i.e., bond agent, before the judge may reinstate the original bond).

77. Bibas, *supra* note 70, at 2493.

78. *See generally* Siegel, *supra* note 50, at 351–69. Although Professor Siegel discusses procedures in South Carolina which granted the prosecutor explicit authority to control every aspect of the docket, reinstitution creates very similar problems. While reinstitution does not grant *de jure* authority over the docket, it does create *de facto* control.

79. Siegel, *supra* note 50, at 352.

80. Siegel, *supra* note 50, at 354.

often leaves the lawyer behind on other cases.[81] Most defense lawyers learn very early that their caseloads make daily trial preparation unsustainable for any considerable length of time. They are put in the tenuous position of taking the prosecutor's word about which case she expects to pursue or fully preparing every single case as though it will actually go to trial.

Meanwhile, prosecutors are quick to learn that defense lawyers, particularly public defenders who have multiple cases set for trial on any given day, are unable to prepare all of their cases for trial. This creates an opportunity for the unscrupulous prosecutor to "cry wolf" about which cases she is going to push to trial, leaving the defense lawyer unprepared.[82] Even if the prosecutor is not trying to game the system, she is often unable to give the defense lawyer accurate or reliable information about which case she will call until the morning of trial.[83] This leaves the defense lawyer in the unenviable position of having to take calculated risks about preparation based on an educated guess that her case will actually proceed.[84] On the other hand, *nolle*-and-reinstitution gives prosecutors discretion to set their own trial schedules, with little input from defense lawyers—an adversarial power most litigators would covet.

All of this means that defense lawyers must develop a variety of coping strategies. The defense lawyer may try to get in bed with the prosecutor by trading adversarial advocacy or practices for reliable information about trial schedules. Alternatively, the defense lawyer may try to maintain a "heightened trial-ready mode . . . with the predictable consequence of chronic fatigue and irritability."[85] Playing this game of Russian roulette with their clients' cases is likely a significant cause of public defender "burn-out" that exists around the nation.[86]

Nolle-and-reinstitution also has a psychological impact on defendants. The abuse of *nolle*-and-reinstitution undermines defendants' confidence in the justice system.[87] Any defendant who has

81. *Id.* at 353.

82. *Id.*

83. Trial work is notoriously unpredictable.

84. Siegel, *supra* note 50, at 353–54.

85. *Id.* at 354.

86. For a discussion of the problems of defense attorney burn-out, see Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders,* 106 HARV. L. REV. 1239, 1294 (1993); see also Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender,* 37 U.C. DAVIS L. REV. 1203 (2004).

87. See Tom R. Tyler & Hulda Thorisdottir, *A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund*, 53

watched a prosecutor override a judge's denial of a continuance invariably begins to question the integrity and fairness of the system. After all, she will ask, "If the prosecutor has enough power to simply ignore the judge, how will I ever get a fair trial?" Seeing the power of the State in action is a terrifying prospect, particularly for those in its crosshairs. Abuse of *nolle*-and-reinstitution magnifies that effect by suggesting that the prosecutor, not the judge, controls the courtroom.[88] It is easy to understand why a defendant would be inclined to plead guilty after watching the State abuse *nolle*-and-reinstitution.

Similarly, *nolle*-and-reinstitution may shake a defendant's faith and confidence in her lawyer.[89] Prosecutorial circumvention of a judicial ruling is so contrary to our expectations about fairness that most defendants assume that it must be against the rules.[90] When defendants witness the abuse of *nolle*-and-reinstitution, they may blame their attorneys for "not fighting back." Psychologically, it may be easier for a defendant to believe that her lawyer is at fault than to question the foundation of the entire system.

In addition to the pervasive psychological problems it causes, abuse of *nolle*-and-reinstitution also raises separation of powers issues.[91] These problems stem from the prosecutor's ability to use *nolle*-and-reinstitution to grant herself a continuance, which is a

---

DEPAUL L. REV. 355, 380 (2003) (identifying four elements that influence perceptions of procedural justice: (1) whether procedures allow people an opportunity to state their case; (2) whether authorities are viewed as neutral (i.e., unbiased), honest, and principled in their decision-making; (3) whether the authorities involved are seen as benevolent and caring (i.e., are "trustworthy"); and (4) whether the people involved are treated with dignity and respect).

88. In the course of my research, I found that most non-lawyers were shocked to hear the ways reinstitution can be abused by the prosecution. The most common response included some rendition of "they shouldn't be allowed to do that." The way *nolle*-and-reinstitution actually plays out in the courtroom particularly heightens the appearance of injustice because it juxtaposes an impotent judge with a seemingly omnipotent prosecutor. After witnessing an abuse of *nolle*-and-reinstitution, it is hard to shake the feeling that our criminal courts are really just a game—and a rigged one at that.

89. Siegel, *supra* note 50, at 353.

90. *See* Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 286 (2003) (discussing the general belief that the police and courts are legitimate and fair).

91. Although the Supreme Court has made clear that the Due Process clause does not mandate separation of powers within the states, every state has some form of separation of power doctrine. *See* Dreyer v. Illinois, 187 U.S. 71, 84 (1902). Commenting on the wisdom of Dreyer and applying reinstitution to every state's unique separation of powers scheme is outside the scope of this Article. For a critique of Dreyer, see David Martland, Note, *Justice Without Favor: Due Process and*

classic judicial power. Once a prosecutor files charges and initiates the adversary system, her use of adversarial charging powers, including *nolle*-and-reinstitution, must be subordinate to, and scrutinized by, the court. In an adversarial role, the prosecutor must cede control of the docket to the judiciary. Authority over whether a party should be granted a continuance is an inherently judicial power, because it requires an 'adjudication' of an active ongoing case.[92]

However, there is also a second separation of powers problem: the prosecution's use of *nolle*-and-reinstitution grants it *de facto* control over the court calendar. If the prosecutor is unhappy with the trial date she need only *nolle*-and-reinstitute to obtain a different one. As I will explain in Part IV, these separation of powers problems have systemic implications that affect the foundation of our justice system.[93]

Unlike prosecutors, who have an inherent bias as litigants, the judge is properly situated to rule on motions to continue. The decision to grant or deny a continuance requires careful balancing of the unique facts and circumstances of each case. The judge must weigh the interests of both parties and make a decision that causes the least amount of harm. The integrity and efficacy of the adversary system depends on such a decision being made by the only disinterested party to the litigation: the judge.

Seen in this light, it is clear that the prosecution should not be able to control the timing of the proceedings or flout judicial rulings through dismissal and reinstitution. The power to grant or deny a continuance can have as profound an effect on the outcome of a case as can the power to suppress or admit evidence. Yet the judiciary's failure to regulate *nolle*-and-reinstitution puts this power squarely into the prosecution's hands.

Separation of Executive and Judicial Powers in State Government, 94 YALE L.J. 1675 (1985).

92. Muskrat v. United States, 219 U.S. 346, 357 (1911) (Defining the "controversies" the Court had authority to hear as cases with the "existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication.").

93. *See infra* Part IV.

III.
THE LEGISLATIVE AND JUDICIAL FAILURE TO REGULATE *NOLLE*-AND-REINSTITUTION

A. State Regulation of Nolle-and-Reinstitution

State legislatures frequently leave defendants with little to no protection from *nolle*-and-reinstitution. Although the states are in apparent agreement about the necessity of the *nolle*-and-reinstitution power, they are split on the single most important issue: oversight of that power. Thirty-one states impose some limits on *nolle*-and-reinstitution, most commonly by requiring that the prosecutor obtain judicial approval before entering a *nolle*.[94] The remaining nineteen states follow the old common law rule and allow the prosecutor to *nolle*-and-reinstitute without any limitation.[95] However, even in the jurisdictions that do require judicial consent, criminal defendants frequently enjoy fewer statutory protections than civil defendants. For example, in federal court, plaintiffs are only al-

94. Sheffield v. State, 959 So.2d 692 (Ala. Crim. App. 2006); ALA. CODE § 15-8-130 (West 2016); ARIZ. R. CRIM. P. 16.6; ARK. CODE ANN. § 16-85-713 (2015); Webb v. Harrison, 547 S.W.2d 748, 751–52 (1977); CAL. PENAL CODE § 1385–86 (West 2015); COLO. CRIM. P. 48; CONN. GEN. STAT. ANN. § C54-56b (West 2016) (Although judicial consent is not required, the State must obtain the defendant's consent unless the State can show "that a material witness has died, disappeared or become disabled or that material evidence has disappeared or has been destroyed and that a further investigation is therefore necessary."); GA. CODE ANN. § 17-8-3 (2015); Sanders v State, 631 S.E.2d 344, 345 (Ga. 2006); HAW. REV. STAT. § 806-56 (2015); Iaea v. Heely, 743 P.2d 456, 457 (Haw. 1987); IDAHO CODE ANN. § 19-3504 (West 2015); IDAHO R. CRIM. P. 48; People v. Woolsey, 564 N.E.2d 764, 766 (Ind. 1990); IOWA R. CRIM. P. 2.33; KY. RCR. 9.64; MICH. COMP. LAWS ANN. § 767.29 (West 2016); MISS. CODE. ANN. § 99-15-53 (2016); MONT. CODE ANN. § 46-13-401 (West 2015); NEB. REV. STAT. ANN. § 29-1606 (LexisNexis 2016); State v. Adkins, 265 N.W.2d 454, 455 (Nev. 1978); N.J. CT. R. 3:25-1; People v. Extale, 967 N.E.2d 179, 180 (N.Y. 2012); N.D. R. CRIM. P. 48; OHIO REV. CODE ANN. § 2941.33 (West 2016); OR. REV. STAT. ANN. § 135.755 (West 2016); PA. R. CRIM. P. 585; TENN. R. CRIM. P. 48; TEX. CODE CRIM. PROC. ANN. art. 32.02 (West 2015); UTAH R. CRIM. P. 25; VA. CODE ANN. § 19.2-265.3 (2016); WASH. SUP. CT. CRIM. R. 8.3; W. VA. R. CRIM. P. 48; State v. Kenyon, 85 Wis. 2d 36 (1978); W. R. CR. P. 48.

