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The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication

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TABLE OF CONTENTS

Introduction.....	1587
I. Adjudication's Weaknesses.....	1592
A. Failures in Fact-Finding.....	1592
B. The Structure and Limits of Prosecutors' and Investigators' Roles	1597
C. The Limited Capacity of Defense Attorneys	1601
D. The Effects of Prosecutorial and Investigative Resource Constraints	1604
E. The Ineffectiveness of Procedural Rules at Trial.....	1606
F. Legitimacy, Conflict Resolution, and Error-Obscuring Processes	1608
G. Plea Bargaining and Truth-Obscuring Incentives.....	1610
II. Toward Reform Through Structured Investigation	1613

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A. Improving Evidence Reliability Within Executive-Branch Structures	1614
1. Investigative Agencies	1614
2. Crime Labs	1618
3. Prosecutors' Offices	1619
B. Improving Evidence Reliability Through Pre-Trial Adversarial Processes	1621
1. Discovery and Open Investigation Files	1621
2. The Problem of Waivable Discovery Rights	1625
3. Judicial Overrides of Disclosure Rules	1627
4. Federal Criminal Dockets and Restrictive Discovery	1628
C. Improving Evidence Reliability Through Judicial Involvement	1632
1. Existing Judicial Practices of Evidence Generation and Review	1632
2. Judicial Review of Investigative Files	1636
3. Judicial Depositions of Witnesses	1638
4. Judicial Role: Factual Accuracy v. Docket Clearing	1641
Conclusion: Structuring Costs for Improving Accuracy	1642

The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication

Darryl K. Brown

With respect to truth-finding, American criminal procedure governs adjudication in considerable detail but regulates investigation with a light hand. In theory, because adjudication checks investigation, weak investigative regulation should not endanger accuracy. Yet adjudication—which occurs through plea bargaining much more often than trials—is an inadequate guarantor of accuracy for many reasons, one of which is the systemic weakening of the adversarial process achieved due to legislative underfunding of indigent defense. However, recent innovations improving fact-finding in criminal adjudication—most prominently DNA analysis—have made accuracy a higher priority by making errors more difficult to conceal. As a result, we now see early signs of a new model for criminal justice: a system that depends less on adversarial process and more on practices akin to those found in administrative and inquisitorial settings.

This shift holds much promise. The accuracy-enhancing function of defense attorneys—scrutinizing the reliability of state evidence and presenting evidence the state ignored—can, in significant ways, be supplanted by other mechanisms, many of which are more politically sustainable than increased funding for indigent defense. New investigation-stage practices have begun to take the place of weak incentives arising from trials and bargaining. Executive and judicial actors are beginning to supplement ineffectual defense counsel in aiding accuracy, and these practices have some advantages over adversarial lawyering. As a result, adjudication is becoming a relatively less important procedural stage for truth-finding as investigation becomes more so; adjudication is weaker than we thought, but investigation is, in some compensatory ways, growing stronger as it also grows less adversarial.

INTRODUCTION

Adjudication systems vary in how they balance commitments to multiple, competing purposes. Accurate fact-finding is only one goal; dispute resolution is another, and in American criminal justice, constraint of

government power is a third. Those purposes sometimes conflict.¹ One recognized feature of adversarial adjudication is that it gives higher priority to dispute resolution and party participation than inquisitorial systems, which are less willing to trade off accuracy for party control of adjudication practice.² Even if government-dominated inquisition seemed likely to provide better truth determination, we would be reluctant to employ it.

To put our particular mix of systemic priorities into action, American criminal procedure has chosen a distinctive approach. Broadly speaking, governments have two ways to regulate behavior: obligatory commands (or rules) and creation of incentives.³ With respect to accuracy and reliability goals, we govern adjudication with detailed constitutional and statutory commands, but we govern investigation through incentives. Police searches and suspect interrogations are extensively regulated by constitutional rules with respect to *other* goals, such as protecting citizen privacy, but largely are not regulated for the purpose of making evidence more reliable.⁴ (In fact, search and interrogation rules may create incentives for investigators to seek *less* reliable forms of evidence that are governed by fewer rules and thus easier to obtain, such as jailhouse informants.) In our adversarial system, the reliability and thoroughness of investigation—meaning not just police activity but all efforts, by both sides, to generate an accurate factual account of relevant events—is governed indirectly by the incentives arising from highly regulated trial adjudication. We lightly govern investigation's reliability, leaving it in the control of parties, largely because we rigorously structure adjudication. Strong regulation of adjudication permits weak rule-based investigative regulation⁵ because, as the

1. Abram Chayes described the "traditional model" of adversarial adjudication as "relatively relaxed about the accuracy of its factfinding." See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1287-88, 1297 (1976). For a recent account of procedure's competing goals, see Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004) (arguing that accuracy is not the overriding goal of procedural fairness, and advocating for the importance of party participation). For a more critical account, see generally WILLIAM T. PIZZI, *TRIALS WITHOUT TRUTH* (1999).

2. See generally MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 101-25 (1986) (describing adjudication systems that prioritize conflict resolution). For a classic mocking but insightful description of the adversarial process, see Thurmond W. Arnold, *Trial by Combat and the New Deal*, 47 HARV. L. REV. 913, 918-22 (1934).

3. Cf. Edward L. Rubin, *Images of Organizations and Consequences of Regulation*, 6 THEORETICAL INQUIRIES IN LAW 347 (2005) (describing options for governmental action as choices between commands and incentive creation).

4. Rules against coercive interrogation are a possible exception. One rationale for such rules is that statements produced by torture or coercion are unreliable. See, e.g., *Brown v. Mississippi*, 297 U.S. 278 (1936).

5. Rule-based investigative regulation is weak in two senses: it is weakly (or lightly) regulated, and it is weak in its ability to produce accurate factual accounts without the support of adjudication practice.

Supreme Court repeatedly implies in its criminal procedure decisions, we believe that adjudication checks investigation.⁶

Much has undermined the model of strong adjudication as the principal regulator of investigation. That model is based on the jury trial, a mechanism that was always an imperfect superintendent of partisan investigation; many wrongful convictions happen despite jury trials. More importantly, jury trials are now rarely used.⁷ Instead, most criminal adjudication now occurs through plea bargains,⁸ and bargaining diminishes supervision of investigation. Gone is the separation of power among executive actors, defendants, judges, and juries⁹ interacting within elaborate procedural rules.¹⁰ Now, defendants' self-interest is the only structural check on government overreaching and the only guarantor of accurate fact-finding.¹¹ Most contemporary adjudication fits Judge Gerard Lynch's account of an "administrative system of criminal justice"¹² carried out in the prosecutor's office rather than in the courtroom:

[T]he prosecutor . . . is the central adjudicator of facts (. . . [and] arbiter of most legal issues and of the appropriate sentence to be imposed). Potential defenses are presented by the defendant . . . to a prosecutor, who assesses their factual accuracy and . . . then

6. Especially in right-to-counsel cases, the Court has repeatedly stressed the importance of defendants forcing the "prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Chronic*, 466 U.S. 648, 656 (1984); *see also* *Alabama v. Shelton*, 535 U.S. 654, 667 (2002) (quoting same language from *Chronic*); *Lockhart v. Fretwell*, 506 U.S. 364, 377 (1993) (quoting same); *Moran v. Burbine*, 475 U.S. 412, 430 (1986) (quoting same).

7. *See* U.S. Dep't of Justice, Bureau of Justice Statistics, State Court Sentencing of Convicted Felons, 2000, at tbls. 4.1, 4.2 (June 2003, NCJ 198822), *available at* <http://www.ojp.usdoj.gov/bjs/abstract/scsc00st.htm> (estimating that 3% of felony convictions in state courts resulted from jury trials and 95% from plea bargaining in 2000); U.S. Dep't of Justice, Bureau of Justice Statistics, Federal Criminal Case Processing, 2001, at 1, tbl. 5 (Jan. 2003, NCJ 197104), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/fccp01.pdf> (noting that 95% of federal felony convictions in 2001 occurred through plea bargaining).

8. On the history of plea bargaining, *see* GEORGE FISHER, *PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003).

9. The background, of course, is the legislature, which defines substantive criminal law and many (non-constitutional) components of procedure and evidence rules.

10. Some argue that the jury's shadow remains an influence on settlement practice. *See* JEFFREY ABRAMSON, WE, *THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* (1994); HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 31-32 (1966) (stating that plea bargains "are in part informed by expectations of what the jury will do"); U.S. Dep't of Justice, U.S. Attorneys' Manual, Principles of Federal Prosecution § 9-27.420 (Aug. 2002), *available at* http://www.usdoj.gov/usao/cousa/foia_reading_room/usam/title9/27mcrm.htm (stating that, in considering plea bargains, prosecutors should weigh the "likelihood of obtaining a conviction at trial").

11. Defendants may assess their self-interests in light of trial rights, though trial procedure's "shadow" is likely weaker than many think. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004). Giving defendants this role, in turn, required revising the conception of a range of constitutional entitlements to make them personal to the defendant and thus waivable by him, rather than public and nonwaivable. Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113 (1999).

12. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998).

decides the charge of which the defendant should be adjudged guilty¹³

This picture will not soon change; the structural forces that drive bargaining remain firmly entrenched.¹⁴ Thus, incentives generated by formal trials have been supplanted by the quite different ones of party negotiation and settlement. The state's *evidence*-gathering practice has always incurred little scrutiny before trial, and bargaining has left it even more lightly scrutinized.

Another feature accompanies this shift toward plea adjudication: the constraints of defense counsel. Beginning in the 1930s with *Powell v. Alabama*,¹⁵ the Supreme Court stressed the importance of defense attorneys and adversarial litigation as a means to assure accurate fact-finding. Right-to-counsel (and later, effective-assistance) cases repeatedly described defense lawyers as improving the accuracy of adjudication.¹⁶ But defense counsel's commitment is not to accuracy; it is to his or her clients, many of whom want inaccuracy to mask their guilt. Legislatures recognize this difference, and they have responded to Court mandates for defense counsel by consistently underfunding defenders in order to constrain their effectiveness.¹⁷ Forty years after *Gideon v. Wainwright*, this political limit on defense counsel is a fixed component of criminal justice; underfunding of defense counsel will not change except at the margins.¹⁸ As a result, adversarial advocacy is a weak means to achieve accuracy.

That weakness has become more noticeable. New means of detecting wrongful convictions—DNA evidence most prominently, but also a range of other forensic science and social-science developments as well—have

13. Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1403-04 (2003). For an earlier (and less sanguine) description that focuses on state courts and emphasizes the non-adversarial nature of routine criminal law practice, see Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooption of a Profession*, 1 LAW & SOC'Y REV. 15 (1967).

14. See generally FISHER, *supra* note 8.

15. 287 U.S. 45, 69 (1932) (without counsel, "though he may be not guilty, [a defendant] faces the danger of conviction because he does not know how to establish his innocence"); see also *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (stating that "[defense] lawyers in criminal courts are necessities" for fair trials, and quoting *Powell* on the risk of wrongful conviction without a defense attorney); *Betts v. Brady*, 316 U.S. 455 (1942).

16. In cases like *Powell* and *Gideon*, they probably did improve accuracy. *Gideon* was convicted in his first trial but, after his pro se appeal to the U.S. Supreme Court won him the right to counsel, he was acquitted after retrial. *Powell* was one of the Scottsboro Boys, several African-American men charged in Alabama with the capital crime of rape of two white women. In their first trial they effectively had no counsel—the trial judge appointed the entire local bar, on the day of trial, to represent the defendants.

17. For the most prominent description of this in the criminal procedure literature, see William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 9-11, 31-33 (1997).

18. Yet those marginal reforms are important. The improvements to defense systems through reforms such as those recently enacted in Texas and Georgia are significant.

greatly undermined confidence in the accuracy of criminal adjudication.¹⁹ Adjudication works to settle conflicts only when truth remains in a black box, that is, only when nothing disturbs our assumption that case resolutions are accurate. Wrongful convictions and demonstrably high error rates for commonly employed evidentiary sources undermine confidence in accurate outcomes.

This weakness of adversarial adjudication is producing early signs of a new model: a system that depends less on adversarial process and more on practices that resemble those found in administrative settings. I suggest that we can understand many of these reforms, and the somewhat reduced role of defense attorneys, as parts of a common evolution along two dimensions. First, a reduced ability to conceal inaccuracy pushes criminal procedure to increase the priority of truth-finding in its balance of competing goals, at some cost to party control and constraint of government power. Second, emerging practices to improve fact-finding diminish adjudication's relationship to investigation and moderate its adversarial features; we are finding new ways to ensure accuracy other than adversarial scrutiny and the incentives arising from trials and bargaining. Recent reforms use executive and judicial actors to supplement weak defense counsel in the task of improving evidence reliability, and many of these reforms have advantages over adversarial lawyering. Other reforms—particularly of discovery rules—refocus the work of weakened defense counsel onto tasks they can handle with limited means, such as scrutinizing government evidence. Both sets of reforms improve the quality of investigation, which helps to compensate for weaknesses of adversarial adjudication. Further reforms within this framework are possible, especially by increasing the involvement of the judicial branch. Adjudication is becoming a relatively less important procedural stage for truth-finding as investigation becomes more so. Adjudication is weaker than we thought, but investigation is, in some compensatory ways, growing stronger.²⁰

19. See, e.g., North Carolina Actual Innocence Commission, *Recommendations for Eyewitness Identification*, available at <http://www.aoc.state.nc.us/www/ids/News%20&%20Updates/Eyewitness%20ID.pdf> (containing information on North Carolina's panel, organized by the state supreme court chief justice with legislative support); Benjamin Weiser, *A Legal Quest Against the Death Penalty: Chance of Error is Too Great, Even for a Murder Victim's Brother*, N.Y. TIMES, Jan. 2, 2005, at 19 (describing U.S. District Judge Jed S. Rakoff's scrutiny of capital punishment's constitutionality in light of factual errors).

20. My focus thus departs from arguments for more trials and less plea bargaining, see, for example, Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1983-84 (1992), and from proposals to improve the bargaining process itself. See, e.g., Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002); Bibas, *supra* note 11; Oren Bar-Gill & Oren Gazal, *Plea Bargains Only for the Guilty* (June 2004), available at <http://ssrn.com/abstract=560401>.

Part I develops the argument that neither trials nor plea negotiations are sufficiently effective, in their real-world forms, to either improve investigation or detect its deficiencies. Part II describes a range of investigation practices with a focus on separated powers and institutional design, identifies several emerging reforms in American practice, and develops additional reform possibilities to improve fact-generation while also limiting executive power in the manner to which formal trial adjudication aspires. The Article concludes with an analysis of the political feasibility for expansion of this reform movement, with a focus on the comparative difficulty of sustaining funding for competing mechanisms to improve accuracy.

I

ADJUDICATION'S WEAKNESSES

Several facets of the criminal justice practice compromise the commitment to accuracy. These include the structure of prosecutors' and investigators' roles, resource constraints on defense attorneys as well as prosecutors and police, and the ineffectiveness of trial procedures. What follows in this Part is a brief sketch of each that highlights the difficulty of designing incentives to guide professional behavior, concluding with an account of the longstanding priority of conflict resolution and systemic legitimacy over reliable fact-finding in criminal adjudication.

A. *Failures in Fact-Finding*

The advent of DNA analysis has led to many dozens of exonerations from serious felony convictions, and in the process it has undermined other, common forms of proof long accepted as highly reliable, namely confessions, eyewitness accounts, and other forms of forensic science. Erroneous eyewitness testimony, for example, is the most common basis for mistaken convictions occurring in a majority of documented wrongful convictions.²¹ But the advent of DNA analysis is only the most prominent event to undermine the perception of criminal judgment reliability. At the same time, other means of forensic analysis—serological, hair, fingerprint, bite-mark, and arson analysis—have all been shown to be grounded in unproven or flawed premises, executed with unreliable methodologies, vulnerable to analyst error, and unreliable when scrutinized with controlled testing.²²

21. See Innocence Project, Causes and Remedies of Wrongful Convictions (2001), <http://innocenceproject.org/causes/index.php> (containing a study of causes of wrongful convictions in the first seventy DNA exonerations).

22. See Jennifer L. Mnookin, *Scripting Expertise: The History of Handwriting Identification Evidence and the Judicial Construction of Reliability*, 87 VA. L. REV. 1723, 1725-26 (2001). On fingerprinting, see Simon A. Cole, *What Counts for Identity?: The Historical Origins of the Methodology of Latent Fingerprint Identification*, 12 SCI. IN CONTEXT 139 (1999); Flynn McRoberts &

Non-scientific sources have faced new criticisms as well. Documented cases of false confessions suggest accounts of defendant statements are not foolproof.²³ In the past two decades, social scientists carried out a broad and compelling set of well-designed studies that undermine commonsense (and judicial) confidence in eyewitness identifications.²⁴ We know, for example, that there is little connection between an eyewitness's accuracy and her high personal confidence that her identification is accurate. And we have numerous, compelling studies showing how formal identification processes can be highly suggestive and lead to erroneous identifications, which has led to development of accuracy-enhancing protocols for administering identification procedures, such as suspect lineups and photo arrays.

On top of all this is the surprising number of crime lab scandals in the last decade. A wide range of state and federal crime labs—the FBI's lab as well as labs in Texas, Montana, Oklahoma, West Virginia, Florida, and several other jurisdictions—have produced large bodies of analyses that were either intentionally fraudulent or so poorly executed (and in violation of standard practice protocols) as to be demonstrably unreliable.²⁵ Those

Steve Mills, *Digitized Prints Can Point Finger at Innocent*, CHI. TRIB., Jan. 3, 2005, at 1. On hair analysis, see Clive A. Stafford Smith & Patrick D. Goodman, *Forensic Hair Comparison Analysis: Nineteenth Century Science or Twentieth Century Snake Oil?*, 27 COLUM. HUM. RTS. L. REV. 227 (1996) (detailing the weaknesses of hair identification analysis). On bite-mark evidence, see Maurice Possley & Steve Mills, *Expert Discredits Bite Mark Evidence*, CHI. TRIB., Dec. 14, 2004, at 1. On arson analysis, see Steve Mills & Maurice Possley, *Texas Man Executed on Disproved Forensics*, CHI. TRIB., Dec. 9, 2004, at 1.

23. See generally Richard A. Leo & Richard J. Ofshe, *The Truth About False Confessions and Advocacy Scholarship*, 37 CRIM. L. BULL. 293 (2001); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998).

24. See, e.g., ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY (1979); Carolyn Semmler, Neil Brewer & Gary L. Wells, *Effects of Postidentification Feedback on Eyewitness Identification and Nonidentification Confidence*, 89 J. APPLIED PSYCHOL. 334 (2004); John Turtle et al., *Best Practice Recommendations for Eyewitness Evidence Procedures: New Ideas for the Oldest Way to Solve a Case*, 1 CAN. J. POLICE & SECURITY SERVICES 5 (2003); Gary L. Wells et al., *Distorted Retrospective Eyewitness Reports as Functions of Feedback and Delay*, 9 J. EXPERIMENTAL PSYCHOL.: APPLIED 42 (2003).

25. For a report on misconduct in the FBI crime lab, see Associated Press, *FBI DNA Lab Probe Widens*, Apr. 27, 2003 (describing investigation of FBI lab by DOJ inspector general); Flynn McRoberts & Maurice Possley, *Report Blasts FBI Lab*, CHI. TRIB., Nov. 14, 2004, at 1 (describing critical report on erroneous FBI fingerprint analysis that led to false arrest); U.S. Dep't of Justice, Office of the Inspector General, *The FBI DNA Laboratory: A Review of Protocol and Practice Vulnerabilities* (May 2004) (describing fraudulent and negligent DNA analysis); U.S. Dep't of Justice, Office of the Inspector General, *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases* (Apr. 1997). For an account of widespread fraud in the West Virginia crime lab, see *In re an Investigation of the W. Va. State Police Crime Lab., Serology Div.*, 438 S.E.2d 501 (W. Va. 1993) (describing analyst's misconduct in state crime lab, including dozens of fabricated blood tests, in cases that ended in convictions); JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 109-25 (2000) (describing in detail West Virginia analyst's mishandling and creation of scientific evidence). On comparable misconduct by a lab official in Oklahoma, see Jim Yardley, *Inquiry Focuses on Scientist Employed by Prosecutors: Chemist Handled 3,000 Oklahoma Cases*, N.Y.

problems undermine confidence that science provides special reliability.²⁶ These risks undermine even DNA analysis, which depends, like all forensic analysis, on trained technicians adhering to accepted procedures, protocols, and interpretive criteria as well as protections against contamination and unreliable chains of custody.²⁷

Together, these developments tell us that DNA exonerations are the tip of an immeasurable iceberg. DNA analysis is decisive in only a small minority of cases, but the forms of evidence that it has proven to be unreliable—other forensic analysis, eyewitnesses, informant testimony—are extremely widespread.²⁸ Adjudication has repeatedly failed to detect these errors, and that has not escaped public notice. Evidence of error has undermined public confidence that guilty judgments correlate sufficiently with factual guilt. Signs of that failed confidence include mainstream political reaction: two state governors have imposed moratoria on implementation of the death penalty due to accuracy concerns,²⁹ and calls for

TIMES, May 2, 2001, at A14 (reporting that the Governor of Oklahoma ordered all felony cases in which forensic scientist Joyce Gilchrist was involved to be reexamined); see also *McCarty v. State*, 765 P.2d 1215 (Okla. Crim. App. 1988) (reversing and remanding capital conviction on account of Gilchrist's poor lab work). For an archive of stories on flaws in the Houston crime lab, see *Hot Topic: HPD Crime Lab*, HOUSTON CHRON., available at <http://www.chron.com/content/chronicle/special/03/crimlab/index.html>. For summaries of problems in several labs, see Maurice Possley, Steve Mills, and Flynn McRoberts, *Scandal Touches Even Elite Labs: Flawed Work, Resistance to Scrutiny Seen Across U.S.*, CHI. TRIB., Oct. 21, 2004, at 1 (recounting incidents of crime lab errors and fraud in Houston, Montana, and the federal FBI lab).

26. See Mnookin, *supra* note 22, at 1729 (challenging the assumption "that reliability is exogenous to law, or, more specifically, that when judges make determinations about the validity and reliability of expert evidence, they are ratifying something that either exists or does not exist out in the world").

27. See Roma Khanna, *Man Convicted of Rape on Faulty DNA Evidence Set Free*, HOUSTON CHRON., Oct. 8, 2004, available at <http://www.chron.com/cs/CDA/ssistory.mpl/special/crimelab/2837075> (noting conviction based on flawed analysis by Houston crime lab).

28. See Innocence Project, *supra* note 21 (noting that serology, hair analysis, and other forms of forensic analysis with high error rates were bases of significant numbers of wrongful convictions later uncovered with DNA evidence); see also Edmund Higgins, *Wrongfully Convicted*, <http://www.dredmundhiggins.com> (last updated July 2, 2003) (containing similar findings with a larger database of cases); Report of the Governor's Commission on Capital Punishment (Apr. 2002), available at <http://www.idoc.state.il.us/ccp> (containing report to Illinois Governor); see also *Wrongful Convictions Symposium*, 52 DRAKE L. REV. 587 (2004) (containing articles by Hugo Adam Bedau, Michael L. Radelet, Constance E. Putnam, Thomas P. Sullivan, Steven A. Drizin, Marissa J. Reich, Christine C. Mumma, David Kyle, Richard J. Wolson, Aaron M. London, Dan S. Levey, Adele Bernhard, and Robert R. Rigg); *Wrongful Convictions*, CRIM. JUST., Spring 2003, at 1 (containing a collection of articles on wrongful convictions); Symposium, *Wrongful Convictions of the Innocent*, 86 JUDICATURE 64 (2002); Am. Judicature Soc., Agenda, National Conference on Preventing the Conviction of Innocent Persons, available at http://www.ajs.org/ajs/ajs_natl_conf_summ.asp (describing January 2003 conference).

29. See CNN, *Maryland Governor Issues Death Penalty Moratorium*, May 14, 2002, <http://archives.cnn.com/2000/US/01/31/illinois.executions.02>; CNN, *Illinois Suspends Death Penalty*, Jan. 31, 2000, <http://archives.cnn.com/2000/US/01/31/illinois.executions.02>. Indiana's governor recently called for a review of his state's administration of the death penalty. Associated Press, *Indiana Governor Commutes Death Sentence as He Leaves Office*, Jan. 10, 2005, available at <http://www.demaction.org/dia/organizations/ncadp/news.jsp?key=1098&t=> (reporting outgoing

moratoria have come from the ABA and a large number of local governments and bar associations.³⁰ A broad range of states, including North Carolina and Connecticut, have created innocence commissions to review adjudication procedures and convictions in addition to pursuing other reforms.³¹

In addition to the frequency with which wrongful conviction accounts now occur, it may be that public attention recognizes the unprecedented scope of American criminal law. Total felony convictions now approach one million per year.³² American incarceration rates have increased roughly six-fold in the past thirty years. Until 1970, the United States imprisoned about 110 people per 100,000, a ratio modestly higher than European countries' contemporary rates. In the past three decades, however, the American incarceration rate has increased to nearly 700 per 100,000, a percentage unprecedented in American history and among industrialized nations.³³ Perhaps when criminal law reaches this degree of intrusion into national life, concern about its accurate enforcement grows.

Whether or not the dramatic growth of the criminal justice system explains public reaction, the sheer number of criminal cases should drive accuracy concerns for two reasons. First, the high overall accuracy rate is surely not evenly distributed across all cases.³⁴ The error rate is much

Governor Joe Kernan's call for a review of Indiana's capital punishment system). A group of former North Carolina Supreme Court Justices have recommended a moratorium in their state. *See* Eight Former North Carolina Supreme Court Justices Call on the General Assembly for an Immediate Vote on the Moratorium Bill, June 29, 2004, <http://www.deathpenaltyinfo.org/article.php?scid=1&did=1051>.

30. *See* American Bar Association, Death Penalty Moratorium Implementation Project, <http://www.abanet.org/moratorium/reportsandlaw.html> (last visited Mar. 23, 2005); *see also* American Bar Association Resolution, at <http://www.abanet.org/moratorium/4thReport/AppendicesA&B.doc> (last visited June 24, 2005) (appendix listing local governments and bar organizations calling for moratoriums).

31. On North Carolina's panel, organized by the state supreme court chief justice with legislative support, *see* North Carolina Actual Innocence Commission, *supra* note 19. *See also* Connecticut Commission on Wrongful Convictions, <http://www.abanet.org/legalservices/probono/lawschools/133.html> (last updated June 7, 2004) (describing Connecticut's innocence commission).

32. *See* U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 2002, tbl. 5.18 at 417, tbl. 5.44 at 477, available at http://www.albany.edu/sourcebook/tost_5.html (reporting that convictions in federal and state courts totaled 984,759 in 2000).

33. *See* Roy Walmsley, United Kingdom Home Office Research, Development and Statistics Directorate, *World Prison Population List 1* (3d ed. 2002), available at <http://www.homeoffice.gov.uk/rds/pdfs/r166.pdf>. For an alternate source with slightly different data, *see* International Centre for Prison Studies, *World Prison Brief*, available at http://www.kcl.ac.uk/depsta/rel/icps/worldbrief/world_brief.html (citing the U.S. rate as the world's highest at 686 per 100,000 as of Jan. 1, 2002); Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980-1996*, in 26 PRISONS: CRIME AND JUSTICE—A REVIEW OF RESEARCH 17, 18-19 (Michael Tonry & Joan Petersilia eds., 1999) (citing 1997 figures from Bureau of Justice Statistics).

34. One rough and conservative estimate based mostly on surveys of judges and attorneys posits an accuracy rate of 99.5%. For an attempt to estimate the extent of wrongful convictions, *see* C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 53-62 (1996) (offering 99.5% accuracy rate based on survey of judges and prosecutors and studies of judges' disagreements with jury guilty verdicts). For the 984,759 convictions reported in 2000, that

lower in most cases where the evidence is strong, for instance, where defendants readily confess or are caught at the scene. But the error rate is much *higher* in the subset of convictions where defendants do not confess, are not caught at the scene, and in which prosecution cases are built on evidentiary sources known to have high rates of error, such as informants, eyewitnesses, and nonscientific forensic analysis. A million felony convictions annually translates to “only” 5,000 wrongful convictions even if the accuracy rate is 99.5%. But those 5,000 convictions are probably concentrated in a much smaller set of cases that share features signaling high risks of error.

Second, and less noted in public and scholarly debate, the risk of inaccuracy affects the *guilty* as well, because even guilty defendants can be inaccurately charged, adjudicated, and punished. Liability often depends upon fine-grained factual understandings: whether an offender has intent to sell the drugs he possesses; whether circumstances support inferences of constructive possession; whether a victim was a first aggressor and posing an immediate threat to a defendant who claims self-defense; whether a defendant’s involvement with a primary perpetrator amounts to complicity, or his role in a conspiracy was a leading or minor one. Sentencing depends on the same sorts of close and subtle factual assessments.³⁵ Criminal convictions depend upon normative judgments,³⁶ and normative judgments are based upon facts. Additionally, even cases that the system gets right (as when charges are dismissed pretrial, acquittals occur at trial, or convictions are reversed in light of new evidence) impose significant costs on the wrongly accused that could be reduced by accurately determining innocence earlier in the process.

Another aspect of criminal procedure affects this accuracy picture. The law of investigation has little direct concern with the reliability or accuracy of evidence. To protect citizen privacy from government overreaching, Fourth Amendment doctrine excludes accurate evidence that police obtain illegally.³⁷ The Self-Incrimination and Due Process clauses exclude

would mean 4,924 wrongful convictions. Figures for convictions in 2000 are from U.S. Dep’t of Justice, *supra* note 32. Huff used data from a decade earlier to reach a comparable estimate. See HUFF ET AL., *supra*, at 62.

35. For example, a defendant’s role in an offense (and dominance over or domination by others) affects punishment levels, as do the circumstances surrounding a murder and the details of an offender’s background, each of which can make the difference between a life sentence or the death penalty. See U.S. SENT. GUIDELINES MANUAL § 3B1.1 (2004) (detailing sentencing adjustments for offender’s role in the offense).

36. See Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423 (1995).

37. See *Katz v. United States*, 389 U.S. 347 (1967) (explaining Fourth Amendment protection for privacy interests); *Mapp v. Ohio*, 367 U.S. 643 (1961) (announcing the Fourth Amendment exclusionary rule). See also Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment “Reasonableness,”* 98 COLUM. L. REV. 1642 (1998); William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842 (2001); Scott E. Sundby,

some evidence from suspect interrogations³⁸ for similar reasons; this may likewise hinder accurate adjudication. They make voluntary statements harder to obtain (and excludable) in order to serve interests other than accuracy.³⁹ Search and interrogation law thereby constrain two important means of obtaining types of evidence that are likely to be especially reliable. When police cannot pursue those forms of evidence, they must pursue others. Those other forms—including jailhouse informants, who are usually a source for purported confessions—are, as a class, less reliable. The law of investigation, then, which pays little direct attention to evidentiary reliability, may create perverse incentives for inaccuracy. It may be that investigation law contributes little to wrongful convictions; innocent defendants have nothing to confess, or nothing to hide in their homes or cars. But impediments to interrogations and searches, which should help rule out some innocent suspects, may drive law enforcement to utilize erroneous sources that mislead prosecutors, judges, and juries.

In what follows, I survey many of the central features of criminal practice to argue that trials and plea bargaining are less effective than we have long believed in checking flawed investigation practices and ensuring accurate dispositions. Institutional roles for prosecutors, judges, defenders, and others create multiple, sometimes conflicting incentives that do not always accord with maximum accuracy. We count on adjudication both to create incentives for strong fact generation and to identify weak presentations of it, yet adjudication is deeply dependent on the rules and institutions that structure pretrial investigation and practice.

B. The Structure and Limits of Prosecutors' and Investigators' Roles

Consider first prosecutors' institutional role, long recognized as one of conflicting demands. Despite a commitment to the quasi-judicial task of seeking justice and not merely victory, prosecutors (like police) are partisan advocates engaged in the "competitive enterprise of ferreting out crime."⁴⁰ Courts recognize that this advocacy role makes them, for

"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 COLUM. L. REV. 1751 (1994).

38. *Brown v. Mississippi*, 297 U.S. 278 (1936) (stating that the Due Process Clause excludes involuntary confessions in state courts); *Ziang Sung Wan v. United States*, 266 U.S. 1 (1924) (stating that the Fifth Amendment excludes involuntary confessions in federal courts); see *Dickerson v. United States*, 530 U.S. 428 (2000) (stating that the *Miranda* exclusionary rule is a constitutional rule); *Miranda v. Arizona*, 384 U.S. 436 (1966) (announcing the exclusionary rule to protect privilege against self-incrimination).

39. See *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960) ("[A] complex of values underlies the stricture against use by the state of [involuntary] confessions."). They do so also partly to improve accuracy; coerced interrogations are less reliable than voluntary ones.

40. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

example, untrustworthy arbiters on such issues as sufficiency of warrants.⁴¹ The Fourth Amendment requirement that “neutral and detached” magistrates check prosecutors’ probable-cause determinations stresses detachment from the prosecutor’s investigative and advocacy tasks—not necessarily independence from the executive branch more broadly⁴²—precisely because of the recognition that partisan duties affect judgment. Criminal procedure builds in several occasions for judicial supervision (including search and arrest warrants and final adjudication by judges or juries) in recognition of how partisan engagement affects even conscientious attorneys.

Yet even if constitutional requirements suggest the need to check police and prosecutors’ desires to fervently pursue evidence and convictions, it is not clear either group has unmitigated motives to *maximize* the quality and scope of investigation files in every case. Professor Dan Richman has described the complex incentives operating upon federal investigative agents, which include direct accountability to agency chiefs rather than prosecutors, a need to impress legislative funders, and concern with deflecting blame from the agency to prosecutors or others for cases that do not result in convictions (especially in politically charged contexts such as terrorism investigations).⁴³ Given this mix of concerns, agents can rationally make decisions, for example, to spread resources widely and increase the number of cases referred to prosecutors at some cost to thoroughness in each case. That can yield credit to the agency for referring lots of cases and shift blame to prosecutors for declining to prosecute (or settling too cheaply) weaker ones.⁴⁴ Prosecutors, who distribute limited resources over heavy caseloads, have comparably mixed incentives for factual thoroughness. And judicial supervision looks only at whether the police and prosecutors have a *minimally sufficient* basis to invade citizen privacy and liberty; judges do not seriously evaluate either the quality of evidence for accuracy or the investigation for its thoroughness.

Furthermore, prosecutors and police, acting in their adversarial capacity, make important decisions about evidence generation, such as whether to seek further evidence, to forgo evidence sources, and to use coercive tools to generate evidence, which may lead to the production of false or misleading evidence or inaccurate dispositions. Take as one example the use of cooperating witnesses. Prosecutors employ a variety of tools to

41. See *id.*; see also DAMAŠKA, *supra* note 2, at 223 (describing American prosecutors’ more “partisan role” in contrast to European prosecutors).

42. *Shadwick v. City of Tampa*, 407 U.S. 345 (1972) (approving municipal magistrates appointed and removable by the executive as appropriate officials for probable cause determinations because they are detached from prosecutors).

43. Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749 (2003).

44. *Id.*

secure information or testimony from witnesses, such as immunity or sentence discounts and threats of prosecution against the witness or his family members if he refuses to testify. These incentives raise obvious risks of inaccuracy in testimony. Moreover, in employing these tools to secure testimony, prosecutors assume, based on *other* sources, that the testimony given by the witness is accurate. But the problems of imperfect information can be substantial in routine crime investigation. Are preschool-age children reliable on accusations of assault? Are drug users with criminal records reliable in accounts implicating dealers? Are eyewitnesses who saw offenders in far-from-optimal viewing contexts sufficiently trustworthy in their identifications? Are jailhouse snitches lying about a defendant's jail-cell confession?

Wrong guesses on such questions explain many erroneous judgments.⁴⁵ The appropriateness of employing carrots or sticks to secure testimony rests upon a number of good-faith hunches about background truth and witness credibility. Decisions regarding the reliability of potential testimony are vulnerable to role biases and cognitive errors.⁴⁶ We depend on trial adjudication (or plea negotiation) to counter those risks but lack any mechanisms to check them earlier in the pretrial process.

To be sure, prosecutors are capable of making such evaluations effectively. Institutional distinctions between police and prosecutors help. When police or other investigators gather evidence, prosecutors are the first legally trained officials to evaluate its sufficiency for securing an indictment

45. For recent examples, see *Goldstein v. Harris*, 82 F. App'x 592 (9th Cir. 2003) (unpublished opinion) (describing Thomas Goldstein's wrongful conviction based largely on a jailhouse informant and an identification affected by suggestive procedures, plus defense attorney's failure to interview the eyewitness); see also *Taylor v. Maddox*, 366 F.3d 992, 1014 n.17 (9th Cir. 2004) (describing *Goldstein* case). See Danny Hakim & Eric Lichtblau, *The Unravelling of a Terror Case Spun From Thinnest Threads*, N.Y. TIMES, Oct. 7, 2004, at A1, A26 (describing an investigation that led the Justice Department to request that convictions of two defendants be dismissed because of Detroit prosecutors' improper reliance on dubious informants, withholding of material discovery, and "'creat[ion] a record filled with misleading inferences'"); see also Danny Hakim, *Judge Reverses Convictions in Detroit Terrorism Case*, N.Y. TIMES, Sept. 3, 2004, at A12 (same).

46. See Nicola Lacey, *Introduction: Making Sense of Criminal Justice*, in CRIMINAL JUSTICE 1, 13 (Nicola Lacey ed., 1994):

Cases do not simply come into the world "weak" or "strong"; to a significant extent, they are made so by the commitment or non-commitment of investigatory resources. . . . Thus, the whole conduct of police investigations—distribution of resources and operational priorities, proportion and patterns of cases taken up, styles and thoroughness of questioning—is central to how the cases which get further into the system are selected and presented.

See also MIKE McCONVILLE ET AL., *THE CASE FOR THE PROSECUTION* 56 (1991) ("The police have, at a most fundamental level, the ability to select facts, to reject facts, to not seek facts, to evaluate facts and to generate facts. Facts, in this sense, are not objective entities which exist independently of the social actors but are created by them."). On police role bias, see Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 507-13 (2004) (describing the "power of organization" in shaping police officers' judgment and conduct, noting "[c]ops are much more likely to frame their decisions in terms of role-based obligations and expectations" and "police officers have a . . . set of 'distinctive cognitive and behavioral responses' . . . that derives from certain characteristics of the police milieu").

or proving guilt. Charge screening is a quasi-judicial practice, yet prosecutors do it routinely—and in some jurisdictions, judging from the rates at which they decline to pursue cases the police present, quite rigorously and effectively.⁴⁷ Screening is more likely to be rigorous when prosecutors are detached from investigation. When prosecutors are committed to investigations because the case is high profile, or when they, rather than police, lead investigations and make key decisions about generating evidence, their ability to assess evidentiary strength in a detached manner that resembles judicial review surely declines. Investigative judgment is affected by something like path dependence,⁴⁸ with early presuppositions and choices affecting subsequent inferences and decisions about evidence credibility, sufficiency, and meaning.⁴⁹

Prosecutorial involvement in investigation illustrates the difficulty inherent in making decisions under uncertainty that affects a range of endeavors. Observer effects such as confirmation bias (“the tendency to test a hypothesis by looking for instances that confirm it rather than by searching for potentially falsifying instances”⁵⁰) affect scientific investigation as well as police and prosecutor fact-development decisions. “Signal detection theory” describes the related problem of requiring decisions even where indicators are faint, ambiguous, or confusing, a difficulty widely studied in the context of medical decision-making such as radiologists’

47. For accounts of state prosecution offices’ rigorous screening practices and high declination rates, see Wright & Miller, *supra* note 20 (describing the New Orleans District Attorney’s Office); JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 223 (1980) (same); *id.* at 237 (describing Jackson County, Missouri, Prosecutor’s Office); *but see id.* at 259 (describing minimal screening before preliminary hearings in Boulder, Colorado, District Attorney’s Office); *id.* at 117 (listing general criteria for screening); *see also* NAT’L DIST. ATTORNEYS ASS’N, NATIONAL PROSECUTION STANDARDS 42.1-42.9 (2d ed. 1991, amended 1997) (recommending screening criteria). For a local prosecutor’s official screening policy, see Attorney General, 7th Judicial District of Tennessee, Criminal Screening and Charging, <http://www.attorneygeneral.org/scrnchrg.html> (last visited Sept. 22, 2005) (describing a Tennessee prosecutor adopting National Prosecution Standards). For varying declination rates by federal prosecutors, see Richman, *supra* note 44 (describing federal practice).

48. On path dependence generally, see Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127 (1999) (describing distinct forms of path dependence).

49. *See* Kola Abimbola, *Questions and Answers: The Logic of Preliminary Fact Investigation*, 29 J. L. & Soc’y 533 (2002) (“[P]resuppositions of questions constrain inferential choices entertained by fact investigators . . . and the sort of inferential connections a legal agent makes when choosing between alternatives, are all dependent upon the presuppositions of the questions posed.”); *id.* at 536-37 (“[A]ll agents . . . have to engage in the interpretation, construction and evaluation of fact in decision-making.”); *id.* at 544 (describing a case study in which an investigation is flawed because “police’s initial investigation was carried out on the assumption that the death was the result of a failed drug deal”). For related social science literature on forms of bias in jury fact-finding, *see* JURIES: FORMATION AND BEHAVIOR (Robert M. Krivoshey ed., 1994); Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273 (1989) (relying on cognitive science literature to describe decision-making at trial).