95. ALASKA R. CRIM. P. 43; DEL. SUP. CT. CRIM. R. 48; State v. Hurd, 739 So.2d 1226, 1228 (Fla. Dist. Ct. App. 1999); IND. CODE ANN. § 35-34-1-13 (West 2015); State v. Williamson, 853 P.2d 56 (Kan. 1993); State v. Larce, 807 So.2d 1080, 1081–82 (La. Ct. App. (2002); ME. R. UNIFIED CRIM. P. 48; Ward v. State, 290 Md. 76, 83 (1981); MASS. R. CRIM. P. 16; MINN. R. CRIM. P. 30.01; State *ex rel.* Norwood v. Drumm, 691 S.W.2d 238, 238–39 (Mo. 1985); NEV. REV. STAT. ANN. § 174.085(7) (LexisNexis 2015); State v. Pond, 584 A.2d 770, 771 (N.H. 1990); State v. Heinsen, 121 P.3d 1040, 1042 (N.M. 2005); N.C. GEN. STAT. ANN. § 15A-931 (West 2015); OKLA. STAT. ANN. tit. 22 § 815 (West 2015); R.I. SUP. CT. R. CRIM. P. 48; Mackey v. State, 595 S.E.2d 241, 242 (S.C. 2004); *In re* Brown, 363 S.E.2d 689, 689 (S.C. 1988); S.D. CODIFIED LAWS § 23A-44-2 (2016); VT. R. CRIM. P. 48.

lowed one dismissal and reinstitution whereas there is no such limitation for federal prosecutors.[96]

Each state has developed its own unique rules and procedures allowing a prosecutor to dismiss and reinstitute. While it seems promising that a majority of the states have taken steps to limit reinstitution through judicial consent, the devil, as always, is in the details. Only a few of these states seem genuinely concerned with protecting defendants from reinstitution.[97] And the states that have required judicial oversight are inconsistent in both their motivation and methods. Some states, like Nebraska, restrict reinstitution for reasons that are inimical to a defendant's rights.[98] Other states stumbled into the regulation of dismissals when they adopted a local version of Rule 48 of the Federal Rules of Criminal Procedure.[99]

Even states that are ostensibly concerned with protecting defendants from abuse of *nolle*-and-reinstitution cannot seem to agree on how much oversight is necessary. Some state courts are hesitant to engage in a power struggle with the executive branch. In many states, appellate courts hamstring trial judges, limiting their discretion to deny a *nolle* unless the prosecutor is acting in bad faith or unless proceeding with the charge would be contrary to public interests.[100] Absent these appellate limitations, trial courts are fre-

96. *Compare* FED. R. CIV. P. 41, *with* FED. R. CRIM. P. 48.

97. Nevada, perhaps more than any other state, has recognized the perils of reinstitution and created a series of limitations to protect defendants against misuse of the power. In addition to requiring judicial consent to enter a *nolle*, the prosecutor has the burden to show good cause. NEV. REV. STAT. ANN. § 174.085(7) (LexisNexis 2015). Furthermore, Nevada limits the prosecutor to one reinstitution per case and automatically exonerates a defendant from any bail obligation once the state dismisses. NEV. REV. STAT. ANN. § 174.085(6)(b) (LexisNexis 2015). Finally, prosecutors are prevented from using reinstitution to shop for a better forum because any case that is reinstituted must be re-assigned to the original judge. *Id.*

98. Nebraska has limited prosecutorial power over *nolle*-and-reinstitution out of an apparent fear that lazy or corrupt prosecutors were using *nolle* to let too many guilty defendants go free. Nebraska now requires prosecutors to give both factual and legal reasons in writing before requesting a dismissal and has empowered the court, in its discretion, to scrutinize those reasons and refuse a request to *nolle* as it sees fit. *See* NEB. REV. ST. ANN. § 29-1606 (LexisNexis 2016).

99. At least six states have passed a judicial consent requirement when they adopted the federal rules of criminal procedure. *See, e.g.*, COLO. CRIM. P. 48; IDAHO R. CRIM. P. 48; N.D. R. CRIM. P. 48; TENN. R. CRIM. P. 48; W. VA. R. CRIM. P. 48; W. R. Cr. P. 48.

100. *See, e.g.*, Rinaldi v. United States, 434 U.S. 22, 30 (1977); People v. Woolsey, 564 N.E.2d 764, 766 (Ind. 1990) ("While State's Attorney has discretion to enter a *nolle* prosequi when, in his or her judgment, prosecution should not continue, the State's Attorney's power . . . is subject to the discretion and approval of

quently uninterested in regulating prosecutors' use of *nolle*-and-reinstitution.[101]

Legislation in states like Arizona and California highlights the inadequacy of most state laws on *nolle*-and-reinstitution and demonstrates that more robust regulation is possible. However, these legislative solutions do not justify the judiciary's constitutional apathy. Abuse of *nolle*-and-reinstitution raises constitutional issues that demand constitutional solutions. Unregulated use of *nolle*-and-reinstitution is a structural failure of the adversary system and a violation of both separation of powers principles and the guarantee of fundamental fairness embodied in the Due Process Clause.

B. Supreme Court's Jurisprudence

Although the Supreme Court has been presented with several cases that involved *nolle*-and-reinstitution, the Court has never directly addressed this combined use of prosecutorial powers. As a result, the Court has not only failed to meaningfully regulate *nolle*-and-reinstitution, it has also failed to identify *nolle*-and-reinstitution as an adversarial charging power problem.

While Rule 48 of the Federal Rules of Criminal Procedure suggests that the Court may have had some concern about the prosecution's unregulated power to *nolle* and reinstitute, that concern has not been born out in the Court's opinions.[102] In 1944, the Advisory Committee drafted a rule that gave prosecutors complete discretion over *nolle*-and-reinstitution.[103] However, the Court overrode the

---

the trial court . . . . A court must allow the State's Attorney to enter *nolle* prosequi unless it is persuaded that prosecutor's action is capricious or vexatiously repetitious or that entry of *nolle* prosequi will prejudice defendant."); Hoskins v. Maricle, 150 S.W.3d 1, 24 (Ky. 2004) ("[A]n 'independent' motion by a prosecutor to dismiss or amend an indictment must be sustained unless clearly contrary to manifest public interest."); State v. Allen, 837 A.2d 324, 327 (N.H. 2003) ("State's discretion, however, [to enter a *nolle* prosequi] is not unlimited, for the trial courts are empowered to curb that discretion where it is used to inflict confusion, harassment, or other unfair prejudice upon defendant.").

101. "But the new statutes and rules, which required prosecutors to move for dismissal and authorized courts to grant or deny the motion, had remarkably little impact. The motion to dismiss and its corollary, the substitution of a lesser charge, were used by prosecutors as they had used the *nolle*—as if it belonged to them alone. Though they were sometimes said by statute or rule to have to justify their decisions, the courts did not often ask for explanations, or examine carefully those that were given. Motions were routinely approved and dismissals were supervised hardly at all." Abraham S. Goldstein, The Passive Judiciary 14 (1981).

102. Fed. R. Crim. P. 48 advisory committee's note.

103. 3B Charles Alan Wright et al., Federal Practice and Procedure § 802 (4th ed. 2013).

Committee *sua sponte* and amended the rule without explanation, requiring the prosecution to obtain "leave of court" prior to dismissing a case.[104] Although its amendment "obviously vest[ed] some discretion" in the trial courts, the Court did not explain when and how that discretion should be exercised.[105] Later, the Court offered limited clarification, explaining that "[t]he principal object of the 'leave of court' requirement is apparently to protect a defendant against prosecutorial harassment, e.g., charging, dismissing, and recharging, when the Government moves to dismiss an indictment over the defendant's objection."[106] The Court's opinions on *nolle*-and-reinstitution, however, have focused on only one particular consequence of reinstitution: delay.

Klopfer v. North Carolina was the Court's first published opportunity to address prosecutorial use of *nolle*-and-reinstitution.[107] The *Klopfer* Court seemed unaware of the scope and magnitude of the reinstitution power.[108] Nevertheless, the Court identified delay, rather than the *nolle*-and-reinstitution power, as the root of the problem in that case.[109]

After Peter Klopfer, a Duke zoology professor, was arrested during a civil rights sit-in, the prosecution indicted him for criminal trespass.[110] At arraignment, Klopfer pleaded not guilty, and an initial trial was held just a month after the indictment.[111] When the jury could not reach a verdict, the judge declared a mistrial and reset Klopfer's case for the following term of court.[112] At the next term, the prosecutor was either unable or unwilling to go forward with the case and requested a continuance to the following term.[113] Klopfer objected and argued that the intervening passage of the Civil Rights Act of 1964 had mooted the charges against him.[114] Klopfer returned to court the following term, only to find that his case was not listed on the court's docket.[115] Klopfer then filed a

104. *Id.*; *Rinaldi*, 434 U.S. at 29 n.15.

105. *Rinaldi*, 434 U.S. at 29 n.15.

106. *Id.*

107. Klopfer v. North Carolina, 386 U.S. 213 (1967).

108. *Id.* at 220.

109. *Id.* The sole exception was Justice Harlan who explained in a short concurring opinion that he would have reversed because the use of reinstitution deprived *Klopfer* of fundamental fairness under the Due Process Clause. *Id.* at 226–27.

110. *Id* at 218.

111. *Id* at 217.

112. *Id.*

113. *Klopfer*, 386 U.S. at 218.

114. *Id.*

115. *Id.*

motion demanding a trial date so that he could permanently resolve the charges filed against him.[116] In response, the State dismissed Klopfer's case without prejudice to its right to unilaterally reinstate the charges.[117] This dismissal tolled the running of the statute of limitations but left the prosecutor free to re-file the charges at any future date and left Klopfer in an indefinite legal limbo.[118] It was in this procedural posture that Klopfer sought review in the United States Supreme Court.

Although the prosecution had not yet reinstated the charges against him, Klopfer's case provided the Court with a window into the awesome potential for abuse inherent in *nolle*-and-reinstitution. As the Court wrote, "[t]he consequence of this extraordinary criminal procedure [is that a] defendant indicted for a misdemeanor may be denied an opportunity to exonerate himself . . . and held subject to trial, over his objection, throughout the unlimited period in which the solicitor may restore the case to the calendar."[119] The Court recognized that *nolle*-and-reinstitution gave the prosecution a uniquely coercive power: it could drag a defendant to and from court without any foreseeable end. Furthermore, the prosecution's refusal to release Klopfer from jeopardy smacked of harassment.[120]

Yet the Court did not identify the *nolle*-and-reinstitution power as the real problem.[121] Instead, the Court characterized the problem as one of pre-trial delay, and, for the first time, incorporated the Sixth Amendment's Speedy Trial Clause to the states. Based on the Speedy Trial Clause, the Court then held that the dismissal with leave to reinstitute violated Klopfer's Sixth Amendment rights.[122] Although the opinion ostensibly established the Speedy Trial Clause as a limitation upon the power to *nolle*-and-reinstitute, the Court did not provide any rules or guidance for lower courts to use

116. *Id.*

117. *Id.*

118. *Id.* at 214.