50. D. Michael Risinger et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CALIF. L. REV. 1, 7 (2002).

interpretations of CT scans.⁵¹ This theory suggests that “decision-makers with equal ability to perceive stimulus information, but who form different implicit decision thresholds for deciding when evidence is sufficient to declare a signal to exist or not to exist ... will produce different decision profiles.”⁵² Prosecutors and police must make evidence judgments based on ambiguous or uncertain indicators; before trial, little regulates their decision thresholds on matters such as witness credibility.⁵³ Yet their judgments on one item may affect a range of decisions on others, such as whether to seek additional witnesses or scientific evidence. That requires defendants either to challenge the evidence at trial or pursue their own investigations for evidence the state forgoes.⁵⁴

C. *The Limited Capacity of Defense Attorneys*

The primary check against errors in prosecution evidence development is skilled defense counsel. The U.S. Supreme Court began the mandatory “lawyerization” of criminal adjudication in the 1930s, when cases like the Scottsboro Boys trials highlighted the unreliable nature of adjudication in which lawyer-prosecutors were pitted against lay defendants.⁵⁵ The Court noted skilled defense counsel can be a formative contributor to accurate fact-finding.⁵⁶ Defense attorneys conduct separate investigations and uncover evidence the government overlooks. (They do so, however, with notably fewer legal tools: no search, subpoena, or deposition powers before trial, or means to generate incentives for testimony such as offers of immunity. And only in limited cases can they get funds for expert assistance.⁵⁷)

51. See David Heeger, *Signal Detection Theory* (2003), available at <http://www.cns.nyu.edu/~david/sdt/sdt.html>; Michael J. Saks & D. Michael Risinger, *Base Rates, The Presumption of Guilt, Admissibility Rulings, and Erroneous Convictions*, 2003 MICH. ST. L. REV. 1051, 1053-57; see Victoria L. Phillips et al., *The Application of Signal Detection Theory to Decision-Making in Forensic Science*, 46 J. FORENSIC SCI. 294 (2001).

52. Saks & Risinger, *supra* note 51, at 1053.

53. There can be substantial and useful checks within law enforcement offices through such mechanisms as review by supervisors. See discussion *infra* Part II.A; see also Lynch, *supra* note 12.

54. Due process doctrine requiring prosecutors to disclose exculpatory evidence requires a strong showing of prejudice before failure to disclose will prompt reversal of a conviction. That prejudice requirement signals to prosecutors that, when other evidence against defendants is strong, withholding material is unlikely to result in reversal. See Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643 (2002).

55. It is hard to imagine now, but it was not always obvious that this arrangement was unfair and error-prone. Consider that defendants could testify by this era; there was little discovery for defense counsel to insist upon and little complicated forensic analysis that required skill to impeach; the burden and standard of proof favored defendants, and juries administered them; guilty defendants had an inherent information advantage over the state, while innocent ones could testify and easily identify alibi witnesses; all probably had greater faith in eyewitness accounts; and prosecutors and trial judges often professed to abide by an ethic of fairness against lay defendants. Alabama's brief in the *Gideon* case argued this last point in opposing a constitutional right to appointed counsel.

56. See *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

57. See *Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985) (defining a due process right for indigent defendants to expert assistance for issues that are “significant factors” in criminal trials).

At trial they can confront state witnesses and probe, for example, the circumstances of eyewitness identifications or arrangements for informant testimony.

But this safeguard is hardly foolproof. Some unreliable evidence is not easily impeached even by skilled confrontation. Once an eyewitness's memory has been affected by suggestive identification procedures, it is hard to undo the damage. Witnesses insist on personal confidence in their memories, and jurors may not be easily persuaded to doubt a confident witness even when unreliable and suggestive procedures are explained.⁵⁸ Contamination of samples and poor chains of custody can be hard to identify in forensic analysis, as can analytical errors arising from arcane interpretive methodologies, signal-detection theory errors, inadequately calibrated equipment, negligence, or fraud.

Moreover, defense counsel have limited ability to extend investigations and prepare rigorous confrontations of evidence. What the Supreme Court tried to grant through constitutional doctrine, legislatures have been able to limit through funding constraints so that defenders have little time and few resources for most cases.⁵⁹ Accounts of poor defense practice, especially for indigents, are widespread and routine across a wide array of jurisdictions.⁶⁰ One study of appointed counsel in New York City found

58. Some are quite subtle. Identifications are less reliable if administered by an officer who knows the suspect's true identity; photo arrays are less reliable if witnesses are not told the suspect's picture might not be included; lineups are less reliable if all members match the description of the defendant rather than the perpetrator.

59. See Stuntz, *supra* note 17, at 4-11, 32-33. But see Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219 (2004) (describing instances in which legislatures appropriately fund public defense services). Public law litigation has never worked for counsel rights the way it has for other institutional reforms such as schools, prisons, and mental hospitals. For discussions of the latter, see, for example, Ronald J. Krotoszynski, Jr., *Equal Justice Under Law: The Jurisprudential Legacy of Judge Frank M. Johnson, Jr.*, 109 YALE L.J. 1237, 1242-43 (2000) (describing and citing examples of Judge Johnson's supervision of Alabama prisons and mental hospitals through long-term structural injunctions). For a rare example of the former, see *State v. Peart*, 621 So. 2d 780, 790 (La. 1993) (holding local defender system presumptively violates *Gideon* due to underfunding and citing similar cases from other states); cf. *Kennedy v. Carlson*, 544 N.W.2d 1, 8 (Minn. 1996) (rejecting, for failure to show injury in fact, a claim by the public defender's office that the state's underfunding caused constitutionally inadequate representation of clients).

60. See, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994). For recent examples of studies documenting state indigent defense systems as underfunded and providing poor representation, see, for example, Robert L. Spangenberg et al., *A Comprehensive Review of Indigent Defense in Virginia* (Jan. 2004), <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/va-report2004.pdf> (study by the Spangenberg Group for the ABA); Report of Georgia Chief Justice's Commission on Indigent Defense (2003), available at <http://www.georgiacourts.org/aoc/press/idx/idxhearings/idxreport.doc> [hereinafter Georgia Chief Justice's Report]. That report was based in part on an empirical study of Georgia's indigent defense system. See Spangenberg Group, *Status of Indigent Defense in Georgia: A Study for the Chief Justice's Commission on Indigent Defense, Part I*, at ii-iii, 44, 48, 91 & 98 (2003), available at http://www.sado.org/publicdefense/georgia_part_1.pdf [hereinafter Georgia Spangenberg Report]. For further such accounts, see <http://www.spangenberggroup.com> (website of the leading consultant retained to conduct studies of access to justice for states and other entities, many of which

that defense attorneys visited crime scenes and interviewed witnesses in only 4% of non-homicide felonies; rates rose to only 21% for homicides.⁶¹ Defenders employed experts in only 2% of all felony cases (and only 17% for homicides).⁶² More recent studies of appointed counsel representation in other jurisdictions suggest these figures are fairly typical.⁶³ The Court is rigorous about protecting the formal right to counsel⁶⁴ but barely regulates the *quality* of counsel. *Strickland v. Washington*,⁶⁵ in which the Court defined the standard for ineffective assistance of counsel, broadly protects defense lawyer discretion and gives wide leeway for poor but routine lawyering judgments, such as failing to interview or subpoena key witnesses. It explicitly protects only the subset of prejudicial outcomes that arise from objectively unreasonable lawyering errors. As a result, it does not capture modest errors that turn out to have momentous consequences, such as failure to track down additional witnesses. Lax investigation rarely fails the *Strickland* standard,⁶⁶ even though it can change case outcomes.

are listed at the website). For examples of litigation on the effect of underfunding on defense services, see, for example, *United States ex rel. Green v. Washington*, 917 F. Supp. 1238, 1271-82 (N.D. Ill. 1996) (finding delays in appellate representation by state defender office are caused by state underfunding of appellate defenders and that lengthy delays are presumptively unconstitutional); *In re Pub. Defender's Certification of Conflict & Motion to Withdraw Due to Excessive Caseload & Motion for Writ of Mandamus*, 709 So. 2d 101, 103-04 (Fla. 1998) (affirming order that barred a Florida public defender's office from accepting new cases because of excessive backlog); *Platt v. State*, 664 N.E.2d 357, 362 (Ind. Ct. App. 1996) (claiming that Marion County, Illinois, public defender system provides constitutionally inadequate representation to clients); *Peart*, 621 So. 2d at 790.

61. See Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 762 (1986-87).

62. *Id.* at 764.

63. See, e.g., Georgia Spangenberg Report, *supra* note 60, at 65:

[E]ven attorneys who feel that an investigator or expert would help in their cases are reluctant to file motions securing investigative help a) because it will be a waste of time, as such requests are routinely denied and/or b) because it might annoy judges. In Clayton County, attorneys told us that even in death penalty cases to get approval for investigators was akin to "pulling teeth."

An appointed attorney in one Georgia county reports that "out of the 20 times he has applied for an expert he has never received an expert. 'If there was more money for experts, by God, my clients would not be in jail.'" *Id.* at 67. A superior court judge in a large urban county "puts an initial cap on the investigator expense" and explains, "As far as experts are concerned, I am as cheap as possible. This is a Chevy operation, not a Mercedes operation. We are under extreme pressure from the county to hold our expenses down." Similarly, a chief superior court judge in a rural circuit reports "that he feels acute pressure from the counties to cut back on expenditures on counsel, experts and investigators." *Id.* at 69. Judges in one Georgia county openly admit to unconstitutional rationing: they grant experts and investigators only in capital cases, despite *Ake* doctrine. *Id.* at 65. See also Georgia Chief Justice's Report, *supra* note 60, at 55-56 (summarizing similar findings). For further such accounts, see <http://www.spangenberggroup.com>.

64. The Court recently expanded the class of defendants entitled to counsel. See *Alabama v. Shelton*, 535 U.S. 654, 667 (2002).

65. 466 U.S. 668 (1984).

66. See, e.g., *State v. LaForest*, 665 A.2d 1083 (N.H. 1995) (holding that failure to interview state witnesses is not ineffective assistance).

Strickland represents the Court's acquiescence to a widespread legislative judgment against the institutionalization of zealous defense counsel, a choice that undermines adversarial process as the dominant guarantor of accurate fact-finding.⁶⁷ When bargaining substitutes for trial, defendants and their counsel replace the jury in the structural role of checking the executive's factual accounts of crimes. Weak defense facilitates case resolution; underfunded defenders prefer quick pleas. But this arrangement aggravates current problems with fact-finding. Yet in part because defense counsel sometimes hinder accuracy as well as help it,⁶⁸ a feasible solution will have to be—and is beginning to be—something other than reversing that political judgment and more fully funding defense counsel.

D. The Effects of Prosecutorial and Investigative Resource Constraints

Adversarial adjudication that puts evidence generation solely in the hands of parties suffers from a wealth effect.⁶⁹ Parties with greater resources can more thoroughly investigate and present evidence and challenge opposing evidence, and that changes outcomes. The more commonly noted version of the wealth effect highlights defendants who lack resources to scrutinize state evidence and pursue their own investigations.⁷⁰ But this is not the only, and perhaps not the worst, form of the wealth effect. Both sides can face resource constraints, as prosecutors rarely enjoy consistently adequate funding.⁷¹

Prosecutorial resource constraints can help defendants; prosecutors sometimes dismiss cases or offer generous plea bargains to save scarce resources. But tight law enforcement budgets do not always work in defendants' favor. Routinely, when police and prosecutors are committed to pursuing charges, resource constraints prompt them to shortchange investigations in other ways: interviewing some but not all witnesses; using quicker eyewitness identification procedures rather than burdensome but more reliable ones; employing unofficial informers (often with criminal records) rather than undercover law enforcement officers when the latter could substitute for the former. Further, a range of evidence-gathering

67. It merits emphasizing that defense attorneys are not always committed to accurate outcomes and sometimes work to frustrate them. See *supra* text preceding note 17.

68. For one example, see KENNETH MANN, *DEFENDING WHITE COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* 56-74, 103-80 (1985) (describing defense strategies of information control).

69. See, e.g., JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 102-03, 256-57, 315-56 (2003) (discussing the "wealth effect," meaning the effect of a party's resources on adjudication).

70. See *id.*

71. For an argument that prosecutors are often as resource-constrained as defendants, see William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993). For accounts of prosecution offices that are affected by insufficient resources, see JACOBY, *supra* note 47, at 238; see also Stuntz, *supra* note 17, at 8-11 (discussing prosecution funding in recent decades in comparison with defense funding).

practices reflect compromises with cost constraints. Investigators may not get necessary training, prosecutors may skip forensic analysis, and police may avoid the trouble and expense of taping undercover officers and informants or interrogations of suspects.

Crime labs also produce less reliable findings under resource constraints. Many crime labs have faced severe funding shortages, which have resulted not only in backlogs but poor conditions for evidence preservation, deficient facilities maintenance and accreditation, and inadequate staff training.⁷² Even without these obvious problems, more subtle ones arise from cost-saving practices. Consider one example. Even when administering testing procedures with high rates of reliability, technicians produce more reliable results when presented with a “lineup” of several samples to test against a known sample (say five blood samples to test against a known sample of a suspect’s blood, four of which are dummies and only one of which police provided from the investigation file). This process reduces the effect of testers’ knowledge or assumptions about “base rates” or odds of occurrence. Testers reach positive conclusions more often when they assume the base rate is high—say one in three—than if they assume it is low—say one in 300.⁷³ Crime lab technicians usually assume high base rates—meaning high odds of a test yielding inculpatory results—because the samples they test are not randomly provided. Those samples mostly come from police who suspect the sample is inculpatory. Using multiple samples reduces errors prompted by base-rate assumptions. But correcting for base-rate bias raises costs, and many crime labs already have backlogs.⁷⁴ The same is true for other procedures needed to ensure “blind” testing, such as protocols that keep technicians from knowing which samples are submitted by police. And this does not take into account errors from analysis grounded in poor science or methodology.

Other sources of investigation error reflect resource constraints through inadequate training of investigators, which can lead to, for instance, inappropriate interviews of child witnesses, who are especially susceptible to suggestion. This problem exists, to a lesser but significant degree, with adult witnesses as well. For example, poor training or interview protocols may lead to error-producing practices such as telling one

72. See Bureau of Justice Statistics, Fact Sheet: *50 Largest Crime Labs, 2002* (Sept. 2004, NCJ 205988) (summarizing census of publicly funded labs and noting the fifty largest, which handle half the forensic requests to public labs, ended 2002 with 93,000 backlogged cases and 270,000 requests for forensic services, more than double the backlog of the prior year, and noting staff shortages as an explanation).

73. See Saks & Risinger, *supra* note 51.

74. Michael D. Shear, *Warner Plans Upgrade of State Crime Lab, New Crisis Office*, WASH. POST, Dec. 15, 2004, at B01 (noting Virginia’s crime lab has a backlog of 13,000 drug cases); see also Justice For All Act of 2004, Pub. L. No. 108-405, § 202(b) (Oct. 30, 2004) (providing federal funding to help state crime labs process backlogs of DNA evidence).

witness what another has said, a strategy that can affect the current witness's account.⁷⁵

In all these ways, the prosecution, prompted in part by resource constraints, can acquire a less-than-accurate account of events despite good faith by all state actors. Some cases are dismissed because of evidentiary weaknesses. Others proceed with well-meaning but biased inferences substituting for components of a factual record that could be made more reliable through rigorous (and expensive) evidence-gathering practices.⁷⁶

Defense counsel cannot always correct, or even make apparent to fact-finders, these sorts of risks through their own investigations or by impeaching state evidence. Sometimes they cannot identify those risks themselves or cannot locate witnesses the state missed. Often, pointing out to juries that witnesses endured suggestive interviews or identification practices, or that labs used a given testing protocol or an unverified analytical theory, is unlikely to convince fact-finders to discount such testimony appropriately.

E. The Ineffectiveness of Procedural Rules at Trial

Procedural rules are one of adjudication's primary safeguards against the full range of errors in evidence generation. Yet most apply only at trial and thus only to a small number of cases, and even in that setting they are fairly weak guardians of accuracy. Trials do not reliably determine factual truth when an investigation's results are weak *in particular respects*. Confrontation, for example, is a weak tool against confident eyewitnesses who went through suggestive identification processes or against lab technicians whose routine practices increased the risk of base-rate errors. At best, confrontation raises doubts about such evidence, when what we really want is better evidence. That can come either in more reliable *forms* of the same evidence, such as eyewitnesses whose reliability is high from careful identification practice, or lab results produced by rigorous protocols and sound analysis. Alternately, better evidence can come from different *sources*, such as evidence from property searches and interrogations rather than jail-house informants. Many familiar tools of impeachment often can only raise doubts about evidence. Aside from creating weak incentives for better

75. This problem is an especially difficult one, because it can be a legitimate and necessary tactic to tell witness A of witness B's account, in order to stop witness A's stonewalling or, in cases such as child sex abuse, silence arising from shame, fear, or embarrassment. But such strategies have to be carefully employed to avoid coaching or coercing witnesses into saying what investigators have signaled they want to hear.

76. It is worth clarifying that not all cases can yield strong evidentiary files that erase ambiguity about historical truth. Some events cannot be reliably recreated or determined despite best efforts. However, it is still possible in many cases to improve the quality of the evidentiary file.

evidence, they do nothing to affirmatively aid in the production of more reliable evidence.⁷⁷

Nonetheless, burden and standard-of-proof rules, and the right to have juries apply those rules, should distribute errors toward false acquittals and minimize the errors about which we worry most: wrongful convictions. But proof rules are insufficient for several reasons. In practice, the burden and standard of proof can work merely to require a high ratio of pro-government evidence to pro-defense evidence; the quality (as opposed to the quantity) of each side's evidentiary contributions can be harder to factor into the final judgment. When defendants lack the practical ability to *generate* evidence, the government has an easier time meeting its burden. This situation is made worse by virtue of the fact that weaknesses in evidence do not always appear as *weak evidence*. Examples of how this might occur abound. The absence of impeachment evidence might leave an unreliable witness seeming trustworthy. Undetected base-rate errors, equipment calibration errors, or flawed interpretation can make questionable lab results appear stronger than they are. Suggestive identification practices can make eyewitnesses more confident and harder to impeach.⁷⁸ Failure to find the second witness to a crime can leave the first witness's account uncontradicted. In these ways, weak evidence appears strong. A high standard of proof is a poor substitute for accurate fact-generation.⁷⁹

77. For a different, broader description of trial adjudication's weaknesses and suggestions for reform to address claims of factual innocence, see Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 Hous. L. Rev. 1281 (2004). Wrongful acquittals occur as well, not only from the default rule that the standard of proof creates, but also from deficiencies in trial processes.

78. Eyewitnesses selecting suspects from live or photographic lineups have error rates in the range of 30 to 40%. See BRIAN L. CUTLER & STEVEN D. PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW* 12-13 (1995) (surveying multiple studies of eyewitnesses and finding mistaken identification rates of 34 to 37.5%); Bruce W. Behrman & Sherrie L. Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 LAW & HUM. BEHAV. 475, 482 (2001) (studying results of real identification procedures employed by police in real cases and finding mistaken identification rates of more than 20% in live lineups).

79. Moreover, jurors likely misunderstand the rules and apply them less rigorously than required. See Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 NOTRE DAME L. REV. 1165 (2003) (describing shift in instructions in the last century toward interpretations that stress assignment of reasons as the operational meaning of reasonable doubt); Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX. L. REV. 105, 119-32 (1999) (finding wide differences in how juries understand "beyond a reasonable doubt"—some taking it to be less rigorous than civil standards—depending on which explanation of the standard they receive); see also SCOTT TUROW, *ULTIMATE PUNISHMENT: A LAWYER'S REFLECTIONS ON DEALING WITH THE DEATH PENALTY* 36 (2003) (arguing that there is a "propensity of juries to turn the burden of proof against defendants accused of monstrous crimes"); but cf. Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven & Zeisel's The American Jury*, 2 J. EMPIRICAL LEGAL STUDS. 171 (2004) (reporting new empirical findings that confirm earlier empirical conclusions that judges have a lower conviction threshold than juries). And if these effects are recognized by parties, prosecutors will be less risk-averse in pursuing cases with somewhat weaker evidence, while

F. Legitimacy, Conflict Resolution, and Error-Obscuring Processes

Risk of inaccurate trial outcomes is sufficiently well known that trial adjudication intentionally conceals some uncertainties in fact-finding to strengthen conflict resolution and the appearance of institutional legitimacy. George Fisher has described one version of this as the criminal jury's "error-erasing function."⁸⁰ Multiple witnesses sometimes provide conflicting accounts. Through the mid-nineteenth century, the means to minimize these conflicts—by settling which witnesses would be taken as reliable—was simply to bar many witnesses from the courtroom. Large classes of witnesses were barred from testifying, including the parties and their spouses, women, and African Americans. Witness-competency and evidence rules evolved through the nineteenth century toward universal witness competency, and as a result, trial evidence increasingly contained contradictory witness accounts. Trial practice needed a new way to resolve those conflicts. The solution was "permitting the jury to resolve credibility conflicts in the black box of the jury room" and thereby to "present to the public an 'answer'—a single verdict of guilty or not guilty—that resolves all questions of credibility in a way that is largely immune from challenge or review. By making the jury its lie detector, the system protects its own legitimacy."⁸¹ Fisher's historical account makes clear, though, that the jury only took on this task because broader witness-competency rules required courts to find a way to address the increased frequency of conflicting testimony, not because the jury is especially competent or reliable in detecting false testimony through such means as observing demeanor. Rather, the jury's virtue is that it hides the inevitable uncertainty and periodic error.

A dozen years before Fisher, Charles Nesson made a compatible argument on how a range of evidentiary rules and trial procedures serve to generate publicly acceptable verdicts rather than outcomes with the highest probability of according with actual events. Jury trials, in short, conceal the varying probabilities that the system's fact-determination outcome is the correct one.⁸² Doctrines that greatly restrict factual reexamination in appellate and collateral review, for example, serve the twin purposes of conserving resources by limiting relitigation and commanding reliance on trial court fact-finding processes. Together, Fisher and Nesson's descriptions support the view of trial adjudication as an imperfect guardian against flawed fact investigation and development. When adjudication cannot prevent errors, it conceals them. It is this obscuring of the periodic disconnect

defendants will be more so. Those perceptions affect not only defendants' decisions to plea but the parties' relative bargaining positions during plea negotiations.

80. George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 579 (1997).

81. *Id.* at 579.

82. See Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985).

between resolution and truth that DNA analysis and other accuracy-enhancing developments have undermined.

Both Fisher's and Nesson's accounts describe features of an adjudication system that sacrifices accuracy—or at least hides inaccuracy—for conflict resolution. Mirjan Damaška has described more broadly the distinctions among national adjudication regimes, which vary notably with regard to the state's independent commitment to truth-finding. Adversarial processes let parties control evidence production because the goal is for the parties to settle their dispute, not for the state to determine truth. After all, "[w]here the object of adjudication is to resolve disputes, and where the judge is not supposed to advance independent policies or values, insistence on the substantive accuracy of verdicts loses much of its *raison d'être*."⁸³ Further,

A legal process aimed at maximizing the goal of dispute resolution . . . cannot simultaneously aspire to maximize accurate fact-finding. In fact, this process does not seek precision of factual findings as a goal independent of dispute resolution, even within the narrow compass of issues as defined by the parties. The verdict in the conflict-solving mode is not so much a pronouncement on the true state of the world as it is a decision resolving the debate between the parties. . . .⁸⁴

According to this view, fair procedure can justify a factually erroneous outcome, because this form of adjudication "values the integrity of the contest above the attainment of accurate outcomes on the merits."⁸⁵ This may explain why we rarely see partisan fact-gathering and adversarial presentations of evidence used in other settings in which fact-finding accuracy is clearly important.⁸⁶ This may explain why partisan fact-gathering and adversarial presentations of evidence are rare in other settings in which fact-finding accuracy is clearly important. In contrast, systems that use partisan

83. DAMAŠKA, *supra* note 2, at 102.

84. *Id.* at 123.

85. *Id.* at 145.

86. A broad range of government fact-finding panels uses multiple evaluators to counterbalance different perspectives. Panels employed to investigate NASA in the wake of both space-shuttle accidents included agency and non-agency members. The 9/11 Commission included members from both political parties. See National Commission on Terrorist Attacks Upon the United States, <http://www.9-11commission.gov> (last updated Sept. 20, 2004) (describing the commission and listing its members; the chair is a former Republican governor and the vice-chair a former Democratic congressman). For a description of the commission investigating the Columbia disaster, see Columbia Accident Investigation Board, http://caib.nasa.gov/board_members/default.html (last visited Sept. 22, 2005); for a description of the Presidential Commission on the Space Shuttle Challenger Accident, see Report of the Presidential Commission on the Space Shuttle Challenger Accident, <http://science.ksc.nasa.gov/shuttle/missions/51-l/docs/rogers-commission/table-of-contents.html> (last visited Sept. 22, 2005). These groups have diverse views in order to evaluate evidence as much as to ensure comprehensive evidence-gathering.

fact gatherers have priorities beyond truth-finding: they aim to settle disputes.⁸⁷

The values associated with this model fit uneasily in criminal, as opposed to civil, practice. Criminal law is public law. Citizens are not settling private disputes; the government is taking coercive action against individual citizens. Yet the state nonetheless employs practices that compromise accuracy for several reasons. One is tradition: public prosecution evolved from private prosecution, and Anglo-American history provides no ready alternative to adversarial process. That historical model is hard to change. The Supreme Court made most procedural entitlements waivable,⁸⁸ which makes trials easy to replace with bargaining. But while defendants can trade juries for bench trials,⁸⁹ the Court's jurisprudence regarding juries makes it hard to innovate other forms of decision makers that might be appealing alternatives to bargaining and juries.⁹⁰ Second is the perceived need to limit state power. Unlike regulatory contexts, such as drug-safety trials and air-travel-safety investigations, we distrust government-run fact-finding in the criminal context, even if it promised greater accuracy. Third, accuracy-compromising practices are tolerable simply because we have been able to get by with them. Criminal cases rarely have broad consequences for non-parties,⁹¹ and adjudication's black box conceals inaccuracies, thereby maintaining legitimacy.

G. *Plea Bargaining and Truth-Obscuring Incentives*

Plea bargaining fully accords with an adjudication system focused on conflict resolution rather than fact-finding. Bargaining requires waiver of trial procedures designed to promote accuracy, such as use of a neutral fact-finder and confrontation of evidence. It allows the parties to shape procedure while the judge (and the state more generally) passively

87. See Chayes, *supra* note 1, at 1287 (describing traditional adversarial process as "relatively relaxed about the accuracy of its factfinding"); *id.* at 1297 (noting "the casual attitude of the traditional model toward factfinding"); Arnold, *supra* note 2, at 918-22 (mocking adversarial process as a truth-finding practice).

88. See King, *supra* note 11 (discussing Supreme Court jurisprudence making most criminal procedural entitlements waivable by defendants).

89. Jury trial waivers often require consent of the prosecution as well. See, e.g., *State v. Dunne*, 590 A.2d 1144 (N.J. 1991) (holding that defendant does not have a unilateral right to a non-jury trial).

90. See *Burch v. Louisiana*, 441 U.S. 130 (1979) (finding that six-person juries must render unanimous verdicts); *Ballew v. Georgia*, 435 U.S. 223 (1978) (finding a five-member jury unconstitutional); *Williams v. Florida*, 399 U.S. 78 (1970) (holding six-member jury constitutional); *Apodaca v. Oregon*, 406 U.S. 404 (1972) (finding that twelve-person juries may render non-unanimous verdicts of 11-1 or 10-2); *Johnson v. Louisiana*, 406 U.S. 356 (1972) (approving a 9-3 jury verdict); see also *Johnson*, 406 U.S. at 366 (Blackmun, J., concurring) (noting a jury verdict based on a 7-5 vote "would afford me great difficulty").

91. This is traditionally true in most civil cases. But when civil litigation has significant consequences beyond the parties, as it did in public law litigation and some private class actions, adjudication practice evolved new means to improve fact-finding. On this point, see Chayes, *supra* note 1, at 1296-97.

concedes any interest in accuracy.⁹² The critical, nonwaivable feature of plea practice requires the judge to find a factual basis for the plea.⁹³ In reality, this provides little judicial check on party fact determination. Judges rarely hear directly from evidentiary sources to confirm a plea's basis. They rely instead on the prosecutor's oral recitation of what the evidence would show, sometimes supplemented by a defense team that has previously agreed with the prosecutor on the main components of the story.⁹⁴ What replaces jury trials as the check on the executive branch is not judicial scrutiny of evidence, but defendants' consent.

In deciding whether to plea bargain, defendants have considerations other than the accuracy of prosecutorial factual accounts. Most obviously, they assess risk of consequences if they do not bargain. Bargaining occurs because prosecutors can create "trial penalties"—greatly increased charges and punishment after a trial conviction.⁹⁵ Defendants may be in pretrial detention,⁹⁶ and, especially in less serious cases, pleas can be the quickest means to end confinement. For serious cases, if defendants refuse to plead guilty prosecutors can threaten long sentences and other penalties, such as property forfeiture, charges against family members or friends, and sometimes civil or regulatory sanctions.⁹⁷ These competing considerations can outweigh accuracy in defendants' consent decisions.⁹⁸

92. See DAMAŠKA, *supra* note 2, at 152, 193.

93. See, e.g., FED. R. CRIM. P. 11(b)(3).

94. "Real offense" sentencing attempts to limit parties' control of facts on which judges base sentencing. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 (2004) (describing adoption of "modified real offense" sentencing policies). For criticisms, see Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523 (1993).

95. See *State v. Lagares*, 601 A.2d 698 (N.J. 1992) (discussing a state statutory regime and practice, common in many states, that leaves to prosecutors' discretion whether to seek enhanced mandatory punishment for repeat offenders); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004). For an estimate of federal plea discounts averaging 30% to 40%, see U.S. SENTENCING COMM'N, SUPPLEMENTAL REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 48 (1987); see also David Brereton & Jonathan D. Casper, *Does It Pay to Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts*, 16 LAW & SOC'Y REV. 45 (1982) (estimating trial penalties). For a proposal to limit plea discounts and thereby decrease wrongful convictions in plea bargains, see Bar-Gill & Gazal, *supra* note 20.

96. For a compelling case study of the effect pretrial detention and minimal help from counsel can have on a felony defendant's decision to plead, particularly when the defendant is a parent of young children, see *Frontline: The Plea* (PBS television broadcast, 2004), available at <http://www.pbs.org/wgbh/pages/frontline/shows/plea> [hereinafter *Frontline: The Plea*]. The documentary recounts the case of Erma Faye Stewart, who describes her decision to plead guilty to a felony drug charge she denied committing in order to gain release from pretrial detention that kept her from her young children. The documentary also surveys evidence suggesting Stewart may well have been factually innocent.

97. The latter occur not just in white-collar contexts. Criminal dispositions can affect public housing or benefits, immigration status, and child custody rights.

98. The Supreme Court found acceptable the coerciveness of terms and circumstances surrounding plea bargains in *Brady v. United States*, 397 U.S. 742 (1970). For a discussion of why plea bargaining conditions do not fit traditional contract law definitions of duress and unconscionability, see Scott & Stuntz, *supra* note 20. A range of other factors makes pleas less likely to track trial outcomes

Plea agreements *could* occur in the wake of rigorous pretrial adversarial scrutiny of evidence. Instead, the deference to party autonomy that characterizes conflict-resolution systems means that parties control most procedures before pleas. Accordingly, parties can waive judicial review of charges (through grand juries or preliminary hearings) and can waive all discovery practice.⁹⁹ Discovery waivers mean defendants may lack access to state witnesses whose reliability they could scrutinize informally before trial; think again of shaky eyewitnesses or informants with testimonial deals. Time limits are also common on plea agreements, and they further constrain pretrial adversarial practice, as do funding constraints on defense attorneys. Limited time and resources mean that defendants cannot track down witnesses the state ignored,¹⁰⁰ investigate eyewitness identification procedures or undisclosed incentives for informants, or review crime-lab practices. As a result, much fact-finding practice, especially in routine state court cases, is fact-finding run by the executive branch with little check from defendants or courts.

These are not problems for guilty defendants, who can see the state has gotten its information right. But they are considerable trouble for innocent or overcharged defendants, who must weigh the advantages of plea leniency against the risks of trial penalties and other consequences if they forgo pleas, decline to waive procedural rights, and engage in fuller adversarial practice. The system's acceptance of this risk evinces a priority for case resolution over truth-finding. Innocent defendants, after all, can quite rationally plead guilty.¹⁰¹ Defendants who are risk-averse, or who plausibly distrust adjudication's capacity to vindicate false charges, can sensibly accede to inaccurate pleas to avoid the risk of graver consequences,¹⁰² much like civil defendants sometimes claim to settle meritless civil actions because settlement costs are less than the costs and risks of litigation.

or fully developed fact investigation results. For a description of many such factors, see Bibas, *supra* note 11.

99. United States v. Ruiz, 536 U.S. 622 (2002) (holding waiver of constitutional discovery rights in plea agreements constitutional).

100. For a compelling example of this problem, see *Frontline: The Plea*, *supra* note 96. This documentary describes the case of Charles Gampero, who pled guilty to a homicide he denied committing to avoid the risk of a much greater sentence after trial. After his plea, the victim's father hired a private investigator who found many witnesses the police ignored (and that Gampero's defense lawyer also did not find), leading him to conclude Gampero was innocent.

101. See Scott & Stuntz, *supra* note 20 (describing information problems, risk aversion, and other barriers to plea bargaining, and proposing reforms to facilitate bargaining); see also Schulhofer, *Plea Bargaining as Disaster*, *supra* note 20, at 1983-84 (criticizing Scott and Stuntz in part for addressing the problem that "bargaining convicts too few innocents because its flawed structure denies them their preferred option of settlement at a low sentence").

102. Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485, 494 & nn.56-58 (2000) (discussing accounts of innocent defendants who plead guilty and their reasons for doing so).

The foregoing shows that every major component of criminal adjudication compromises fact-finding to serve competing commitments to government restraint, efficient case disposition, and law enforcement effectiveness. But adjudication systems evolve. The American system is changing in ways that begin to address deficiencies in fact-finding, and these nascent changes suggest paths for further evolution that strike a better balance between accuracy and competing goals. The next Part sketches many of these emerging practices and suggests ways to extend them.

II

TOWARD REFORM THROUGH STRUCTURED INVESTIGATION

The structure of trial adjudication divides power among the executive-branch prosecutors, judge and jury, and the defense. But the prevailing forms of trial and party negotiations, built upon party-run investigation, hardly exhaust the options for maximizing the accuracy of fact-finding. The tools of institutional design, particularly separation of powers and construction of incentives on professional roles, are widely adaptable, as found in a range of public and private settings. Constitutional separation of powers doctrine seeks to limit the odds of bad government action and improve odds for normatively desirable action through federal government design.¹⁰³ These strategies also characterize scientific investigation. Mechanisms such as double-blind experimentation, anonymous peer review, independent data re-analysis, and replication of experiment results disperse authority and check investigators' biases.

In adjudication, juries and defense attorneys serve the role of checking government actors, but these two institutions do not adequately serve a strong commitment to accurate fact-generation. Yet we have other options to make the investigation and pretrial stages (rather than trial or negotiation stages) more stringent, reliable evaluators and producers of accurate information. With this shift, adversarial adjudication becomes a less critical stage for producing fact reliability. In what follows, I sketch possibilities for reforming pre-adjudication practices into better producers of reliable factual accounts. I divide these options into three categories. The first identifies means to separate powers and to design institutional roles *within* the executive branch, so that the government produces a more reliable record before outside scrutiny assesses or supplements that record. The second focuses on discovery practice and identifies ways to improve adversarial checks on reliability in the investigation stage rather than the trial stage. The third explores perhaps the most radical possibility, greater judicial

103. See *id.* The argument for "compensating adjustments" of institutional arrangements in response to changed circumstances is a familiar one in the literature on constitutional separation of powers. See, e.g., Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 398-404 (1997) (discussing and criticizing various proposals for "compensating adjustments" in separation of powers scholarship).

involvement in fact generation and assessment in pretrial practice, but it builds on existing examples of the judicial branch acting uncontroversially outside its core (and weak) adjudicative role.

In rethinking current pre-adjudication practices, I examine three contexts of emerging reform in criminal justice: eyewitness identification protocols, broad discovery, and crime lab improvements. Each represents existing efforts to take factual accuracy more seriously in criminal justice and to make improvements in pretrial stages so that early fact development becomes more reliable and thus trials and negotiations less critical for factual accuracy. To these ideas I offer additional possibilities and borrow from shifts in the civil judicial role to suggest ways for the judicial branch to play a more active part in assuring factual accuracy within the confines of party-driven, adversarial traditions.

A. Improving Evidence Reliability Within Executive-Branch Structures

1. Investigative Agencies

Police and other investigative agencies dominate evidence-gathering, though prosecutors control a subset of complex investigations conducted through grand juries. De facto adjudication mostly occurs in prosecutors' offices, where prosecutors routinely listen and respond to defense arguments about evidence and case merits.¹⁰⁴ For case resolution, this practice permits the sorts of compromise dispositions with certainty of outcome that both parties often prefer.¹⁰⁵ But for fact determination, this system works only as well as the information sources that the parties have available to them. We can improve administrative criminal justice by looking for means to divide and restructure roles within these executive-branch actors.

Power can be diffused among public actors within the same branch of government.¹⁰⁶ Examples of this already exist in executive-branch investigative practice. Inspectors general, for one, are political appointees who report to the head of the agency they monitor, yet they serve an independent watchdog function to audit an agency from within. Inspectors general do not duplicate tasks of other departmental offices. Instead, they assess the efficacy with which public officials fulfill their duties, and they monitor corruption or incompetence.¹⁰⁷ A second partial analogy is Justice

104. As Judge Lynch has argued, this is not necessarily grounds to wholly condemn this "informal, administrative, inquisitorial process of adjudication, internal to the prosecutor's office." Lynch, *supra* note 13, at 1404.

105. *Id.* at 1405-06.

106. For a development of this point in constitutional separation of powers literature, see M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 632-60 (2001).

107. The Justice Department's inspector general recently effectively served this function by investigating work of an incompetent scientist in the FBI's crime lab. Associated Press, *FBI DNA Lab*

Department offices (and comparable state-level offices) that focus on public corruption and criminal civil rights violations by public actors. Here again, one government agency investigates misconduct of another, sometimes within the same state or federal executive branch, though the Justice Department office also provides federal monitoring of state and local officials.

More direct models for intra-executive branch checks are rival law enforcement agencies. Tensions between the FBI and local law enforcement are well known. In the wake of September 11, there has been much concern about competition and poor communication between the CIA and FBI, or the FBI and local law enforcement or immigration officials. Despite the downsides of those institutional divisions, they also demonstrate the possibility of agency independence among officials who, one might suspect, have every reason to cooperate in service of a common goal. Mere institutional separation within the executive branch, informed by distinct missions and leadership, can lead to competitive office cultures that serve to prevent unproductive collusion, such as agents' unwillingness to challenge other officials' investigative work.¹⁰⁸ The distinct missions of inspectors general are to scrutinize and evaluate other officials' work. Prosecutors likewise assess the quality of police fact development, and distinctions between local and federal investigators can generate competitive motives that improve fact-development.

These models suggest the promise of greater institutional separation of detectives and other investigators from local police departments, perhaps with agency heads distinct from police chiefs and career avenues distinct from police training and employment.¹⁰⁹ This could create a cadre of investigators who routinely take a central role in crime investigation but are somewhat less institutionally aligned with the police even as they regularly work with them, and who are thereby better able to bring distinct judgments to evidence-gathering and evaluation decisions. Many local prosecutors' offices (and a few federal ones) already have their own detective

Probe Widens, Apr. 27, 2003 (describing investigation of FBI lab by DOJ inspector general); Peter J. Neufeld, *Advancing Justice Through the Use of Forensic DNA Technology* (congressional testimony, 2003), available at http://www.innocenceproject.org/docs/Neufeld_Congressional_Testimony.html.

108. Investigative officials work in a range of federal departments and agencies. Core criminal enforcement agents, such as those in the FBI and Drug Enforcement Agency, are in the Justice Department, while immigration agents, customs agents, and the Secret Service are in the Homeland Security Department. Additionally, agencies such as the Securities and Exchange Commission and the Environmental Protection Agency have investigators who develop cases for federal prosecutors. See Richman, *supra* note 43, at 756-61 (discussing diversity among investigative agencies, including dispersion among federal departments, and challenges to prosecutorial supervision and coordination of investigative agents).

109. Cf. Armacost, *supra* note 46, at 512-13 (describing the consistent practice of bringing all police officials—including supervisors and, presumably, detectives—through a period of service as “beat cops” to create a common “working personality” and acculturation).

teams, separate from police departments, that may serve some of this function.¹¹⁰

Diffusing power among institutional players in this way is not fool-proof; it may be that routine workplace associations would forge common identities in the same way police and prosecutors sometimes do, despite residing in separate agencies with distinct bosses and political accountability mechanisms. But institutional distinction increases the prospect of more distinct roles, incentives, customs, and assumptions.¹¹¹ The prospects increase that a skeptical investigator will arise to identify weaknesses in the government's case. Office culture can play a large role here. There is evidence that the culture of a bureaucracy is significantly affected by leadership and management¹¹² in addition to institutional design. Despite the real prospect that a formal agency division means little in practice, division increases the odds of distinct institutional identities that disperse power and limit negligence, misconduct, or myopic assessments of evidence.