119. *Klopfer*, 386 U.S. at 216.

120. *See generally* Brief of ACLU at 21, Klopfer v. North Carolina, 386 U.S. 213 (1967), 1966 WL 100766 (U.S.) ("[A]n examination of the facts and setting of this prosecution tend convincingly to establish that the actual reason for the prosecutor's action may have been highly improper and vindictive, and that it had nothing whatever to do with the fair administration of justice.").

121. *Id.*

122. Notably, Justice Harlan wrote a concurring opinion in which he argued that *Klopfer* should have been decided "not on the speedy trial provision of the Sixth Amendment, but on the ground that this unusual North Carolina procedure . . . violates the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment." Klopfer v. North Carolina, 386 U.S. 213, 227 (1967) (Harlan, J., concurring).

when analyzing reinstitution. As a result, *Klopfer* had little impact on the practice of *nolle*-and-reinstitution; its primary legacy remains its incorporation of the Sixth Amendment Speedy Trial Clause to the states.[123]

The next case that shaped the Court's *nolle*-and-reinstitution jurisprudence had nothing to do with *nolle*-and-reinstitution at all. In *United States v. Marion*, the defendants raised due process and speedy trial claims because of the four-year pre-charging delay between when the Department of Justice learned of the illegal activity and when the prosecution filed charges against them.[124] First, the Court patently rejected the defendants' speedy trial claim, holding that the speedy trial right is not implicated until arrest, indictment, or restraint on liberty.[125] And although the Court also denied the defendants' due process claim, it acknowledged the theoretical possibility that pre-charge delay might violate due process. However, the Court's admission was not supported by the nearly insurmountable rule it created. To win on a pre-trial delay due process claim a defendant must prove: (1) the delay caused prejudice that precluded a fair trial, and (2) the prosecution intentionally used the delay to gain a tactical advantage over the defendant.[126] Thus the Court gave wide discretion to the prosecutor's inquisitorial powers.

The next time that *nolle*-and-reinstitution was brought before the court was in the case of *United States v. MacDonald*.[127] Fifteen years after *Klopfer*, and well into the burgeoning war on crime, the *MacDonald* Court displayed none of the *Klopfer* Court's outrage and suspicion about reinstitution.[128] Instead, the Court eviscerated any due process limitations on *nolle*-and-reinstitution, despite the fact that the Court was not even considering the due process issue.

MacDonald was originally charged under the Uniform Code of Military Justice for the murder of his wife and two children.[129] After an extensive investigation including interviews with fifty-six wit-

123. Specifically, *Klopfer* held that the Sixth Amendment Speedy Trial right is a fundamental right and is therefore incorporated to the states. *Id.* at 223.

124. 404 U.S. 307, 309 (1971). For consistency, delay of this nature (i.e., delay in filing an initial charging document) will be referred to as pre-charging delay.

125. *Id.* at 320–21.

126. *Id.* at 324.

127. 456 U.S. 1 (1982).

128. The Court insisted that it did not intend to reverse *Klopfer*. Nevertheless, its opinion stripped *Klopfer* of any significance with regard to *nolle*-and-reinstitution. The *Klopfer* Court had considered a wide range of harms that might flow from *nolle*-and-reinstitution. Whereas the *MacDonald* Court narrowed its inquiry, asking only about the purpose of the Speedy Trial Clause.

129. 456 U.S. at 4.

nesses, the Army dropped the charges against MacDonald.[130] But MacDonald's case did not end there. Four-and-a-half years after the Army dismissed the original charges, the Department of Justice re-indicted MacDonald on the same charges.[131] MacDonald was ultimately convicted of murder and appealed to the Supreme Court under the Due Process and Speedy Trial Clauses.[132]

Although the Court did not make a decision about MacDonald's due process claim, its treatment of the delay during the *nolle*-and-reinstitution for its speedy trial analysis had tremendous implications for *nolle*-and-reinstitution jurisprudence.[133] The *MacDonald* Court held that the Due Process Clause, not Speedy Trial, applied to the delay between a dismissal and reinstitution. However, the Court's reasoning was problematic. Specifically, the *MacDonald* Court treated the *nolle*-and-reinstitution delay as though it were identical to the delay in *Marion,* despite the fact that there was not a *nolle* or reinstitution in *Marion*. The Court not only failed to appreciate the difference between filing an initial charge and re-filing a charge for the second, third, or fourth time, but it also imputed *Marion's* insurmountable due process standard to challenges to *nolle*-and-reinstitution. As discussed in Part IV, the Court's conflation of inquisitorial and adversarial charging powers is inappropriate.

Of course, *nolle*-and-reinstitution presents more than just the delay problem discussed in *Marion*. It is a charging power problem that raises due process issues of fundamental fairness and separation of powers. The Court's misunderstanding of the nature of *nolle*-and-reinstitution deepened in May 2014, when it decided *Martinez v. Illinois*.[134]

In *Martinez*, the Court ostensibly endorsed *nolle*-and-reinstitution as a way for the State to avoid the Double Jeopardy Clause.[135] The State was unable to locate two essential trial witnesses,[136] and, after almost four years of delay, the trial court refused to grant the State a fifth consecutive continuance.[137] Nevertheless, the trial

130. *Id.* at 5.

131. *Id.*

132. *Id.* at 6.

133. The *MacDonald* opinion properly raised the due process claim in both the lower courts and the Supreme Court. However, because the Fourth Circuit did not rule on the due process issue, the Supreme Court declined to address the claim. United States v. MacDonald, 456 U.S. 1 (1982).

134. 134 S. Ct. 2070 (2014).

135. *Id.* at 2076–77.

136. *Id.* at 2072.

137. *Id.*

court was sympathetic to the State; the court announced that if the police were unable to find the witnesses before the end of *voir dire*, the court would grant a motion to *nolle*, but only before it swore in the jury.[138] Inexplicably, the State refused the trial court's invitation to *nolle* (and later reinstitute when it had found the witnesses), apparently in favor of challenging the court's decision to deny the continuance.[139] When the judge swore in the jury, the State declined to participate in the trial by refusing to call witnesses or present evidence.[140] Predictably, the trial granted the defendant's motion for a judgment of acquittal. The State appealed the trial court's denial of its motion for continuance and argued that such an error by the trial court barred the use of the Double Jeopardy Clause.[141]

The *Martinez* Court had no trouble deciding that jeopardy attached when the court swore in the jury, thereby precluding reinstitution of the case.[142] However, in dicta, the Court emphasized both its regret over having to enforce the Double Jeopardy Clause and its concern over the prosecution's failure to *nolle*-and-reinstitute the charges[143]: "critically, the court told the State on the day of trial that it could move to dismiss [its] case before the jury was sworn."[144] The Supreme Court appeared to suggest that prosecutors should use *nolle*-and-reinstitution to evade the trial court's denial of continuance and the limitations imposed by the Double Jeopardy Clause.

Martinez is cause for concern. It suggests that, rather than ignoring *nolle*-and-reinstitution, the Court depends on it to justify its enforcement of constitutional procedural norms. Taken at face value, *Martinez* suggests that the Court is willing to strictly enforce the Double Jeopardy Clause only because prosecutors can avoid its bite through the unregulated charging power of *nolle*-and-reinstitution. If this is true, the Court's implicit reliance on *nolle*-and-reinstitution increases the urgency of a full and fair examination of the *nolle*-and-reinstitution power.

---

138. *Id.*

139. *Id.* at 2073.

140. *Martinez*, 134 S. Ct. at 2073.

141. *Id.*

142. *Id.* at 2074 ("There are few if any rules of criminal procedure clearer than the rule that 'jeopardy attaches when the jury is empaneled and sworn.'") (quoting Crist v. Bretz, 437 U.S. 28, 35 (1978)).

143. *Id.* at 2077 (explaining that the Illinois Supreme Court's ruling was "understandable, given the significant consequence of the State's mistake," despite clear Supreme Court precedent to the contrary).

144. *Id.* at 2076–77 (internal quotation marks omitted).

C. Critique of the Court's Jurisprudence

1. Inadequacy of Statutes of Limitations

The Supreme Court has suggested that statutes of limitations offer protections against misuse of *nolle*-and-reinstitution.[145] But statutes of limitations fail to make up for the gross inadequacies of *Marion*. Rather, statutes of limitations share a fatal flaw with *Marion*—they only address delay. Neither was designed to protect against the multifaceted harms of *nolle*-and-reinstitution. Statutes of limitations are even less protective than *Marion* because they do not purport to account for prejudice, bad faith, or fairness.

But even in the context of delay, statutes of limitations fail to adequately protect against *nolle*-and-reinstitution. As creatures of state law, statutes of limitations are optional. Indeed some states have refused to enact any at all,[146] and there is wide variation in the limitations period in states that do have them.[147] To compound the problem, statutes of limitations have been steadily falling out of favor with legislatures, resulting in blanket exceptions for many crimes.[148]

---

145. United States v. MacDonald, 456 U.S. 1, 8 (1982) (Claiming, in addition to statutes of limitations, that the Due Process Clause also offered protection against *nolle*-and-reinstitution. However, the Court failed to address Justice Marshall's dissent, "[T]hat the Due Process Clause protects against purposeful or tactical delay that causes the accused actual prejudice at trial. The due process constraint is limited, and does not protect against delay which is not for a tactical reason but which serves no legitimate prosecutorial purpose.").

146. *See, e.g.*, Remmick v. State, 275 P.3d 467, 470 (Wyo. 2012) (holding there is no statute of limitations in Wyoming and therefore criminal charges may be brought anytime during the life of the accused).

147. Compare, for example, Arkansas with South Carolina. Arkansas limits the prosecution to three years for any felony charges other than murder, rape, and felonious conduct of public officials, and one year for any misdemeanors. ARK. CODE. ANN. § 5-1-109 (West 2015). On the other hand, South Carolina provides no statute of limitations for any crime whatsoever.