In addition to agency design, office procedures can check official action in ways that reduce errors in fact generation. In particular, slowly emerging protocols for eyewitness identification should substantially reduce error from eyewitness evidence, the most frequently noted contributor to wrongful convictions. (Recall that poor identification procedures can both *destroy* the original evidentiary source—a memory unaffected by post-crime suggestion—and be difficult to discredit via confrontation.¹¹³)

110. Richman, *supra* note 43, at 825-26; U.S. Dep't of Justice, Bureau of Justice Statistics, National Survey of Prosecutors: State Court Prosecutors in Large Districts, 2001, at 2, tbl. 1 (2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/scpld01.pdf> (reporting that staff investigators comprise 9.9% of total personnel in prosecutors' offices in large districts (defined as those serving populations of 500,000 or more)); Martin H. Belsky, *On Becoming and Being a Prosecutor*, 78 Nw. U. L. REV. 1485, 1512 (1984) ("Increasingly, prosecutors use their own detectives to investigate offenses."). Separate investigators in district attorneys' offices might encourage less thorough work by police departments, who know these investigators can fill in gaps. Even so, that distinction among investigation teams means fresh perspectives are brought to fact evaluation.

111. See Richman, *supra* note 43, at 811-13 (discussing the tensions between collaboration and distinction among prosecutors and investigative agents, and arguing "the distinctive institutional homes for prosecutors and agents . . . provide the best guarantee that the blurring of the line between investigatory and adjudicatory decisionmaking will not break down the diversity of their perspectives" and "[s]o long as each player orients to his distinct institution and professional culture, interaction presents less a risk of capture than an opportunity for both productive collaboration and mutual monitoring").

112. See, e.g., Sean Nicholson-Crotty & Laurence J. O'Toole Jr., *Public Management and Organizational Performance: The Case of Law Enforcement Agencies*, 14 J. PUB. ADMIN. RES. & THEORY 1 (2004); JACOBY, *supra* note 47, at 199 (noting that site visits to prosecution offices "detect a distinct influence of individual policy decisions on office performance"), 231 (discussing a case study of the New Orleans District Attorney's Office, which is "strictly controlled by the executive level policy makers" and such control accounts for "successful implementation of policy"), 243 (noting supervisory enforcement of office norms in Missouri prosecutor's office). For a related account of organizational culture in police departments that facilitates police brutality, see Armacost, *supra* note 46, at 507-16.

113. See U.S. Dep't of Justice, National Institute of Justice: Post-Conviction DNA Testing: Recommendations for Handling Requests 55-57 (Sept. 1999, NCJ 177626) (noting that

The data on the effects of identification procedures are now so well established, and the protocols for reliable identifications so widely agreed upon,¹¹⁴ that calls for mandatory police use of optimal procedures appear in every study of wrongful convictions or criminal justice reform.¹¹⁵ Those procedures require that (1) lineups be photographed and photo spreads preserved for defense examination; (2) eyewitnesses sign a form clarifying that the suspect might not be in the lineup or photo spread, the witness is not obligated to make an identification, and the person administering the lineup does not know which person, if any, is the suspect; (3) suspects should not appear substantially different from “fillers” based on the original description of the perpetrator; and (4) officials dealing with witnesses should not know which person is the suspect.¹¹⁶ Various jurisdictions have voluntarily adopted these procedures, including police departments in New Jersey, North Carolina, Minneapolis, Boston, Santa Clara, California, and Northhampton, Massachusetts.¹¹⁷

Identification protocols increase evidence reliability in ways that adversarial process alone cannot. Confrontation can only discredit testimony and create incentives for future identification practices. Because protocols guard against non-obvious risks such as effects of suggestion, they prevent even well-meaning officers from facilitating creation of erroneous or unreliable evidence. And they achieve this within the police department without adversarial or outside supervision. Protocols work in part by dividing power among officers in the same department. A setting in which one officer knows the suspect’s identity, but another who does not administers the identification process, achieves a micro-level separation of power. These kinds of internal police practices both functionally replace and often

eyewitnesses often continue to believe their erroneous identifications even after DNA evidence has excluded the suspects they identified); *Frontline: What Jennifer Saw* (PBS television broadcast, 1998), available at <http://www.pbs.org/wgbh/pages/frontline/shows/dna> (describing conviction of rapist based on eyewitness testimony of the victim; DNA evidence later exonerated the alleged rapist and identified the actual perpetrator).

114. For a description of optimal identification practices, see U.S. Dep’t of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* (Oct. 1999, NCJ 178240) [hereinafter *Eyewitness Evidence*].

115. See, e.g., Report of the Commission on Capital Punishment (Apr. 2002) (report to Illinois Governor), available at <http://www.idoc.state.il.us/ccp>; North Carolina Actual Innocence Commission, *supra* note 19; see also *Wrongful Convictions Symposium*, *supra* note 28, at 64-121; *Wrongful Convictions*, CRIM. JUST., Spring 2003, at 1 (containing collection of articles on wrongful convictions); Symposium, *Wrongful Convictions of the Innocent*, 86 JUDICATURE 64-121 (2002); Am. Judicature Soc., Agenda, National Conference on Preventing the Conviction of Innocent Persons, *supra* note 28.

116. See Edwin Colfax, *Illinois Death Penalty Reform Legislation*, (July 29, 2003), available at <http://www.law.northwestern.edu/depts/clinic/wrongful/documents/Omnibusbillanalysis.htm> (describing protocols in Illinois); *Eyewitness Evidence*, *supra* note 114.

117. See Barry C. Scheck, *Mistaken Eyewitness Identification: Three Roads to Reform*, 28 CHAMPION 4 (Dec. 2004). For a description of identification reforms in Illinois, see Colfax, *supra* note 116 (describing legislation funding pilot project on research and implementation of procedures in local police departments); David S. Bernstein, *Reasonable Bias*, BOSTON PHOENIX, Jan. 7-13, 2005 (describing Boston police reform of eyewitness identification procedures).

improve upon the structural check of adversarial scrutiny. It does not *displace* defense confrontation, but it relieves it from being the primary means to assess and improve eyewitness reliability.¹¹⁸

2. *Crime Labs*

State crime labs are also candidates for institutional and procedural reform. Labs have demonstrated an astonishing number of high-profile failures in the forms of incompetence, shoddy scientific protocols, and outright corruption. The FBI's crime lab and those in many states are under the supervision of law enforcement officials. The latter are located within police departments and their daily agendas are driven by law enforcement's need for forensic services. This kind of institutional affiliation, in addition to underfunding, surely helps account for the dramatic failures of labs in recent years. But in contrast to local investigators, we can easily envision ways to make labs bureaucratically separate from law enforcement. One option is simply to remove administrative control of labs from law enforcement agencies and make them independent. Virginia made this change with its lab, a reform that divides the government's evidence-gathering practice.¹¹⁹

In addition to this organizational change, lab-analysis reliability can be improved with greater funding and more rigorous accreditation, which would assure proper staff training, improved equipment maintenance, and better adherence to optimal analytical practices, such as those that reduce base-rate errors.¹²⁰ Movement toward these changes occurred last year with the passage of the federal Justice For All Act, which provides funding for state crime labs (though only for DNA analysis) to address backlogs. The Act ties that funding to more rigorous lab accreditation, external audits,

118. Other emerging law enforcement practices, especially electronic recording of suspect interviews, serve a comparable purpose. Interrogation tapes will facilitate adversarial examination (pretrial as well as at trial), though that practice does not by its nature do as much as eyewitness protocols to increase reliability beyond the means of adversarial scrutiny.

119. H.B. 2216, 2005 Sess. (Va. 2005) (moving state crime lab into newly created Department of Forensic Science and establishing Forensic Science Board and Science Advisory Committee). On crime lab underfunding in Virginia, see Shear, *supra* note 74, at B01; Amy Jeter, *Crime Lab Backlog Delays Drug Cases*, *Virginian-Pilot*, Oct. 5, 2004, at A10 (noting backlog of several thousand analysis requests due to increased caseload and staff cuts). Virginia's lab, despite a strong reputation for accuracy, has not been without controversies surrounding occasional errors. For an example of one high-profile scandal in a capital wrongful conviction, see Possley et al., *supra* note 25 (describing Virginia lab analyses in case of Earl Washington).

120. Base-rate errors, discussed earlier, include blind-sample analysis. For a description of lab analysis practices and their importance in reducing error, see Saks & Risinger, *supra* note 51. Many labs are accredited only by the American Society of Crime Laboratory Directors rather than broader-based scientific groups; that society has come under criticism for lax enforcement of lab standards. See Possley et al., *supra* note 25 (quoting a former prosecutor who critically describes the society as "more of a fraternal organization than an authoritative scientific body").

and adherence to federal quality-assurance standards.¹²¹ Again, this creates a non-adversarial structure that scrutinizes evidence production by the executive branch, and this structure holds greater promise than defense confrontation for improving factual accuracy. External auditors, like inspectors general, conduct independent reviews, much as defense attorneys less effectively try to do. Defense counsel are not displaced by auditors and accreditors; they can still scrutinize test practices, check on accreditors, search for fraud, and seek independent tests. But there is relatively little of this kind of adversarial practice due to defense resource constraints. Emerging in its place is an executive-branch practice that holds promise both for improving factual accuracy *and* for garnering more sustained legislative favor in funding battles than the defense bar ever will. The Justice for All Act hardly cures all labs' funding problems, but it is evidence of legislators' greater receptivity to requests from labs, which promise factual accuracy, than defense attorneys, who promise zealous opposition to law enforcement.

3. Prosecutors' Offices

The separation of prosecutors into distinct offices and assignments establishes checks on both police and other prosecutors. Detaching investigators from prosecutors helps make the latter a check on the former. Prosecutors evaluate police evidence-gathering and decide which charges, if any, the evidence supports.¹²² This screening is sometimes rigorous; some prosecution offices frequently decline to bring charges on cases that investigators present. Some offices structure their staffs and procedures to ensure rigorous screening of police evidence files. For example, the New Orleans District Attorney's Office is unusual in committing a significant number of experienced prosecutors to its charging division. The goal is to limit plea bargaining,¹²³ but this practice also keeps weak fact files from becoming poorly grounded charges that the adversarial process must detect later. As a result, executive actors modestly reduce the need for defense attorneys and trial prosecutors to scrutinize investigations for accuracy. This is not insignificant. Given the high volume of midlevel crimes that state courts process quickly, rigorous screening prevents weak (and perhaps erroneous) cases from being resolved through pleas rather than

121. See Justice For All Act of 2004, Pub. L. No. 108-405, § 202(b) (Oct. 30, 2004). Virginia's lab may soon get a substantial funding increase as well. See Shear, *supra* note 74, at B01.

122. See generally ABRAHAM GOLDSTEIN, *THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION & THE GUILTY PLEA* (1981).

123. Screening reduces the opportunity for plea bargaining because trial prosecutors have few weak charges they are willing to bargain away, and defendants have come to know this. See Wright & Miller, *supra* note 20.

dismissals.¹²⁴ Furthermore, it also allows limited defense resources to be shifted from that screening task to stronger or more serious cases.

Comparable checks occur *among* prosecutors as well. Many federal prosecution offices have policies requiring trial attorneys to seek supervisor review and approval of certain charging and disposition decisions. In this way, prosecutors with the advantage of more experience or less personal investment in the case check frontline attorneys.¹²⁵

To be sure, these models have weaknesses. Most state prosecution offices are small, making separation of staff into distinct divisions or roles infeasible.¹²⁶ Supervising prosecutors facing time constraints may conduct cursory reviews that defer to trial attorneys who know case facts better.¹²⁷ Elected prosecutors, who dominate state practice, face familiar problems as agents whose principals, the public, monitor imperfectly. Prosecutors face the most public scrutiny when prosecuting serious, high-profile crimes.¹²⁸ The public easily monitors basic outcomes, such as charging or declination, conviction or acquittal, but pays less attention to factors contributing to those outcomes, such as weak forensic analysis or incredible key witnesses. In those contexts prosecutors may moderate their scrutiny of police or trial attorneys' work or knowingly proceed on weaker cases in order to avoid blame.¹²⁹ And in a small but important subset of mostly federal

124. Anecdotal evidence suggests this possibility is real, and when inaccurate cases come to public attention, they add to the legitimacy problem of an inaccurate, case-resolution-oriented system. PBS's *Frontline* broadcast a documentary on several guilty pleas of defendants who had strong cases for innocence. One defendant, Erna Stewart, pled guilty to a felony drug charge. A police informant used in seventeen cases provided the sole basis for Stewart's prosecution. The informant was later so discredited in the trial of another defendant that the prosecutor dismissed all cases based on his testimony. But Stewart had already pled guilty, while maintaining her factual innocence, so her conviction stood. See *Frontline: The Plea*, *supra* note 96.

125. See U.S. Dep't of Justice, U.S. Attorneys Manual, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/title9.htm (last visited Sept. 22, 2005). English practice includes an interesting variation: solicitors with the Crown Prosecution Service prepare criminal cases but then transfer them over to barristers for trial, who are institutionally distinct, formally private trial lawyers not affiliated with the CPS. See PIZZI, *supra* note 1.

126. See Bureau of Justice Statistics Bulletin, *Prosecutors in State Courts* 2001 (May 2002, NCJ 193441) (noting median size of state prosecutor offices is nine attorneys).

127. Federal supervisory prosecutors, due to time constraints, often must review files quickly and depend on the trial attorneys' evidentiary descriptions. Interview with Professor Daniel C. Richman, at Fordham Law School (Oct. 28, 2004). This works better for judging the appropriateness of charges for given conduct than evaluating the details of evidentiary items' reliability or disclosure of borderline *Brady* obligations.

128. See Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583 (2005); JACOBY, *supra* note 47, at 292 (describing popular responsiveness of elected prosecutors and effects on office policy). This is also true of specific lower-level crimes that attract interest-group and press scrutiny, especially domestic-violence and drunk-driving crimes.

129. Scholars identify public attention to high-profile crimes as a circumstance that correlates with wrongful convictions. C. Ronald Huff, *Wrongful Conviction: Causes and Public Policy Issues*, 18 CRIM. JUST. MAG. 15, 17 (Spring 2003) (discussing "community pressure for convictions"). The *Goldstein* case—in which prosecutors employed a jailhouse snitch and suppressed evidence both of his

practice, where prosecutors run investigations rather than evaluate agents' work, professional judgment of fact-evaluation decisions is harder to maintain.¹³⁰ Those who make deals with jailhouse informants for testimony, for example, may be too personally invested in a case to assess dispassionately the appropriateness and reliability of the evidence they helped generate.¹³¹ Nonetheless, expansion of models such as New Orleans' and federal prosecutors' screening practices can, at least in important segments of prosecution practice, reduce the role of adversarial adjudication in detecting weakly grounded charges.

B. Improving Evidence Reliability Through Pre-Trial Adversarial Processes

1. Discovery and Open Investigation Files

Discovery rules require only that parties disclose what evidence they possess, not that they affirmatively seek evidence. But discovery is a primary mechanism to improve the factual record's comprehensiveness and reliability, because it makes fact investigation and pretrial adversarial scrutiny of evidence easier. Parties may have resources to interview witnesses that opponents identify but not to search out those witnesses independently. Further, the more information parties have, the more easily they can find missing information. One witness may identify other potential witnesses neither side has yet contacted. Adversarial systems set up defendants to supplement state investigations in just this way—to do things like seek out more witnesses when the state's investigation concluded too quickly.¹³² To make investigations more reliable without adjudication, we want to increase the portion of evidence in parties' files that has been subjected to competing scrutiny outside of trial. Even informal interviews of opponents' witnesses, for example, make the evidentiary record more reliable.

Yet discovery rules have goals other than increasing the scope and reliability of evidentiary records. Against this goal they balance risks that

testimonial incentives and the suggestive procedures used to secure testimony of the sole eyewitness—is a case in point. See *Goldstein v. Harris*, 82 F. App'x 592 (9th Cir. 2003) (unpublished opinion); see also *Taylor v. Maddox*, 366 F.3d 992, 1014 n.17 (9th Cir. 2004) (describing *Goldstein*).

130. See Richman, *supra* note 43, at 803-04 (describing tension between “engagement and information access” and “professional judgment” for federal prosecutors who are “extensively involved in investigative decisionmaking”); *id.* at 806 (describing other nations' responses to this concern).

131. For descriptions of cases that are examples of this problem, see *Goldstein*, 82 F. App'x at 592; *Taylor*, 366 F.3d at 1014 n.17; *Hakim & Lichtblau*, *supra* note 45 (describing supervisory investigation by Justice Department's Washington headquarters of flawed prosecution by Detroit federal prosecutor's office); see also Danny Hakim, *Judge Reverses Convictions in Detroit Terrorism Case*, N.Y. TIMES, Sept. 3, 2004, at A12.

132. For a case study of this problem, see *Frontline: The Plea*, *supra* note 96. This documentary describes the case of Charles Gampero, whose guilt was placed into doubt after a private investigator found many witnesses that both the police and Gampero's defense lawyer had ignored.

arise from information disclosure: risks to undercover agents and informants, to ongoing investigations, and to witnesses. Broad discovery might increase risks of witness intimidation. In some contexts (especially federal practice), information disclosure might compromise ongoing investigations based on confidential government information, such as informant identities. It could also facilitate defendant perjury.¹³³ To balance the benefits and risks of information disclosure, federal discovery rules, and those of some states modeled on them, remain quite restrictive.¹³⁴ Under these restrictive rules, parties are not required to disclose before trial the names of witnesses they will call to testify, much less identify those who may have relevant information but will not be subpoenaed for trial.¹³⁵ Nor must they disclose a witness's prior statements until after the witness has testified on direct examination at trial, which means there is no requirement ever to disclose such statements in most cases.

Note the effect of restrictive discovery: because it limits competitive, pretrial evidence evaluation, it depends on the traditional structure of weak investigation practice backed by strong adjudication. Less discovery means investigations are more separate, partisan, and less scrutinized by opponents before trial. Adjudication, through trials or plea negotiations, must play a larger role in sorting evidence and assuring accuracy. Not until trial are witnesses put under oath or available even informally to opposing parties, unless parties voluntarily agree otherwise. Tools to assess their credibility—prior statements, criminal records, and cooperation agreements—likewise may not be available until trial.¹³⁶

These restrictions make sense in the portion of cases in which concerns such as witness safety and investigative confidentiality are real. But those interests are not strong in most cases, especially those in state courts. As a result, more states are replacing the restrictive model of federal

133. A fairness argument also justifies limits: expansive discovery cannot be fully reciprocal because defendants cannot be compelled to reveal self-incriminating evidence. The Fifth Amendment privilege against self-incrimination covers only "testimonial" evidence. Defendants can therefore be compelled to yield a range of incriminating evidence, from documents the police take through search warrants to blood samples that may reveal intoxication evidence.

134. The following jurisdictions closely track Federal Rule of Criminal Procedure 16 in not requiring pretrial disclosure to defendants of the names, addresses, or statements of government witnesses and in denying defendants the ability to depose witnesses: ALA. R. CRIM. P. 16.1; ALASKA STAT. § 12.45.050 (1996); COLO. R. CRIM. P. 16; CONN. GEN. STAT. § 54-86(b) (West 1994); KAN. STAT. ANN. § 22-3213 (1973 & Supp. 1997); KY. R. CRIM. P. 7.24; 723 LA. CODE CRIM. PROC. ANN. art. 23 (1981 & Supp. 1997); MISS. CODE ANN. § 99-27-45 (2004); N.H. SUPER. CT. R. 99; N.Y. R. CRIM. P. § 240.20; N.D. R. CRIM. P. 16; PA. R. CRIM. P. 311; TENN. R. CRIM. P. 16; TEX. CODE CRIM. PROC. ANN. Art. 39.02 (Vernon 1979 & Supp. 1998); VA. S. CT. R. 3A:11 (modeled on federal rule).

135. See FED. R. CRIM. P. 16, 26.2; Jencks Act, 18 U.S.C. § 3500 (2002) (restricting pretrial disclosure to the defense of prior statements by government witnesses).

136. See Corinna Barrett Lain, *Accuracy Where It Matters: Brady v. Maryland in the Plea Bargaining Context*, 80 WASH. U. L.Q. 1 (2002) (describing doctrinal ambiguity on whether constitutional disclosure obligations apply before trial in plea bargains). Most states require pretrial disclosure by statute. See *infra* note 138.

discovery and moving toward broad, reciprocal discovery regimes. Under these rules, defendants can get a lot of information from the state if they agree, in return, to disclose comparable information, such as witness lists and test results.¹³⁷ In contrast to federal constitutional and statutory requirements, more than forty states require that exculpatory evidence be disclosed to defendants at some point before trial.¹³⁸ Nearly half of the states, in contrast to the federal rule, require pretrial disclosure of witness names, addresses, and prior statements—a policy based on the conclusion that the truth-facilitating (and perhaps settlement-facilitating) function of broader discovery outweighs witness-safety concerns. A few states, such as New Jersey, effectively mandate open investigation files and require prosecutors to disclose all “persons whom the prosecutor knows to have relevant evidence or information” even if they will not be state witnesses.¹³⁹ A few

137. North Carolina is the most recent state to move from a restrictive discovery regime modeled on federal rules to a broad, reciprocal discovery regime. See N.C. GEN. STAT. § 15A-902 (2004). The legislation was enacted in response to scandals of prosecutors withholding evidence that led to apparently wrongful capital convictions. See, e.g., Brad Bannon, *Justice For All Means Opening the Files*, RALEIGH NEWS & OBSERVER, Apr. 20, 2004, at A11; Andrea Weigl, *Lawyers Debate Openness; Prosecutors Say Each Side Should See Files*, RALEIGH NEWS & OBSERVER, Mar. 15, 2004, at B1. Parties often voluntarily exchange information to facilitate settlement. See, e.g., JACOBY, *supra* note 47, at 242, 264 (describing voluntary open-file discovery by local prosecutor). This is less true in weak cases. See John G. Douglass, *Balancing Hearsay and Criminal Discovery*, 68 FORDHAM L. REV. 2097, 2140-41 (2000):

Most discovery in most federal cases occurs informally, and much of it is earlier and broader than the letter of the law requires. . . . But . . . the system tends to work best when it matters least. Prosecutors aiming for guilty pleas have the strongest incentive to disclose in cases where their evidence is most overwhelming. In the weaker cases, the very ones where discovery is most likely to make a difference to the defendant, there is less incentive for a prosecutor to disclose and more reason to play “hard ball” when the rules permit it.