148. *See, e.g.,* Lindsey Powell, *Unraveling Criminal Statutes of Limitations*, 45 AM. CRIM. L. REV. 115, 124-128 (2008).("Even against this backdrop of episodic change, the recent fervor with which Congress has been carving out new exceptions to the general rule is unusual. In contrast to the one or two exceptions created every few decades since the rule's inception, and even the unusual number of exceptions created in the 1950s, the past two decades have seen about a dozen new exceptions to the rule, some of them quite sweeping." For example, "Congress in 2001 eliminated the limitations period for any terrorist offense that 'resulted in, or created a foreseeable risk of, death or serious bodily injury to another person.' Congress explained the provision not with regard to the rationales and interests traditionally understood to underlie limitations periods, but as a necessary step toward '[r]emoving impediments to effective prosecution' of terrorists.").

Statutes of limitations are particularly poor substitutes for a robust due process analysis because the protections guaranteed by the Due Process Clause should increase proportionally with the right at stake in the proceeding, i.e., the more a litigant has to lose, the more process she is due.[149] Statutes of limitations, in contrast, do the exact opposite—they *decrease* inversely with the risk. For the least serious crimes, states have enacted relatively strict limitation periods; however, these periods grow proportionately with the severity of the crime.[150] For the most serious crimes, such as murder, the vast majority of jurisdictions have removed any time limitation whatsoever.[151]

149. The Court has applied this 'proportionality' principle in criminal cases in its 8th Amendment jurisprudence on cruel and unusual punishment. *See* Harmelin v. Michigan, 501 U.S. 957, 997,,1001 (1991) (Kennedy, J., concurring) (although it is rarely applied to noncapital cases, the Court has "acknowledged the existence of the proportionality rule for both capital and noncapital cases"); Solem v. Helm, 463 U.S. 277, 288 (1983).

150. *See, e.g.*, ALA. CODE § 15-8-130 (2016); ALASKA STAT. § 12.10.010 to .040 (2015); ARIZ. REV. STAT. §§ 13-107 (LexisNexis 2015); ARK. CODE. ANN. § 5-1-109 (2015); CAL. PENAL CODE §§ 799–805.5 (West 2016); COLO. REV. STAT. ANN. §16-5-401 (West 2016); CONN. GEN. STAT. ANN. § 54-193–193(b) (West 2016); DEL. CODE ANN. tit. 11, § 205 (West 2016); FLA. STAT. ANN. § 775.15 (West 2016), *amended by* 2016 Fla. Sess. Law. Serv. 24 (West); GA. CODE ANN. § 17-3-1 to -2.1 (2015); HAW. REV. STAT. ANN. § 701-108 (West 2016); IDAHO CODE ANN. §§ 19-401(1)–(5) (West 2015); 720 ILL. COMP. STAT. 5/3-5, -7 (West 2016); IND. CODE § 35-41-4-2 (2015); IOWA CODE ANN. § 802.1–.6 (West 2016); KAN. STAT. ANN. § 21-5107 (West 2016); KY. REV. STAT. ANN. § 500.050 (West 2016); LA. CODE CRIM. PROC. ANN. art. 571–576 (2016); ME. REV. STAT. ANN. tit. 17-A, § 8 (2016); MD. CODE ANN., CTS. & JUD. PROC. § 5-106, -107 (West 2016); MASS. GEN. LAWS ch. 277, § 63 (2016); MICH. COMP. LAWS ANN. § 767.24 (West 2016); MINN. STAT. ANN.§ 628.26 (West 2016); MISS. CODE ANN. 99-1-5 (2016); MO. REV. STAT. § 556.036 (2016); MONT. CODE ANN. § 45-1-205 (West 2016); NEB. REV. STAT. ANN. § 29-110 (LexisNexis 2016); NEV. REV. STAT. § 171.080 et seq. (2016); N.H. REV. STAT. ANN. § 625:8 (2014); N.J. STAT. ANN. § 2C:1-6 (West 2016); N.M. STAT. ANN § 30-1-8 (West 2016); N.Y. CRIM. PROC. LAW § 30.10 (McKinney 2014); N.C. GEN. STAT. § 15-1 (2015); N.D. CENT. CODE § 29-04-01 to -04 (2016); OHIO REV. CODE ANN. § 2901.13 (LexisNexis 2015); OKLA. STAT. tit. 22, §152 (2015); OR. REV. STAT. § 131.125, 145, 155 (2015); 42 PA. CONS. STAT. §§ 5551–5554 (2014); 12 R.I. GEN. LAWS § 12-12-17, 18 (2016); S.D. CODIFIED LAWS § 23A-42-1 et seq. (2016); TENN. CODE ANN. § 40-2-101 to -102 (2015); TEX. CODE CRIM. PROC. ANN. arts. 12.01 to .03 (West 2016); UTAH CODE ANN. § 76-1-301, 304 (LexisNexis 2015); VT. STAT. ANN. tit. 13, § 4501 (2015).; VA. CODE ANN. § 19.2-8 (2016); WASH. REV. CODE § 9A.04.080 (2016); W. VA. CODE ANN, § 61-11-9 (LexisNexis 2015); WIS. STAT. ANN. § 939.74 (West 2014). *But see* Remmick v. State, 275 P.3d 467 (Wyo. 2012) (stating that there is no statute of limitations in Wyoming and therefore criminal charges may be brought anytime during the life of the accused). South Carolina does not have an applicable statute.

151. *See* sources cited *supra* note 150; Alexander McCall Smith, *A Collaboration over Time*, 64 SMU L. REV. 1203, 1206 (2011).

It is easy to understand the temptation to use statutes of limitations as a due process substitute—they can be applied mechanically and predictably without any thought or analysis.[152] If statutes of limitations were adequate protection from the abuse of *nolle*-and-reinstitution, courts could avoid the difficulty of constructing a meaningful balancing test and the headache of policing its enforcement. However, mechanical statutes of limitations cannot regulate the use of *nolle*-and-reinstitution, which must be scrutinized on a case-by-case basis.

2. Inadequacy of Marion/MacDonald

The *Marion* rule, like statutes of limitations, fails to protect against misuse of *nolle*-and-reinstitution. The *Marion* rule only addresses one possible consequence of *nolle*-and-reinstitution: delay. It completely fails to address the other significant problems created by *nolle*-and-reinstitution.[153] But even in cases where the only source of prejudice from *nolle*-and-reinstitution is delay, the *Marion* rule is still indefensible because it creates a nearly insurmountable burden for defendants.[154] *Marion* requires a defendant to prove: (1) that the delay caused actual prejudice to the defendant's case; and (2) that the government intentionally, and in bad faith, delayed prosecution to gain a tactical advantage.[155]

The problem begins with the prejudice prong. *Marion* demands that a defendant demonstrate actual prejudice, as opposed to the more general, potential, prejudice the Court required in *Barker v. Wingo*'s speedy trial inquiry.[156] Therefore, relief depends upon a defendant's ability to show harm to her defense at trial,

---

152. Powell, *supra* note 149, at 117–118.

153. *See supra* Part II. *Marion* was not originally intended to apply to cases involving *nolle*-and-reinstitution. Rather, the rule addresses the separate (but sometimes overlapping) question of delay in the filing of an initial charging document. United States v. Marion, 404 U.S. 307, 308, 323–25 (1971).

154. Stoner v. Graddick, 751 F.2d 1535, 1540 (11th Cir. 1985).

155. *Marion*, 404 U.S. at 324.

156. 407 U.S. 514, 533 (1972). *Compare Marion*, 404 U.S. at 325-26 ("No actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them. Appellees rely solely on the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost."), *with Barker*, 407 U.S. at 533 (including all of the negative consequences from delay as 'prejudicial' in a speedy trial analysis, such as living under a cloud of anxiety, suspicion, and hostility); *see also* Moore v. Arizona, 414 U.S. 25 (1973) ("The state court was in fundamental error in its reading of *Barker v. Wingo* and in the standard applied in judging petitioner's speedy trial claim. *Barker v. Wingo* expressly rejected the notion that an affirmative

such as the loss of an exculpatory witness. Yet, because of the very nature of delay, a defendant will rarely be able to meet this heightened showing of prejudice; the passage of time often makes it impossible to prove the loss of exculpatory evidence or witnesses.[157] As the *Barker* Court explained, "[t]here is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown."[158] Furthermore, this formulation of prejudice ignores the other injuries caused by reinstitution, such as anxiety and concern, loss of counsel of choice, and coercion of guilty pleas.[159]

If *Marion*'s prejudice prong sets a defendant up for failure, *Marion*'s bad faith prong guarantees it. The presumption of regularity regarding prosecutorial charging power prevents a judge from inferring bad faith from the circumstances; instead, the defendant must affirmatively prove the prosecutor acted vindictively.[160] It strains credulity to imagine that defendants could readily establish such proof. The prosecution would have to be unscrupulous enough to abuse process for a tactical advantage and foolish enough to keep a record of it. However, *Marion* unfairly lays the burden of proof on the defendant, violating a core consideration about the allocation of a burden of proof—fairness.[161]

When a defendant complains of pre-indictment delay unrelated to a prosecutor's *nolle*-and-reinstitution, *Marion* is a defensible rule. The Court should encourage prosecutors to make thorough and deliberate choices when filing an *initial* criminal charge.[162] At the preliminary stage of the process, before anyone has been arrested or charged, speed is neither the goal nor inherently desirable. The decision to arrest and charge an individual with a crime potentially deprives someone of her life or liberty; that decision

---

demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial.").

157. *Barker*, 407 U.S. at 532.

158. *Id.*

159. *See supra* Part II.C.

160. *See* Bordenkircher v. Hayes, 434 U.S. 357, 361 (1978).