138. See, e.g., ALA. R. CRIM. P. 16.1(a) (within fourteen days after the defendant’s request has been filed); ARIZ. R. CRIM. P. 15.1(a) (within ten days after arraignment); CAL. R. GLENN SUPER. CT. 12.7 (within fourteen days after the information or indictment is filed); COLO. R. CRIM. P. 16(b)(1) (within twenty days after defendant’s first appearance); FLA. R. CRIM. P. 3.220(b)(1) (within fifteen days after serving notice of discovery); HAW. R. PENAL P. 16(e)(1) (within ten days after arraignment); KY. R. JEFFERSON CIR. CT. 603(A) (within ten days before pretrial conference); ME. R. CRIM. P. 16 (within ten days of arraignment on certain offenses); MICH. CT. R. 6.201(F) (within seven days of defendant’s request); N.Y. CRIM. PROC. LAW § 240.20(1) (McKinney 1993) (upon defendant’s demand); N.C. GEN. STAT. § 15A-903 (defendant’s motion); VT. R. CRIM. P. 16(1) (as soon as possible, after a plea of not guilty); WASH. ST. SUPER. CT. CRIM. R. 4.7(1) (no later than the omnibus hearing). For a comprehensive list, see Stanley Z. Fisher, *The Prosecutor’s Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 FORDHAM L. REV. 1379, 1417 n.206 (2000).

139. See N.J. COURT R. 3:13-3(c)(6). Note this kind of disclosure rule could have adverse incentive effects on state investigation. If police know all people they speak to will be disclosed to the defense, they may selectively investigate, seeking only witnesses they suspect have incriminating evidence, or stopping after they have some incriminating witnesses to avoid the risk of discovery-conflicting ones. Incomplete state investigations are a real problem; for a case study of an investigation that seems to have missed critical evidence in a homicide case and raised doubts about a wrongful conviction, see *Frontline: The Plea*, *supra* note 96 (documentary describing case of Charles Gamper as a possible wrongful conviction due in part to inadequate police investigation that was later examined by a private investigator).

others, such as Florida, have broken with criminal practice tradition and allow witness depositions in criminal cases.¹⁴⁰ Every discovery reform in recent years has expanded, rather than narrowed, discovery rights. All of these practices suggest that the traditional concerns of witness safety and investigative confidentiality do not justify narrow discovery regimes in contemporary state practice.¹⁴¹

Consider this broad-discovery trend in light of the limited role of defense counsel. Minimal discovery works best when defendants have strong counsel who can replicate state investigation and independently uncover the state's evidence.¹⁴² But broad discovery partially compensates for restricted defense counsel; it helps make up for the deficiency in adversary process of constrained defense advocacy. With broad discovery, counsel can spend more time on the cheaper, quicker tasks of reviewing and following up on state disclosures, and they need not spend as much time tracking down witnesses and evidence from scratch. Broad discovery plus constrained defense services focus pretrial adversarial practice on the task of scrutinizing the reliability of the state's evidence sources. Improved access to the state's information should improve the *quantity* of evidence to some degree; defenders do little investigation now, but broad discovery makes it cheaper for them to seek out witnesses. It should improve the *quality* of evidence even more than the quantity, because even if defenders do not add evidence through independent investigation, more state evidence will face adversarial scrutiny during the discovery stage. In contrast, restricted discovery coupled with restricted defense counsel provides little means for adversarial double-checking of the state's case, because the defense has limited ability to replicate the state's case and no right to scrutinize the state's file.

The broadest American discovery practice comes close not only to civil practice but to the model of mandatory open investigation files

140. See FLA. R. CRIM. P. 3.220(h) (granting broad rights to depositions in felony criminal cases); 3.190(j) (parties may move for depositions of witnesses "to perpetuate testimony"); see also ARIZ. R. CRIM. P. 15.1 & 3 (limited deposition rights); HAW. R. PENAL P. 16; NEB. REV. STAT. § 29-1912-1917 (1995); N.J. STAT. ANN. § 2A:23A-10 (West 1987 & Supp. 1997); *State v. LaForest*, 665 A.2d 1083 (1995) (describing New Hampshire criminal deposition practice under Superior Court Rule 99, which was suspended in 1999); cf. FED. R. CRIM. P. 15 (allowing courts to grant party requests for witness depositions in "exceptional circumstances and in the interest of justice"). For a comprehensive, state-by-state survey of discovery provisions, see Milton C. Lee, Jr., *Criminal Discovery: What Truth Do We Seek?*, 4 D.C. L. REV. 7, 26-29 (1998).

141. State criminal dockets differ substantially from the traditional federal criminal docket. State courts are full of traditional street crime, and state drug crime prosecutions typically address possession, retail, street-level sales, and local production operations rather than large-scale conspiracies and cartels. There are fewer ongoing investigations that discovery could compromise, fewer defendants likely to intimidate witnesses, and fewer pretrial witness statements (such as those made to grand juries) that are problematic to disclose.

142. For guilty defendants, that is often easy; they know their own criminal conduct and, usually, most of the results arising from and circumstances surrounding it.

employed in some northern European countries.¹⁴³ The European model compiles a single investigative file for each case containing all materials known to investigators. In contrast to American practice (especially in restrictive-discovery jurisdictions), where police typically share their files only with prosecutors,¹⁴⁴ European investigative files are disclosed fully to prosecutors, defense counsel, and judges.¹⁴⁵ Where narrow discovery rules in adversarial systems make factual accounts reliable by redundant investigations,¹⁴⁶ this European model puts more emphasis on multiple scrutiny of a single file.

American jurisdictions that combine broad discovery with limited defense funding move the adversarial regime somewhat toward this model, providing greater promise of reliability than the combination of narrow discovery rules and underfunded defense. Shared scrutiny of the investigative file produces bargaining that is more often based on accurate factual accounts, rather than bargaining that is driven by inaccurate information and by party concerns that hinder accuracy. Broad discovery is not a full substitute for underfunded defense; attorneys may be so constrained that they have little ability even to review evidence prosecutors hand them, and review may not be enough. If the state's investigation missed key witnesses, the defense still needs means to uncover them. But broad discovery is nonetheless a move in the right direction for the post-*Gideon* system of limited defense advocacy.

2. *The Problem of Waivable Discovery Rights*

If, to serve accuracy, expansive discovery is an important structural complement to limited defense advocacy, then letting parties waive discovery is problematic. All the players have incentives unconnected to accuracy that can motivate waiver. Prosecutors will demand waivers to move heavy

143. For a description of this practice in Norway, Germany, and the Netherlands, see PIZZI, *supra* note 1, at 112-13.

144. And sometimes not even their entire files. See *Kyles v. Whitley*, 514 U.S. 419 (1995); Fisher, *supra* note 138. This was apparently the problem in the federal prosecution of Timothy McVeigh, in which the FBI failed to disclose documents to prosecutors as well as to defendants. See Office of the Inspector General, Semi-Annual Report to Congress: The Belated Production of Documents in the Oklahoma City Bombing Case (Oct. 1, 2001-Mar. 31, 2002) available at <http://www.usdoj.gov/oig/semiannual/0203/ove.htm>; CBS News, *Widespread Failure in McVeigh Case*, Mar. 19, 2002, available at <http://www.cbsnews.com/stories/2002/03/19/national/main504062.shtml> (summarizing report of Justice Department's inspector general that describes the FBI's multiple failures to disclose documents to prosecutors and defendants).

145. See PIZZI, *supra* note 1, at 112-13. Defense counsel can even request police to supplement the file by, for instance, interviewing additional witnesses. *Id.* This approach is apparently supported by a professional culture among investigative agents to produce a thorough file without a partisan commitment. *Id.* at 112.

146. See DAMAŠKA, *supra* note 2, at 223-24.

caseloads, ensure convictions, protect victims from stressful interviews,¹⁴⁷ and minimize adversarial resistance. Defense attorneys also have heavy caseloads and want to minimize time investments when compensation is minimal.¹⁴⁸ Defendants themselves face a variety of incentives to grant waivers and speed disposition, some of which prosecutors help create. These inducements to waive discovery mainly include pretrial detention and steep plea discounts in exchange for waivers,¹⁴⁹ and occasionally include risks such as forfeiture or prosecution of family members. Waiver preserves party autonomy, and parties sometimes have reasons to prioritize other interests over accuracy and thus may resolve cases on flawed factual accounts.¹⁵⁰

A broad commitment to party autonomy is deeply embedded in American practice. Rarely do courts limit parties' ability to waive procedural safeguards.¹⁵¹ The high value on party autonomy reflects the criminal justice system's preference for conflict resolution over accuracy. Yet, if the continued legitimacy of criminal justice will depend on a heightened commitment to accuracy, then waiver is problematic. Waiver allows parties to shape procedure in their own interests, and those interests are not always

147. See *State v. Draper*, 784 P.2d 259 (Ariz. 1989) (describing prosecutor's demand of discovery waiver to protect victim from deposition by defendant).

148. In public defender systems, heavy caseloads are frequent problems. See, e.g., *State v. Peart*, 621 So. 2d 780 (La. 1993) (describing caseloads for New Orleans public defenders as so excessive as to create a presumption that defenders will render ineffective assistance). In jurisdictions that provide indigent defense by appointing private attorneys who are paid by fee schedules, low per-case fees create incentives to minimize work. See, e.g., *State v. Lynch*, 796 P.2d 1150 (Okla. 1990) (describing defense attorneys who shared the maximum fee for defense of a murder case that amounted to less than \$15 per hour for each and resulted in each losing money by taking on the representation); Stuntz, *supra* note 17, at 10-11 (noting that "a typical appointed defense lawyer faces something like the following pay scale: \$30 or \$40 an hour for the first twenty to thirty hours, and zero thereafter").

149. See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (regarding a defendant who declined a plea offer to a five-year sentence on forged-check charge and was convicted at trial, receiving a mandatory life sentence under habitual offender statute). See also *Frontline: The Plea*, *supra* note 96 (recounting defendants who accepted pleas to crimes they claim they did not commit, largely because of desire to avoid trial penalties).

150. Defendants may accede to inaccurate dispositions to serve these other interests. Prosecutors rarely *intentionally* pursue knowingly false charges; the risk is rather that their partisan role makes them untrustworthy assessors of evidentiary records.

151. For a rare example of a limited restriction on discovery waiver, see *Draper*, 784 P.2d at 263-64 (allowing a defendant, under the Due Process Clause, to agree to the prosecutor's demand that he not interview the victim except in limited circumstances when other safeguards are present, such as the defendant's sufficient access to other state evidence). The Supreme Court has defined very few procedural features of the criminal process as "structural," making their absence a basis for automatic reversal rather than harmless-error analysis. *Johnson v. United States*, 520 U.S. 461, 468 (1997) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)) (complete denial of counsel); *Tumey v. Ohio*, 273 U.S. 510 (1927) (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39 (1984) (denial of public trial); *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (defective reasonable-doubt instruction). These errors occur despite defendant's objection, not despite his waiver of each entitlement.

synonymous with public commitment to truth-finding. Taking that commitment more seriously strengthens the argument for mandatory, nonwaivable procedural components that maximize the odds of accurate outcomes.¹⁵² Expansive discovery is an important counterpart to limited defense representation. Many state reform efforts seem to recognize this, because statutes that aim to reduce wrongful convictions usually expand prosecution disclosure obligations.¹⁵³ But so far none places limitations on waiver and makes the pretrial process of adversarial scrutiny of evidentiary files mandatory. Whether American jurisdictions start to moderate party autonomy (and systemic efficiency) in favor of mandatory precautions for accuracy may be a signal of how far criminal justice will shift toward a commitment to truth-finding over conflict resolution. Mandatory disclosure rules would still allow considerable private ordering through plea negotiations, but these rules would also provide information that might improve party-driven dispositions and strengthen the investigation stage on which plea or trial adjudication depends.¹⁵⁴

3. *Judicial Overrides of Disclosure Rules*

Mandatory disclosure rules could be refined by assigning judges a more rigorous role in scrutinizing party-requested waivers.¹⁵⁵ Instead of mandatory discovery exchange, the rule could establish a presumption of disclosure that can be overcome only by a judicial finding that adversarial review of investigation files is unlikely to be critical to accuracy. The basis for making such a finding is tricky, but some indicia can serve as rough guideposts. Evidence that has a demonstrable track record of low reliability—government informants, many forms of eyewitness identification, and some witness statements made under police interrogation—are strong cases for adversarial scrutiny through discovery and poor cases for waiver. Over time, lawyers and judges are likely to develop routines for some types of evidence and charges that make waivers easy to obtain. Nonetheless, sorting waivable and nonwaivable discovery is costly to parties and judges, and these costs would prompt parties to forgo waiver requests.

Other case features might give judges rough guidance. Federal prosecutors include discovery waivers as part of “fast-track” plea policies in

152. Cf. DAMAŠKA, *supra* note 2, at 123, 145-46, 152 (noting that European systems that prioritize truth-finding tend to have mandatory process components, while dispute-resolving regimes allow more procedural waiver and party control).

153. For the two most recent examples, see Death Penalty Reform Act, Ill. Pub. Act. 93-0605 (Nov. 19, 2003); N.C. GEN. STAT. § 15A-902 (effective Oct. 1, 2004).

154. Granted, the history is not promising to mechanisms that add to workloads; parties find ways around them. This is a lesson of George Fisher’s history of plea bargaining. See FISHER, *supra* note 8.

155. This is the approach of one of the few cases that limits discovery waiver. See *State v. Draper*, 784 P.2d 259, 263-64 (Ariz. 1989) (stating that judge can approve defendant discovery waiver when safeguards are present, such as defendant’s sufficient access to other state evidence).

illegal-immigration cases.¹⁵⁶ In that context, factual records are usually straightforward because legal residency is easily resolved. And defendants, represented as a group by public defenders, have leverage against prosecutors through their collective capacity to create big delays. That adversarial power makes it less likely that defendants are excessively weak negotiators. Because immigration cases rely upon relatively uncomplicated factual records and involve defendants with some degree of negotiating power, these cases are plausible candidates for discovery waivers.¹⁵⁷ Domestic violence cases, in contrast, often generate factual records that contain many ambiguities.¹⁵⁸ In some jurisdictions, suspects meet with prosecutors without defense counsel, waive discovery, and plead guilty to misdemeanor charges.¹⁵⁹ Yet the nature of these cases provides less assurance that law enforcement accounts alone are accurate. Violent disputes without uninvolved witnesses can be hard to sort out, and political pressure for strong enforcement policies encourages charging in ambiguous cases (including those involving potentially self-defending victims).¹⁶⁰ Adjudication without discovery or defense counsel provides little scrutiny of the investigation. One possible alternative, described in the next Part, is for judges to take a more active role in determining the factual basis for a plea, such as hearing victim, police, and defendant testimony rather than relying on prosecutor summaries. Judges could accept waivers only when they compensate for adversarial process with judicial inquiry.

4. *Federal Criminal Dockets and Restrictive Discovery*

In federal courts, which handle more complex, multi-party crimes than state courts, discovery is limited due to concerns about witness safety and investigative confidentiality.¹⁶¹ To address problems arising from large,

156. This is routine in Arizona and Southern California due to increased federal enforcement. Additional agents in Tucson alone doubled the number of arrests to 40,000 in January 1996 from half that a year earlier. See Laura Storto, *Getting Behind the Numbers: A Report on Four Districts and What They Do "Below the Radar Screen"* 19 (unpublished manuscript, Mar. 2, 2001), available at <http://www.law.yale.edu/outside/pdf/centers/sentencing/Storto-Paper.pdf>.

157. Further, risk of irreparable harm is low. Under fast-track policies, defendants typically plead to offenses with a maximum sentence of thirty months; median sentences are twenty-one to twenty-four months. Storto, *supra* note 156, at 18. That term is not much different from typical pretrial detention periods and a steep discount from ten to twenty-year maximums. See Storto, *supra*, at 20-21 (noting penalties under 18 U.S.C. §§ 1325, 1326).

158. For an example of such a program, see Brenda K. Uekert, *Process Evaluation of the Southwest Colorado Domestic Violence Project* (July 1999), available at http://www.ilj.org/dv/casestudies/la_plata.pdf (Institute for Law and Justice evaluation describing Colorado programs).

159. *Id.* at 8-12.

160. Police frequently arrest multiple parties in one dispute. Fast-track practice makes it easier for prosecutors, facing incentives for high conviction rates, to convict all participants. *Id.* at 12.

161. This became less true as federal criminal law expanded and many federal dockets came to look much more like traditional state dockets, especially with large numbers of routine drug crimes.

ongoing investigations involving especially dangerous defendants, federal rules restrict discovery to hide witness identities from defendants before trial. But these restrictions also weaken the reliability of the fact-generation process, and thus we need either adjudication to detect its weaknesses or a stronger investigation practice to improve the accuracy of the factual record in the first place. Because we cannot achieve the latter in the way that many state systems do—by broadening discovery and deposition rights—two alternatives present themselves. The first is to disaggregate the cases that need the security of restrictive discovery from those that do not (that is, those that look more like routine state cases). The second is to find ways other than expansive disclosure to build reliability checks into investigation practice.

Broad discovery rules require prosecutors to seek a judge's order or defendant's consent to restrict discovery. Narrow discovery rules, in contrast, require defendants to seek prosecutors' consent for broad disclosure. Prosecutors often give such consent when they conclude witness safety and ongoing investigations are not threatened and when disclosure will speed settlement because defendants will recognize the strength of the government's case. But prosecutors are tempted to make disclosure judgments based on not only witness-safety grounds but on strategic grounds as well; they are least likely to expand discovery not only when investigations are threatened but also when the government's case is weak, regardless of witness-safety concerns.¹⁶²

One option for reform is to keep the existing narrow discovery rule but change the decision maker. Narrow discovery rules could contain a provision under which *judges*, rather than prosecutors, decide whether witness safety and investigation confidentiality justify denial of a defendant's request for broader discovery.¹⁶³ Federal courts lack such a rule, but some district judges have devised a limited practice that is analogous. These judges occasionally order early disclosure of some evidence by relying on *Brady v. Maryland*, which requires disclosure of exculpatory evidence, even though discovery statutes do not require disclosure until trial.¹⁶⁴

After 9/11, however, federal dockets may be shifting back somewhat to traditional federal criminal law concerns.

162. See Douglass, *supra* note 137; JACOBY, *supra* note 47, at 209 (recounting "commonly expressed opposition to discovery" by prosecutors because of "fear that exposing his case to defense scrutiny will jeopardize his chances of winning"); *id.* at 250 (describing trial attorneys who do not want to "show their hand" with open discovery in "marginal" cases).

163. States with broad discovery rules have a reverse version of this rule: they allow prosecutors to petition courts for the right to conceal material that the rules otherwise require to be disclosed. See, e.g., N.C. GEN. STAT. § 15A-1415(f) ("If the State has a reasonable belief that allowing inspection of any portion of [its] files by counsel for the capital defendant would not be in the interest of justice, the State may submit for inspection by the court those portions of the files so identified.... [T]he court in its discretion may allow the State to withhold that portion of the files.").