161. Edward W. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 12 (1959).

162. Obviously, there are some exceptions. States like Florida and Louisiana jail defendants for lengthy periods between arrest and filing a formal charge. La. C. Crim. P. Art. 701(B)(1)(a) (allowing the State sixty days to file charges after an arrest for a felony and forty-five days for a misdemeanor); Fla. R. Crim. P. 3.134. However, by-and-large most defendants would rather be under investigation than formally charged. *Cf.* Phyllis Goldfarb, *When Judges Abandon Analogy: The Problem of Delay in Commencing Criminal Prosecutions*, 31 WM. & MARY L. REV. 607 (1990).

should not be made lightly or hurriedly.[163] Police should have adequate time to investigate, and the prosecution should have adequate time to make careful and reasoned inquisitorial charging decisions. A lesser standard for defendants challenging pre-indictment delay would force the prosecution to prioritize speedy charging decisions over accurate and complete investigations.[164]

The policy rationales justifying wide prosecutorial discretion in the timing of initial charges are not applicable to the reinstitution of charges after prosecutors have initiated the adversaryl system. The Court should not reward the prosecution by showing it the same level of deference on its second or third filing of the same charges, particularly because the prosecution has such wide latitude to choose the timing of filing of the initial charge. Moreover, using the *Marion* rule for prosecutorial *nolle*-and-reinstitution has the perverse effect of undermining the goals of the lenient pre-indictment delay rules. If *Marion* applies to prosecutorial *nolle*-and-reinstitution, then the State need never concern itself with a thorough and complete pre-charge investigation. If a judge dismisses for lack of probable cause, or the State is unprepared for trial, the prosecution can *nolle* the charges and reinstitute them at its leisure, subject only to *Marion*'s rule.

The *Marion* rule also creates a perverse financial incentive for the government. The *Marion* rule encourages the State to postpone, and potentially avoid, the monetary expense required to investigate a case. The State can charge a defendant without fully investigating and then try to coax the defendant into an early plea before committing its resources to the investigation necessary for conviction at trial. This, in turn, increases the risk that a defendant will be wrongfully prosecuted. A rule restricting the state's ability to *nolle*-and-reinstitute would force the State to commit its resources before charging someone, not after.

163. *See generally* United States v. Marion, 404 U.S. 307, 320 (1971) ("Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.").

164. *See* United States v. Lovasco, 431 U.S. 783, 795–96 (1977) ("Penalizing prosecutors who defer action . . . would subordínate the goal of orderly expedition to that of mere speed.").

IV.
A NEW REGIME FOR REGULATING CHARGING POWERS

The Court's failure to properly regulate charging powers extends well beyond its failure to regulate the *nolle*-and-reinstitution power. The Court refuses to regulate other prosecutorial charging powers that are prone to abuse.[165] This abdication of judicial authority stems from the Court's failure to distinguish between those charging powers it should not regulate—inquisitorial charging powers—and those it *must* regulate—adversarial charging powers. The Court ignores this distinction, giving prosecutors plenary charging power regardless of when that power is used.[166] *Nolle*-and-reinstitution highlights this error in the Court's jurisprudence and demonstrates the need to differentiate between the use of prosecutorial charging power in the inquisitorial phase and its use in the adversarial phase. *Nolle*-and-reinstitution presents a viable opportunity for the Court to experiment with regulating the prosecution's use of its adversarial charging power.

A. The Difference Between Inquisitorial and Adversarial Charging Powers

Inquisitorial charging powers are those charging powers exercised before the prosecutor files an initial charge.[167] Before a prosecutor files charges and initiates the adversary system, her role is that of an inquisitor. As an inquisitor, the prosecutor acts as investigator

165. *See, e.g.*, United States v. Goodwin, 457 U.S. 368 (1982).

166. "A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution." *Id.* at 382 (1982). "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978). *But see supra* Part III.B (discussing *Marion*, 404 U.S. at 324, which held that pre-indictment delay violates the Due Process Clause of the Fifth Amendment if the delay prejudices a defendant's right to a fair trial and the government intended to use the delay to gain a tactical advantage over the defendant).

167. "Our system of justice is, and has always been, an inquisitorial one at the investigatory stage." McNeil v. Wisconsin, 501 U.S. 171, 181 n.2 (1991). "[F]or most defendants the primary adjudication they receive is, in fact, an administrative decision by a state functionary, the prosecutor, who acts essentially in an inquisitorial mode." Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2120 (1998). "In the absence of contrary evidence. courts presume that criminal prosecutions are undertaken in good faith and in a nondiscriminatory manner." Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 266 (2001) (citations omitted).

and adjudicator—her job is to examine the evidence and decide what punishment, if any, the executive should seek.[168] The prosecutor's inquisitorial charging powers include the power to file charges, select charges, or refuse to prosecute altogether.[169] At this stage of the process, the prosecutor's primary ethical responsibility is to remain neutral and detached as she weighs the executive's interest in prosecution.[170]

Adversarial charging powers, by contrast, are any charging powers that are used after the prosecutor files an initial charge. By filing charges, the prosecutor transforms herself from a neutral inquisitor in an extra-judicial arena into a party-opponent in an adversarial proceeding. There, she must aggressively pursue the State's interests against a hostile defendant who is presumed to be innocent.[171] Indeed, when litigating criminal cases, prosecutors are not expected to be "neutral and detached."[172] Rather, they "are necessarily permitted to be zealous in their enforcement of the law."[173] Exercises of adversarial charging powers include the power

168. H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1696 (2000) (describing the two "pre-adversary" roles of the prosecutor as an investigator and adjudicator)

169. For the purpose of this Article, inquisitorial charging decisions only occur when the *prosecution* files a bill of information or receives a grand jury indictment; an arrest and complaint by a police officer is not an 'inquisitorial charging decision.' Whether a decision not to prosecute should be considered an inquisitorial charging decision is beyond the scope of this Article, although, as the Court recognized in *Marion,* there are strong policy reasons to give the State free rein before filing a charge.

170. Uviller, *supra* note 169, at 1696; *see also* Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 924, 970–71 (1996) (arguing that "[i]n determining the offense and the offender, the investigating attorney should act not as an advocate but as a neutral fact finder").

171. Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 865–66 (2004) ("If we expect prosecutors to act as partisan advocates at trials and assume that this advocacy helps effectuate appropriate results, why should the same not hold true for other discretionary prosecutorial decision-making?").

172. Marshall v. Jerrico, Inc., 446 U.S. 238, 248 (1980).

173. *Id.*; *accord* United States v. Sigillito, 759 F.3d 913, 927 (8th Cir. 2014) ("Prosecutors are permitted to be zealous in their prosecution of a crime."), *cert. denied*, 135 S. Ct. 1019 (2015); Wright v. United States, 732 F.2d 1048, 1056 (2d Cir. 1984), ("[A] prosecutor need not be disinterested on the issue of whether a prospective defendant has committed the crime with which he is charged. If honestly convinced of the defendant's guilt, the prosecutor is free, indeed obliged, to be deeply interested in urging that view by any fair means."), *cert. denied*, 469 U.S. 1106 (1985); State v. Lovely, 480 A.2d 847, 851 (N.H. 1984) ("A prosecutor has the duty to act as a zealous advocate in presenting the State's case."); Grey v. McEwen,

to enhance, reduce, dismiss, divert, and *nolle*-and-reinstitute a charge.

1. The Court Correctly Applies a Presumption of Regularity to Initial Charging Decisions

Inquisitorial charging decisions are "core executive" decisions that require a subjective judgment about how best to enforce the law.[174] The initial decision to prosecute embodies the executive's enforcement policy and reflects a case-by-case exercise of discretion about the viability of prosecution. Even in cases where there is ample evidence, there are many different reasons a prosecutor may decline to file charges. For example, the victim may have expressed a desire not to prosecute, the cost of prosecution may outstrip the benefit to society, non-prosecution may induce a defendant to become a State witness, or the harm done by the defendant can be mitigated without prosecution.[175]

Although the Court did not use the term, it has, on several occasions, discussed the limitations on its review of inquisitorial charging powers.[176] In *Wayte*, the Court evaluated the constitutionality of the prosecution's decision to charge only the vocal minority of people who refused to register for selective service.[177] The prosecutor's choice of which non-registrants to pursue was a subjective decision, made within the purview of executive power, in an extrajudicial setting.[178] Accordingly, the Court held that the prosecutor

No. CV 11-7510, 2014 WL 7149442, at *8 (C.D. Cal. Dec. 15, 2014) (describing prosecutors as "partisan advocates who are permitted to be zealous in their enforcement of the law" when they represent the state in a criminal trial"); *In re* Field (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 17 ("[O]ur system of administering criminal justice is adversarial in nature, and prosecutors must be zealous advocates in prosecuting their cases . . . ."). On occasion, "prosecutors may . . . be overzealous and become overly committed to obtaining a conviction." *Ex parte* Reposa, No. AP-75965, 2009 WL 3478455, at *12 (Tex. Crim. App. Oct. 28, 2009).

174. United States v. Armstrong, 517 U.S. 456, 465 (1996).

175. *See* LaFave et al., *supra* note 2, § 13.2 at 710–11; Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 Law & Soc. Inquiry 387, 391 (2008) ("A prosecutor might decline prosecution because she feels that a suspect is not morally culpable or because she believes that adequate alternatives to charging exist. A prosecutor may also decline to prosecute for policy reasons—for example, because she feels that her office is over-whelmed, and it would be impractical to take the case, or because she thinks that charging would make for bad press. Or she may decline to prosecute for no apparent reason at all.").

176. U.S. v. Armstrong, 517 U.S. 456, 457 (1996); Wayte v. United States, 470 U.S. 598, 607 (1985).

177. Wayte v. United States, 470 U.S. 598 (1985).

178. *Id.* at 607.

had broad discretion over this charging decision, one that is quintessentially inquisitorial.[179] Later, in *United States v. Armstrong*, the Court made it even more difficult for defendants to challenge the prosecution's inquisitorial decisions.

In *Armstrong*, the Court considered the standard for when a defendant is entitled to discovery.[180] There, several defendants alleged that they were selectively prosecuted for possession with intent to distribute crack cocaine because they were black.[181] The Court held that in order to establish an entitlement to discovery, a defendant must produce credible evidence that similarly situated defendants of other races could have been prosecuted, but were not.[182] This threshold standard for discovery cuts to the heart of judicial regulation of charging powers, because without access to discovery defendants will rarely have the information they need to successfully challenge the prosecutor's inquisitorial charging decision.[183] Conversely, allowing defendants access to prosecutorial practice, policy and motives would make it much easier for defendants to challenge inquisitorial charging powers and would therefore force the judiciary to police a legitimate executive function. Thus, the Court protected inquisitorial decisions by creating another strong obstacle for defendants, who are now required to make "a credible showing of differential treatment of similarly situated persons" before they are entitled to discovery.[184]

This bar to discovery is not the only protection the Court extends to the prosecutor's inquisitorial charging powers. The Court has accorded a presumption of regularity to inquisitorial charging decisions, a presumption derived from a line of cases holding that all public officials—not just prosecutors—are presumed to have ac-

179. *Id.* at 608; *see also* Oyler v. Boles, 368 U.S. 448, 456 (1962) (considering whether the charging decision was "deliberately based upon on unjustifiable standard").