164. See, e.g., *United States v. Campagnuolo*, 592 F.2d 852 (5th Cir. 1979) (describing district court's standing order to disclose government witness statements before trial if they are exculpatory,

Some prosecutors believe judges cannot fully appreciate risks to witness safety. Prosecutors have a personal stake in the dangers to which they expose their witnesses that judges (especially if they lack prosecution or criminal-docket experience) might not.¹⁶⁵ This point is not easy to settle, but there are unquestionably many cases in which the witness-safety concern is minimal and no greater than in state courts. The expansion of federal criminal law means many federal prosecutions are ones formerly handled in state courts.¹⁶⁶ Among these prosecutions, there is surely a large set in which there is no real ambiguity about ongoing investigation and continuing need for witness confidentiality. Judges could easily grant broad discovery in *those* cases even if they are risk-averse about overriding prosecutor judgment in closer cases.¹⁶⁷ And judges can consider the fact that witness-safety risks can often be addressed with pretrial detention¹⁶⁸ and practices commonly used in domestic violence contexts, such as

despite Jencks Act rule that prosecutors need not disclose them after witness's trial testimony); *cf.* *United States v. Algie*, 667 F.2d 569 (6th Cir. 1982) (reversing district court order that ordered early prosecution disclosure of Jencks Act material to serve court's needs for efficient docket administration). As *Algie* describes, judges have a docket-efficiency interest in early disclosure. Federal Rule of Criminal Procedure 26.2 and the Jencks Act, 18 U.S.C. § 3500, do not require disclosure of witnesses' prior statements until after the witness testifies on direct examination at trial. When prior statements are voluminous, as in the case of prior grand jury testimony, judges must grant a mid-trial continuance for counsel to review the newly disclosed material. To avoid those delays, judges sometimes urge pretrial disclosure. *See also* Memorandum of the United States Opposing Defendants' Joint Motion for Early Release of Jencks Act Material, *United States v. Atlas Iron Processors, Inc.*, No. 97-0853-CR (S.D. Fla. May 7, 1998), available at <http://www.usdoj.gov/atr/cases/f3800/3873.htm> (opposing early release order but offering voluntary early disclosure twenty-four hours before trial).

165. I take this observation from Professor Dan Richman, who, before teaching, was a federal prosecutor and had extensive experience in complex prosecutions involving real risks to witnesses. For an example of such a case, see *United States v. Houlihan*, 92 F.3d 1271 (1st Cir. 1996).

166. Indeed, some essentially are state cases. In the 1980s, New York City federal prosecutors developed a "Federal Day" program with their state counterparts pursuant to which they would randomly charge state drug arrestees one day a week in federal court, where sentences for the same crimes were much higher than in state courts. *See* Katherine Bishop, *Mandatory Sentences in Drug Cases: Is the Law Defeating Its Purpose?*, N.Y. TIMES, June 8, 1990, at B16. "Project Exile" policies, in which state crimes involving firearms are punished under federal laws, are another example. *See, e.g.,* Law Enforcement Services, Virginia Exile, <http://www.dcjs.virginia.gov/exile> (last modified Jan. 25, 2005) (describing the first "Project Exile" in Richmond, Virginia); United States Attorney's Office, Western District of New York, Project Exile, http://www.usdoj.gov/usao/nyw/proj_exile.htm (last updated July 29, 2005) (describing same program in Rochester, New York). On the trend generally of federal criminal law expanding to cover traditional state crimes, see, for example, Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?* 80 B.U. L. REV. 1227 (2000); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995).

167. One question, to which I do not know the answer, is how large this set of easy cases is after we subtract those in which prosecutors voluntarily grant broad discovery. But given partisan incentives to conceal weaknesses with minimal disclosure (and avoid the administrative burden of disclosure), see Douglass, *supra* note 137, surely some exist.

168. Federal pretrial detention law already allows detention if defendant poses a risk to "the safety of any other person," 18 U.S.C. § 3142(e) (2000); defendants who qualify for detention under that statute would rarely qualify for optional broad discovery.

issuing restraining orders barring defendant-victim contact or moving victims to protective shelters.

Even in cases in which narrow discovery is justified, additional possibilities exist to balance witness-safety and confidentiality concerns with heightened interests in pretrial assessment of evidence reliability. Discovery could be contingent on various pretrial restrictions. Judges could offer fuller or complete early access to the investigation file on condition not only that defendants remain in detention until disposition, but also that they have no contact with visitors (and perhaps even other inmates) other than their attorneys. Further, a judicial officer, such as a marshal, law clerk, or probation officer, could monitor attorney-client communications.¹⁶⁹ Such precautions could allow broader disclosure and thereby strengthen the evidentiary record through adversarial scrutiny while guarding against risks to evidence sources.¹⁷⁰

Despite the potential for reform, narrow discovery regimes necessarily reduce the ability of parties to develop factual records through adversarial pretrial practice. Thus narrow discovery relies more on adjudication to scrutinize and develop factual records, because narrow discovery restricts pre-adjudication fact development. If states continue to move away from narrow discovery, however, those restrictions will affect only a small portion of American criminal practice. Moreover, there is another option for improving pretrial fact-finding: giving the judiciary a larger role at the investigation stage. That role need not mimic European investigative magistrates' capacities. It can build on American judges' existing traditions of involvement in fact development with limited, specific expansions of judicial fact investigation and review. Expansion of the judicial fact-finding role, along with reforms in executive-branch structures and pre-trial adversarial processes, provides a third means to strengthen factual records before adjudication. As will be explained in the next Part, it can also avoid many of the witness-safety and enforcement-confidentiality concerns that justify narrow discovery.

169. *Cf.* 66 Fed. Reg. 55062 (Oct. 31, 2001) (permitting the Justice Department to monitor, without judicial oversight, attorney-client communications of suspects held in custody).

170. Marginal risk remains through the actions of defense attorneys, but the system should trust them much more than their clients, especially with safeguards like contempt proceedings or state bar disciplinary action, and perhaps something analogous to a security-clearance prescreening for sensitive domestic crime investigations. *Cf.* *Doorson v. Netherlands*, 22 Eur. Ct. H.R. 330 (1996) (describing limitations on defendant's right to confront prosecution witnesses; witnesses' identities were concealed from defendant but known to the judge, and the judge questioned those witnesses in the presence of defense counsel but not the defendant).

C. *Improving Evidence Reliability Through Judicial Involvement*

1. *Existing Judicial Practices of Evidence Generation and Review*

American judges have a distinctly constrained role in adjudication. They have no routine investigation power independent of the parties,¹⁷¹ and unless parties agree otherwise, juries, rather than judges, find facts.¹⁷² These limits reflect a preference for restricting government power—specifically, *judicial* power. Yet these limits are odd in light of the modern growth in *executive* power in criminal law. In early American practice, prosecutors were relatively weak officials, and judges were the more worrisome agents of government power.¹⁷³ We have constrained one form of government power while expanding another, and it is not self-evident that executive power is less worrisome than judicial power, especially with the jury's sharp decline. Indeed, judicial power is one means to counterbalance executive power and, in particular, to diffuse authority in fact evaluation. Second, despite these limits, we have seen the judicial role grow substantially in contemporary *civil* practice, and even in particular aspects of criminal judging, in ways that demonstrate an acceptance of some forms of heavy judicial involvement in fact production and evaluation. Contemporary judicial practice has innovated models for expanded judicial involvement in pre-adjudication fact development, and these models provide clues to constructing an expanded judicial role that bolsters factual records and checks executive action.

There has been a much-noted trend over the past thirty-plus years in which judges in civil litigation have taken a much more active role in pre-trial discovery and negotiation than was traditional for common law judges.¹⁷⁴ At least in the subset of federal civil practice dealing with large class actions against public institutions (such as prisons, mental hospitals, and school systems) or corporations, judges have developed, in Judith Resnik's well-known description, a "managerial" judicial role.¹⁷⁵ One noteworthy innovation of managerial judging includes detailed,

171. Arguable exceptions appear in specialized contexts, as when judges impanel experts in mass tort litigation or appoint special masters in large-scale public law litigation. See *infra* note 181 and accompanying text (describing these contexts); Chayes, *supra* note 1, at 1300-02 (describing same).

172. See generally GOLDSTEIN, *supra* note 122. More recently, many jurisdictions have constrained judges' sentencing authority with sentencing guidelines, the one area in which they traditionally had broad authority. See generally KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998) (describing the loss of judicial sentencing power under federal guidelines).

173. See JACOBY, *supra* note 47, at 273-76.

174. See Chayes, *supra* note 1, at 1284 (describing "the emerging model of 'public law litigation'" and the judge as the "dominant figure" in it, in contrast to the "traditional adversary relationship" of party control).

175. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982); see also Chayes, *supra* note 1, at 1297-98.

fact-intensive, substantive judicial involvement in pretrial litigation. There was, for a time, much debate over the appropriateness of judges being so actively involved in discovery and pretrial settlement negotiations.¹⁷⁶ One point of concern was whether judges who gained substantial pretrial factual knowledge of disputes, and who closely observed or directed parties' discovery and negotiation behavior, could still be disinterested judges during the trial and post-trial phases.¹⁷⁷ Whether this managerial practice extends to smaller-scale, more routine state court civil litigation is less clear. But it seems likely, given docket pressures in all courts, that the basic ethos of the managerial civil judge's role—in which judges supervise discovery and settlement but in the process gain detailed, pretrial knowledge of facts—has filtered more broadly into civil practice.¹⁷⁸

Civil judges also have taken advantage of judges' limited ability to *generate* evidence as well as manage the parties' development thereof. Civil judges have long had the capacity to appoint special masters to handle investigations and fact assessment, and also to design and administer complex remedies.¹⁷⁹ Moreover, evidence rules allow both civil and criminal judges not only to examine witnesses,¹⁸⁰ but to call their own witnesses and supplement the parties' evidence.¹⁸¹ Especially in the context of mass tort litigation, judges have used this power aggressively to impanel experts whose views are effectively dispositive for large groups of cases.¹⁸² The real bright-line limit on American judging bars merely fact investigation *outside* the presence of the parties.¹⁸³ American judges may have pretrial knowledge of facts, supplement those facts, take part in settlement

176. See, e.g., Chayes, *supra* note 1; Resnik, *supra* note 175; Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442 (1983); Judith Resnik, *Managerial Judges: The Potential Costs*, 45 PUB. ADMIN. REV. 686 (1985).

177. See, e.g., Resnik, *supra* note 175.

178. Note that civil judges who fit the managerial model have taken on one key feature of European magistrates—detailed knowledge of case facts from pretrial dossiers—much more so than American criminal judges.

179. See Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1216-18 (2005) (discussing judicial traditions of special master investigators); Chayes, *supra* note 1, at 1300-01 (noting modern usage).

180. See, e.g., FED. R. EVID. 614(b).

181. See FED. R. EVID. 614(a), 706.

182. See, e.g., *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387 (D. Or. 1996); Gina Kolata, *Judge Rules Breast Implant Evidence Invalid*, N.Y. TIMES, Dec. 19, 1996, at A1 (describing *Hall* and noting that the judge in that case appointed four experts to a panel to assess the quality of scientific evidence on whether breast implants cause disease).

183. In the United States, it is grounds for disqualification for a judge to conduct fact investigation on her own, without the parties (that is, to act something like a European investigative magistrate). See, e.g., Tom Jackman, *Sniper Prosecutors Want Judge Off Sniper Case, Citing Improper Probe*, WASH. POST, Sept. 9, 2004, at A1 (describing objections to a trial judge who allegedly interviewed witnesses on his own); but see DAMAŠKA, *supra* note 2 (describing panels of European judges in which one is assigned to gather evidence for the panel to evaluate).

negotiations, and otherwise intrude on party control of evidence without exceeding ongoing traditions of the judicial role.

Despite these innovations on the civil side, criminal judges have in many respects receded to a peripheral role. Some reasons for this diminished role are rule-based limitations. In contrast to civil judges' active involvement in fact development and settlement negotiation, criminal judges are forbidden in many jurisdictions from taking part in the parties' plea negotiations.¹⁸⁴ In the context of federal sentencing, the Sentencing Guidelines clearly—and largely intentionally—restricted judicial authority and shifted power to prosecutors.¹⁸⁵ Although the Supreme Court held in *United States v. Booker* that the Sentencing Guidelines were unconstitutional, the guidelines still have advisory, if not mandatory, weight. Further, criminal judges often minimize their own involvement in aspects of plea bargaining even where they have formal power to do more. In adopting the traditional passive role in fact-finding, judges routinely fulfill their obligations to find a factual basis for guilty pleas by relying on parties' fact summaries rather than hearing witnesses and examining other evidence.¹⁸⁶

Despite these restraints and choices, American criminal courts have a less noticed counter-tradition: they retain longstanding capacities to conduct or initiate specialized fact-finding. In limited contexts, judicial agents regularly conduct investigations. Probation officers, who, in most jurisdictions, are agents of the judicial branch, have long conducted factual investigations (requiring witness interviews and document research) on defendants' backgrounds, the circumstances surrounding crimes, and defendants' post-crime conduct, all of which judges may use for sentencing purposes. Such judicial investigations routinely provide information that neither party would disclose.

Grand juries also are a reminder, now mostly symbolic, of judicial fact-investigation capacity. While grand juries have long since become de

184. See, e.g., FED. R. CRIM. P. 11(c)(1); COLO. REV. STAT. ANN. § 16-7-302(1) (West 2005) ("The trial judge shall not participate in plea discussions."); GA. SUPER. CT. R. 33.5(A) ("The trial judge should not participate in plea discussions."); *Commonwealth v. Evans*, 252 A.2d 689, 691 (Pa. 1969) ("[W]e feel compelled to forbid any participation by the trial judge in the plea bargaining prior to the offering of a guilty plea."); *Perkins v. Court of Appeals*, 738 S.W.2d 276, 282 (Tex. Crim. App. 1987) ("Although Texas trial judges are not expressly prohibited by statute or any rule of law from participating in a plea bargaining session, this Court has nevertheless stated that a trial judge should not participate in any plea bargain agreement discussions until an agreement has been reached between the prosecutor and the defendant."); SUP. CT. OF VA. R. 3A:8(c)(1) ("In any such discussions under this Rule, the court shall not participate."); WASH. REV. CODE § 9.94A.421 (2004) ("The court shall not participate in any discussions under this section.").

185. See Stuntz, *supra* note 95, at 2559-60. In *United States v. Booker*, the U.S. Supreme Court declared the federal Sentencing Guidelines unconstitutional and made the formerly mandatory guidelines merely advisory on judges. 125 S. Ct. 738 (2005). In the immediate wake of *Booker*, then, federal judges have more formal sentencing discretion. Whether they retain that power after Congress responds to *Booker* remains to be seen.

186. FED. R. CRIM. P. 11.

facto tools of prosecutors,¹⁸⁷ their institutional placement within the judicial branch is a vestige of judicial investigative power and judicial checks on executive power. Another remnant of this tradition is the state court of inquiry that allows a judge either to appoint a prosecutor or otherwise to conduct criminal investigations independent of executive-branch actors, especially (as in some cases of public corruption) where police and prosecutors may be unreliable due to conflicts of interest.¹⁸⁸ Federal courts, of course, also have the constitutional authority to appoint prosecutors independent of executive-branch control.¹⁸⁹ The state court models, though, suggest that judges are capable of playing a stronger supervisory role than federal judges have assumed under the independent counsel statute. Judges can control special-prosecutor budgets and otherwise manage investigations in ways that check prosecutorial overreaching.

Finally, in addition to generating facts, criminal judges sometimes have capacity to evaluate facts (and influence parties' evaluation) pretrial. In contrast to federal practice, there is a modest trend among states to allow judicial involvement in plea negotiations; these jurisdictions are comfortable with judges influencing plea terms and conveying evidentiary assessments to defendants.¹⁹⁰ Moreover, we already allow criminal judges to

187. See Andrew D. Leipold, *Why Grand Juries Do Not (And Cannot) Protect the Accused*, 80 CORNELL L. REV. 260 (1995).

188. Apparently only one state continues to authorize courts of inquiry. See TEX. CODE CRIM. PROC. ANN. arts. 52.01-52.09 (Vernon 2005) (authorizing courts of inquiry conducted by district judges); see also Ralph Blumenthal, *Rarely Used Courts Investigate El Paso Police and District Attorney*, N.Y. TIMES, June 4, 2004, at A17. For a recent historical example, see *State v. Moynahan*, 325 A.2d 199 (Conn. 1973). *Moynahan* describes Connecticut General Statute § 54-47, since repealed, which provided for a judicially initiated "investigatory inquiry" in which "witnesses may be questioned by the judge, the referee, the state's attorney ... or any other attorney appointed for that purpose and the report made to the Superior Court." *Id.* at 204. However, the "judge or referee who conducts the inquiry has no power or authority to issue an indictment. His sole function is to investigate and report his findings to the court. The court has the option of making the information garnered by the inquiry available to the state's attorney but this decision under § 54-47 rests with the court, not the investigating officer." *Id.*

189. See *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding the constitutionality of the independent counsel statute).

190. For examples of jurisdictions permitting judicial involvement in plea negotiations, see, for example, ARIZ. R. CRIM. PROC. 17.4(a) (2005) ("At the request of either party, or sua sponte, the court may, in its sole discretion, participate in settlement discussions by directing counsel having the authority to settle to participate in a good faith discussion with the court regarding a non-trial or non-jury trial resolution which conforms to the interests of justice."); CAL. PENAL CODE § 1192.7(b); *State v. Warner*, 762 So. 2d 507, 513-14 (Fla. 2000) (stating that court may participate in plea bargaining to a limited extent upon the request of a party); HAW. R. PENAL P. 11(e) (2005); IDAHO CRIM. R. 11(d); ILL. S. CT. R. 402(d); N.C. GEN. STAT. ANN. § 15A-1021(a); VT. R. CRIM. P. 11(e)(1) ("The court shall not participate in any such discussions, unless the proceedings are taken down by a court reporter or recording equipment."). New York's rule is less clear. See *People v. Glendenning*, 487 N.Y.S.2d 952, 953-54 (N.Y. Sup. Ct. 1985) ("The judicial role in plea bargaining is that of overseeing and supervising the delicate balance of public and private interests. The Court is to act as an impartial referee and not as an advocate."). For a vivid account of judicial practice in New York, see *Frontline: The Plea*, *supra*

learn significant amounts about the investigative record through pretrial motion practice. In low-level cases, judges make pretrial decisions about appointment of defense counsel by determining whether the sentence will include incarceration, a determination that requires learning enough facts to *prejudge* a case worthy of incarceration.¹⁹¹ In serious cases, judges need substantial pretrial fact information to determine whether defendants, under *Ake v. Oklahoma*,¹⁹² are entitled to funds for expert assistance on “significant” issues in the case. Accordingly, defendants must provide judges with factual accounts and their theory of defense as a basis for that decision. Hearings on evidence suppression similarly expose judges to case facts.

In all these contexts, we are comfortable with judges receiving and acting on pretrial fact accounts when they will later preside over disposition. Yet criminal judges have ceded their own public role in substantive supervision of criminal adjudication to the more partisan actors in the process: prosecutors. This minimal judicial role amplifies the privatized and partisan nature of criminal adjudication. The dominant public actor is not only a partisan one but usually an elected (or politically appointed) one. Minimizing the judge’s role vis-à-vis the parties forecloses options for separated-powers-style strategies of adjudication reform. In contrast, existing judicial involvement in pretrial factual evaluation provides a basis for enlarging the judicial role in a manner that accords with tradition while potentially checking prosecutorial power.

2. *Judicial Review of Investigative Files*

Keeping in mind the historically limited role of the judiciary in investigation and contemporary judicial involvement, consider one low-cost means for increasing judges’ participation in the factual substance of criminal adjudication. Judges could receive something like a dossier of each case—a full account of the investigation. Judges already get cursory accounts through warrant requests, preliminary hearings, and motions practice. More significantly, judges are *supposed* to receive sufficiently full accounts of the evidence in plea hearings to assure that a plea is well-grounded in fact.¹⁹³ It would be a modest conceptual shift (though a larger practical burden) to require the parties to present that factual basis *before* the hearing. Especially in those jurisdictions in which judges take an active role in plea negotiations, there is strong justification for the judge having a

note 96. For a less heavy-handed example of judicial involvement, see ABC News, *State v. Pelofske* (television broadcast, June 2002).

191. *Alabama v. Shelton*, 535 U.S. 654 (2002); *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

192. 470 U.S. 68, 83 (1985) (defining a due process right for indigent defendants to expert assistance on any issue that will be a “significant factor” in a criminal trial).

193. FED. R. CRIM. P. 11(b)(3).

well-developed evidence file—preferably the prosecution’s entire file—much earlier, at the outset of those negotiations.

Note that the rationales that justify restrictive discovery practices between prosecutors and defendants do not hold true when the exchange of information occurs between prosecutors and judges. Criminal procedure rules could mandate something like a prosecutorial open-file policy, but with the file disclosed *only to judges* in sensitive cases (and to defendants as well when broad discovery is appropriate). Prosecutors would expend some resources preparing the file in a form judges could review; judges likewise would spend more time on each case reviewing the full prosecution file (or, realistically, having judicial clerks review those files).¹⁹⁴

Greater judicial pretrial access to evidence could serve several purposes. This disclosure rule might define mandatory components of the prosecutorial file that are broader than the defendant’s discovery entitlements, such as all material evidence, the criminal record of witnesses,¹⁹⁵ and statements on whether investigators are aware of witnesses and evidence sources that were not pursued. Furthermore, this regime could make the *Brady* doctrine, which guarantees defendants access to all material, exculpatory evidence, more meaningful.¹⁹⁶ The *Brady* rule currently works poorly because prosecutors decide both what is material and what is exculpatory. Prosecutors are tempted not to disclose evidence that hurts their cases, and odds are that if a prosecutor does not disclose it, the evidence will never be uncovered. Accordingly, errors generally occur in one direction (under-disclosure) and are nearly risk-free.¹⁹⁷ Providing judges with full case files transfers the decision on what evidence is covered by *Brady* to judges. (And because prosecutors know judges will double-check them, they may more readily disclose.) If judges effectively make *Brady* decisions *in camera*, disclosures should increase, and accuracy would likely improve. The process has the further benefit of giving judges an institutional stake in accuracy. They, as well as prosecutors, would carry the blame for concealed evidence.