180. *Armstrong*, 517 U.S. at 458.

181. *Id.*

182. *Id.* at 470.

183. "One longstanding difficulty, [for defendants], is that prosecution policies are not reduced to writing and made available to the public. In lieu of or in addition to that information, it would be helpful to the defendant if he could require the prosecutor to give testimony concerning the reasons underlying his inaction in other cases or his affirmative action in the instant case, but courts are understandably reluctant to require prosecutors to so testify even when this might be the only way the defendant could establish his claim." LAFAVE ET AL., *supra* note 2, § 13.4(b) at 721.

184. *Armstrong*, 517 U.S. at 470.

ted in good faith.[185] This presumption "supports . . . prosecutorial decisions and, 'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'"[186] This presumption of regularity all but guarantees that defendants' challenges to inquisitorial charging powers will fail.[187] However, the Court has very legitimate reasons for refusing to interfere. Any judicial interference with inquisitorial charging powers creates serious separation of powers concerns.[188] In the criminal justice system, one of the executive's fundamental roles is to decide how and when to enforce the law, i.e., use their inquisitorial charging powers.[189] Federal prosecutors have "broad discretion" precisely because they are "designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'"[190] Judicial review of this "core executive" function would usurp a legitimate executive power

185. *See* United States v. Chem. Found., Inc., 272 U.S. 1, 6 (1926) (citing United States v. Nix, 189 U. S. 199, 205 (1903); United States v. Page, 137 U. S. 673, 679–80 (1891); Confiscation Cases, 87 U.S. 92, 108 (1873)).

186. *Armstrong*, 517 U.S. at 464 ("Absent clear evidence of invidious motive that is hard to prove even when it exists, the prosecutor's charging discretion is plenary." (quoting United States v. Chem. Foundation, Inc., 272 U.S. 1, 14–15 (1926)); Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN ST. L. REV. 1155, 1156 (2005).

187. "The Court has set a high threshold of proof for these cases." Griffin, *supra* note 168, at 276. Courts "restrict defendants' challenges [to the use of prosecutorial discretion] and employ a standard of review that is favorable to prosecutors." *Id.* at 276. "The prosecutor's decision to institute criminal charges is the broadest and least regulated power in American criminal law. The judicial deference shown to prosecutors generally is most noticeable with respect to the charging function . . . [T]he charging decision is virtually immune from legal attack." Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L. J. 513, 513 (1992-1993). Similarly, "[t]he prosecutor's decision not to prosecute a case is virtually unreviewable . . . . Likewise, decisions regarding diversion programs, venue, immunity, and victim participation are left to the unreviewable discretion of the prosecutor." Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 736 (1996).

188. LAFAVE ET AL., *supra* note 2, § 13.3 at 716 ("[I]t is compelled by the separation of powers doctrine, that is the notion that courts are not to interfere with the exercise of discretion by the executive branch."); Sarat & Clarke, *supra* note 176, at 389 (2008) ("[P]rosecutors are granted 'considerable latitude in devising and executing . . . [their] own enforcement strategies' out of respect for the separation of powers.").

189. *Armstrong*, 517 U.S. at 467 ("[O]ne of the core powers of the Executive Branch of the Federal Government, [is] the power to prosecute.").

190. Griffin, *supra* note 168, at 275 (quoting *Armstrong*, 517 U.S. at 464).

and put the judiciary "in the undesirable and injudicious posture of becoming 'superprosecutors.'"[191]

Prudential concerns support the Court's reluctance to regulate inquisitorial charging powers. Simply put, the judiciary does not have the tools for the job. The factors that go into a decision to prosecute (or not prosecute) are subjective, decisions that are "ill-suited to judicial review."[192] "[T]he 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."[193] Moreover, "subjecting the prosecutor's motives and decision-making" to judicial review might "chill law enforcement" in its exercise of independent judgment.[194] Finally, judicial regulation would drain scarce court resources, delaying criminal proceedings with hearings that would require judicial attention and consideration.[195]

Judicial review would also "undermine prosecutorial effectiveness by revealing the Government's enforcement policy."[196] In aggregate, decisions about whether to prosecute embody the executive's enforcement policies . If the Court were to oversee challenges to these decisions, it would be forced to make the government's policies public through the Constitutional practice of written public opinions. This, in turn, would reduce the deterrent power of law enforcement; the public would no longer be deterred from committing those crimes that the government was not vigorously enforcing.[197]

---

191. Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 380 (2d Cir. 1973). *But see* Dripps, *supra* note 187, at 1174–75 (considering a scheme for the regulation of prosecutorial discretion in which "[t]he predictable claim that executive charging authority must be plenary as a constitutional separation of powers matter would be subordinated to individual constitutional rights to due process and equal protection").

192. *Wayte*, 470 U.S. at 607; *see also Armstrong*, 517 U.S. at 465.

193. *Wayte*, 470 U.S. at 607.

194. *Armstrong*, 517 U.S. at 465 (quoting *Wayte*, 470 U.S. at 607).

195. *Id.*

196. *Id.* (quoting *Wayte*, 470 U.S. at 607).

197. *But see* Dripps, *supra* note 187, at 1174–75. Dripps suggests an administrative law approach to the regulation of prosecutorial charging discretion in which "[p]rosecutors would need to develop guidelines for their exercise of discretionary power, and those guidelines in particular cases would be reviewable either by a body of supervisory government lawyers or by courts." *Id.* Prof. Dripps is unsympathetic to the "the objection that public and enforceable criteria for the exercise of prosecutorial discretion would enable violation of some laws." *Id.* Instead,

2. The Court Correctly Applies a Doctrine of Vindictiveness to Post-Verdict Charging Decisions

In addition to the presumption of regularity, which applies before charges have been filed, the Court created a doctrine to oppose the adversarial use of charging powers that are exercised after conviction. Unlike the presumption of regularity, which protects a prosecutor's charging decisions, the doctrine of vindictive prosecution protects defendants from abusive prosecutions. The Court first applied this doctrine to post-trial charging decisions in *Blackledge v. Perry*.[198] There, the Court considered whether a prosecutor's decision to file more serious charges after a defendant was convicted in district court and exercised his statutory right to a *de novo* jury trial, constituted a vindictive prosecution.[199]

The doctrine of vindictive prosecution is derived from the Due Process Clause and exists to ensure that criminal defendants can pursue their constitutional rights "without apprehension that the State will retaliate by substituting a more serious charge for the original one."[200] The two elements necessary to establish a claim of vindictive prosecution are: (1) the defendant must exercise some right; and (2) the prosecutor must subsequently use her charging powers to the defendant's detriment.[201] The Court considered whether there was bad faith or malice on the part of the prosecutor; notably, the Court focused purely on the possibility of prosecutorial vindictiveness.[202]

The Ninth Circuit has explained that the "mere appearance of prosecutorial vindictiveness suffices to place the burden on the government" because the doctrine of vindictive prosecution "seeks[s] to reduce or eliminate apprehension on the part of an accused" that she may be punished for exercising her rights.[203] Such unregulated prosecutorial discretion would allow "the State [to] ensure that only the most hardy defendants [would] brave the hazards of a

---

he urges that "[p]eople have a right to know the law . . . and which criminal statutes . . . prosecutors . . . nullify." *Id.* at 1176.

198. Blackledge v. Perry, 417 U.S. 21 (1974). The Court had already addressed the question of post-trial judicial vindication in *North Carolina v. Pearce*, 395 U.S. 711, 725–26 (1969), *abrogated by* Alabama v. Smith, 490 U.S. 794 (1989).

199. *Blackledge*, 417 U.S. at 22–24.

200. *Id.* at 28.

201. "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978).

202. *Blackledge*, 417 U.S. at 27–28.

203. United States v. Jenkins, 504 F.3d 694, 700 (9th Cir. 2007) (internal citations omitted).

de novo trial."[204] Thus, the Court created a prophylactic protection of defendants' due process rights by deciding that post-trial charging powers are presumptively vindictive.[205] This rule, in turn, protects the integrity of the larger adversary system by preventing the "chilling [of] the exercise of [legal] rights by other defendants who must make their choices under similar circumstances in the future."[206] However, the Court did not prohibit all uses of post-trial adversarial charging powers, but instead left the door open for prosecutors to rebut the presumption of vindictiveness if they could show that the need to use their powers post-trial was outside of their control.[207]

3. The Court's Refusal to Apply the *Blackledge Presumption* to Other Adversarial Uses of Charging Power.

The Court has refused to apply the same presumption of vindictiveness to the pre-trial use of adversarial charging powers. Instead the Court has taken the opposite approach and created a *de facto* presumption that protects pre-trial uses of prosecutorial charging powers. This section examines the Court's questionable motives and inconsistent justifications for refusing to apply the presumption pre-trial.

Perhaps the most common use of pre-trial adversarial charging power is "charge bargaining."[208] In charge bargaining, prosecutors

---

204. *Blackledge*, 417 U.S. at 27–28.

205. *Jenkins*, 504 F.3d at 700. The first element, requiring a defendant to have exercised a right, will always be met for post-trial uses of charging powers because the only way a prosecutor would have the opportunity to use her powers, after an initial conviction, is if the defendant successfully exercised a right (most commonly, by winning an appeal). *Blackledge*, 417 U.S. at 21.

206. *Jenkins*, 504 F.3d at 700 (internal citations omitted).

207. *See Blackledge*, 417 U.S. at 29 n.7 ("This would clearly be a different case if the State had shown that it was impossible to proceed on the more serious charge at the outset, as in Diaz v. United States . . . . In that case the defendant was originally tried and convicted for assault and battery. Subsequent to the original trial, the assault victim died, and the defendant was then tried and convicted for homicide. Obviously, it would not have been possible for the authorities in Diaz to have originally proceeded against the defendant on the more serious charge, since the crime of homicide was not complete until after the victim's death.") (internal citation omitted).

208. The politics and pragmatics of the overburdened criminal system make it unlikely that the Supreme Court will interfere with charge bargaining powers; limitations on charge bargaining would threaten the entire plea bargaining system. As Professor William Stuntz explained: "Plea bargaining took on increased importance as crime rates rose. By 1978, criminal dockets were rising, and prison populations were rising with them. Given the massive increase in crime of the preceding generation, it was obvious that further increases were coming. Both the number of

file a serious initial charge and then, during the adversarial process, offer the defendant a charge reduction in exchange for a plea. Or, alternatively, prosecutors file a less serious initial charge and then, during the adversarial process, threaten to file a more serious charge unless the defendant agrees to plead guilty.[209] These charge bargains frequently coerce defendants, who plead guilty rather than risk a draconian sentence after conviction at trial.[210] The problems with charge bargaining are exacerbated by mandatory minimum sentences and three-strikes laws, which often give prosecutors—rather than the judge—the ultimate control over a defendant's sentence.[211]

Since *Blackledge*, the Court has twice addressed the prosecution's pre-trial adversarial use of its charging powers. In those cases, during the adversarial process, prosecutors wielded their charging power as a club to encourage defendants to plead guilty. In *Bordenkircher v. Hayes,* the prosecutor threatened to indict on a more serious charge if the defendant refused to plead guilty.[212] In *U.S. v. Goodwin,* after the defendant demanded a trial, the prosecution filed more serious charges against him, far exceeding the severity of the charges filed during the inquisitorial process. In both cases, the Court upheld the prosecutor's use of adversarial charging powers and its primary justification was neither constitutional nor prudential—it was pragmatic.

In *Bordenkircher*, the Court balked because it knew that regulating adversarial charging powers would upset the plea bargaining regime on which the criminal judicial system had come to de-

---

felony prosecutions and the number of prison inmates more than doubled in the dozen years after *Bordenkircher*. Rising caseloads were not accompanied by rising prosecutorial budgets. In most states, district attorneys' offices are paid for by local tax dollars, and local governments were already strapped for cash. The only way the system could process many more defendants without hiring many more prosecutors was by getting more guilty pleas. That meant more aggressive use of plea bargaining. A constitutional shadow on plea bargaining, something a defense victory in *Bordenkircher* might produce, would make it harder for prosecutors to extract guilty pleas. More defendants would go to trial, and the plea rate would fall. At a time of high crime and steeply rising dockets, that result was unacceptable." Stuntz*, supra* note 33, at 16.

209. *But cf.* Albert Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85 (1968).

210. *See generally* Stuntz, *supra* note 33, at 16.

211. See James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 Harv. L. Rev. 1521, 1529–30 (1981).

212. Bordenkircher v. Hayes, 434 U.S. 357, 358 (1978).

pend.[213] The concern for protecting a defendant's constitutional rights that existed just a few years earlier in *Blackledge* evaporated when plea bargaining came into the picture. The Court insisted that:

> While confronting a defendant with the risk of more severe punishment clearly may have a "discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable"—and permissible—"attribute of any legitimate system which tolerates and encourages the negotiation of pleas." It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.[214]

The price of that acceptance has been the toleration and encouragement of the charging power as a negotiation tool.

The Court acknowledged the potential for abuse of prosecutorial adversarial charging powers but nevertheless refused to address it.[215] To protect the plea bargaining system, the Court simply pretended that prosecutors did not have *carte blanche* use of their adversarial charging powers. And, while the Court insisted that, "there are undoubtedly constitutional limits" upon the exercise of that power, the constitutional "limits" to which the Court referred were wholly illusory: "It says something about the wide berth the judiciary has given prosecutorial power that the leading case invalidating an exercise of prosecutorial discretion is the nearly century-old decision in *Yick Wo v. Hopkins*."[216] The result of this magical thinking is an explicit blessing of the prosecutor's practice of threatening increased punishment in pursuit of a guilty plea.

---

213. "We have recently had occasion to observe: '[W]hatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned.'" *Bordenkircher*, 434 U.S. at 361–62 (quoting Blackledge v. Allison, 431 U.S. 63, 71 (1977)).

214. *Bordenkircher*, 434 U.S. at 364 (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 31 (1973)); *see also* Dripps, *supra* note 187, at 1174 (arguing that "[t]he shocking thing about *Bordenkircher* is not the existence of a trial penalty but the coercive size of that penalty. We would be better off than at present if we accepted a high percentage trial penalty (say, 100%) but capped the trial penalty at ten years in prison. Khafkaesque as that sounds, it's a step up from *Bordenkircher*.").

215. "There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse." *Bordenkircher*, 434 U.S. at 365.

216. James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1539 (1981); *see also* United States v. Armstrong, 517 U.S. 456 (1996).

The Court found no constitutional invalidity in a plea that was "induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial."[217]

Later, in *Goodwin*, the Court used a contradictory justification to uphold a prosecutor's decision to file more serious charges after the defendant demanded a jury trial instead of pleading guilty.[218] Contrary to *Bordenkircher's* acknowledgement that prosecutors had a motive to encourage defendants to plead guilty, the *Goodwin* Court claimed that there was no reason to suspect a vindictive motive when the prosecutor responded to a defendant who had imposed upon the State the burden of a jury trial by filing more serious charges.[219] The Court explained: "[A] defendant before trial is expected to invoke procedural rights that inevitably impose some 'burden' on the prosecutor. . . . It is unrealistic to assume that a prosecutor's probable response to such motions is to seek to penalize and to deter."[220] The Court insisted that "[a] prosecutor has no 'personal stake' in a bench trial and thus no reason to engage in 'self-vindication' upon a defendant's request for a jury trial."[221] Then the Court went on to distinguish this insignificant pre-trial bias from the "institutional [post-trial] bias" because of "the strong tradition in this country in favor of jury trials," notwithstanding the overwhelming evidence to the contrary.[222]

Despite the Court's contradictory positions regarding prosecutorial motivations, there was one point on which the Court was very consistent: the importance of plea-bargaining. In *Goodwin*, as in *Bordenkircher*, the Court understood that judicial regulation of adversarial charging powers would threaten the plea bargaining regime which had become the very bedrock of the criminal justice system.[223] The Court wrote:

> If a prosecutor could not threaten to bring additional charges during plea negotiation, and then obtain those charges when plea negotiation failed, an equally compelling argument could be made that a prosecutor's initial charging decision could never be influenced by what he hoped to gain in the course of

217. *Bordenkircher*, 434 U.S. at 363.

218. United States v. Goodwin, 457 U.S. 368, 370 (1982).

219. *Id.* at 381.

220. *Id.*

221. *Id.* at 381, 383.

222. *Id.* at 383 n. 18; Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255 (2005).

223. *See* Stuntz, *supra* note 33, at 16.

> plea negotiation. Whether "additional" charges were brought originally and dismissed, or merely threatened during plea negotiations, the prosecutor could be accused of using those charges to induce a defendant to forgo his right to stand trial. If such use of "additional" charges were presumptively invalid, the institution of plea negotiation could not survive. Thus, to preserve the plea negotiation process, with its correspondent advantages for both the defendant and the State, the Court in Bordenkircher held that "additional" charges may be used to induce a defendant to plead guilty.[224]

Even outside the context of plea bargaining, there is reason for concern. Although the Court's fear of upsetting the plea bargaining regime drove it to protect adversarial charging powers in *Bordenkircher* and *Goodwin*, the Court had no trouble approving of adversarial charging powers even when judicial regulation would not have interfered with systemic plea bargaining. As previously discussed, the *Martinez* Court endorsed the prosecutor's use of *nolle*-and-reinstitution to thwart judicial denial of a continuance and the application of the Double Jeopardy Clause. Alarmingly, the Court explicitly endorsed this prosecutorial use of the adversarial charging power as a means to gain a procedural advantage that was unavailable to the defendant. Although the Court did not explain its tacit endorsement of *nolle*-and-reinstitution in *Martinez*, it once again showed its unwillingness to regulate any pre-trial adversarial charging powers.

4. Failure to Regulate the Adversary Use of Charging Powers Violates the Separation of Powers Doctrine and Due Process Doctrines

Unlike the regulation of inquisitorial charging powers, judicial regulation of adversarial charging powers does not present insurmountable separation of powers concerns. When the prosecutor files charges, she does more than just initiate the adversary system; she surrenders her "core" executive authority and inquisitorial powers and submits herself to judicial regulation. The core principles of the adversary system require this submission, just as they require courts to scrutinize all adversarial charging powers.

Once a prosecutor files charges, defendants' constitutional rights, including due process, spring into full effect. One of the

224. *Goodwin*, 457 U.S. at 375 n.10 (emphasis omitted). *See also* Stuntz, *supra* note 33, at 8 ("Plea bargaining lies at the heart of the criminal justice system, Hayes's argument would cast a constitutional shadow over the practice, and that consequence is simply too radical to permit.").

roles of due process is to "speak to the balance of forces between the accused and his accuser."[225] The adversary system requires this balance because it is based on the premise that the best way to discover the "truth" is through the competitive struggle between two equally matched combatants: "When two equal adversaries compete in this way, the theory goes, falsehoods are exposed and the truth emerges."[226] The litigants are not just expected to pursue their own interests, they are required to do so.[227] But a constitutionally adequate adversary system needs more than just two litigants who are willing to "duke it out"; it also requires equality between the litigants. The system ensures this equality in many ways, including through the requirement that a neutral referee, a judge, oversee the trial.[228] The judge's role as a "referee" extends past simply making judgment calls about which blows are fair and which are foul; it includes a duty to ensure that one party cannot use a special power that is not available to the other side.[229] There is good reason the Due Process Clause demands judicial obsession with fairness: "[N]either liberty nor justice would exist" if fairness to criminal defendants were sacrificed.[230] Indeed, as one court put it, "What can be more basic to the scheme of constitutional rights precious to us all than the right to fairness throughout the proceedings in a crimi-

225. Wardius v. Oregon, 412 U.S. 470, 474 (1973).

226. Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. SCH. L. REV. 911, 914 (2012) ("The adversary system operates on the fundamental belief that the best way to ascertain the truth is to permit adversaries to do their best to prove their competing version of the facts."); Frank J. Macchiarola, *Finding the Truth in an American Criminal Trial: Some Observations*, 5 CARDOZO J. INTL. & COMP. L. 97, 101 (1997) ("[T]he search for truth is put in a secondary role. For rather than focus on truth, the trial is seen as a contest before a neutral decider of facts . . . . The adversarial system is built upon a basic trust in the fact that the search for truth can be found in the clash between the adversaries.").