Further, this judicial review of the evidence file would force prosecutors to strengthen their rationales for obtaining discovery waivers from defendants. Judges would review a fuller set of information on each case,

194. On judges’ temptation and need to use clerks for substantive work, see Alex Kozinski, *The Appearance of Propriety*, LEGAL AFFAIRS (Jan.- Feb. 2005).

195. Illinois has taken a partial step in this direction with a new statute that requires disclosure, to judges and defendants, of state informant-witnesses’ criminal records and cooperation deals. See Capital Punishment Reform Study Committee Act, Ill. Pub. Act. No. 93-0605 § 115-21(c) (2003), available at <http://www.ilga.gov/legislation/publicacts/93/PDF/093-0605.pdf>. Trial judges must use that information to rule pretrial on the informant’s reliability.

196. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

197. For an insightful account of *Brady*’s limitations as a disclosure rule, see Sundby, *supra* note 54, at 647-50 (arguing that the Court’s “materiality” standard in the *Brady* doctrine protects prosecutors from errors of nondisclosure).

giving them a meaningful capacity to assess the appropriateness of bargains, including terms such as discovery waivers.¹⁹⁸ The practice thereby enables judges to assure an accurate factual basis in each disposition in a way that compensates for limited defense counsel resources, pre-trial detention, and the incentives of bargains backed by trial penalties. Pre-hearing judicial review of the prosecutorial file forces disclosure to a player who can check executive-branch judgment without raising concerns, such as witness intimidation or public revelation of law enforcement strategy, that underlie restrictions on discovery to defendants.¹⁹⁹

3. *Judicial Depositions of Witnesses*

In addition to increasing access to the parties' evidentiary records, we could increase judicial involvement in substantively reviewing prosecution witnesses when defendants are barred from doing so pretrial by discovery limits or voluntary waivers. The policy concerns that justify discovery restrictions do not apply when evidence, such as confidential witness identities, is disclosed solely to judges. Especially for those cases in which a confidential informant's testimony is central to the government's case, we can use the judiciary as an alternative to granting the defense access to the witness. Judges could then conduct independent interrogations of critical witnesses.

Courts could conduct witness depositions generally, as a means of assuring the factual basis for pleas. More realistically, they could take on this task in the limited sets of cases that pose the greatest risk of factual error through unreliable witnesses. Judicial depositions might occur only in cases in which prosecutors are under the most pressure for convictions, such as high-profile terrorism cases, death penalty cases, and other notorious cases such as child abuse prosecutions. In such instances, public and political pressure create special risks of compromising law enforcement judgment on evidence strength.²⁰⁰ Alternatively, judges could depose only

198. In cases in which the bargain does not dictate the sentence, the rule gives judges some additional information upon which to base the exercise of sentencing discretion. Note, however, the type of information this is likely to be. Parties would still disclose and argue evidence on sentencing factors, and judges still often have pre-sentence reports prepared by their probation officers. Thus, investigative file review allows judges to adjust sentences on the same strength-of-evidence basis that underlies many pleas.

199. See *United States v. Ruiz*, 536 U.S. 622, 631-32 (2002) (citing disruption and confidentiality of law enforcement strategy as a rationale for limiting discovery to defendants).

200. Scholars have identified public attention as a factor that correlates with wrongful convictions. See Huff, *supra* note 129, at 17 (discussing "community pressure for convictions"). This clearly seems to have been the case in a recent, erroneous federal prosecution. See Hakim & Lichtblau, *supra* note 45 (describing a supervisory investigation by the Justice Department's Washington headquarters of a flawed prosecution led by the Detroit federal prosecutor's office); see also Danny Hakim, *Judge Reverses Convictions in Detroit Terrorism Case*, N.Y. TIMES, Sept. 3, 2004, at A12. See *supra* note 45 for a brief description of the case. Public attention was also a likely cause for the *Brady* violation of

witnesses who are critical to the government's case and who fall into defined categories of especially questionable reliability, such as jailhouse informants and eyewitnesses.

Illinois has adopted a limited variation of this practice. In capital prosecutions only, the court must conduct a hearing on any informant testimony offered by the state and must rule on the witness's reliability in light of this preliminary witness examination, the state's written disclosure of testimonial incentives, and the informant's background.²⁰¹ Parties apparently participate in the hearing, so the provision is not designed to create *judicial* examinations and thereby address the witness safety and confidentiality issues that drive restrictive federal practice. Also, it applies only to trial (not plea-bargained) cases, and it can be waived by defendants. But the rule has two critical features. First, it singles out a particularly untrustworthy source of evidence. Second, it adds an additional judgment about *reliability*: judges must find the witness reliable before juries have the opportunity to assess credibility.

In a broader version of such a rule, judges could employ judicial agents (in line with existing models of special masters or probation officers) to conduct interviews. Those agents could supplement the interviews with the kind of background investigation of the witness that the judiciary now routinely conducts on defendants in pre-sentencing investigations, identifying factors such as criminal records and pending charges. For jailhouse snitches, judicial agents might also interview police officers and prosecutors handling the informant's case, a procedure that might expose informant deals occasionally concealed by the state, thereby creating greater incentives against concealment.

If parties do not participate in the interviewing of witnesses, judicial depositions could be disclosed to both parties shortly before trial to improve adversarial practice. Alternatively, especially in cases implicating the need for witness confidentiality, the examination record could remain undisclosed to the defense and serve simply as a basis for judicial assessment of the facts supporting a plea. Judges could then provide merely a concise finding of reliability or a report only of factors indicating unreliability, such as informant deals.

Finally, to make the measure politically feasible—just as broad discovery statutes have gained legislative support by requiring defense disclosures—this reform could be coupled with a requirement that defendants

evidence concealed by the state in *Strickler v. Greene*, 527 U.S. 263, 266-80 (1999) (involving a high-profile murder in the small town of Harrisonburg, Virginia).

201. See Death Penalty Reform Act, Ill. Pub. Act. 93-0605 (Nov. 19, 2003), available at <http://www.ilga.gov/legislation/publicacts/93/PDF/093-0605.pdf>, also summarized in Colfax, *supra* note 116. The statute defines an informant as "someone who is purporting to testify about admissions made to him or her by the accused while incarcerated in a penal institution." Ill. Pub. Act. 93-0605 § 115-21(a).

submit to pretrial examinations if they choose to go to trial and testify. *Williams v. Florida* held that a requirement that defendants disclose alibi witnesses pretrial does not violate the Self-Incrimination Clause.²⁰² Such disclosure requirements are now common for alibi and insanity defenses. The logic of *Williams* thus supports the constitutionality of a required pretrial deposition before the defendant testifies at trial. Such a deposition would also serve the interest of accuracy by locking defendants into testimonial accounts before they have a chance to tailor testimony in reaction to trial witnesses.²⁰³

While judges do not have the same partisan incentives as defendants in conducting such depositions, they do not need such incentives; their task is not the same. Judges in this mode are not seeking new evidence but confirming the reliability of evidence that the parties present.²⁰⁴ They do, however, have a significant interest in the integrity of evidence offered in their courts. In this sense, such depositions depart little from American judges' traditional roles.²⁰⁵

Furthermore, the important point is not that investigation has been reviewed by a "neutral" judicial officer rather than a "partisan" prosecutor or police investigator. Instead, the point is that investigative and fact-evaluation power has been fragmented. Judges add another means beyond the police-prosecution team to generate a more reliable factual account, thereby moderating somewhat the executive's dominance in fact evaluation. Increased judicial involvement also modestly reduces our dependence on defense counsel, at trial or before, to scrutinize state evidence reliability. As a structural check, defense advocacy is hard to maintain politically because it associates the public role of government watchdog with the self-interest of private criminal suspects. But here again we see a way to shift some of the responsibility for examining the state's evidence to another actor, so that we can serve that function through a means likely to be more politically sustainable.²⁰⁶ Moreover, judicial depositions improve reliability without limiting defendants' ability to manage their own defense and without creating the risks posed by some defendants to the integrity of the evidentiary record.

202. 399 U.S. 78, 83 (1970).

203. I thank Professor Bill Stuntz for bringing this argument (and others) to my attention.

204. Even judicial examination of witnesses that the prosecutor would not call at trial is merely a way of assessing the reliability of evidence upon which the state relies. Examining an informant's arresting officer, or the prosecutor in charge of the informant's pending case, gives the judge a means of uncovering testimonial incentives that law enforcement officials occasionally conceal.

205. See, e.g., FED. R. EVID. 614.

206. Judges, like prosecutors and crime labs, do not always have an easy time with legislative funding requests; dockets usually rise faster than court funding. But judges usually face better odds than indigent defense proponents, and that should be true if requests for more funds to expand the judicial bureaucracy are built on arguments for improving factual accuracy.

4. *Judicial Role: Factual Accuracy v. Docket Clearing*

The real challenge to this sort of expansion of the judicial role is not its departure from traditional judicial practices. Rather, it is the departure from the dominant conception of the judicial role that is a product of institutional incentives acting upon judges. American judges have no tradition of taking serious responsibility for the accuracy of evidence in the liability stage; in routine cases, they leave facts to the parties.²⁰⁷ The motivation for more involvement in pretrial fact development and settlement discussion by managerial judges has mostly been efficiency and docket management rather than accuracy.²⁰⁸ Even bold moves such as court-created expert witness panels or assertive engagement in the creation of settlement terms (including plea bargains) are probably better explained as responses to burdensome caseloads than as efforts to improve fact-finding and appropriate dispositions. The challenge to any effort to engage judges in an active responsibility for accuracy is that it requires more work from judges, and this extra work is likely to slow, rather than speed, case disposition.

Fostering judicial responsibility for accuracy, in addition to the ingrained commitment to docket efficiency, likely requires more than merely creating mechanisms for judges to assume a greater role. It requires a shift in long-standing judicial culture that takes little responsibility for factual accuracy. Such a change probably depends upon restructuring the incentives that construct the judicial role. Rules that *mandate* judicial depositions for jailhouse snitches and critical eyewitnesses are one possibility. Not only would they compel judicial action, but they create a means for judges later to incur part of the blame when accuracy failures occur. This accountability could affect judicial reputations the same way public monitoring of trial judges' docket management creates an incentive for speedier dispositions, or the way monitoring of sentencing patterns affects sentencing decisions.²⁰⁹ But dockets and sentencing are easier to measure and

207. See Chayes, *supra* note 1, at 1286 (noting that in "the traditional conception of adjudication ... the trial judge ... was passive" with "limited involvement" in fact-finding); GOLDSTEIN, *supra* note 122; DAMAŠKA, *supra* note 2, at 168 (describing the "essentially passive" role of judges in "conflict resolution" justice systems), 205 (in systems with features like American courts, a judge's "primary responsibility for some procedural steps (e.g., interrogation of witnesses) tends to be treated loosely—he lacks drive and tends to be inert" and is "actually passive ... and in need of prodding by the parties").

208. But see Chayes, *supra* note 1, at 1287-98 (noting that, as public law litigation began to have wide impact beyond parties, judges sought to improve the reliability of fact-finding).

209. Virginia offers one example of structuring judicial incentives. In Virginia, where judges are appointed by the legislature rather than facing popular election, the trial bench has a strong incentive to adhere to voluntary sentencing guidelines. Judicial sentencing records—including variations from guidelines—are reported to the legislature, which looks unfavorably on upward departures because a consistent practice of sentencing above the guidelines would require spending more money for prison expansion. See Nancy J. King & Roosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 916-19 (2004) (describing legislative monitoring of judicial sentencing practices).

monitor than factual accuracy; no plausible tracking system would discover more than very occasional cases of factual inaccuracies. Instead, we can monitor rates or consistency of use of prophylactic practices, like judicial depositions. Even so, it is unclear whether judicial roles and incentives, at least without nonwaivable procedures, can shift enough to make judges take real responsibility for accuracy, as well as efficiency, so that they can help compensate for the weaknesses of adversarial adjudication.

CONCLUSION: STRUCTURING COSTS FOR IMPROVING ACCURACY

Legal systems evolve, and the history of criminal adjudication demonstrates tremendous malleability. Holding aside international comparisons of inquisitorial and adversarial systems, our American criminal adjudication system has gone through fairly dramatic changes. The right to counsel for 150 years meant merely the right to *hire* an attorney; only since the 1930s has the Supreme Court viewed defense counsel as an important contributor to accurate fact-finding.²¹⁰ The Fifth Amendment guarantees defendants the right not to testify, but for several decades defendants were also *forbidden* to testify under oath.²¹¹ Discovery rights, nearly nonexistent until the 1930s,²¹² are now quite broad in many jurisdictions. Plea bargains were once rare; they now resolve most cases. Private victims or court-appointed lawyers once initiated charges; executive officials now control prosecution.²¹³ Juries were once all white and male; constitutional law now substantially regulates jury selection to improve class, race, and gender diversity.

Viewed functionally, we see that different institutions and arrangements have served the same purpose at different times. With the rise of plea bargaining, we substituted defendants' self-interest for juries as the main structural check on the executive. The rise and partial fall of defense

210. See *Betts v. Brady*, 316 U.S. 455 (1942); *Powell v. Alabama*, 287 U.S. 45 (1932).

211. See Fisher, *supra* note 80, at 579 ("Not until the second half of the nineteenth century could accused criminals anywhere in the common law world testify under oath at their own trials."); *id.* at 656-97 (detailing the history of the criminal defendant's right to give sworn testimony).

212. See WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* § 20.1 (4th ed. 2004) (summarizing the common law history of criminal discovery rules).

213. For the early English history of this practice, see LANGBEIN, *supra* note 69. On American practice, see JACOBY, *supra* note 47, at 3-28 (describing early American practice); FRANK J. GOODNOW, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES* 411-12 (reprint 1999) (1905). American prosecutors early on were often court-appointed lawyers rather than executive-branch officials. See Abraham S. Goldstein, *History of the Public Prosecutor*, in *ENCYCLOPEDIA OF CRIME AND JUSTICE* 1286, 1287-88 (Sanford H. Kadish ed., 1983). It is not clear whether early federal prosecutors were under presidential control. See Stephen L. Carter, Comment, *The Independent Counsel Mess*, 102 HARV. L. REV. 105, 126 (1988) (noting that early federal prosecutors, known as district attorneys, "were appointed by the President, but had no direct superior in the federal government, and they acted with considerable independence, often as aides to the federal courts and the judicially controlled grand juries") (citing HOMER CUMMINGS & CARL MCFARLAND, *FEDERAL JUSTICE* 8-187 (1937)).

attorneys reflect evolution in means to check prosecutors and improve truth-finding. Variations in contemporary adjudication practice reveal even more ways to reconfigure functions among existing players and institutions. Better crime-lab funding, scientifically grounded methodologies, and accreditors' scrutiny improve forensic evidence reliability as much as—and probably more than—defense-attorney scrutiny. Thus, crime labs can replace part of the function of diminished defense counsel, and can do so in a way likely to garner more sustained political support. Crime labs will not get blank checks from legislatures, but tying crime lab funding to rigorous outside accreditation is easier than, say, ensuring that defense counsel are diligent.

Expanded and mandatory evidence disclosure practice restructures costs in politically sustainable ways as well. Disclosure is costly for prosecutors, but it is usually cheaper than the cost of defense teams digging up the same evidence independently (which is not always possible in the absence of search powers). And it shifts the cost of getting information into the hands of the defense from defense teams to prosecutors. Prosecutors routinely face funding challenges, but rarely are those challenges worse than those of defense attorneys.²¹⁴ Expansive disclosure allows defenders, constrained by funding, to allocate less time to evidence-gathering (which most do little of anyway) and more time to evidence inspection. Along the same lines, further fragmenting executive-branch evidence-gathering and assessment among distinct entities (separating labs from law enforcement, detectives from police) should cost little, and may harness distinct institutional identities, allegiances, and rivalries to increase intra-executive evidence scrutiny. In this way, executive actors make a modest contribution toward the jury's and defense attorney's task of checking both factual accuracy and executive action.

Similarly, judicial depositions and access to evidence files shift some of the structural burden of evidence scrutiny from defense attorneys to the more politically appealing entity of the courts, even if they do impose additional costs on the judiciary. However, defendants and judges have different motives for evidence scrutiny, and judges' motives may be insufficient. They may have greater motivation to dispose of cases than to ensure accuracy.²¹⁵ But defendants' motives are mixed, too. The guilty and innocent both want to discredit state evidence—the guilty have little interest in accuracy.²¹⁶ Neither has perfect motives, and this fact probably counsels for input of both. But if recurrent legislative disfavor of defense funding is, in

214. See Stuntz, *supra* note 17, at 8-9 (documenting police and prosecutors' greater success than defense attorneys' success at obtaining legislative funding).

215. Cf. Kozinski, *supra* note 194 (describing ethical challenges for judges arising from increased caseloads, including the temptation to give many cases cursory consideration).

216. On the other hand, the guilty have a real and legitimate interest in accuracy if errors lead to excessive charges and punishment.

large part, a policy judgment about defense motives, then a larger role for judges in accomplishing the structural role of checking executive action is a plausible, and perhaps necessary, alternative.

In ways such as these we can build mechanisms of reliability throughout the continuum of criminal procedure, from investigation through adjudication. These means to more reliable fact-finding are a shift in adjudication's orientation in two ways. First, they represent a strategy of strengthening *investigation* because we distrust adjudication's capacity to detect factual errors; this inverts the traditional model in which strong adjudication tools check partisan fact-gathering. Second, our adversarial model has long balanced fact-finding against other interests, particularly conflict resolution and efficiency.²¹⁷ Compromises are inevitable; cases must end, and they must end with finite resources. But the particular balance of those interests is not inevitable, and pieces of criminal procedure's history can be read as adjusting this balance toward an increased concern for accuracy. The expansion of discovery is one example. Constitutional doctrine giving priority to factual innocence claims over finality interests in post-conviction litigation is another.²¹⁸ The early cases establishing the right to counsel—*Powell* through at least *Gideon*—justified defense attorneys as critical to fact-finding. Recent statutory reforms that expand use of DNA evidence and grant defendants post-conviction access to prosecutors' complete files in capital cases²¹⁹ are a continuation of accuracy-bolstering strategies. Proposals for capital murder verdicts under an unprecedented standard of "beyond all doubt"²²⁰ fit this trend as well. But our tradition contains more and better tools for extending an expanded commitment to truth-finding.

217. Cf. DAMAŠKA, *supra* note 2, at 123.

218. The Supreme Court has indicated that conviction of the factually innocent is a fundamental miscarriage of justice that justifies a habeas forum for constitutional claims otherwise barred by procedural rules. See *McCleskey v. Zant*, 499 U.S. 467, 495 (1991) (stating successive habeas petitions should be permitted to avert "fundamental miscarriage[s] of justice"). That requirement can be satisfied by presenting "new facts [that] raise[] sufficient doubt about [a defendant's] guilt to undermine confidence in the result of the trial." *Schlup v. Delo*, 513 U.S. 298, 317 (1995). See also *Herrera v. Collins*, 506 U.S. 390, 404 (1993) (stating "a petitioner otherwise [barred]... may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence" to ensure "that federal constitutional errors do not result in the incarceration of innocent persons."); *id.* at 417 (stating that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim."); *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992) (stating successive habeas petitions allowed on a "colorable claim of factual innocence").

219. See N.C. GEN. STAT. § 15A-1415(f) (2004) (requiring disclosure of complete prosecution file to defense after capital conviction) (effective 1997); *State v. Bates*, 497 S.E.2d 276, 281 (N.C. 1998) (interpreting section 15A-1415(f) to require disclosure of prosecution's and law enforcement's work product).

220. See Report of Massachusetts Governor's Council on Capital Punishment 22 (2004), available at <http://www.mass.gov/Agov2/docs/5-3-04%20MassDPReportFinal.pdf> (recommending that juries be required to find there is "no doubt" about defendant's guilt before imposing death penalty).

The animating ideas of adjudication are the familiar ones of separating powers among players and stages of process, so that fact determinations depend on contributions from a broader range of actors with varying incentives and identities. Readjusting this mix is important, because the strategy of pursuing accuracy through adversarial processes—through well-equipped defense counsel in particular—has reached a political limit. Broadly speaking, legislatures are interested in accurate criminal adjudication, but they do not view zealous defense attorneys as the best way to achieve that goal. Accordingly, adversarial process will not be a politically sustainable means for assuring the accuracy of fact-gathering. Partisan challenges brought by defense counsel against the state's evidence must become—and are becoming—less dominant tools for serving a renewed popular commitment to accuracy. Other actors and institutions, with different mixes of motives and weaknesses, are equipped to take on—and are starting to take on—more of that task.