227. MODEL RULES OF PROF'L CONDUCT Preamble & Scope 2 (AM. BAR ASS'N 2013) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

228. *Cf.* Gideon v. Wainwright, 372 U.S. 335, 342–43 (1963) (on making the system fair to defendants).

229. Jay William Burnett & Catherine Greene Burnett, *Ethical Dilemmas Confronting A Felony Trial Judge: To Remove or Not to Remove Deficient Counsel*, 41 S. TEX. L. REV. 1315, 1326 (2000) (arguing "that the trial judge has an obligation not only to merely referee conflict and facilitate the resolution of litigation, but to oversee aspects of counsel's performance, consistent with the judge's moral and ethical obligations. Seen in that light, an aspect of the judge's role includes that of 'guardian' and protector").

230. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (internal citation omitted).

nal case?"[231] Adversarial charging powers threaten this fairness. As discussed in Part II, *nolle*-and-reinstitution gives prosecutors many strategic and systemic advantages that are fundamentally unfair. Similarly, charge bargaining upsets the balance of power between prosecutors and defendants because allowing prosecutors to use their charging powers to coax or coerce defendants into a plea gives them the power to simply disregard the adversarial process's concerns about fairness by bullying the defendant into surrender.

The judiciary's failure to regulate adversarial charging powers not only threatens this fairness, it also allows prosecutors to usurp a legitimate judicial power. Prosecutorial use of *nolle*-and-reinstitution to grant a continuance that the judge would not presents a classic example of this usurpation. Use of *nolle*-and-reinstitution in this way violates separation of powers because pre-trial rulings, such as rulings on motions to continue, are squarely in the province of the judicial branch.[232]

Contrary to the Court's opinions in *Bordenkircher* and *Goodwin*, there is a tremendous risk that prosecutors will use their charging powers to gain an unfair advantage once they file charges and initiate the adversary system. In the inquisitorial phase, there is no defendant and the prosecutor's role is to be neutral and detached.[233] In contrast, the adversarial phase fosters bias.[234] "[T]he earnest effort to do justice is easily corrupted by the institutional ethic of combat."[235] When "the prosecutor is primarily an advocate, [he] sees himself, armor-clad, prepared to do battle for what is right, [and] detachment falters."[236]

Ethical rules impose few constraints on the prosecution's use or abuse of its charging powers during adversarial proceedings. The requirement that prosecutors act as "ministers of justice" is antithet-

231. United States v. Stein, 435 F. Supp. 2d 330, 360–61 (S.D.N.Y. 2006), *aff'd*, 541 F.3d 130 (2d Cir. 2008).

232. Muskrat v. United States, 219 U.S. 346, 357 (1911).

233. Uviller, *supra* note 169, at 1696.

234. In *State v. Love*, 2000-3347 (La. 5/23/03), 847 So. 2d 1198, 1205, the Louisiana Supreme Court not only recognized the prosecutor's bias to use *nolle*-and-reinstitution to gain an advantage, it expected it. "[I]t was not unreasonable for the prosecutor to avail himself of all legitimate means [i.e., *nolle*-and-reinstitution] to gain adequate time to marshal the proof need [sic) to properly present its [sic) case [after a judicial denial of a continuance]. That was his responsibility. To do less would not serve the State's interest. His plenary power in this regard is not subject to question, and, under those circumstance, he is entitled to the presumption that he exercised this power for a proper and lawful purpose in keeping with his duty as a public official." *Id.* (internal citations omitted)

235. Uviller, *supra* note 169, at 1702.

236. *Id.*

ical to their partisan adversarial role.[237] The end result is that once they initiate adversarial proceedings, prosecutors, no matter how well-intentioned, are put in an untenable position. On the one hand, they are asked to maintain their inquisitorial neutrality, while on the other, they are expected to become a vigorous litigant.[238] To protect defendants from the risk of these competing interests, it is incumbent on the judiciary to step in and scrutinize every prosecutorial exercise of adversarial charging powers. One way for courts to begin that scrutiny is to apply the rebuttable presumption the Court articulated in *Blackledge*.[239]

5. Testing a Presumption Against the Adversarial Use of Prosecutorial Charging Powers

Nolle-and-reinstitution is an ideal place for the Court to experiment with the application of the *Blackledge* presumption against the adversarial use of charging powers. *Nolle*-and-reinstitution cases are a sufficiently small pool of cases to permit regulation without an overwhelming impact upon the criminal justice system, writ large. And regulation of this practice, unlike charge bargaining, would not threaten to grind the plea bargaining regime to a halt. To the contrary, the limited practice of *nolle*-and-reinstitution would eliminate any concerns about delay or misuse of scarce judicial resources.

Courts could begin regulating *nolle*-and-reinstitution with relative ease because the ideal test is one that the judiciary is familiar and comfortable with: a rebuttable presumption. Contrary to the Court's opinion in *Goodwin*, a rebuttable presumption that adversarial charging powers are invalid is a workable solution to protect

---

237. *But see* Berger v. United States, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.").

238. *Compare* MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (AM. BAR ASS'N 2015) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."), *with* MODEL RULES OF PROF'L CONDUCT Preamble & Scope 2 (AM. BAR ASS'N 2013) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

239. *See* Blackledge v. Allison, 417 U.S. 21, 28–29 (1974).

against misuse of *nolle*-and-reinstitution.[240] The Court's concern that the State will be barred from legitimate use of adversarial charging powers, such as when it uncovers "additional evidence" or realizes the information it already had has a "broader significance" lacks merit.[241] A rebuttable presumption would simply not be the "inflexible" bar the Court thinks it would.[242]

A rebuttable presumption, unlike a *per se* ban, would allow prosecutors to use their adversarial charging powers when they are in the interest of justice. To be sure, there are legitimate instances in which prosecutors should be allowed to exercise this power.[243] And in all of the Court's examples where prosecutors should be allowed to use this power, there was a common theme: the prosecutor could not have prevented or predicted her need to use her adversarial powers. For example, as the *Blackledge* Court noted, if a victim dies after the prosecutor files initial charges, the prosecutor would be entirely justified in exercising her power to *nolle*-and-reinstitute in order to amend the charge from aggravated battery to murder. Thus, the standard for prosecutors to overcome the presumption should be centered on whether the prosecutor can show that she could not have predicted or prevented the problem through due diligence and better investigation during the inquisitorial phase. If the prosecutor can meet this burden, the only remaining inquiry for the court is to balance the prejudice, if any, to the defendant against the State's interest in using her charging power.

The Court's concern that during the pre-trial "stage of [a] proceed[ing], the prosecutor's assessment of the proper extent of prosecution may not have crystallized" does not justify leaving adversarial charging powers unregulated.[244] The reason that a prosecutor's assessment of the case "may not [be] crystallized" is because she has not finished her investigatory due diligence during the inquisitorial phase.[245] However, there is no reason to tolerate or

240. Justice Blackmun proposed such a solution in his dissent in *Bordenkircher*. 434 U.S. 357, 371 (1978) (Blackmun, J., dissenting) ("I therefore do not understand why, as in Pearce, due process does not require that the prosecution justify its action on some basis other than discouraging respondent from the exercise of his right to a trial.").

241. United States v. Goodwin, 457 U.S. 368, 381 (1982).

242. *Id.*

243. *Id.*

244. *Id.*

245. The number of post-charging dismissals demonstrates that prosecutors frequently fail to do an adequate job investigating their cases before charging. *See, e.g.*, BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ

encourage this practice.[246] The Court's jurisprudence on inquisitorial charging powers holds that prosecutors have plenary power to decide when to file charges. This guarantees that prosecutors have as much time as they need to investigate before removing the charge to the adversarial process. Weighed against the consequences of leaving adversarial charging powers unregulated, it is perfectly reasonable to require prosecutors to do their due diligence before filing charges rather than after.

It is appropriate to allocate to the prosecution the burden of rebutting this presumption. The prosecutor is the only party in a position to prove that its need for this "extraordinary" power is legitimate.[247] Defendants simply have no way of getting into the mind of the prosecutor and thus no way to meet a presumption. Prosecutors, on the other hand, are the only ones who will ever be able to prove they have clean hands. If the prosecutor is able to rebut the presumption against adversarial charging powers, the judiciary is experienced and comfortable conducting the second half of the analysis as well—a balancing test. Ironically, this balancing test strongly resembles the analysis for motions to continue, a judicial determination that prosecutors frequently avoid or defy by using the *nolle*-and-reinstitution power.

CONCLUSION

Despite the serious separation of powers and due process problems, *nolle*-and-reinstitution has flown under the radar for decades. The collective failure to identify *nolle*-and-reinstitution as the systemic problem that it is does not stem from lack of judicial and

243777, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 – STATISTICAL TABLES (2013), http://www.bjs.gov/content/pub/pdf/fdluc09.pdf (table 21).

246. 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 pre-trial screening requirements imposed to justify the detention and charging of the defendant." *Id.* at 108 (citing Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1361–62 (1997)). Often "[p]rosecutors fail to screen and instead charge arrestees based solely on allegations in police reports." Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1328 (2012).

247. Edward W. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 12 (1959) (arguing that one of the core considerations when allocating who should bear the burden of proof is one of fairness, i.e., if only one party has access to the necessary evidence, it should bear the burden).

scholarly attention.[248] Instead, the problem has been the lens through which courts and commentators have viewed the use of prosecutorial charging powers. *Nolle*-and-reinstitution shows that the necessary paradigm for regulation of charging powers must differentiate between inquisitorial and adversarial exercises. Unless and until courts begin to scrutinize adversarial charging powers, prosecutors will continue to gain an unfair advantage that compromises the integrity of the entire adversary system. Approaching this problem through the discrete example of the *nolle*-and-reinstitution power will enable the Court to take a measured approach to the regulation of adversarial charging powers. This would be an important first step in the broader project of creating a fairer adversary system that cabins the prosecution's use of its extraordinary charging powers.

248. *See* LAFAVE ET AL., *supra* note 2, § 13.2(g) at 714–15 (discussing the various models that have been proposed to address the problem with unregulated prosecutorial discretion).